WHY PROCEDURE IS MORE IMPORTANT THAN SUBSTANTIVE LAW

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I. INTRODUCTION

IT has been suggested[1] that those reading this article are likely to fall into two groups: those who regard my proposition as obvious but feel that if I go on, as I evidently intend to, they will be driven to the opposite conclusion; and, on the other hand, those who take the view that my thesis can scarcely be taken seriously, but that they had better pay careful attention, just in case there is something in it.

By way of preliminary comment let me stress that I am not saying that substantive law is unimportant. What I shall be suggesting is that the outcome of cases, whether criminal or civil, is in practice more likely to be affected by procedural rules than by any niceties of substantive law such as those that preoccupy textbook writers. Further or alternatively, as pleaders say, I shall be suggesting that parties are more likely to regard their treatment at the hands of the law as unjust because of what they perceive to be defects of procedure than because of what they perceive to be defects of substantive law. If I am right, then at any rate until very recently, at least so far as England is concerned, insufficient attention has been paid to questions of procedural reform relative to the attention that has been paid to questions of reform of substantive law.[2]

To try to engage a measure of sympathy from those of you who take the view that my proposition that procedure is more important than substantive law could scarcely be taken seriously, I ask you to imagine that you have been transported back in time some 750 years. You would find the English then spoken fairly impenetrable but by paying careful attention and with some understanding of Latin and Norman French you might learn to your horror that you were accused of some wrong—a *malum in se* and not merely a *malum prohibitum*—though the precise nature of the wrong might be unclear. A distant recollection of legal history might inform you that, since the case appeared to be criminal in

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1. The comment was made by Lord Hoffman, who chaired the lecture on which this article is based. He likened the situation to an Appellate Committee of the House of Lords hearing an advocate at an appeal.

2. As mentioned *infra*, the British Institute of International and Comparative Law is proposing to undertake a major comparative study of procedure. Certainly, I support such a project.

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nature, the mode of trial would not be by compurgation, that is, getting a sufficient number of appropriate people to swear an oath of horrid complexity to support your cause; equally, the mode of trial would not be by battle—which for many of us would be a cause of at least momentary relief. However, the mode of trial might be by ordeal or by jury. If by ordeal, then, probably depending on your social class, the ordeal might be by cold water—which sounds unpromising since, if you were innocent, your innocence might be established by the very fact that you drowned. Or the ordeal might be by heat, involving carrying a piece of iron of prescribed size, heated to a prescribed temperature, for a prescribed distance; the resulting burn would then be bound up with more or less clean bandaging; depending on whether or not your wound then festered, your guilt or innocence would be established. Finally, even if your trial were to be by jury, you would be naturally preoccupied with whether the jury was to be composed of a group of Sherlock Holmeses and Hercule Poirots who themselves would ferret out the truth or whether there would be a trial in a modern sense—that is, evidence being called and the jury deciding on the evidence—though even then you would not be encouraged when you recalled that, quite apart from your language difficulties, you yourself would not be allowed to give evidence. I suggest that you would be far more preoccupied with such procedural questions than with the definition of the crime, once its identity had been determined.

Now, it may well be suggested that I have cheated by using the artificial device of time travel and there could never have been any rational basis for believing that trial by ordeal was a reliable way of establishing criminal guilt.

So the rhetorical question that I would ask at this stage, and which I will come back to, is: what empirical data do we have that establish that *our* methods of establishing the truth for the purposes of the administration of justice are reliable? That is clearly a legitimate question having regard to the diversity of procedures that are in use today, even in the developed countries. I can also here usefully remind you of a dictum of Lord Denning, as Master of the Rolls, in *Ward* v. *James*.[3] That case of course established that in England in actions for personal injuries a jury will not be ordered unless there are exceptional circumstances. In his judgment Lord Denning said:[4]

> Let it not be supposed that this court is in any way opposed to trial by jury. It has been the bulwark of our liberties too long for any of us to seek to alter it. Whenever a man is on trial for serious crime, or when in a civil case a man's honour or integrity is at stake *or when one or other party must be deliberately lying*, then trial by jury has no equal [emphasis added].

3. [1966] 1 Q.B. 273.
4. *Idem*, p.295.

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In at least a number of civil cases today, in all parts of our judicial system including the Commercial Court, the Chancery Division and the Family Division, one or other party or their witnesses must be deliberately lying and the outcome of the case may well depend on which of them is telling the truth, yet no one seriously contemplates using the mode of trial described by Lord Denning as having no equal for deciding such cases.

I shall return to general considerations of that kind later. But first I want to examine two recent *causes célèbres* in the United States to illustrate the crucial importance of procedural rules.[5]

II. PRESIDENT CLINTON

THE first of the two cases is that of President Clinton. His relevant troubles started on 6 May 1994 when Ms Paula Jones sued him in the US District Court for the Eastern District of Arkansas, Western Division. Ms Jones's statement of claim alleged that she had been deprived of her constitutional rights and privileges and, in particular, the equal protection of the laws under the Fourteenth Amendment to the US Constitution; that the defendant, Mr Clinton, had conspired with others to deprive her of equal protection of the laws; that the defendant's conduct constituted an intentional infliction of emotional distress; and that the defendant and his employees and agents had defamed her.

So far as I can see, under rule 11 of the Federal Rules of Civil Procedure, the attorney who filed the pleading must have signed it; and his or her signature constituted a certificate that to the best of the signer's knowledge, information and belief, formed after reasonable enquiry, it was well grounded in fact and was warranted by existing law or a good faith argument for the extension, modification or reversal of existing law.

One at once asks, and I cannot answer the question, how far rule 11 of the Federal Rules of Civil Procedure, which is paralleled in some but not all State Rules of Procedure, is conscientiously enforced in practice so as to operate as a real constraint on the making of unsustainable claims in order to harass the defendant for political or commercial reasons or, at worst, the making of demands for money without reasonable cause, i.e. blackmail. Parenthetically, I note here that under rule 7.6 of the draft Civil Procedure Rules that will be implemented in this country in April this year, a plaintiff will in future have to sign a statement that he or she believes that the facts stated in the claim form or the particulars of claim are true. Rules such as these are potentially of great importance but in practice their effects will depend on their effective enforcement.

5. I am indebted to Matthew Happold of the British Institute for factual research that he carried out for me.

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Going back to the case of President Clinton, his lawyers initially took the point that the US Constitution barred the bringing of personal damages litigation against an incumbent president and, whilst that plea in bar was being litigated, Mr Clinton obtained interim orders preventing Ms Jones from obtaining discovery from anyone.

On 27 May 1997 the US Supreme Court rejected the plea in bar; and on 22 August 1997 an Arkansas federal judge ruled that Ms Jones's lawyers could invoke powers of discovery to pursue her claim, allowing them to subpoena anyone who could shed light on Mr Clinton's sexual history, after as well as before the events relied on by Ms Jones. Thus Mr Clinton himself became obliged under discovery procedures to give evidence on oath and his entire sexual history came under scrutiny as Ms Jones's lawyers issued subpoenas to anyone they considered could throw light on allegations that, whilst Governor of Arkansas, Mr Clinton used State resources to pursue "romantic assignments". That provides a good example of the fact that, as Judge David Edward puts it in a very interesting paper to which I shall refer further, "[in] the United States ... the processes of discovery and interrogatories have been carried to such lengths that cases are almost tried twice—first *inter partes* and then in court".[6]

A pre-trial deposition was taken from Mr Clinton on 17 January 1997 and he was subjected to unlimited cross-examination by Ms Jones's lawyers. The cross-examination lasted several hours and, as I understand it, lack of relevance is not a ground for refusing to answer a question at the pre-trial stage. It appears that Mr Clinton was questioned about his subsequent and indisputably consensual relationship with Monica Lewinsky and that he was asked whether he had had "sexual relations" with her, which he denied. It is believed that Ms Jones's lawyers questioned at least five other women in connection with their supposed association with Mr Clinton.

Suppose that *Jones* v. *Clinton* had been tried in the English courts. Any pre-trial interrogations would have had to be administered in writing (and could not have been addressed to non-parties). The interrogatories would have had to be precisely drafted and capable of being answered yes or no and it must be doubtful that a question whether the defendant had had "sexual relations" with someone would be sufficiently precise. Under Order 26 of the Rules of the Supreme Court the party administering the interrogatories could be called on to satisfy the court that the interrogatories were necessary either for disposing fairly of the cause or matter or for saving costs. *Prima facie* it seems unlikely that, in order to deal fairly with a case of alleged intentional infliction of emotional distress,

6. "Fact-Finding: A British Perspective", in D.L. Carey Miller and Paul R. Beaumont (Eds.), *The Option of Litigating in Europe* (1993), chap.4.

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interrogatories about subsequent romantic assignments would be deemed necessary by an English court.

Around New Year 1998 Miss Lewinsky received a subpoena. On 7 January 1998 she agreed to sign a "sealed affidavit" denying that she had had any sexual relationship with Mr Clinton. Linda Tripp, Miss Lewinsky's confidante, spoke to deputies of Kenneth Starr, the Independent Counsel, on 12 January 1998, stating that she had tapes proving that the President's most trusted adviser had told Miss Lewinsky to perjure herself. On 16 January 1998 Janet Reno, the Attorney-General, authorised Mr Starr to widen his investigation to include the President's infidelities and possible perjury.

Miss Lewinsky was scheduled on 22 January 1998 to give a sworn deposition to Ms Jones's lawyers on 23 January 1998, but Judge Susan Webber Wright postponed her deposition indefinitely on 22 January 1998 so that Miss Lewinsky might have time to negotiate a deal with Mr Starr for immunity from perjury charges.

Again, one may contrast the position under English law, which provides no machinery for compelling third parties to give pre-trial oral testimony. In so far as the interests of justice are best served if parties are enabled to gather relevant facts, if necessary under compulsion of law before the trial, the US procedure has merit. Yet like the English process of general discovery and potentially general disclosure of documents by the parties to civil litigation, the cost, in terms of rendering civil litigation over-complex and hence over-expensive, may be simply too high. Hence the intention to cut back on the discovery process in England. On the other hand, the English courts have recently remedied a deficiency in English law by enabling a party to civil litigation to issue a subpoena *duces tecum* that requires a non-party to appear "at trial" on a given date with specified documents, the given date actually being well before the case comes on for hearing; that procedure enables the parties to study the documents in preparation for the actual trial, thus obviating the need for an adjournment once the actual trial has started.

The use of the subpoena *duces tecum* in that way is clearly distinguishable from broad pre-trial discovery by oral testimony such as is available in the United States since the subpoena *duces tecum* must specify or describe the documents that are required to be produced and so cannot be used to obtain, in effect, discovery from non-parties. Equally, although the apparently unlimited wording of RSC Order 39, rule 1 (power to order depositions to be taken) is wide enough to empower the English High Court to order pre-trial oral depositions US-style, in practice the rule is used only where the witness is too old and decrepit to attend a trial or might die before the trial or is so ill that there is no prospect of his or her being able to attend the trial or is pregnant and likely to be delivered about the time of the trial or intends to leave the country before the trial. None of those considerations applied to Miss Lewinsky.

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Parenthetically here I draw attention to Judge Edward's observation that in Scotland, until well into the nineteenth century, there was a prejudice against sworn oral testimony unless it was really necessary to the decision of the case; that prejudice existed precisely because it created the opportunity for the commission of perjury, which is not only a crime but also "a heinous offence in the sight of Almighty God" which endangers the witness's immortal soul. The Clinton case is a good example of the force of the old Scottish view that "the putting of unnecessary oaths to the litigants or witnesses ought to be avoided". I suspect that the English system of administration of justice also leads to the commission of perjury on an avoidably massive scale, though less than in the United States.

The next step in *Jones* v. *Clinton* occurred on 1 April 1998 when Ms Jones's case was dismissed, effectively (as I understand it) as disclosing no cause of action or as being otherwise frivolous or vexatious. Judge Wright stated that there were no "genuine issues" worthy of a trial in the case. Again an apparently small point of procedure had crucial implications for the President. In the English courts it is advisable, and usual, for a defendant to apply to the court to strike out a claim or the entire action, as soon as the plaintiff's pleadings are complete—the plaintiff's claim being then adequately described; if it had been practicable to follow it and President Clinton's lawyers had done so, and done so successfully, there would have been no pre-trial testimony by Mr Clinton and the whole alleged basis for impeaching him would never have come into existence.

Judge Wright may have erred in law (and the subsequent settlement of the case by Mr Clinton for $850,000 suggests that his lawyers may not have been totally confident of the sustainability of Judge Wright's order) and, of course, I accept that substantive law was also important in *Jones* v. *Clinton*, and in particular how the law of tort deals with unwanted approaches for sexual favours made by one person in an organisation to another person lower down in the same organisation. But I believe I have said enough to show that the case illustrates the crucial importance of procedural rules in civil litigation.

III. LOUISE WOODWARD

MY second illustration concerns another US case but this time a criminal case tried under the law of the State of Massachusetts—the case of Louise Woodward, who, employed in Boston as a child-minder, was charged with murdering a young child who was in her care.

Where someone is charged with murder, Massachusetts law, like English law, permits a jury to bring in a verdict of manslaughter. Whether for that reason or because the prosecutors, who were political appointees, wanted to be seen to be energetic, aggressive prosecutors, the indictment evidently did not include an alternative count of manslaughter. However,

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according to press reports, until late in the trial it was expected that the jury would retire with the option of bringing in a verdict not only of murder but alternatively of manslaughter or assault. The *defence* then applied to limit the jury's choice to either a verdict of guilty of murder or a verdict of not guilty. Such a choice is apparently known in US legal circles as "loose or noose". In this connection it may or may not be relevant that Miss Woodward's lawyers were being paid by the employment agency which had placed her with the victim's family and the agency would naturally have been apprehensive that a verdict of manslaughter might be used by the family as a basis for launching against the agency a civil claim for massive damages. In any event, looking at the matter as one of cold logic, a restricted loose or noose choice ought to have operated only favourably to Miss Woodward since, unless the jury was satisfied that she had committed murder, they ought to have acquitted her of murder even if they thought that she was guilty of a lesser offence and would have convicted her of it. The judge, Judge Hiller Zobell, questioned the defendant on whether she understood what was being discussed. He held that: "I am persuaded that Miss Woodward is an intelligent and rational person capable of making serious decisions concerning her future and that she fully understands the consequences of the election she wishes to make."

Accordingly the judge directed the jury that the choice open to it was to find the accused guilty of first or second degree murder or to bring in a verdict of not guilty. It is my understanding that, following general US practice, Judge Zobell would have directed the jury exclusively on the law and not at all on the facts, although, in the case of Louise Woodward, the facts included conflicting expert evidence of a complex technical nature. Despite the risks of judges unduly influencing juries on the facts, if they sum up on the facts as well as the law, the US practice has always seemed to me to increase the risk of erroneous verdicts by juries.

After deliberating for three days, the jury returned a unanimous verdict of guilty of second degree murder. Counsel for the defendant then applied to the judge to quash the conviction, order a retrial or substitute a verdict of guilty to the lesser charge of involuntary manslaughter.

Massachusetts Rules of Criminal Procedure, Rule 25(b)(2) states: "If a verdict of guilty is returned, the judge may on motion ... order the entry of a finding of guilty of any offense included in the offense charged in the indictment." In such cases, the facts, as well as the law, are open to consideration.

The court may reduce the level of the conviction "for any reason which justice may require", which in turn means that the judge must decide whether failing to reduce the verdict raises a "substantial risk" that justice has miscarried.

Judge Hiller Zobell held that "the interests of justice, as Rule 25(b)(2) and the cases construing it have defined them—mandate my reducing the

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verdict to manslaughter. I do this in accordance with my discretion and my duty."

In relation to the prosecution's claim that it would be unfair to allow the defendant to escape the consequences of a decision by her experienced lawyers which she personally and publicly approved, the judge held: "If leaving the verdict untouched would preserved a miscarriage of justice, Rule 25(b)(2) makes the judge's duty clear. He must determine the existence of the miscarriage, not its cause."

Before I come to the course of the subsequent appeal, by both Miss Woodward and the prosecution, I will compare what happened in Boston with what would have happened if the trial had taken place in England.

In the first instance, although it would not have been necessary for the prosecution to include in the indictment an alternative count or counts of manslaughter and/or causing grievous bodily harm with intent to do so, the prosecution would probably have done so in the *Woodward* case. But whether or not it had done so does not materially affect what follows.

If, in the submission of the defence, the prosecution evidence, taken at its highest, was such that a jury, properly directed, could not properly convict the accused of murder or any of the relevant alternatives, defence counsel would have made a submission to that effect at the end of the prosecution case. The submission might have been confined to the charge of murder, leaving open the possibility of a verdict of guilty of one of the lesser alternatives. If the judge had agreed that the prosecution evidence would not support a verdict of guilty of any of the possible offences, he would then have directed the jury to bring in a verdict of not guilty. Alternatively, he might have indicated to the jury that in due course he would be directing them to bring in a verdict of not guilty of murder but that, after hearing any evidence called by the defence, they would have to consider whether the accused was guilty of manslaughter or causing grievous bodily harm with intent to do so. However, if the strength or weakness of the prosecution's evidence depended on the view to be taken of the prosecution's witnesses' reliability or other matters which are generally speaking within the province of the jury and on one view there was evidence on which the jury could properly convict, the judge would have allowed the case to continue.

Neither the prosecution nor the defence in an English court could have sought to preclude the judge leaving the jury with the possibility of bringing in a verdict of not guilty of murder but guilty of one of the lesser alternatives, though in a case where it is obvious that if it was the accused who committed the act, it was murder, e.g. because the victim's throat was cut right through to the victim's vertebrae, the judge does not need to direct the jury about manslaughter.

Assuming that there was no successful submission by the defence at the end of the prosecution case that there was no case to answer, the defence

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would have led its evidence and, following final speeches by the prosecution and the defence, the judge would have summed up the facts, being careful to stress that their appreciation was ultimately a matter for the jury alone, and he would have directed the jury on the law.

If the jury had then brought in a verdict of guilty, whether of murder or a lesser offence, the judge's sole function would be to pass sentence; he would have had no power to enter some verdict other than that delivered by the jury because he thought that the jury's verdict was erroneous. Perhaps the difference between the US and the English rules is a corollary of the fact that the US judge does not sum up to the jury on the facts, whereas the English judge can draw to the jury's attention all the weaknesses, as he perceives them, in the prosecution's evidence. On the other hand, the power of the US judge to enter a lesser verdict or a verdict of not guilty after the jury have brought in their verdict has clear merits. It is undoubtedly now English law that if the Court of Appeal believes that a conviction is unsafe, it will allow a criminal appeal even though the trial judge's summing up on the facts and his directions to the jury on the law were impeccable. If the Court of Appeal can and should so act, is it not strange that the trial judge has to allow the jury's verdict to stand even if he has at the very least a belief that the conviction is unsafe, especially when the trial judge has had the benefit not enjoyed by the Court of Appeal of seeing and hearing the witnesses, something which our appellate courts constantly stress as being of crucial importance?

Both the defence and the prosecution appealed in the *Woodward* case—the defence essentially on the ground that a conviction even for the lesser offence of manslaughter was unsafe on the evidence and the prosecution essentially on the ground that, as the defence had persuaded the judge not to allow the lesser charge of manslaughter to be considered by the jury, it was wrong for the judge himself then to consider that charge and to substitute a verdict of guilty on that charge for the verdict of murder delivered by the jury. By a majority of four to three the appeal court, the Supreme Court of Massachusetts, upheld the judge's decision. Both the majority and the minority criticised the judge for allowing the defence to opt for "loose or noose". The minority explicitly took the view that, by so opting, the accused had "brought the result on herself".

In the English courts there would have been no "loose or noose" choice, the judge would have directed the jury on manslaughter as well as on murder and would have summed up on the facts. If the jury had nevertheless brought in a verdict of murder, the trial judge would have been constrained to pass a life sentence though *Archbold* suggests that in an appropriate case the trial judge can recommend a very short minimum period of imprisonment.[7] On any appeal the Court of Appeal would then

7. *Archbold on Criminal Pleading, Evidence and Practice* (1999 edn), 19–96, p.1586.

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have to decide whether the conviction was unsafe and to allow the appeal on that basis or, of course, because there was some other ground for appeal such as some form of misdirection or non-direction to the jury.

The lesson that I seek to draw from the *Woodward* case is that, here again, although the State of Massachusetts is a common law jurisdiction which inherited its criminal law and procedure from England, procedural differences between Massachusetts and English procedures are capable of being of huge importance and in many cases are more likely to affect the outcome than differences in substantive law, though, of course, I accept that the precise dividing line between second degree murder and manslaughter under Massachusetts State law may have been of significance in the *Woodward* case.[8]

IV. THE JURY AND THE COMMON LAW TRIAL

HAVING by now I hope persuaded you that my thesis that procedure is more important than substantive law is not fanciful, I should explain what led me to choose the topic for discussion in this lecture. There are three reasons. The first is the belief that I have long held that curial procedures, at least so far as Anglo-American curial procedures are concerned, are very ill-suited to dealing with the rather broad issues that are frequently raised in "economic" cases such as competition law and trade regulation law procedures. I do not intend to go into that any further here, as I have done so elsewhere.[9]

The second reason was my reading a year or so ago a Leyden Lecture given by Professor Stephen Goldstein.[10] The lecture was concerned primarily with the role of the jury trial in shaping Anglo-American legal procedures, whether or not a jury is involved in the procedures in question.

8. I would here add a comment that applies equally to the procedure in relation to the possible impeachment of President Clinton and what I regard as the sorry story of Miss Woodward: they both involve prosecutors for whom, I suspect, winning is or was the primary consideration. Excessive prosecutorial zeal is liable to affect the investigative techniques used to secure evidence, techniques which, as *The New Yorker* put it (16 Nov. 1998), may seem perfectly reasonable when they are applied to relatively minor offenders; excessive prosecutorial zeal is also liable to affect courtroom tactics in ways that most of us would regard as undesirable.

9. "Use and Abuse of the Law in Economic Regulation", a Hamlyn Lecture delivered in 1991.

10. Professor Goldstein called his lecture "The Anglo-American Jury System as Seen by an Outsider (Who Is a Former Insider)", reproduced in the Clifford Chance *Leyden Lectures*, ed. B. Markesinis. When I agreed to give the Grotius Lecture, I did not know that Professor Goldstein would be coming to London and lecturing at Gray's Inn on 30 Nov. Had I known, I would have suggested that all advertisements for my lecture should have had printed in bold type "Don't worry about getting to Lever but be sure to get to Professor Goldstein." I say that because when I read Professor Goldstein's lecture, the scales fell from my eyes. A number of things that I ought to have, but had not, appreciated became obvious—I felt like someone who witnesses the first use of the wheel. Of course, why didn't I think of that?

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By way of background, recall that in England until 1854 all civil cases in the common law courts were tried by juries. By 1964 the proportion was some 2 per cent and I surmise that the proportion today, certainly if one includes county courts, is almost certainly less than 1 per cent, being effectively confined to cases of fraud, libel, slander, malicious prosecution and false imprisonment. Although the court has a discretion to permit jury trial in other cases, it will do so only very rarely indeed.

Therefore in England, for at least half a century now, jury trial in civil cases has been extremely rare. Of course it remains the norm in criminal trials for serious offences; and here I parenthetically remark that the higher conviction rate before magistrates than before juries in cases where the accused may elect to go for trial by jury provides some further corroboration of my thesis about the relative importance of procedure, though I accept that perhaps an accused is more likely to elect to go for trial by jury if he or she is innocent; on the other hand if US experience is relevant in this context it is interesting that a survey in the 1960s established that in 20 per cent of all jury cases US judges disagreed with the jury's verdict, juries generally being more lenient than judges to the criminal defendant (though in personal injuries cases no jury tendency in favour of either plaintiff or defendant was evident).

However, reverting to Professor Goldstein's main thesis, the passage of his lecture that struck me most strongly reads as follows:[11]

> A "trial, i.e., a clearly defined formal proceeding in which all the facts are adduced before the decision-maker and at the end of which he renders his decisions only on the basis of what has been produced and learned in this proceeding is unique to common law procedure. The existence of this trial dictates that all that precedes it is pre-trial, the primary purpose of which is preparation for the great event, the happening, the trial.
>
> This contrasts clearly with the Continental model of a continuing process of exchange of written matter, punctuated when necessary by short proof-taking hearings, with no central, dramatic proof-taking event.
>
> What is the explanation for this difference? The Continental method would seem to need no explanation, for it represents the normal decision-making process. However, the Anglo-American trial is extraordinary. It needs explanation. In my view, the explanation for this is the use—or at least historic use—of the jury in the common law procedure.
>
> The connection between the jury and the common law trial has been recognised by a number of scholars. However, the literature as a whole has not given sufficient emphasis to the fact that the common law trial, as we know it, is a direct result of the use of the jury. Without the common law jury, there would be no common law trial.

Judge David Edward makes a similar point in his perceptive paper, to which I have already referred.[12] He points out that in a jury trial all the

11. *Op. cit. supra* n.10, at pp.169–170.
12. *Op. cit. supra* n.6.

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material for judgment must be presented to all the jurors at the same time, and must be so presented orally since many jurors are ill-equipped to read and digest a large volume of written material; and, since the jury cannot be reassembled from time to time, the oral evidence must be presented in a single continuous process and without the possibility of reconvening the jury to consider their verdict if it is found to rest on false assumptions of fact or a wrong application of the law.

> The factual material presented to the jury must therefore be as complete as possible, and it must be "filtered" to ensure that the jury is not misled by irrelevant material or influenced by material which, for reasons such as privilege or confidentiality, ought not to be used. Since the jury's function is solely to determine the facts, application of the law to those facts (the function of the judge) cannot take place until the jury has completed its work. The procedure must therefore be exhaustive so far as the facts are concerned.
>
> Everything that goes before the trial is preparatory or incidental to it. Any subsequent appeal is concerned with what happened at the trial or the conclusion to be drawn from it. Although civil jury trial has largely been abandoned in most common law countries other than the United States, the same pattern of procedure is followed before the judge of first instance who is treated as a surrogate jury.[13]

Hence, as Judge Edward points out, appeal courts sometimes refer to the trial court judge having "misdirected himself" and hence also, in the absence of misdirection, his findings of fact are entitled to almost the same degree of respect as the verdict of a jury.

At least in England and other common law jurisdictions that have largely if not entirely abandoned jury trial in civil cases, the jury is a phantom limb which, though no longer present, profoundly affects the behaviour of the body of which it used to be part. In particular the phantom limb needs to be sustained by sworn oral testimony, presented without interruption and potentially unnecessarily in that quite a lot of it may ultimately turn out to have been unnecessary. One of Judge Edward's conclusions is that the inherent characteristics of the jury system explain why common lawyers are so "fact-oriented"; another of his conclusions, in the context of civil law, is:[14]

> The technique of the civil law systems is archetypally "judicial" in that it involves a professional lawyer applying the rules, the methods and the outlook of the law as a science to a problem submitted by the parties to the judge, as a *lawyer*, for solution. This, of course, is quite unlike the technique of jury trial which relies on the capacity of the common man to "detect falsehood or receive an assurance of truth" and treats the process of

13. *Idem*, p.47.
14. *Idem*, p.54.

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> fact-finding as a necessary and logical precursor of applying the law. It is pointless to look in the civil procedure of France, Germany or Italy for anything corresponding to a "trial" in the common law sense, since there is no place and no need for such an event. Correspondingly, an appeal court is free, and sometimes bound, to re-examine the facts since no particular sanctity attaches to the findings of the judge of first instance. The fact/law dichotomy becomes technically important only in the context of "cassation" as distinct from appeal.

With this second conclusion of Judge Edward's I respectfully agree, without qualification. But there is a qualification that I would venture to add to his first conclusion about the common law system being fact-oriented. My qualification is essentially a rider to the point made by both Judge Edward and Professor Goldstein that in the common law system all that matters is what happened at the trial. That is indeed true and the corollary is that *what actually happened* is irrelevant unless it was accurately depicted at the trial: the common law trial is like a dramatic production; the audience, whether it is a judge and jury or a judge alone, delivers its verdict on the basis of what it hears and sees on the stage. The process is essentially dramatic and not wholly dissimilar from one of those television programmes in which a studio audience delivers a verdict on the basis of what is presented to it. It is no coincidence that the greatest dramatist since antiquity was an Englishman: the English love drama and their courts—and, I would add, their Parliament—reflect the national predilection for drama.

It is sometimes said that the common law judge, even when sitting alone at first instance, is like the referee in a game, entrusted with the task of deciding impartially, on the basis of what is properly presented to him, which side has won. In some ways I find the analogy even more alarming than that of the theatre since it highlights a further danger of any legal procedure and not least our own: that the result, like that of a game, will depend on the skill with which the parties—or, more accurately, their lawyers—play the game.

That surely was what was so peculiarly unattractive in the manoeuvring in Louise Woodward's case—the gambit of the defence lawyers at first instance to the effect that, even if she was guilty of manslaughter and the jury could be satisfied on the evidence that that was so, a rule of the game should preclude the jury so finding; and a gambit of the prosecution lawyers on appeal to the effect that whether or not she had actually committed murder and whether or not the evidence established that that was so, she ought to spend much of her life in jail because, at the game stage before the jury, she had gambled unwisely. The administration of justice is not a game and even if it suits lawyers to treat it as if it were a game, we ought to be constantly on our guard against their being able to do so because of the procedural rules and their application.

Recall Professor Goldstein's comment that the Continental method would seem to need no explanation, for it represents the normal

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decision-making process whereas the Anglo-American trial is extraordinary. Let me give an example. For many years past the phantom limb of the jury has precluded the admission of hearsay evidence even before a judge sitting alone in a civil case. Belatedly, the Civil Evidence Act 1995 abolished that rule—or did it? Commentators have pointed out that the Act relates only to "statement[s] made otherwise than by a person while giving oral evidence in the proceedings in which [they are] tendered as evidence of the matters stated", so that evidence about the *conduct* of non-witnesses remains inadmissible as evidence of the existence of some state of affairs, even though the conduct is such as to make the alternative to that state of affairs more or less inexplicable. Thus, letters written to a testator in normal terms by persons who cannot be called as witnesses but who knew the testator were and apparently remain inadmissible as tending to prove the witness's sanity at the time in question; the conduct of a deceased sea captain who, after examining every part of a vessel, embarked on it with his family is apparently inadmissible as evidence that the ship appeared to be sea-worthy; the conduct of a series of non-witnesses in coming to a house and asking for X to obtain drugs from him apparently remains inadmissible as evidence that X rather than another occupant of the house was a drugs supplier.[15] Ask yourself whether outside a court of law any rational person, entrusted with responsibility for taking a decision, whether very serious or trivial, would totally exclude from consideration the instances of conduct such as those that I have just described. Yet because those whose conduct was witnessed could not themselves be brought on stage for questioning, their conduct, even though indisputable, had to be wholly excluded from consideration—presumably because, like hearsay statements, it might unduly sway a jury; and the surrogate jury, that is to say, today's judge in a civil case, is similarly to be kept in ignorance of such conduct. Consider how strange all this must seem to a Continental judge who, broadly speaking, takes his decisions in the same sort of way as do government ministers and administrators, as businessmen, indeed as we all take our decisions in relation to our important (and unimportant) affairs.

I referred earlier to Lord Denning's statement in *Ward* v. *James* that in any case in which one or other party must be deliberately lying, trial by jury has no equal. It is my understanding that in many cases where it is practicable to do so the security services of the major powers use polygraphs—or lie detectors—to test the veracity of agents, double agents, defectors and so on. As I have pointed out, as a general rule the English courts certainly do not use juries in civil cases for that purpose. But what of polygraphs?

The 1990 edition of *Phipson on Evidence* is a little ambivalent, stating: "There is as yet no reported English authority on the admissibility of the results of tests conducted with the aid of polygraphs (lie detectors) for the

15. Archbold, ch. 11.

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purpose of assessing the credibility of a witness."[16] *Phipson* continues with what might be described as the classic approach of the common lawyer: "It might be thought that this question is pre-eminently one for the jury rather than an expert witness or a machine programmed by an expert"—in other words truth is to be determined on-stage rather than off-stage—"but conflicting views have been taken in Canada on the point."[17] However, in the following text this ideological stance is softened and the editors suggest that the objection to the use of polygraphs and other techniques such as the administration of "truth drugs" is that at their present state of development they are "insufficiently reliable to justify the displacement of the jury's role as principal assessor of the credibility of witnesses",[18] leaving open the question whether advances in technology would justify doing so.[19]

The interesting point is that *Phipson* simply assumes that any imperfections that the jury or the judge as a surrogate jury may have as a truth-detection mechanism are less than the imperfections of polygraphs and other such techniques at their present state of development. That assumption *may* be right but there seems precious little hard evidence to support it.

It is undoubtedly true that courtroom histrionics are less blatant than they were 100 years ago but there remains a fundamental difference between an English trial and a Continental procedure.[20] In the former, the judge or judges come in, the house lights are dimmed, the curtain goes up and the audience settles down to watch the play, though it may react from time to time to ensure that the rules governing the drama are observed and to clarify aspects of the action.

By contrast, in many Continental procedures the action is essentially provided by the judiciary and the reaction, if any, is by the parties' lawyers: I say the reaction, if any, because at least in the case of appeals, the advocates' role may be wholly confined to the making of written submissions.[21]

16. *Phipson on Evidence* (14th edn, 1990), 32–10, p.808

17. *Idem*, 32–10, p.805.

18. *Idem*, 32–10, p.808.

19. Since my lecture was delivered, the German Supreme Court has reached precisely the conclusion reached in *Phipson*.

20. This was vividly brought home to me when I was in Berlin in 1998 and asked the President of the Competition Law Chamber of the Kammergericht, the Berlin Court of Appeals, a question that I ought to have known better than to ask. I asked him who, in an appeal from a decision by the Federal Cartel Office (which is a non-adversarial procedure governed by the rules of administrative law), began when the appeal came on for hearing. The President looked extremely surprised by that question and then responded, "Why, of course, it is I who begins."

21. Some years ago I was sitting as an ICC arbitrator in Brussels. The President of the Tribunal was a most distinguished, conscientious and delightful Belgian advocate. One day he said to me: "I am afraid that we shall have to start a little late tomorrow as I have a case that is coming on for a hearing before the Cour de Cassation." I asked whether we should be able to sit at all on the morrow in those circumstances. "Oh yes," he said, "I shan't say anything but as a matter of courtesy, I always like personally to attend at the Court when one of my cases is called on for hearing."

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I must stress that I do not intend even implicitly to make value judgments about the different forms of procedure that are used today within the European Union and within the major common law jurisdictions throughout the world. It is, I think, clear that different procedures have their advantages and their disadvantages. The disadvantages can sometimes be mitigated and, on my reading of what may be called the Woolf reforms, they are intended to mitigate a number of disadvantages of current English procedures, without, however, questioning, in general, the basic assumptions that underlie those procedures.

Moreover, the advantages and disadvantages of different procedures are not confined to the cost-effectiveness of the administration of justice. Thus one of the advantages that is claimed for the jury system is that it involves many thousands of ordinary citizens directly in the administration of justice—now in England effectively only criminal justice but of great importance as such. A man or woman who has sat as a juror *ought* to feel much more personally associated with the administration of justice as a result. This utilitarian argument makes I think a different point from the point made by Professor Goldstein with reference to the use of the jury, particularly the civil jury, in the United States—that it is an integral part of the democratic political process which is effectively a point of principle, not based, at least at all directly, on the utilitarian calculus, though the passage from Lord Denning's judgment in *Ward* v. *James* that I cited earlier is a good example of a general belief that trial in England too by jury is a bulwark of our liberties.

More broadly, there is the point made by Professor Tom R. Tyler, a US professor of psychology, in his book *Why People Obey the Law*. Professor Tyler found that a widespread feeling of moral obligation to obey the law was at the root of the belief in its legitimacy and that compliancy was much more strongly related to views of legitimacy than to assessments of the likelihood of being caught. Professor Roger Hood summarises Professor Tyler's conclusion as follows:

> Tyler, in effect, has raised a utilitarian argument for maximising procedural rights. Not only, he argues, are they of the greatest importance in ensuring satisfaction but they positively reinforce the extent to which citizens believe that the law is legitimate and the degree to which they are willing to comply with it. In other words, respect for procedural rights tends to foster acceptability of the law: they are not, as administrators often suppose, simply a tool for challenge and conflict. If legal institutions are to bolster respect for the law, rather than alienate those they deal with, procedural rights become of prime importance.

I said earlier that there were three reasons that had led me to choose as a topic the importance of procedure. The first was my belief that Anglo-Saxon curial procedures are ill-suited to dealing with broad issues such as arise in many "economic cases". The second was the stimulus

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provided by Professor Goldstein. The third is more topical. It is that the British Institute of International and Comparative Law is proposing to embark on a major comparative study of procedure. The project was suggested by the Institute's Chairman, Lord Goff, who points out that the law faculty in most German universities has a professor of civil procedure whereas in England the subject has been neglected. Many practitioners are, of course, immensely knowledgeable about procedure and the *White Book* is a monumental edifice of learning; but we are concerned essentially with how the established system works and with improving the modalities rather than with questioning the basic assumptions on which it rests.

No one should underestimate the magnitude of the task that the Institute is setting itself. As Judge David Edward remarks:[22]

> Codes and treatises on the law of evidence are, at best, unreliable guides. Superficially, the rules of two systems may appear very similar. For example, some aspects of Dutch procedures bear a striking resemblance to recent proposals for new procedures in the Scottish courts. Yet we can be certain that if the Scottish proposals were to be implemented, the Scottish courts would still work very differently from the Dutch courts.
>
> Lawyers from different traditions start from different assumptions about the way in which the law ought to work, and they carry these assumptions through into the way in which they make it work. The greatest problem for the comparatist is to articulate what lawyers of different traditions do not think to explain because they take it for granted. He must especially avoid making value judgments about the respective merits of different systems before establishing the facts about how they work.

If this article has persuaded readers that the task that the Institute has set itself is an important one which deserves substantial support, then it will have served a valuable purpose.

22. *Op. cit. supra* n.6, at p.44.

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