The Business of Judging

Selected Essays and Speeches

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PART I: THE BUSINESS OF JUDGING

The judge's job at a civil trial, it is often said, is first of all to decide what happened (in legal jargon, 'find the facts'), then to identify the relevant rules or principles of law, and then to apply the law to the facts as he has found them. Broadly speaking, this is true, although in some cases there is no dispute about the facts and the only argument is about the law; and sometimes (in practice, more often) there is little or no argument about the law and the real argument between the parties is about the facts; and sometimes, after the judge has decided what happened and what the applicable law provides, the real problem is what order the judge should make, how he should 'exercise his discretion'. If a case goes to appeal the argument is normally about the correctness of the judge's ruling on the law and much more rarely about his decision on the facts.

The first of the three papers in this section concerns the first of the judge's tasks, the making of a decision on what happened (a role performed by the jury in a serious criminal trial). This is a very important function, since the parties to a civil action *know* if the judge's decision is wrong on the primary facts, and the public at large expect judges to be right when they decide that this or that did or did not happen. But judges are not, on appointment, invested with some magical gift of second sight; they are not clairvoyants; they were not there when the disputed events took place. They did not see the road accident, or witness the explosion of the factory boiler, or sit in on the negotiation of the contract. All they can do, coming to the case well after the disputed events, is to try to piece the story together and attempt, on the basis of all available evidence produced in court, to reach a sound factual conclusion. The first paper considers how judges set about this task.

The second paper concerns the judge's role in developing, or making, the law, in cases when the legal rule or principle to be applied to the facts is not clear or is seriously out of date or fails to cover the facts. This paper was given at a conference in Auckland, New Zealand, in honour of Lord Cooke of Thorndon, a great judge who had for ten years (1986–96) been President of the Court of Appeal of New Zealand (and a judge of the court for ten years before that). Lord Cooke was (and is, for he continues to sit as a judge, although now mostly in London), a very learned and scholarly judge but also a very bold, forward-looking and liberal one. So this conference to celebrate his judicial achievement seemed a good opportunity to consider whether judges do 'make' law, and whether they should and, if so, how they set about it.

The third paper addresses a more elusive problem: the exercise of the judge's

discretion. If a judge concludes that one person has suffered injury or loss through the negligence or breach of contract of another, he will give judgment for the injured party and calculate the appropriate damages; he cannot exercise his discretion to deny the injured party appropriate compensation. But all judicial decisions are not so clear-cut. In some situations the judge has a choice between one course and another; there are points and arguments each way; it is a question of weighing and balancing. It may make all the difference to the parties how he decides; and appellate courts are very reluctant to disturb decisions of this kind. So this area, grey though it may be, gives rise to difficult and anxious problems.

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*The Judge as Juror: The Judicial Determination of Factual Issues**

In the hierarchy of legal skills, pride of place is given, and quite rightly, to the great exponents of legal principle, those (whether academic or judicial) who weave disparate threads of authority into coherent doctrine or plant the flag of legal principle in hitherto untrodden factual territory. In comparison with these mandarin arts, the judicial determination of factual issues occupies a somewhat lowly place, an activity of its nature ephemeral, uncreative and particular. In short, a task appropriately left in criminal cases to the legally unqualified lay juror.

But reference to the criminal juror perhaps gives one pause for thought. His obstinate survival into modern times is, after all, at least in part, a reflection of public belief that where guilt and innocence depend on them factual decisions are too important to be left to judges. To the civil litigant also, whose case will almost always be tried by a judge sitting alone without a jury,[1] findings of fact are likely to be crucial. This is because, first, most cases turn largely, if not entirely, on the facts; as Justice Cardozo observed:

> Lawsuits are rare and catastrophic experiences for the vast majority of men, and even when the catastrophe ensues, the controversy relates most often not to the law, but to the facts.[2]

And secondly it is so because factual findings once made at first instance are very hard to dislodge on appeal,[3] for reasons to which I will return. Of the litigants who each year tramp out of the law courts muttering darkly of a bad day for British (never, curiously, English) justice, I strongly suspect that a large majority have been outraged not by a decision against them on the law but by a factual decision which they know or believe or claim to be wrong. To the judge, resolution of factual issues is (I think) frequently more difficult and more exacting than the deciding of pure points of law. In deciding the facts, the judge knows that no authority, no historical enquiry and (save on expert issues) no process of ratiocination will help him. He is dependent, for better or worse, on his own unaided judgment. And he is uneasily aware that his evaluation of the reliability and credibility of oral evidence may very

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[1] s. 6(1) of the Administration of Justice (Miscellaneous Provisions) Act 1933 is in practice little used save in libel cases.

[2] Benjamin Cardozo, *The Nature of the Judicial Process* (Yale, 1921), 128–9.

[3] See, e.g. *Hontestroom (Owners) v. Sagaporack (Owners)* [1927] AC 37; *Powell v. Streatham Manor Nursing Home* [1935] AC 243; *Onassis v Vergottis* [1968] 2 Lloyd's Rep. 403.

well prove final. So it is, I hope, worth considering what his factual task involves, and how he sets about it.

The judge's role in determining what happened at some time in the past is not of course peculiar to him. Historians, auditors, accident investigators of all kinds, loss adjusters and doctors are among those who, to a greater or lesser extent, may be called on to perform a similar function. But there are three features of the judge's role which will not all apply to these other investigations. First, he is always presented with conflicting versions of the events in question: if there is no effective dispute there is nothing for him to decide. Secondly, his determination necessarily takes place subject to the formality and restraints (evidential and otherwise) attendant upon proceedings in court. Thirdly, his determination has a direct practical effect upon people's lives in terms of their pockets, activities or reputations.

Some would draw attention to a further difference. The common law judge, it is often said, unlike his counterpart in a civil law system and unlike the other investigators I have mentioned, is not concerned with establishing the truth of what did or did not happen on a given occasion in the past but merely with deciding, as between adversaries, whether or not the party upon whom the burden of proof lies has discharged it to the required degree of probability. The Court of Appeal has said that 'The due administration of justice does not always depend on eliciting the truth. It often depends on the burden of proof.'[4] This may be unreservedly accepted, and it is of course true that the judge's independent power to remedy deficiencies in the evidence in civil cases is extremely limited.[5] The Court of Appeal has none the less defined the English judge's object as being, 'above all . . . to find out the truth, and to do justice according to law', and as being, 'at the end to make up his mind where the truth lies'.[6] This, I respectfully suggest, accords with the reality of what occurs in an English civil trial of any substance where factual issues are important. The mills of civil litigation may grind slowly, yet they grind exceeding small. By the time both parties have explored every point which they think may help them or damage their adversary not much remains obscure, and it is not (I think) a common complaint of judges at the end of such a case that the material submitted has been inadequate in quantity. While the burden of proof always exists, few substantial cases turn upon it and in making his factual findings the judge is usually expressing his considered judgment as to what in truth occurred. The crucial difference between him and his civil law counterpart is not, surely, in their respective objectives but in the means which have been evolved under the two systems for achieving the objective common to both, the ascertainment of the truth. 'In practice,' as Lord Devlin

[4] *Air Canada* v. *Secretary of State for Trade* [1983] 2 AC 394 at p. 411, *per* Lord Denning M.R.
[5] *Re Enoch and Zaretsky, Rock & Cos Arbitration* [1910] 1 KB 327.
[6] *Jones v National Coal Board* [1957] 2 QB 55 at pp. 63, 64 *per* Denning LJ, these references forming part of a passage described by Lord Devlin in *The Judge* at p. 56 as 'a classic account of the judge's function in the adversary system'.

observed, referring to the two systems, 'there is not, at any rate in the civil case, all that much difference.'[7]

Let me then turn to the central questions. Faced with a conflict of evidence on an issue substantially effecting the outcome of an action, often knowing that a decision this way or that will have momentous consequences on the parties' lives or fortunes, how can and should the judge set about his task of resolving it? How is he to resolve which witness is honest and which dishonest, which reliable and which unreliable? How, as between competing experts in a field not his own, is a judge to determine where the truth lies? Is our existing way of resolving expert conflicts the best way? I shall begin by considering the resolution of issues of primary fact, the choice between first-hand eye-witnesses. Then I shall turn to expert evidence.

The normal first step in resolving issues of primary fact is, I feel sure, to add to what is common ground between the parties (which the pleadings in the action should have identified, but often do not) such facts as are shown to be incontrovertible. In many cases, letters or minutes written well before there was any breath of dispute between the parties may throw a very clear light on their knowledge and intentions at a particular time. In other cases, evidence of tyre marks, debris or where vehicles ended up may be crucial. To attach importance to matters such as these, which are independent of human recollection, is so obvious and standard a practice, and in some cases so inevitable, that no prolonged discussion is called for. It is nonetheless worth bearing in mind, when vexatious conflicts of oral testimony arise, that these fall to be judged against the background not only of what the parties agree to have happened but also of what plainly did happen, even though the parties do not agree.

The most compendious statement known to me of the judicial process involved in assessing the credibility of an oral witness is to be found in the dissenting speech of Lord Pearce in the House of Lords in *Onassis v Vergottis*.[8] In this he touches on so many of the matters which I wish to mention that I may perhaps be forgiven for citing the relevant passage in full:

'Credibility' involves wider problems than mere 'demeanour' which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person, telling something less than the truth on this issue, or, though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so, has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by overmuch discussion of it with others? Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day

[7] *The Judge, supra,* p. 60.
[8] [1968] 2 Lloyd's Rep. 403 at p. 431.

that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance. And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that it is on balance more likely that he was mistaken? On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness. And motive is one aspect of probability. All these problems compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process. And in the process contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part.

Every judge is familiar with cases in which the conflict between the accounts of different witnesses is so gross as to be inexplicable save on the basis that one or some of the witnesses are deliberately giving evidence which they know to be untrue. There are, no doubt, witnesses who follow the guidance of the Good Soldier Šveyk that 'The main thing is always to say in court what isn't true,'[9] as a matter of principle, but more often dishonest evidence is likely to be prompted by the hope of gain, the desire to avert blame or criticism, or misplaced loyalty to one or other of the parties. The main tests needed to determine whether a witness is lying or not are, I think, the following, although their relative importance will vary widely from case to case:[10]

(1) the consistency of the witness's evidence with what is agreed, or clearly shown by other evidence, to have occurred;
(2) the internal consistency of the witness's evidence;
(3) consistency with what the witness has said or deposed on other occasions;
(4) the credit of the witness in relation to matters not germane to the litigation;
(5) the demeanour of the witness.

The first three of these tests may in general be regarded as giving a useful pointer to where the truth lies. If a witness's evidence conflicts with what is clearly shown to have occurred, or is internally self-contradictory, or conflicts with what the witness has previously said, it may usually be regarded as suspect. It may only be unreliable, and not dishonest, but the nature of the case may effectively rule out that possibility.

The fourth test is perhaps more arguable. Much time is spent, particularly in criminal but also in civil cases where the honesty of witnesses is in issue, cross-examining as to credit, that is, in cross-examining witnesses on matters not germane to the action itself in order to show that they are dishonest witnesses whose evidence on matters which are germane to the action should be rejected. The underlying theory is that if a witness is willing to lie or can be shown to have

[9] *The Good Soldier Šveyk* (Penguin edn. 1983), 382.
[10] For this, as for much of the ensuing discussion, I acknowledge my debt to the Hon. Sir Richard Eggleston QC *Evidence, Proof and Probability* (1978), 155.

acted dishonestly in one matter, he will be willing to lie or act dishonestly in another. As the Latin maxim put it, *falsus in uno, falsus in omnibus*. The practice of many advocates would suggest that the reliability of the principle is beyond doubt. And no doubt to any witness who from earliest youth, like Matilda's aunt, 'had kept a Strict Regard for Truth', the telling of any lie, large or small, on a matter relevant or irrelevant, would be unthinkable. There must nonetheless be many other witnesses who regard questions concerning their previous career or personal history or habits as an unwarranted intrusion into their privacy, in no way bearing on the substance of their testimony and undeserving of an honest answer. Or the truth may, for reasons right or wrong, be thought to be embarrassing. Let me give one very familiar example. A husband and wife both witness an event the subject of an action tried years later. Some months before the trial both give statements to the lawyers for the party wishing to call them. Both are in due course called to give evidence and are asked by cross-examining counsel whether their evidence has been the subject of discussion between them. Much more often than not, in my experience, the witness vehemently denies that there has been any discussion at all. It usually does not matter whether there has been discussion or not, but counsel who has obtained such an answer habitually points to the extreme unlikelihood of its being true and urges that the whole of the witness's evidence should be treated as suspect. Sometimes, taken in conjunction with other grounds for suspicion, this indication may be significant. I have on occasion relied on it.[11] But I very strongly suspect that many witnesses, not being untruthful people, infer from the asking of the question that any discussion of their evidence with their spouse will be criticised as improper; so, to avoid such public criticism, they deny that such discussion occurred, contrary to the very strong probability that most unestranged husbands will discuss with their wives matters which involve and concern them both. Equally, I strongly suspect that many honest witnesses, who would do their very best to ensure that the substance of their evidence was reliable and accurate, would nonetheless be willing to prevaricate, or if necessary lie, when asked why they lost their previous job or how their first marriage came to break up. Cross-examination as to credit is often, no doubt, a valuable and revealing exercise, but the fruits of even a successful cross-examination need to be appraised with some care.

And so to demeanour, an important subject because it is the trial judge's opportunity to observe the demeanour of the witness and from that to judge his or her credibility, which is traditionally relied on to give the judge's findings of fact their rare degree of inviolability. Lord Loreburn reflected such thinking when he said in *Kinloch v Young*:[12]

> Now, your Lordships have very frequently drawn attention to the exceptional value of the opinion of the judge of first instance, where the decision rests upon oral evidence. It is

[11] e.g. *The Zinovia* [1984] 2 Lloyd's Rep. 264 at pp. 278–9.
[12] [1911] S.C (H.L.) 1 at p 4.

> absolutely necessary no doubt not to admit finality for any decision of a judge of first instance, and it is impossible to define or even to outline the circumstances in which his opinion on such matters ought to be overruled, but there is such infinite variety of circumstances for consideration which must or may arise, and it may be that there has been misapprehension, or that there has been miscarriage at the trial. But this House and other Courts of appeal have always to remember that the judge of first instance had had the opportunity of watching the demeanour of witnesses—that he observes, as we cannot observe, the drift and conduct of the case; and also that he has impressed upon him by hearing every word the scope and nature of the evidence in a way that is denied to any Court of appeal. Even the most minute study by a Court of appeal fails to produce the same vivid appreciation of what the witnesses say or what they omit to say.

Lord Pearce, in his speech from which I have already quoted, makes the same point:

> One thing is clear, not so much as a rule of law but rather as a working rule of common sense. A trial Judge has, except on rare occasions, a very great advantage over an appellate Court; evidence of a witness heard and seen has a very great advantage over a transcript of that evidence; and a Court of Appeal should never interfere unless it is satisfied both that the judgment ought not to stand and that the divergence of view between the trial Judge and the Court of Appeal has not been occasioned by any demeanour of the witnesses or truer atmosphere of the trial (which may have eluded an appellate Court) or by any other of those advantages which the trial Judge possesses.[13]

What, then is meant by the demeanour of the witness in this context? The answer is: his conduct, manner, bearing, behaviour, delivery, inflexion; in short, anything which characterises his mode of giving evidence but does not appear in a transcript of what he actually said. In *Clarke v Edinburgh Tramways*[14] Lord Shaw put it in this way:

> witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page.

Lord Justice Ormrod recently emphasized the importance of demeanour as a pointer to the truth. Referring to our system of oral trial, he said:

> As a method of communication, it is very complex, involving not only what is actually said, but how it is said. Inflections in both questions and answers may be highly significant, and demeanour, not only of the witness, but of others in court may be revealing.[15]

I have a hunch, which I cannot begin to justify, that in days of yore trial judges rather prided themselves on and had considerable confidence in their ability to

[13] [1968] 2 Lloyd's Rep. 403 at p. 431.
[14] [1919] S.C. (H.L.) 35 at p. 36.
[15] *Judges and the Process of Judging (Jubilee Lectures*, Holdsworth Club Presidential Address 7/3/80).

discern the honesty of a witness from the showing which he made in the witness box. Be that as it may, the current tendency is (I think) on the whole to distrust the demeanour of a witness as a reliable pointer to his honesty. Let me quote passages from the extra-judicial utterances of three very experienced trial judges. First, Lord Devlin:

> The great virtue of the English trial is usually said to be the opportunity it gives to the judge to tell from the demeanour of the witness whether or not he is telling the truth. I think that this is overrated. It is the tableau that constitutes the big advantage, the text with illustrations, rather than the demeanour of a particular witness.[16]

Second, Mr. Justice MacKenna, in a passage which Lord Devlin later adopted as his own:

> I question whether the respect given to our findings of fact based on the demeanour of the witness is always deserved. I doubt my own ability, and sometimes that of other judges, to discern from a witness's demeanour, or the tone of his voice, whether he is telling the truth. He speaks hesitantly. Is it the mark of a cautious man, whose statements are for that reason to be respected, or is he taking time to fabricate? Is the emphatic witness putting on an act to deceive me, or is he speaking from the fullness of his heart, knowing that he is right? Is he likely to be more truthful if he looks me straight in the face than if he casts his eyes on the ground, perhaps from shyness or a natural timidity? For my part I rely on these considerations as little as I can help.[17]

Third, Lord Justice Browne:

> So the main job of the judge of first instance is to decide the facts. How does he do it? When there is a conflict of evidence between witnesses, some judges believe that they can tell whether a witness is telling the truth by looking at him and listening to him. I seldom believed that. . . .[18]

To these powerful voices may be added two from Australia, suggesting that a loss of faith in the value of demeanour is not a purely local phenomenon. The Hon. Sir Richard Eggleston, QC wrote in 1978:

> Many judges think they can tell from the demeanour of a witness when he is lying, but in the course of my practice at the Bar there were several occasions on which witnesses, whom I firmly believed to be honest and to be telling the truth, displayed evident signs of embarrassment and discomfort in the witness-box, sufficient to make them appear to be lying. I am therefore very sceptical of such claims. A more complicated case in which demeanour was deceptive was that of a man whom I knew well, who was employed as a book-keeper on a sheep station. When called upon to tell a social lie, he was covered with blushes and showed every sign of acute embarrassment. He always spent much more than his salary and was believed to have wealthy parents, but so transparent did he appear to be that it did not occur to anyone to question his honesty until a query came from head office

[16] *The Judge*, 63.
[17] 'Discretion', The Irish Jurist, vol. IX (new series), 1 at p. 10.
[18] 'Judicial Reflections', *Current Legal Problems* (1982), 5.

about the accounts, when he asked for the afternoon off, and was found dead some distance away. He had been systematically defrauding his employers for years, and almost everything he had told his associates about himself was fiction.[19]

And lastly, an advocate's view from Mr A. M. Gleeson, QC.:

> Reasons for judgment which are replete with pointed references to the great advantage which the trial judge has had in making the personal acquaintance of the witnesses seem nowadays to be treated by appellate courts with a healthy measure of scepticism. What might be called the Pinocchio theory, according to which dishonesty on the part of a witness manifests itself in a manner that does not appear on the record but is readily discernible by anyone physically present, seems to be losing popularity.[20]

Seeing that we have so great a cloud of witnesses, any additional observations by me are plainly unnecessary. But I shall of course make some. There are, I feel sure, occasions on which a witness leaves a judge with a profound conviction that he is, or is not, telling the truth. This may not derive from anything he has said or failed to say but may be based ultimately on impression. As such it is probably impossible to explain or justify in rational terms. Whether his conviction was soundly based the judge is unlikely ever to know, so that he has little or no check on the accuracy of his own impressions, but if an impression is strong enough he will be unable in conscience to deliver a judgment which does not give effect to it. A firm judgment of this kind formed by one whose judgment is supposed to be his stock in trade is, I think, not lightly to be overridden. I would furthermore suggest that many judges, with years of forensic experience behind them, are likely to have developed some skill at recognizing certain types of rogue, particularly if the type is one they have met before. But subject to those qualifications I ally myself with the doubters. The cases which vex a judge are not those in which he is profoundly convinced of a witness's honesty or dishonesty. In those cases, whether his conclusion is right or wrong, the decision for him is easy. The anxious cases are those, which arise not infrequently, where two crucial witnesses are in direct conflict in such a way that one must be lying, but both appear equally plausible or implausible. In this situation I share the misgivings of those who question the value of demeanour—even of inflexion, or the turn of an eyelid—as a guide. To Mr Justice MacKenna's percipient remarks I would simply add three addenda:

First, the ability to tell a coherent, plausible and assured story, embellished with snippets of circumstantial detail and laced with occasional shots of life-like forgetfulness, is very likely to impress any tribunal of fact. But it is also the hallmark of the confidence trickster down the ages.

Secondly, there is (I think) a tendency for professional lawyers, seeing themselves as the lead players in the forensic drama, to overlook how unnerving an experience the giving of evidence is for a witness who has never testified before.

[19] *Evidence, Proof and Probability* (1978), 163.
[20] 'Judging the Judges', *Australian Law Journal*, vol. 53 (July 1979), 344.

The architecture of the Law Courts in the Strand, with its blend of the ecclesiastical (in the entrance hall) and the custodial (in many of the upper corridors), and the lay-out of the courts themselves, with the witness raised up and isolated like a lone climber on a peak in the Dolomites, might almost have been designed to maximize his unease. It would rarely, in my view, be safe to draw any inference from the fact that a witness seemed nervous and ill-at-ease; and if he did not it could well be because he had taken a tranquilliser to fortify himself for the ordeal, so that his apparent calmness would be equally lacking in significance.

Thirdly, however little insight a judge may gain from the demeanour of a witness of his own nationality when giving evidence, he must gain even less when (as happens in almost every commercial action and many other actions also) the witness belongs to some other nationality and is giving evidence either in English as his second or third language, or through an interpreter. Such matters as inflexion become wholly irrelevant; delivery and hesitancy scarcely less so. Lord Justice Scrutton once observed: 'I have never yet seen a witness who was giving evidence through an interpreter as to whom I could decide whether he was telling the truth or not.'[21] If a Turk shows signs of anger when accused of lying, is that to be interpreted as the bluster of a man caught out in a deceit or the reaction of an honest man to an insult? If a Greek, similarly challenged, becomes rhetorical and voluble and offers to swear to the truth of what he has said on the lives of his children, what (if any) significance should be attached to that? If a Japanese witness, accused of forging a document, becomes sullen, resentful and hostile, does this suggest that he has done so or that he has not? I can only ask these questions. I cannot answer them. And if the answer be given that it all depends on the impression made by the particular witness in the particular case that is in my view no answer. The enigma usually remains. To rely on demeanour is in most cases to attach importance to deviations from a norm when there is in truth no norm.

There are of course occasions when the simple language used by a witness, reproduced on the printed page, may be ambiguous although its meaning is, to anyone who hears the answer, apparent. For example, a witness may assent to a suggestion of cross-examining counsel with a shrug of the shoulders to indicate that though theoretically possible the suggestion is in practical terms absurd, or the assent may come after a long pause and in a manner indicating full acceptance. But responsible counsel do not allow a case to proceed on the basis of a single answer without making sure that the witness's position is clearly established, and were they to do so the judge would intervene to ensure that there was no room for doubt. The occasions on which the flavour of a witness's evidence is more accurately derived from the inflexion attached to a single answer, or his demeanour when giving it, than from the gist of a series of answers must, I suggest, be few.

[21] *Compania Naviera Martiartu of Bilbao v Royal Exchange Assurance Corporation* (1922) 13 Ll. L. Rep. 83 at p. 97.

If these doubts concerning the significance of demeanour are justified, certain consequences logically follow. An appellate court, reading the transcript of the evidence given, could decide the facts as well as the trial judge. There need be no bias in favour of the judge's factual conclusions. There could on an appeal be a complete re-hearing, on fact as well as law. The result would be to increase very substantially the burden on the appellate courts, to delay the *finis litium* which is held to be in the public interest, to increase uncertainty (because a litigant could never be sure on what version of the facts a point of law was to be decided) and to increase the already frightening cost of litigation. These are, without doubt, ills to be avoided if possible, and it would in my view be a respectable rule that every litigant should be entitled to a full contest on the facts at one level only and that the facts should be open to review thereafter only if some glaring and manifest error could be demonstrated. This is not, I think, very different from the substance of the present practice, but that practice might perhaps be better justified on that ground than by reference to the peculiar advantage enjoyed by the judge who has seen and heard the witnesses.

Before finally leaving the subject of demeanour—to which I have already, probably, devoted too much time—perhaps I may briefly digress to recount a somewhat remarkable cautionary tale. In *La Compania Martiartu of Bilbao v Royal Exchange Assurance Corporation*,[22] the owners of the steamship *Arnus*, which had been lost at sea off the coast of Brittany, sued the defendant insurers upon a time policy issued on the hull and machinery of the vessel, alleging that the loss was caused by perils of the sea. The insurers denied a loss by perils of the sea and alleged that the vessel had been wilfully cast away—scuttled—by those on board with the knowledge and consent of the owners. After a trial lasting five days (which contrasts with the four comparable cases tried since 1960, none of which lasted less than forty) the learned trial judge reserved judgment. When he gave judgment eight days later, he referred to powerful evidence in favour of scuttling but concluded on balance that the vessel had sunk as a result of striking a piece of floating wreckage. The crucial factor in the owners' favour was the evidence of the second mate:

> If I do not believe the second mate it is quite clear this vessel was scuttled. I have to make up my mind whether in fact, when he says he saw this floating mass there was this mass or not. I was from the first and am still deeply impressed with the second mate's evidence. He gave his evidence in commission and repeated it here. I was impressed with his demeanour and frankness. . . . He gave his evidence quite fairly and frankly, and with great reticence. In my judgment that was a witness of truth. . . The main reason why I decide in favour of the owners is that I accept the evidence of the second mate. . . .[23]

The learned judge had apparently formed the view that his decision, being based almost entirely upon facts, was not open to review, and indeed spoke of it with what was later described as 'some degree of sanguineness' as practically

[22] (1922) 11 Ll. L. Rep. 186. [23] Ibid., at pp. 188–9.

unappealable.[24] No doubt his conclusion founded on the demeanour of the second mate fortified that belief. But he proved to be mistaken. A finding of scuttling, made by the Court of Appeal, was upheld by the House of Lords. The task of the appellate courts was made easier when it emerged that the second mate, although he had testified on commission, had never attended the trial or given evidence at all and had (as Lord Birkenhead put it) 'enjoyed therefore small opportunity of exhibiting either his demeanour or his frankness'.[25]

If too much attention has over the years been paid to the demeanour of the witness in guiding the trial judge to the truth, too little has perhaps been paid to probability. I do not use that word in any mathematical or philosophical sense, but simply as indicating in a general way that one thing may be regarded as more likely to have happened than another, with the result that the judge will reject the evidence in favour of the less likely. I think most judges give weight to this factor in reaching their factual conclusions. Mr Justice MacKenna, in the paper from which I have already quoted, has said that he habitually did:

> When I have done my best to separate the true from the false by these more or less objective tests, I say which story seems to me the more probable, the plaintiff's or the defendant's, and if I cannot say which, I decide the case, as the law requires me to do, in the defendant's favour.[26]

Lord Justice Browne spoke to rather similar effect, also in the paper previously quoted:

> Sometimes one has to rely on probabilities and on circumstantial evidence; which I always thought was less unreliable than oral evidence. But the judge's own opinion about probabilities can be dangerous, being based on his own, perhaps limited, experience. Like all motorists, I thought I could see what the probabilities of a motor accident were, but I was quite incapable of judging the probabilities of a factory accident.[27]

In choosing between witnesses on the basis of probability, a judge must of course bear in mind that the improbable account may nonetheless be the true one. The improbable is, by definition, as I think Lord Devlin once observed, that which may happen, and obvious injustice could result if a story told in evidence were too readily rejected simply because it was bizarre, surprising or unprecedented. The most striking illustration of this which I know of, although given by Wigmore,[28] is one for which I am indebted to Sir Richard Eggleston:[29]

> A woman living in Lancester, Massachusetts, on the hill that leads to the gaol, was considered to be suffering from hallucinations, because of her complaint that the head of her late

[24] (1924) 19 Ll. L. Rep. 95.
[25] Ibid., at pp. 95–6.
[26] 'Discretion', The Irish Jurist, vol. IX (new series), 1 at p. 10.
[27] 'Judicial Reflections', *Current Legal Problems* (1982), 6.
[28] J. H. Wigmore, *The Science of Judicial Proof* (3rd edn.) (Boston, 1937), 443–5.
[29] *Evidence, Proof and Probability*, 164.

husband (a negro) had rolled down the steps into her kitchen and had been retrieved by the devil wearing a black cloak. In fact, the devil was an eminent scientist, who had been making a study of the heads of criminals, and had, on the night in question, been carrying the head of a negro who had died at the gaol; he dropped the head in the street and it rolled down the steps of the old woman's house. As the removal of the head was not strictly lawful, he had wrapped his cloak round his face and calling out 'Where's my head? Give me my head!,' gone to retrieve it, confident that he would not be recognized.

American fact is stranger than English fiction. A second note of caution must also be sounded. An English judge may have, or think that he has, a shrewd idea how a Lloyd's broker, or a Bristol wholesaler, or a Norfolk farmer, might react in some situation which is canvassed in the course of a case but he may, and I think should, feel very much more uncertain about the reactions of a Nigerian merchant, or an Indian ship's engineer, or a Jugoslav banker. Or even, to take a more homely example, a Sikh shopkeeper trading in Bradford. No judge worth his salt could possibly assume that men of different nationalities, educations, trades, experience, creeds and temperaments would act as he might think he would have done or even—which may be quite different—in accordance with his concept of what a reasonable man would have done.

None the less, and despite these important disclaimers, I think that in practice judges do attach enormous importance to the sheer likelihood or unlikelihood of an event having happened as a witness testifies in deciding whether to accept his account or not. If, for example, a witness who is shown to have been a meticulous diarist, log-keeper, letter-writer or note-taker testifies to the happening of an event which he claims to have been of importance to him at the time but of which he made no record, then in the absence of some convincing explanation the court is likely to infer that the event did not occur at all, or that if it did occur the witness did not know of it, or that if it did and he did know of it the event did not then strike him as important. This is no more than ordinary common sense. Examples could be multiplied, but perhaps I can give one from my recent experience.[30] A seaman who was due to fly out to join a new ship went to the airport with his wife and children and there met a First Officer bound for the same ship. There being some delay before the aircraft took off, they all (according to the seaman-witness's evidence) had a meal together in a public restaurant at the airport. The witness's wife commented on the heat in India, where the ship was sailing, whereupon the First Officer told the witness and his wife not to worry about the heat, because he proposed to run the ship aground before she reached India in order to earn extra over-time. It was not suggested that the First Officer had ever met the witness's wife before, or that the witness and the First Officer (although they were acquainted) had ever discussed a crime of this character before or that the witness's children (although very young) were out of earshot. As it happened, there were other strong reasons for doubting the honesty of this witness, and in

[30] *The Zinovia* [1984] 2 Lloyd's Rep. 264 at p. 281.

addition he did not make a favourable impression as a person, nor did his evidence accord closely with his earlier statements. But I should, dealing with a foreigner and with statements taken either through interpreters or in very different circumstances, have been unhappy to rely on these last points alone. As it was the story struck me as so highly improbable—although not, of course, impossible—that I would, if necessary, have rejected it on grounds of sheer unlikelihood alone. It is, I think, a common occurrence for a judge to find, after using his imagination to place himself in the position of the witness and in the context of the case as a whole, that an account given in evidence is one that he simply cannot swallow. While this is not a very scientific test nor is it in my view, if carefully and imaginatively applied, any the worse for that.

Different views have been expressed of the frequency with which judges encounter deliberately untruthful witnesses. Sir Richard Eggleston took a rather gloomy view:

> In my experience, judges tend to overrate the propensity of witnesses to tell the truth. Since judges regard breach of the obligation imposed by the oath as a serious crime, as indeed it is, they tend to think that witnesses will be as overawed as those who impose the sanction of an oath think they ought to be. In fact, I do not think many people feel any sense of wrongdoing when they swear falsely, so long as they can persuade themselves that they are doing it in a good cause.[31]

One must certainly accept that of the thousands who take the oath each year it would be a tiny minority who would be constrained thereby to tell the truth for fear of spiritual penalty. But Lord Justice Browne expressed a more generous opinion—not, I feel sure, accounted for by the difference of national jurisdiction:

> I think that in civil cases (unlike criminal cases) the witnesses are seldom lying deliberately. But I am very sceptical about the reliability of oral evidence. Observation and memory are fallible, and the human capacity for honestly believing something which bears no relation to what really happened is unlimited.[32]

I respectfully agree although, regrettably, somewhat less wholeheartedly than I should have done some years ago.

The tests used by judges to determine whether witnesses although honest are reliable or unreliable are, I think, essentially those used to determine whether they are honest or dishonest: inconsistency, self-contradiction, demeanour, probability and so on. But so long as there is any realistic chance of a witness being honestly mistaken rather than deliberately dishonest a judge will no doubt hold him to be so, not so much out of charity as out of a cautious reluctance to brand anyone a liar (and perjurer) unless he is plainly shown to be such. There are three sources of unreliability commonly referred to by judges when rejecting the evidence of honest witnesses.

[31] *Evidence, Proof and Probability*, 159.
[32] 'Judicial Reflections', *Current Legal Problems 1982*, 5.

The first source of unreliability, arising principally when the evidence relates to an accident or incident occurring over a very short space of time, is where the witness although present at the scene and in a position to see what happened does not in truth see, or in any event register mentally, exactly what did happen. Most of those who witness events of this kind are in the position of casual watchers of football on television, denied a commentary or a slow-motion replay: they see that a goal is scored; they know which side has scored it; they may (just) be able to identify the player who scored it; but they could not to save their lives give an accurate description of the moves and passes which led up to it. As witnesses so regularly say, 'It all happened so quickly, it was over in a flash.' There is of course a minority of accurate and very perceptive observers, although I doubt if there would be many even of that select band who could with any pretence of accuracy answer the sort of question habitually asked in motor accident cases: 'Had you reached the second telegraph pole on the left in photograph number 3 when you first saw the oncoming vehicle?'

Work done by psychologists on the operation of the human memory throws a very interesting sidelight on this point.[33] There is good reason to accept that with a significant number of witnesses, exposure to later misinformation gives rise to an inaccurate recollection as a result of supplementation or alteration. An account of this was recently given by Elizabeth Loftus, of the University of Washington, in a paper presented to the Royal Society:[34]

> In a typical experiment, subjects see a complex event and are then asked a series of questions which exposes them to post-event information. Typically some of the questions are designed to present misleading information, that is, to suggest the existence of an object or detail that did not in fat exist. Thus, in one study, subjects who had just watched a film of an automobile accident were asked, 'How fast was the white sports car going when it passed the barn while travelling along the country road?' Whereas no barn existed. The subjects were substantially more likely to later 'recall' having seen the non-existent barn than were the subjects who had not been asked the misleading questions.

The scope for quite unintentional distortion of a witness's recollection by police or enquiry agents or solicitors taking pre-trial statements is obvious. The same psychological testing suggested a number of other interesting conclusions, potentially significant to litigation: that once the memory is altered in this way, it is difficult to retrieve the original memory; that there is a tendency to reject misinformation if it comes from a source which the subject regards as biased or other than independent; that a warning against possible misinformation has an effect if given before the feeding of the misinformation but not after; that the longer the interval between the original event and the misinformation, the greater the chance of distortion; that misinformation is less likely to be rejected the less prominently

[33] I am indebted to Gillian Butler, of The Warneford Hospital, Oxford for her expert guidance through this, to me, unknown terrain.

[34] *Misfortunes of Memory*, paper presented at meeting of the Royal Society in January 1983.

it features in the question put to the subject; and that exposure to an incident of extreme and ugly violence tends to limit a subject's recollection and also render him more vulnerable to later misinformation. I am not of course competent to discuss these conclusions, but they do perhaps go some way towards showing that the judges' habitual caution in accepting evidence of this kind reflects an approach justified by science as well as common sense.

The second source of unreliability is loss of recollection. It is an unfortunate but inescapable fact that most factual issues come to be determined, at any rate in the High Court, several years after the material events occurred. It is almost axiomatic that a witness cannot recall an event which happened several years ago as clearly and accurately as one that happened the day before. As it is often put, recollections fade with the passage of time. I do not doubt the essential truth of this proposition, although there is (I believe) a school of thought which holds that memories, once stored in the human mind, last for ever, the only problem being one of retrieval.[35] But I would add two comments:

First, it is often assumed—or appears to be assumed—that recollection fades in a more or less constant way, such that if loss of recollection were plotted against time the result would be a straight line. Thus judges sometimes speak as if a lapse of time, no matter how long after an event, must deprive a witness of some significant recollection of it. As Lord Pearce put it, 'with every day that passes the memory becomes fainter. . . .'[36] Taken very literally this is no doubt true, but I have often wondered whether loss of recollection, particularly of rather ordinary events not regarded as very striking or noteworthy at the time, does not occur in the main early on—say, the first six months or a year—with relatively little loss thereafter of what remains at the end of that period. I am reassured to find that the results of psychological investigation tend to confirm this hunch.[37] Although related to an entirely different subject matter (the retention of nonsense syllables) and a time scale altogether inappropriate to the sort of event with which litigation is likely to be concerned, these investigations appear to show a very high rate of loss immediately following the event and then no more than a minimal loss. If this pattern applied generally, it would strongly justify the attention habitually paid to the date when a witness made his first statement, that being identified as the same at which his recollection crystallized.

Secondly, I strongly suspect that recollection fades in a selective and not in a uniform way: in other words, that the circumstantial detail falls away or becomes blurred while recollection of the crucial and striking features of the event (as perceived by the witness) survive. This is suggesting no more than what is perhaps obvious, that the dominant impression lasts longest. My own experience suggests to me that the crucial features of any real emergency in which one has been personally involved remain clear for a very long time, if not indefinitely.

[35] Ibid.

[36] See note 8, *supra*.

[37] Alan D. Baddaley, *The Psychology of Memory* (Harper & Row, New York, 1976).

Psychologists would not, I think, challenge that view, but tests reported by F. C. Bartlett as long ago as 1932[38] tended to show that the loss of recollection by subjects of the test asked to reproduce a narrative after a lapse of time followed a systematic pattern: as one would expect, the summary given became shorter and details were omitted, but omitted also were features which did not fit in with the subject's prior expectations, and there was a tendency to introduce material to explain incongruous features of the original narrative; certain detail might become dominant; words and names would be changed so as to become more familiar; and sometimes even the order of events would change. In a platitude, the memory plays funny tricks.

The third source of unreliability which I would mention is wishful thinking. I have already quoted passages in which Lord Pearce and Lord Justice Browne refer to this. Many other similar citations could be made. There can be few trial judges who have not at some time said something to this effect: 'X testified that so and so happened. I am sure that X was being entirely truthful in giving this evidence. I am also sure that so and so did not happen. In my judgment X has, over the years, erroneously but quite genuinely persuaded himself that so and so happened as he described.' This approach has philosophical support; Nietzsche observed:

> 'I did this,' says my memory, 'I cannot have done this' says my pride, and remains inexorable. In the end memory yields.

I certainly do not challenge that such wishful thinking, usually a process of unconscious self-exoneration, occurs. But I do a little question how often, in normal (unhallucinated) people, it does so. One cannot usefully make a clinical experiment upon oneself, because that which one has wishfully persuaded oneself to be true is (if the theory is sound) indistinguishable to oneself from the truth. I must, however confess a personal belief that the effect of time is often quite the opposite: acts or omissions which at the time one persuades oneself are in every way proper and justifiable become, in retrospect, embarrassingly obvious as grounds of criticism. Perhaps it all depends on the individual. The consensus appears to be that this is not an uncommon phenomenon, and if, as I have suggested, the memory is vulnerable to misinformation from without, it is perhaps to be expected that the urgings of the subconscious will be no less efficacious.

When one turns from witnesses of primary fact to witnesses expressing expert opinions, the problem is different. Expert witnesses may be and often are partisan, argumentative, and lacking in objectivity, but they are not dishonest. I have only ever encountered one clear instance of an expert witness consciously and deliberately attempting to mislead a tribunal. But the problem remains: how is a judge, faced with conflicting opinions of two or more experts, to choose between them? Manner and demeanour give no assistance here, and it is surely a truism

[38] F. C. Bartlett, *Remembering* (Cambridge, 1932).

that the more truly learned a man is the more ready he is likely to be to admit ignorance and acknowledge inability to provide a perfect solution. It is often the superficial expert or the charlatan who offers the most confident and comprehensive answer. Nor can the choice be based on comparison of the experts' respective qualifications. Frequently, the experts' qualifications are broadly comparable. Where they are not, the choice usually lies between one expert whose career has been devoted to the amassing of postgraduate degrees to the virtual exclusion of practical experience in the field and another with no formal qualifications but a lifetime of experience in handling the commodity or operation in question. There is in truth no easy way out, no short cut. The only safe way in which a judge can choose between the opinions of experts is on the basis of what they have actually said, both in any reports they have submitted and in the course of forensic questioning. This is as it should be. But it does, I think, raise a problem.

For a judge to prefer the opinion of one expert to another he must understand what they have both said and form a reasoned basis for his preference. Usually this gives rise to no problem. The conflict of expert opinion may relate to an issue which is not particularly complex, or it may arise in a field of which the judge has previous experience or which he has studied at a level which at least enables him to understand the concepts to which the experts refer and the language they use. But this is by no means always so. The more advanced and experimental a technology the more risk there is of mishap, and legal proceedings do on occasion involve issues arising at or near the frontier of the technology involved. And it would not be at all unusual for one judge in the course of his career to be confronted by highly technical problems arising in the field of (and I give examples largely at random) chemical engineering, metallurgy, soil mechanics, brain surgery, naval architecture, computer technology, nuclear radiation, oil refining, navigation, mining engineering, combustion, and the international currency markets. No single man, however sophisticated his education or eclectic his interests or broad his experience, could hope to be familiar with all these fields, and as society becomes more complex and science more specialized, so the role of the amateur is diminished and the problem of assimilation and comprehension becomes greater. There are in my view times when the ability of judges to understand the effect of evidence given sufficiently to make an informed judgment is taxed to the very utmost, and I can imagine it being exceeded. There is, I think, an anomaly here. If an aircraft crashes or a factory blows up with serious loss of life, or if a major scandal rocks the financial world, a judge or a leading practitioner may well be appointed to investigate the matter and determine what happened. He would, however, be sure to have the assistance as fellow members of his tribunal or as assessors of two or three experts skilled in the disciplines involved in the inquiry. Yet if the same or a similar issue arose in the course of ordinary litigation the judge would be expected to cope with the problem as best he could on his own.

Many would argue that there is no anomaly. They would point out that in an

action, unlike an inquiry, there are competing sides, and the clash of adversarial debate will highlight the substantial strengths and weaknesses of the expert opinions on each side so as to enable the judge to make a reasoned choice between them. The official investigation does not have the benefit of the same adversarial debate. Moreover, they would add, advocates are not themselves endowed by nature with knowledge of these esoteric sciences, and if they can master them sufficiently to present the case the judge should be able to master them sufficiently to decide it. There is of course force in these points, but I think that there is at least a partial answer to each. In the first place, while it is true that an official inquiry is inquisitorial in approach, it invariably works out in practice that different parties end up in an adversarial relationship to at least some others. This may owe something to the background and training of English lawyers, but I think it owes more to the obvious desire of parties to shift blame from themselves to others or at least to implicate others in a shared blame. In addition, there are often insurance considerations and potential claims lurking in the wings. So in the end the difference between the inquiry and the action is not very great. Secondly, while judges have the opportunity to study experts' reports and hear them questioned, they do not have the great advantage which advocates enjoy of prolonged, informal discussion with experts so that the rudiments of the subject, starting if necessary from first principles, can be methodically and even laboriously explained. The constraints of presentation in court make this in practice very difficult, if not impossible, to achieve with the judge as pupil, and even if achievable involves the parties in very great expense. In the small minority of cases in which problems of this kind arise, might it not be desirable for a judge to sit with the assistance of an expert assessor or for an independent expert to be appointed to assist the court?

Lest this question should be thought to be tainted by any element of originality, let me hasten to make clear that an omniscient legislature has anticipated it. Section 70(1) of the Supreme Court Act 1981 (based on section 98 of the Judicature Act 1925) provides:

In any cause or matter before the High Court the court may, if it thinks it expedient to do so, call in the aid of one or more assessors specially qualified, and hear and dispose of the cause or matter wholly or partially with their assistance.

The costs of any such assessor are to be determined by the court and form part of the costs of the proceedings. The same section makes provision for the appointment of scientific advisers to assist the Patents Court, but the remuneration of such advisers come out of public funds.

The Rules of the Supreme Court reflect these statutory provisions. They provide for trial by a judge or official referee with the assistance of assessors as one of the permissible modes of trial.[39] Such trial is to take place in such manner

[39] R.S.C., Ord. 33, r. 2.

and on such terms as the court may direct.[40] They also make provision, on the application of any party, for appointment by the court of an independent expert or experts to act as a court expert and inquire into and report on any question of fact or opinion not involving questions of law or construction.[41] Such expert is if possible to be a person agreed between the parties but is, in default of agreement, to be nominated by the court. The Rules regulate the rights of the parties to cross-examine the court expert and to call their own experts on points covered by his report.

In admiralty proceedings there are special, and perhaps more familiar, provisions. The Rules of the Supreme Court here provide for an order to be made on the summons for directions whether the trial is to be without assessors or with one or more assessors, whether Elder Brethren of Trinity House, nautical assessors or other assessors,[42] and if the action is to be tried with assessors the court may on the application of any party make an order for the inspection of the ship by the assessors.[43] A special code also exists in patent proceedings under the 1949 and 1977 Acts. The court may at any time and on or without the application of any party appoint an independent scientific adviser to assist the court either by sitting with the judge at the trial or hearing of the proceedings or by inquiring and reporting on any question of fact or of opinion not involving a question of law or of construction.[44] The court nominates the scientific adviser and settles his instructions.

One might have thought that considerable use would be made of these provisions. In *Waddle v Wallsend Shipping Company Ltd.*[45] for example, a fatal accidents claim arising out of the unexplained sinking of a vessel which had been the subject of a wreck inquiry, Mr Justice Devlin felt himself at something of a disadvantage sitting alone to determine issues on which the Wreck Commissioner had had expert assistance. He said:[46]

A Wreck Inquiry has already taken place before a Wreck Commissioner assisted by two naval architects and a ship's captain as assessors. Frequent references have been made during the course of the trial before me to the evidence given at the Inquiry. The report has not been tendered and I have not been told what conclusion was reached about the cause of the loss. I think this is strictly correct; the report is not admissible and the parties are entitled to have the matter considered and determined afresh. At the same time, I think it unfortunate that an application was not made before this trial began that it should take place with assessors. That would have happened, I imagine, as a matter of course if it had been tried in the Admiralty Division, and a Judge of that Division has himself considerable experience in this class of case. I considered at the outset of the trial whether I should myself make an order in the matter, but it would have involved postponement, the date of the trial had been fixed for some time past, and many witnesses were in attendance. It will not be very satisfactory if I arrive at a different result from that reached by a very experienced Commissioner assisted by skilled assessors, but I have to do my best to arrive independently at the right conclusion.

[40] R.S.C., Ord. 33, r. 6. [41] R.S.C., Ord. 40. [42] R.S.C., Ord. 75, r. 25(2).
[43] R.S.C., Ord. 75, r. 28. [44] R.S.C., Ord. 104, r. 11. [45] [1952] 2 Lloyd's Rep. 105.
[46] Ibid. at p. 131.

Profiting from his experience in that case, the judge did in the following year appoint an assessor. In *Esso Petroleum Co. Ltd. v Southport Corporation*,[47] he began his judgment as follows:

> In this case questions of seamanship and navigation arise and, acting under the Judicature Act, 1925, s. 98 and R.S.C., Ord. 35, r. 43, I have appointed one of the Elder Brethren of Trinity House to act as an assessor and to advise me upon them. In *Waddle v Wallsend Shipping Co. Ltd.* I called attention to what seemed to me the undesirability of having questions of this sort tried by a judge of the Queen's Bench Division sitting without assistance. The practice of sitting with the Elder Brethren is always followed in the Admiralty Division, and if it is not followed in this Division as well it is bound to lead to the belief that the result will not be as satisfactory as it should be. I have therefore been advised by an Elder Brother, Commodore Hubbard, R.D., R.N.R., before arriving at my conclusions in this case, but I have not had his assistance during the hearing. I hesitated in this case, as I did in *Waddle v Wallsend Shipping Co. Ltd.*, to adjourn the trial so that an assessor might be present because of the inconvenience to the parties and their solicitors and counsel. But I doubt whether I shall in any similar case in the future allow these considerations to deter me again.

On an appeal to the House of Lords the Lord Chancellor approved these observations:

> If a judge comes to the conclusion that the case is one in which he would profit by the presence of an assessor, it is manifestly more satisfactory that this assistance should be available during the trial than after its completion.[48]

Despite these observations, the use of the provisions I have mentioned has in recent years and with only limited exceptions been slight. I have myself never known of a Queen's Bench action tried with assessors, and enquiries do not suggest my experience (or lack of it) to be untypical. Appeals against orders for the taxation of costs are heard with assessors but are scarcely in point. The only Queen's Bench judge whom I know to have proposed appointing an assessor was unable in the event to do so and was pleased at the end of the case that he had not. The Senior Queen's Bench Master tells me that he has never in seventeen years known of a court expert being appointed in that Division and nor have any of his staff. The present Admiralty Judge does sit with an Elder Brother as assessor in collision cases, but has never done so in any other class of case (although he did once propose to do so in a case which settled). The Patent Judges have on occasions, in cases involving advanced technologies such as computers and colour television, appointed a scientific adviser, usually because the parties wanted it, but these occasions have been few. By and large the judges have dealt with cases on their own.

The general neglect of assessors can be fairly readily explained. By and large counsel show great skill in presenting even very complex factual issues in a way which enables judges to grasp them. And finding a suitable assessor may be very hard. In a practical or fast-moving-field those who are most readily available—a

[47] [1956] AC 218 at p. 223. [48] Ibid., at p. 238.

retired civil servant, perhaps, or academic—may be unable to give the sort of help which is really needed, while those with the best up-to-date practical knowledge may be unable to spare the time. An assessor must in addition be manifestly disinterested and this also can cause problems: in a case involving two of the Big Seven oil companies, for example, it would not be easy to find an experienced oil man who had not been employed by either of them, or been refused employment by either or been involved in close dealings or negotiations with either. The neglect of court experts is also explicable. The chances and changes of litigation are formidable enough as it is, but parties do at least feel able (sometimes, as it turns out, mistakenly) to rely with confidence on their expert saying what he has committed himself to say. They are naturally reluctant to forgo this assurance for an independent expert whom they do not engage, do not directly pay, cannot decline to call if his opinion is entirely hostile and cannot, perhaps, cross-examine so effectively.

In both cases there are, I think, other reasons. One may be that in the absence of a docket system of the kind familiar to American judges it is very unusual for the judge who is ultimately going to try the case to be in charge of the interlocutory proceedings from the start. If he were, it might be easier for unusual plans to be laid in good time before the trial for the expeditious and effective determination of expert issues. More fundamentally, the general neglect of assessors and court experts surely owes much to the temperamental reluctance of English lawyers, judges, and practitioners alike, to depart at all from the traditional, adversarial format of English proceedings. An assessor is an expert, not open to cross-examination by the parties, whose professional beliefs and interpretation of the evidence may have an important influence on the judge. A court expert is independent of either party, and for that very reason liable to carry special weight with the court. Both procedures encroach a little on the principle that truth and justice are born of the clash of warring parties before an independent and uninformed tribunal, and for that reason are viewed with suspicion.

Many would regard the professional neglect of these procedures as the surest proof of their worthlessness: 'The market knows best.' Maybe so. But we live at a time when the length and expense of trials are the subject of urgent public concern, when technologies become daily more complex and when (for professional and social reasons) the number of lawyers with any specialised expertise outside the law steadily diminishes. It could not plausibly be argued that the elucidation of complex technical issues could not be more quickly and economically achieved between judge and assessor out of court than by the laborious processes of question and answer in court, even allowing for the submission of written reports. The assessor will not decide the case. The responsibility of arriving at a judicial conclusion remains that of the judge alone.[49] As Viscount Simon said in *Richardson v Redpath Brown & Co. Ltd.*:[50]

[49] *The City of Berlin* [1908] P. 110 at p. 118; *The Koning Willem II* [1908] P. 125 at p. 137.
[50] [1944] AC 62 at p. 70.

He is an expert available for the judge to consult if the judge requires assistance in understanding the effect and meaning of technical evidence. He may, in proper cases, suggest to the judge questions which the judge himself might put to an expert witness with a view to testing the witness's view or to making plain his meaning. The judge may consult him in case of need as to the proper technical inference to be drawn from proved facts, or as to the extent of the difference between apparently contradictory conclusions in the expert field.

Where expert reports can be wholly or largely agreed before the hearing, no problem of course arises. But a court expert would then harm neither party. His report would identify the common ground between the parties. There are, however, many trials in which days and days of expensive time are spent in establishing that experts whose initial reports appeared to be in fundamental conflict were not in truth so deeply divided after all. There should, in any field in which an expert is entitled to testify at all, be a corpus of knowledge and experience accepted by most orthodox practitioners,[51] and a court expert would at least clarify where the essential conflict lay. It is moreover not uncommon in arbitration, particularly where some of those involved are not exclusively reared in the Anglo-American tradition, to hive off time-consuming factual issues for investigation and report by an independent expert, thereby saving days or weeks of hearing time. A court procedure does exist for reference of a factual issue to a special referee,[52] but this procedure (like the others I have mentioned) is rarely used and merely provides another mode of trial. The time has come, I suggest, when our traditional beliefs might profitably be re-examined. Almost every procedural change which is nowadays made dilutes to some extent the pure water of adversarial litigation by requiring earlier disclosure and reducing the element of surprise. The civil law procedures of the continent and elsewhere are no longer dismissed with chauvinistic scorn, even if we continue to regard our own as on the whole superior.[53] Perhaps we have something to learn. However good the results which the judges now achieve, it may be that a more flexible approach to procedure in this field would achieve even better results, or the same results more quickly and more cheaply. In the law, as in religion, there is a growing awareness that the route to the desired end may be a multi-line highway, not a monorail.

On this point, as on others, I offer no final solution but only questions. Perhaps I may end with the quotation from Holt C.J. with which Lord Denning concluded his famous speech in *Rahimtoola v The Nizam of Hyderabad*:[54]

I have stirred these points, which wiser heads in time may settle.

[51] Kenny, 'The Expert in Court' (1983) 99 LQR 197 at p. 205.
[52] R.S.C., Ord. 3.
[53] See, for example, *The El Amria* [1981] 2 Lloyd's rep. 119 at p. 126 *per* Brandon LJ; *Amin Rashid Shipping Corporation v Kuwait Insurance Co.* [1984] 1 AC 50 at p. 67, *per* Lord Diplock.
[54] [1958] AC 379.