



Article

Truth and justice, and sheep

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This article is a reflection on the nature of and relationship between truth and justice according to the rule of law. Within the Western legal tradition, and even within the common law system, the concept of truth and the concept of justice as reflected in available forms of civil procedure have not remained constant. The relationship between truth and justice has evolved through many phases.

The large and quite serious topic I want to touch upon is the concept of truth within our common law system and the relationship between that concept of truth and the concept of justice according to the rule of law. The sheep I will add mainly for illustration.

My preoccupation with the topic was sparked by meeting in Canberra last year a visiting delegation of Chinese judges. They were visiting Australia to study evidence — not so much the rules of evidence as the concept of determining civil or criminal liability by making findings of fact based on evidence presented to a court. One of the judges, I was told, had quite recently been a member of an appellate court which had for the first time in Chinese history set aside a murder conviction for insufficiency of evidence.¹

The way our own legal system goes about determining civil and criminal liability by making findings of fact based on evidence adduced at a trial is so deeply rooted in our tradition that I had until then very much taken it for granted. The meeting caused me to reflect on the reality that our entire approach is historically and culturally contingent.

Here come some sheep

I have three stories. I would like to call them parables, but that would be misleading because they are about real events. Together, they illustrate the aspects of our own legal system that I want to explore.

The first story I have heard several times, only by hearsay. The story has

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¹ Nian Bin — Case of Placing Dangerous Materials, decided by the Fujian Provincial High People's Court on 22 August 2014. See Elisa Nesossi, 'Wrongful Convictions: The Useful Injustice?' in Flora Sapio et al (eds), *Justice: The China Experience* (Cambridge University Press, 2017) 141, 154 n 26.

been most authoritatively attributed to the late Jim Killen² who was a distinguished and colourful member of the House of Representatives and a distinguished and colourful member of the Queensland Bar. The story is about a prosecution for sheep stealing, colloquially known as ‘sheep-duffing’, tried before a local jury in western Queensland. At the conclusion of the trial, the judge asked the jury the customary question, ‘How do you find the accused?’ The response of the jury, delivered through its foreman, was ‘Not guilty your Honour — provided he gives back the sheep’.

The second story comes from the report of a civil case decided by the Supreme Court of Michigan in 1887. The case was *Dunbar v McGill*.³ Mr Dunbar sued Mr McGill for damages for conversion of 34 of Mr Dunbar’s sheep. Mr Dunbar alleged that his 34 sheep were grazing in his unfenced paddock when a much larger flock of sheep under the control of drovers employed by Mr McGill came along an adjoining road. Mr Dunbar alleged that his 34 sheep became mingled with the larger flock and so were taken from him by Mr McGill. Mr McGill pleaded the general issue. That is, Mr McGill said in effect to Mr Dunbar, ‘You prove that 34 of the sheep in the flock are yours.’ The case was tried before a civil jury. The trial judge told the jury that the question for them was whether there was more evidence to show that 34 of the sheep in the flock were Mr Dunbar’s sheep than there was evidence to show that they were not Mr Dunbar’s sheep. The Supreme Court of Michigan held that the trial judge’s direction was wrong in law and ordered a new trial.

In a statement of principle which resonates within the Australian legal system, the Supreme Court of Michigan said this:

We think this instruction was misleading. It leaves out of view an important element to be considered in the application of the preponderance of probabilities; and that is, the testimony introduced tending to show that these were plaintiff’s sheep must have been of such character and weight as satisfied the jury that the sheep which mingled with defendant’s, and which it was claimed defendant converted, were the property of the plaintiff. This question did not depend upon whether there was more evidence to show that these were Dunbar’s sheep than that they were not his sheep, but upon the question whether there was sufficient evidence to satisfy the jury that they were his sheep.⁴

The third story was told to me by Gavan Griffith QC who, for many years before he became Solicitor-General of the Commonwealth, was a barrister in commercial practice in Melbourne. In 1967, as a very junior counsel, he defended against a dogged old-school silk a Victorian Supreme Court action for partnership accounts between two farmers who just happened to be cousins and who happened to be Greek. One cousin alleged and the other denied that the partnership assets included 227 sheep. The trial ran for 19 days before an equally dogged old-school judge, Justice Murray McInerney, who apart from

2 The Hon Justice Peter McClellan, ‘Juries — Common Sense and the Truth’ (Speech delivered at the New South Wales Crown Prosecutors’ Annual Conference on Law and Order and the Jury System, 25 March 2008). A variation of the story, attributed to Dennis Rose QC, has the judge directing the jury to reconsider their verdict and provoking the revised response, ‘Still not guilty — and he can keep the **** sheep!’

3 31 NW 578 (Mich, 1887).

4 Ibid 581.

his day job was also a part-time lecturer in evidence and procedure at Melbourne Law School. The 19-day trial was slowly followed by a reserved judgment in the following terms:

On the Plaintiff's Claim, I am not satisfied to the civil standard of balance of probabilities that the sheep existed. Claim dismissed with costs.

On the Defendant's Counterclaim, I am not satisfied to the civil standard of balance of probabilities that the sheep did not exist. Counterclaim dismissed with costs.

Individually and cumulatively, the three stories illustrate much about our concept of justice and our related concept of truth. The verdict of the western Queensland jury — 'Not guilty your Honour — provided he gives back the sheep' — is perverse to those who are trained as lawyers. Evidently, it did not seem perverse to the local members of the jury. Whether or not you think the verdict perverse depends on your concept of justice. If your concept of justice is one of maintaining social harmony, there is nothing at all perverse about deciding that a man should not face criminal sanction for taking his neighbour's sheep provided he makes restitution.

The verdict is perverse if your concept of justice is the common law concept of justice according to the rule of law. The rule of law postulates the existence of a legal rule and postulates imposition of a legal sanction for breach of that legal rule. The link between the rule and the sanction is the fact of breach. Whether or not there is a breach of the rule is a question of fact.

In a trial by jury, the function of administering justice according to the rule of law is divided between judge and jury. The function of the judge, reflected in the judicial oath, is to do justice according to law: to articulate the relevant legal rule and to impose the sanction of the law in the event of a finding of breach. The function of the jury, reflected in the juror's oath, is to do nothing more than to render a true verdict — that is, to make a formal finding of the fact of breach or non-breach of the relevant legal rule — in accordance with the evidence.

The relevant rule in the Queensland sheep-duffing case was no more complicated than 'thou shalt not steal thy neighbour's sheep'. The relevant question for the Queensland jury was the correspondingly simple question of fact: did the defendant steal the sheep? The verdict was perverse because the jury formally found as the fact that the defendant had not breached the rule but implied that the jury believed that the defendant had breached the rule.

What the story of the Queensland sheep-duffing case illustrates is that maintenance of the rule of law is dependent on the ability of our system to generate reliable findings of fact. For breach of a legal rule to result in a sanction for breach of that legal rule, our legal system needs to be able to determine with integrity in respect of a past event, the occurrence of which is contested and the occurrence of which is uncertain, that the event either happened or did not happen, or more accurately is either proved to have happened or not proved to have happened. That brings me to the significance of the other two stories.

What the Michigan case of *Dunbar v McGill* illustrates is the point that proof of a fact within our system is proof of a fact to the subjective satisfaction of the tribunal of fact, whether the tribunal of fact happens to be a judge or a jury. When we speak in a civil case of proof 'on the balance of probabilities' or 'on the preponderance of the evidence', just as when we speak in a criminal

case of proof ‘beyond reasonable doubt’, we are expressly eschewing any notion that we can determine that a past fact happened or did not happen with absolute certainty. We are talking probabilistically. But we are not talking about objective probabilities; otherwise we would never find an improbable thing to have happened. We are talking about belief, and we are acknowledging that belief can be held with different degrees of intensity.

In *Murray v Murray*, a civil case which involved fact-finding by a judge rather than a jury, Dixon CJ put it this way:

What the civil standard of proof requires is that the tribunal of fact, in this case the judge, shall be ‘satisfied’ or ‘reasonably satisfied’ ... [T]he point is that the tribunal [of fact] must be satisfied of the affirmative of the issue. The law goes on to say that he is at liberty to be satisfied upon a balance of probabilities. It does not say that he is to balance probabilities and say which way they incline. If in the end he has no opinion as to what happened, well it is unfortunate but he is not ‘satisfied’ and his speculative reactions to the imaginary behaviour of the metaphorical scales will not enable him to find the issue mechanically.⁵

That explanation was given by Dixon CJ in 1960. No doubt, McInerney J had it in mind when he came to decide Gavan Griffith’s case about 227 sheep in 1967. The result — that on the claim he was not satisfied that the sheep existed and that on the counterclaim he was not satisfied that the sheep did not exist — might seem perverse to a layman and may well have seemed perverse to the parties. But it is a result which our system treats as logically open. The result is logically open in normal civil cases because we impose the burden of proving a fact on the party who asserts that fact. The tribunal of fact is not asked to decide between the existence of a fact and the non-existence of the fact. The tribunal of fact is asked to decide whether the evidence presented at trial causes the tribunal of fact to believe an assertion of fact with the requisite degree of intensity. That makes it possible, in the rarest of cases where the evidence is such that the tribunal of fact is unable to make up its mind one way or the other, for the tribunal of fact not to be satisfied on the balance of probabilities of either of two mutually contradictory assertions of fact.

The three illustrations together show us this. First, our concept of justice is reliant on our concept of truth. Second, our concept of truth is not absolute but a matter of degree. Third, truth for us is relative. True or untrue is proven or unproven, and proven or unproven is ultimately believed or not believed with the requisite degree of intensity.

Within the two and a half millennia of the development of our Western legal tradition, and even within the 800 or so years of the development within that tradition of our common law system, it has not always and everywhere been so. Justice has not always and everywhere been seen to be reliant on truth. And truth has not always and everywhere been seen to be a matter of degree.⁶

5 (1960) 33 ALJR 521, 524. See also *Briginshaw v Briginshaw* (1938) 60 CLR 336, 361–2.

6 In the historical narrative which follows, I have drawn principally on the following legal sources: W S Holdsworth, *A History of English Law* (Methuen, first published 1903, 1938 ed) vol 1 ch 3; Harold J Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, 1983); Harold J Berman, *Law and Revolution, II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Belknap Press, 2003); Peter Stein, *Roman Law in European History* (Cambridge University Press, 1999). I

The Greeks

Justice as administered by those citizens of classical Athens who were chosen by lot to serve as jurors in its popular courts is generally understood to have drawn no very sharp distinction between fact and law and to have involved no formal rules pertaining to proof. Athenian juries were large popular assemblies often numbering several hundred. The oath of the Athenian juror was to vote according to the laws and decrees of the Athenian people but, concerning things about which there were no laws to decide, to the best of his judgment without fear or enmity.⁷ The vote of the jury which determined the rights of parties in dispute was a simple majority vote, indicated by dropping a pebble into an urn. The vote was taken without deliberation immediately at the end of a trial in which the parties in dispute acted mostly for themselves, sometimes under the tuition of sophists or other specialists in the art of rhetoric. Although the trial was presided over by a magistrate also chosen by lot, no part of the function of the magistrate was either to limit the information or arguments presented by the litigants or to instruct the jury as to the applicable law.⁸

The Athenian trial was focussed less on proof of facts relevant to establishing an asserted breach of Athenian law than on persuading jurors to the merits of a disputant's overall position.⁹ The verdict of the jury was a matter of opinion, and the formation of that opinion was a matter of persuasion. To the extent that proof of facts assisted the persuasion of jurors to the merits of a disputant's position, rhetorical techniques were directed less to inferences available to be drawn from evidence, which tended to be treated with suspicion because it could be easily fabricated, than on what those involved would have been likely to have done given their circumstances and their character.

One of the paradoxes of the Hellenic world — not unlike the paradox of Achilles and the Tortoise — was the paradox of Protagoras and Euathlus, also known as the 'Paradox of the Court'. The great sophist Protagoras agrees to teach Euathlus how to win cases in court. Euathlus agrees to pay Protagoras a fee, saying to Protagoras, 'I will pay you when I win my first case.' Protagoras teaches Euathlus. But Euathlus decides not to take on any cases. Protagoras sues Euathlus for his fee. Protagoras argues as follows: 'If I win, Euathlus has to pay me my fee by force of the judgment of the court. If he wins, Euathlus has to pay me my fee under our agreement anyway

have also drawn on the following non-legal sources: Barbara J Shapiro, *Probability and Certainty in Seventeenth-Century England: A Study of the Relationships between Natural Science, Religion, History, Law, and Literature* (Princeton University Press, 1983); Donald Gillies, *Philosophical Theories of Probability* (Routledge, 2000); James Franklin, *The Science of Conjecture: Evidence and Probability before Pascal* (Johns Hopkins University Press, 2001); Ian Hacking, *The Emergence of Probability: A Philosophical Study of Early Ideas about Probability, Induction and Statistical Inference* (Cambridge University Press, 2nd ed, 2006). Other sources are separately noted.

⁷ Adriaan Lanni, *Law and Justice in the Courts of Classical Athens* (Cambridge University Press, 2006) 72.

⁸ *Ibid* 37.

⁹ See Vasileios Adamidis, 'The Relevance of Liturgies in the Courts of Classical Athens' (2017) 3 *Athens Journal of History* 85.

because he will have won his first case. Either way Euathlus has to pay me.’ Euathlus argues as follows: ‘If I win, I do not have to pay Protagoras his fee by force of the judgment of the court. If Protagoras wins, I do not have to pay him his fee under our agreement anyway because I will have lost my first case. Either way, I do not have to pay him.’ The question for which the ancient Greeks had no answer was: does Protagoras get his fee?

The paradox, of course, is only a problem at all if it is thought that the function of the court is to determine the merits of the disputants’ overall positions. If the function of the court is to do no more than to decide whether or not Euathlus has breached his agreement to pay Protagoras a fee, what happens next does not need to be determined; the more so if the matter in dispute is resolved by the judgment of the court.

The Romans

Justice as administered according to the civil procedure of late Republican and early Imperial Rome was rather more practical and was rather more focussed on the law and the facts necessary to determine whether or not the law had been breached.¹⁰ The Roman system for the adjudication of civil disputes was at that time divided between the magistrate, an official who was advised by legally trained jurists, and the judge, who was a citizen selected from a roll of citizens who acted in that capacity as a civic duty much like a modern juror. The procedure unfolded in two distinct stages. The first stage was about identifying and isolating issues for trial. It involved the parties appearing before the magistrate for the plaintiff to explain his claim and for the defendant to articulate any defence. The magistrate would at that time prepare a *formula*, which was a brief written instruction to the judge as to how the dispute should be adjudicated. Reduced to its essence, and leaving to one side any unresolved question of law, the formula said to the judge of the defendant: if these facts appear, condemn the defendant to pay the plaintiff; if these facts do not appear, absolve him.

The judge who received the formula then had the duty to conduct a public trial at which he would listen to both parties and at the conclusion of which he would give a verdict in the form of a verbal response to the instruction contained in the formula. The judge’s verdict would bind the parties immediately. The matter in dispute between them would be *res judicata*.

In the trial before the judge, the parties would be represented by advocates and would be permitted to adduce evidence from witnesses. The fundamental rule was that proof was incumbent on the party who asserted a fact rather than on the party who denied it.¹¹ But, beyond that, there were few rules of evidence and the trial procedure appears to have been largely unregulated. The advocates, it appears, were not jurists but rather orators who adapted and applied the rhetorical techniques of the Greeks. The judges, it appears, were

¹⁰ See generally H F Jolowicz and Barry Nicholas, *Historical Introduction to the Study of Roman Law* (Cambridge University Press, 3rd ed, 1972) 199–203; Bruce W Frier, *The Rise of the Roman Jurists: Studies in Cicero’s Pro Caecina* (Princeton University Press, 1985) 212–13, 226–7; Rafael Domingo, *Roman Law: An Introduction* (Routledge, 2018) 50–6, 114–23.

¹¹ Franklin, above n 6, 9.

practical men who were pretty much left to their own devices in determining the verdict they would give.

The scholastics

Greek philosophers were not lawyers just as Roman lawyers were not philosophers.¹² Beginning in the 12th century, however, following the discovery in about 1070 of a manuscript of Roman law compiled under the Roman Emperor Justinian in about 534, mediaeval scholastics first at the University of Bologna and then elsewhere in Europe blended Roman law with Greek philosophy and transfused the mixture with Judaeo-Christian belief. The scholastics glossed the substantive principles of Roman law found in Justinian's *Code*, *Institutes* and *Digest* with the philosophy of Plato and with that of Aristotle (insofar as the works of Aristotle were then available) to form an integrated body of supposedly timeless and transcendent legal principle. That body of principle formed the basis initially of canon law as administered in ecclesiastical courts. Within a relatively short time, it came also to inform civil and criminal law as administered in many secular courts. The 12th century was, as Professors Pollock and Maitland put it, the 'most legal' century.¹³

Truth within that synthesised system was the foundation of justice. Truth was to be pursued with mathematical exactitude and the pursuit itself was to be meticulously recorded. The seeker after truth was the scholastically trained professional judge. Where, following the commencement of an action by the plaintiff making a written complaint, the defendant filed a written response contesting the plaintiff's claim, the duty of the judge was to ascertain the truth of facts in issue through a process of investigation. Although the parties might be represented by lawyers, the investigation was to be conducted by the judge acting either alone or through or with the assistance of court officials. The process of investigation was to be documented so as to produce a written record on the basis of which the judge would make the final judgment. The judgment was to be in writing, although not the reasons.

The judgment had to be based on the satisfied conscience of the judge. But rules were developed to guide and thereby to ease the conscience of the judge. As the system developed the rules became more elaborate and the task of the judge became correspondingly more mechanical. The judge became able to receive only that evidence and to draw only those inferences from evidence as the detailed rules of the system allowed. Testimony was required to be on oath. Testimony was permitted only from a witness who had direct sensory perception of the fact in issue. Testimony, however, was prohibited from a witness who was a party or who by reason of his or her relationship with a party could be expected to be moved by personal considerations and who for that reason would face the temptation to commit the sin of perjury. In addition to the testimony of witnesses, formal admissions of facts in issue in a civil case could be extracted from the parties by the administration of written

¹² See James Gordley, 'The Method of the Roman Jurists' (2013) 87 *Tulane Law Review* 933.

¹³ Sir Frederick Pollock and Frederic William Maitland, *The History of English Law before the Time of Edward I* (Cambridge University Press, 1895) vol 1, 88.

interrogatories just as in a criminal case, provided sufficient indications first appeared to justify it, an admission could be extracted by torture, a process hailed as ‘The Queen of Proofs’.

Truth under that system came to be measured in fractions, ‘the judge being a kind of accountant who totaled up the fractions’.¹⁴ Full proof, sufficient to establish a fact in issue, required either the testimony of two ocular or auricular witnesses (a requirement which seems to have been drawn from Mosaic law) or the formal admission of the opposing party which might be extracted by interrogatory.

In England, a version of that procedure was adopted by the Court of Chancery where it survived into the 19th century. Professors Langdell and Wigmore, writing around the turn of the 20th century, described the procedure concerning proof of facts in Chancery as having differed from that of the courts administering the common law in a number of distinct ways.¹⁵ Apart from the uniquely Chancery practice of documentary discovery, the differences they identified included the continuation in Chancery of the canon law tradition which required two witnesses to prove or disprove material allegations or denials of fact as well as the tedious, laborious and often unsatisfactory requirement that testimony be taken only in writing: in the form of depositions, affidavits, written answers to interrogatories or written answers to cross-interrogatories. Faced with contradictory written testimony on oath from opposing witnesses, the Court of Chancery had no way of determining a fact in issue. The let-out was that the Court of Chancery could always refer a question of fact to a common law court for trial.

The requirement that testimony in Chancery be taken only in writing was abolished by statute in England only in 1852.¹⁶ The practice of requiring two witnesses appears to have died out only with the melding of the jurisdictions of the Court of Chancery with those of the Courts administering the common law into that of the High Court of Justice in 1875.¹⁷

The canon law prohibition on a party giving evidence found its way into the rules of evidence applied by the courts administering the common law. It was abolished by statute in England only in 1851.¹⁸ The canon law prohibition on a witness who had an interest in the outcome of a case giving evidence similarly found its way into the rules of evidence applied by the courts administering the common law. It was abolished by statute in England just slightly earlier, in 1843.¹⁹

14 Shapiro, *Probability and Certainty*, above n 6, 174.

15 See C C Langdell, *A Summary of Equity Pleading* (Charles W Sever, 2nd ed, 1883) 1–50, chs 1–2; John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law: Including the Statutes and Judicial Decisions of All Jurisdictions of the United States* (Little, Brown, 1904) vol 1, § 4, 10–11. See also Edmund Robert Daniell, *A Treatise on the Practice of the High Court of Chancery: With some Practical Observations on the Pleadings in that Court* (J & W T Clarke, 1840) vol 2, 404–6.

16 *Court of Chancery Procedure Act 1852*, 15 & 16 Vict, c 86, s 30. See also *Chancery Regulation Act 1862*, 25 & 26 Vict, c 42, s 1, requiring that ‘every Question of Law or Fact’ in a matter instituted in the Court of Chancery ‘shall be determined by or before the same Court’ instead of Chancery referring the question to a common law court for determination.

17 *Supreme Court of Judicature Act 1873*, 36 & 37 Vict, c 66, s 24, sch 1 r 36.

18 *Evidence Act 1851*, 14 & 15 Vict, c 99, s 2.

19 *Evidence Act 1843*, 6 & 7 Vict, c 85.

The early common lawyers

The common law system of justice itself originated towards the end of the 12th century with the establishment by Henry II ('Henry the law giver') of the first permanent and professional royal court of justice in England known as the Court of Common Pleas, which was supplemented not long afterwards by the Court of King's Bench.²⁰ Civil actions under the reforms which Henry II instituted were commenced by the plaintiff seeking from the King's Chancellor at Westminster a writ by which the King summoned the defendant to appear before one of the King's justices for determination of the matter in dispute. The practice of the Chancellor became to issue writs in limited circumstances for what became standardised forms of action.²¹ The forms of action when combined with a subsequent process of pleading had the effect of resolving issues of law in advance of trial so as to define relatively narrow issues of fact which, if determined at trial in the plaintiff's favour, would eventually result in the entry in the rolls maintained at Westminster of judgment for the plaintiff on the form of action identified in the writ.

Common law trials limited to the issues of fact isolated on the pleadings were then presided over by the King's justices during court sessions, known as assizes, held periodically in designated townships throughout the country. Originally, the common law trial could take at the option of the defendant any one of several forms each of which had its origins in the folklaw of the Germanic tribes. That which would evolve to become most significant was trial by jury. But two others ought to be mentioned. One was trial by ordeal, a Norman variation of which was trial by battle. The other was trial by compurgation.

Trial by ordeal in its mediaeval conception was a procedure through which occurred the divine revelation of truth.²² The outcome of the ordeal revealed the judgment of God. The informing notion was that truth was known only to God and that God determined the outcome of the ordeal. In determining the outcome of the ordeal, God did not sit in judgment on a disputed question of fact but rather provided proof of that fact for the benefit of the human judge. The informing notion was coherent in its own terms, but the idea that God was at the beck and call of man to assist in determining disputes did not fit well with Christian belief. The Fourth Lateran Council condemned trial by ordeal in 1215, but trial by battle, also known as 'wager of battle', remained an option to a defendant at common law for another 6 centuries.²³ Trial by battle was abolished by statute only in 1819,²⁴ after the last 'gauntlet' had been

20 Pollock and Maitland, above n 13, 132–4; Ralph V Turner, 'The Origins of Common Pleas and King's Bench' (1977) 21 *American Journal of Legal History* 238.

21 This is, of course, the same Chancellor who came to preside over the Court of Chancery. The Chancery was not originally a court, but rather a department of state which was responsible for the drawing-up and authentication of documents. The Chancery's role in issuing the original writs gave it an association with the 'ordinary administration of justice', and this association was part of the setting for its emergence as a court: see J H Baker, *An Introduction to English Legal History* (Oxford University Press, 4th ed, 2002) 99.

22 L Jonathan Cohen, 'Freedom of Proof' in William Twining (ed), *Facts in Law* (Franz Steiner Verlag, 1983) 1, 6.

23 Baker, above n 21, 73–4.

24 *Appeal of Murder, etc Act 1819*, 59 Geo 3, c 46.

thrown down in the Court of King's Bench in 1818.²⁵

Trial by compurgation, also known as wager of law, was for obvious reasons more popular than trial by ordeal. Trial by compurgation allowed the defendant conclusively to establish the falsity of the facts alleged by the plaintiff simply by coming before the assize to swear an oath to that effect which was supported by the oaths of a specified number of compurgators or 'oath helpers'. The compurgators did not give evidence of the facts in issue but rather swore to their belief in the truthfulness of the defendant's oath. The informing notion was that the accumulation of oaths operated to purge or clear away the allegations, the defendant and each of his oath-helpers facing the certainty of eternal damnation were their oaths to be false.

Trial by compurgation appears to have been as much favoured in the townships as it was disfavoured at Westminster. For newer forms of action it was not permitted, and for older forms of action its use was discouraged by the Justices. But it survived as a mode of trial available at the option of the defendant for actions in debt, detinue and account into the 19th century, being affirmed by the Court of Common Pleas in 1805²⁶ and relied on in the Court of King's Bench in 1824.²⁷ It was abolished by statute in England only in 1833²⁸ and in New South Wales only in 1841.²⁹

Trial by jury in England in the time of Henry II little resembled the trials by jury in 19th century Michigan and 20th century Queensland which I earlier described. The trial was essentially an inquest conducted by the Justice presiding at the assize. It consisted of assembling a small group of local inhabitants not to hear evidence but to answer under oath from knowledge gained by them before the trial the question or questions of fact on which judgment for the plaintiff on the form of action identified in the writ depended.

The surprisingly late emergence of the common law trial on evidence

Witnesses seem to have begun occasionally to appear before juries in civil cases in the 13th century and their appearance seems not to have been uncommon by the mid-15th century. But the now characteristic role of the jury as the tribunal of fact charged with determining the facts on the evidence led at trial did not emerge until the 16th century and was not clearly articulated until the second half of the 17th century.

In 1670, Sir John Vaughan, as Chief Justice of the Court of Common Pleas, in the course of a decision of constitutional significance granting habeas corpus to compel the release of jurors who had been imprisoned for bringing in a verdict contrary to the direction of a judge, made clear that the testimony of a witness and the verdict of the jury were 'very different things': the witness swearing to what he had seen or heard; the juror swearing 'to what he can infer[] and conclude from the testimony ... by the act and force of his

²⁵ Baker, above n 21, 74; *Ashford v Thornton* (1818) 1 B & Ald 405, 457, 460; 106 ER 149, 168–9.

²⁶ *Barry v Robinson* (1805) 1 Bos & Pul (NR) 293, 297; 127 ER 475, 476.

²⁷ *King v Williams* (1824) 2 B & C 538, 539–40; 107 ER 483, 484.

²⁸ *Civil Procedure Act 1833*, 3 & 4 Will 4, c 42, s 13.

²⁹ *Advancement of Justice Act 1841* (NSW).

understanding'.³⁰ Sir Mathew Hale, who in 1671 became Chief Justice of the Court of King's Bench, took the same point further in explaining that the jury were not bound to give their verdict in accordance with the testimony of any witness but were able to weigh the testimonies of all to determine the truth for themselves.³¹ In a trial for libel in 1681, the jury were instructed that they did not swear and were not bound to swear that the defendant was the publisher of the book in question but only that, taking the evidence in the case, they believed it so.³²

The transformation of the jury into a tribunal of fact whose function it was to evaluate the evidence was substantially complete by the early 18th century when Sir Geoffrey Gilbert, a distinguished lawyer and mathematician who was to become a Baron and then Chief Baron of the Court of Exchequer from 1722 until his death in 1726, penned the first English treatise on the law of evidence. The subject matter to be treated, Gilbert explained in his introduction, was 'the Evidence that ought to be offer'd to the Jury, and by what Rules of Probability it ought to be weigh'd and consider'd'.³³ Drawing directly on John Locke's *An Essay Concerning Human Understanding*, published in 1689, Gilbert commenced by saying:

[I]t has been observed by a very learned Man, that there are several Degrees from perfect Certainty and Demonstration, quite down to Improbability and Unlikeliness, even to the Confines of Impossibility; and there are several Acts of the Mind proportion'd to these Degrees of Evidence, which may be called the Degrees of Assent, from full Assurance and Confidence, quite down to Conjecture, Doubt, Distrust, and Disbelief.³⁴

What is done in 'Trials of Right', Gilbert went on to say, 'is to range all Matters in the Scale of Probability'. The 'Rights of Men' were of necessity not to be determined by demonstration but by appropriately proportioned degrees of evidence resulting in correspondingly proportioned degrees of satisfaction or belief.³⁵

Gilbert's description of the trial and his acknowledgement of Locke suggest that the understanding of the nature of fact-finding which had come by the 18th century to prevail in courts administering the common law owed less to the influence of classical or scholastic patterns of thought or to customary patterns of behaviour than it did to the influence of 17th century empiricism: little in epistemological terms to Plato and Aristotle, more to Locke and before him the authors within the circle of Blaise Pascal of the *Port-Royal Logic* (the first edition of which was published in 1662) who introduced the notion of probability as a basis for the formation of belief as to the truth and not merely for the formation of opinion,³⁶ and much to Robert Boyle and Isaac Newton

30 *Bushell's Case* (1670) Vaugh 135, 142; 124 ER 1006, 1009.

31 Sir Matthew Hale, *The History of the Common Law of England* (University of Chicago Press, 3rd ed, 1971) 164–5.

32 Barbara J Shapiro, 'Law and Science in Seventeenth-Century England' (1969) 21 *Stanford Law Review* 727, 760.

33 Sir Geoffrey Gilbert, *The Law of Evidence* (first published 1754, 1756 ed) 1.

34 *Ibid* 1–2.

35 *Ibid* 2–3.

36 See John Maynard Keynes, *A Treatise on Probability* (Macmillan, 1921) 87–8. See generally Antoine Arnauld and Pierre Nicole, *Logic, or The Art of Thinking: Being the Port-Royal*

and other members of the Royal Society (founded in 1660) who emphasised induction from observation as a source of scientific knowledge. John Wilkins, the Bishop of Chester and one of the first secretaries of the Royal Society, summed up the emerging understanding, when he wrote in a tract published posthumously in 1675 that '[i]n all the ordinary affairs of life men use to guide their actions by this rule, namely, to incline to that which is most probable and likely, when they cannot obtain any clear unquestionable certainty'.³⁷ The informing notion was that reasonable people employing their faculty of reason and drawing on their experience could draw conclusions about the world from direct observation or from the testimony of others which, while they might not be absolutely true, were nevertheless sufficiently true to serve as the basis for the conduct of human affairs.

Modern scholarship tends to support that suggestion. Professor Shapiro, in her work on the development of the law of evidence, has explained that once it became evident that trial by jury required critical evaluation of witnesses, it was natural for legal thinkers of the 17th and 18th centuries to draw on then current scientific and philosophical understandings to explain to the jury the nature of the evaluation involved. She has written:

Throughout this development two ideas to be conveyed to the jury have been central. The first idea is that there are two realms of human knowledge. In one it is possible to obtain the absolute certainty of mathematical demonstration, as when we say that the square of the hypotenuse is equal to the sum of the squares of the other two sides of a right triangle. In the other, which is the empirical realm of events, absolute certainty of this kind is not possible. The second idea is that, in this realm of events, just because absolute certainty is not possible, we ought not to treat everything as merely a guess or a matter of opinion. Instead, in this realm there are levels of certainty, and we reach higher levels of certainty as the quantity and quality of the evidence available to us increase.³⁸

Professor Berman, in the second volume of his monumental work on the development of the Western legal tradition, has gone further. He has linked the epistemology of 17th century empiricism to the emergence of the distinctive common law system of justice as now understood. Taking root within the common law in the same period, Professor Berman has pointed out, was an understanding of precedent as the accumulation of experience as well as the concept of the reasonable man as providing the measure of morally and legally acceptable conduct.³⁹

The basic idea that a tribunal of fact weighing the testimony of witnesses could form a belief as to the truth with a sufficient degree of confidence to reach a conclusion about a fact in issue has not changed since the second half of the 17th century. What came to be added to it, as trial procedures became

Logic (Thos S Baynes trans, Sutherland and Knox, 1850) [trans of: *La Logique ou l'art de penser* (first published 1662)]; Jan Miel, 'Pascal, Port-Royal, and Cartesian Linguistics' (1969) 30 *Journal of the History of Ideas* 261, 262.

37 John Wilkins, *Of the Principles and Duties of Natural Religion: Two Books* (1675) 34–5. See Hacking, above n 6, 80–2.

38 Barbara J Shapiro, 'Beyond Reasonable Doubt' and 'Probable Cause': *Historical Perspectives on the Anglo-American Law of Evidence* (University of California Press, 1991) 41.

39 Berman, *Law and Revolution, II*, above n 6, 298–302.

more adversarial in the 18th and 19th centuries, was greater precision about the degree of confidence required. The refinement that a conclusion of fact necessary to result in a criminal conviction was to be reached ‘beyond reasonable doubt’ occurred towards the end of the 18th century,⁴⁰ although the requirement for the prosecution to establish by inferences drawn from evidence every element of a criminal offence came to be recognised as the ‘golden thread’ running through the common law system of criminal justice only in 1935.⁴¹ The refinement that a conclusion of fact necessary to result in civil liability was to be reached ‘on the balance of probabilities’ or ‘on the preponderance of the evidence’ occurred towards the mid-19th century,⁴² although just what that meant was still being worked out as late as 1938⁴³ and was still on occasions requiring explanation, as we have seen, as late as 1960.⁴⁴

Surveying Anglo-American scholarship on the law of evidence since the time of Gilbert, Professor Twining has noted that practically all of it has implicitly proceeded on essentially the same basic set of assumptions about the nature of adjudication and about what is involved in determining disputed questions of fact. As succinctly stated by him, those assumptions are as follows:

epistemology is cognitivist rather than sceptical; a correspondence theory of truth is generally preferred to a coherence theory of truth; the mode of decision making is seen as ‘rational’, as contrasted with ‘irrational’ modes such as battle, compurgation, or [ordeal]; the characteristic mode of reasoning is induction; the pursuit of truth as a *means* to justice under the law commands a high, but not necessarily an overriding, priority as a social value.⁴⁵

Here come some more sheep

That, in a nutshell, is the concept of truth and its relationship to the concept of justice that has come to prevail in our modern common law system. Not all legal systems have come from the same place, although in the modern world legal systems are converging.

The period of Chinese history known as the period of the Warring States overlapped substantially with the period of classical Greece. Within that period were written the *Analects* of Confucius. In the *Analects*, a conversation is recorded between Confucius and the ruler of one of the Warring States, the Duke of She. The Duke of She says to Confucius, ‘Among us here there are those who may be styled upright in their conduct. If the father has stolen a sheep, the son will bear witness to the fact.’ Confucius says to the Duke of She, ‘Among us, in our part of the country, those who are upright are different

40 See Anthony A Morano, ‘A Reexamination of the Development of the Reasonable Doubt Rule’ (1975) 55 *Boston University Law Review* 507; Shapiro, ‘*Beyond Reasonable Doubt*’, above n 38, ch 1.

41 *Woolmington v DPP* [1935] AC 462, 481.

42 John Leubsdorf, ‘The Surprising History of the Preponderance Standard of Civil Proof’ (2015) 67 *Florida Law Review* 1569, 1608–12.

43 *Briginshaw v Briginshaw* (1938) 60 CLR 336.

44 *Murray v Murray* (1960) 33 ALJR 521.

45 William Twining, *Rethinking Evidence: Exploratory Essays* (Northwestern University Press, 1994) 72–4 (emphasis in original).

from this. The father conceals the misconduct of the son, and the son conceals the misconduct of the father. Uprightness is to be found in this.’⁴⁶

The Chinese character that translates as ‘justice’ is *yi*. In its ancient form, *yi* is composed of the character for ‘I’ or ‘myself’ overlaid with the character for ‘sheep’. The same character that translates as ‘justice’ translates also as ‘loyalty’ — or more fully, ‘the conventional norms of right conduct concerning the relationship between an individual and his group’.⁴⁷ As someone with no schooling in Chinese history or philosophy, I would not presume to explain the symbolism.

In the first volume of his work on the development of the Western legal tradition, Professor Berman made the following observation:

In the tradition of peoples of Asia who have lived under the strong influence of both Buddhist and Confucian thought, social control is not to be found primarily in the allocation of rights and duties through a system of general norms but rather in the maintaining of right relationships among family members, among families within lordship units, and among families and lordship units within local communities and under the emperor. Social harmony is more important than ‘giving to each his due’. Indeed, ‘each’ is not conceived as a being distinct from his society — or from the universe — but rather as an integral part of a system of social relationships subject to the Principle of Heaven. Therefore in the ancient civilizations of Asia the traditional, collective, and intuitive sides of life were emphasized, and the intellectual, analytical, and legal sides were fused with and subordinated to them.⁴⁸

‘This’, Professor Berman went on to observe, ‘was true also of the peoples of Europe before the great explosion of the late eleventh and early twelfth centuries’.⁴⁹ My exploration of the concepts of truth and justice within the common law system as we now understand it has been an attempt to tell the story of a divergence that occurred in stages over the 8 centuries since then. The reconvergence now occurring is a story waiting to be told. Forgive me if I have milked the sheep.

46 See Confucius, *The Analects* (James Legge trans, University of Adelaide, 2014) book 13.

47 Jinhua Jia and Kwok Pang-Fei, ‘From Clan Manners to Ethical Obligations and Righteousness: A New Interpretation of the Term *yi*’ (2007) 17 *Journal of the Royal Asiatic Society* 33, 39.

48 Berman, *Formation of the Western Legal Tradition*, above n 6, 78. Cf Franklin, above n 6, 38.

49 Berman, *Formation of the Western Legal Tradition*, above n 6, 79.