THE ADVERSARIAL SYSTEM AND THE SEARCH FOR TRUTH

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I INTRODUCTION

The topic of this essay is the adversarial system and the truth and how the former struggles to achieve the latter. My central premise is that the adversarial system is not well adapted to arrive at the truth. My conclusion is that without fundamental restructuring to shift the adversarial system toward a more managerial one, our system will remain second best.

This article focuses upon the civil justice system, in particular, the role of the judge in shaping the issues to be resolved or in gathering and presenting evidence. It does not attempt to define 'the truth'. My old philosophy textbooks which discuss theories of truth, such as the correspondence, coherence, epistemic and deflationary theories, do not help much. All that I can conclude now, as I concluded when I first encountered those theories, is that I have no idea how to define the truth. In any event, I doubt the existence of an absolute or objective truth. But, what I do not doubt is that our legal system is not geared to finding the truth, however it is defined.

The question that naturally arises, then, is if no one can authoritatively define the truth, how can one argue that a legal system should bother to seek the truth? The short answer is that, even if the courts cannot realise an absolute truth, the public still expects the courts to try. Whether futile or not, the search for truth is central to the court's legitimacy in the public's eye. The public's confidence in the courts' ability to find an objective truth may or may not be philosophically sound, but in the end that does not really matter — the courts must be pragmatic and search for the best approximation of the truth.

This is not to say that courts should ignore the shortcomings of defining truth and, in particular, its potentially subjective nature. The court's pivotal role in the structure of government would not be justified if it failed to introduce reforms, a fundamental object of which is to develop a system designed to discover the truth.

II THE ADVERSARIAL MODEL AND TRUTH

An investigation of what changes are required should begin with a closer look at whether the adversarial model is up to the task of pursuing truth. The theory of how the adversarial model is structured to attain the truth is probably familiar to everyone. The parties are supposed to engage in fierce combat, pulling apart each

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other's case and, once the dust has settled, the truth will emerge. It should be the only thing left standing after the battle.

The model assumes that the parties' self-interest will ensure that all relevant material is presented and tested before the court. However, the judge must make do with the evidence thus presented and hope that the parties know what they are doing.

As Denning LJ famously noted, the judge's object 'above all, is to find out the truth, and to do justice according to law'[1] and that justice is best done 'by a judge who holds the balance between the contending parties without himself taking party in their disputations'.[2]

In reality, however, there is an inherent contradiction between the stated aim of truth-seeking on the one hand and the passivity of the judge's role on the other. Further, there are strong arguments against a model which relies on parties' self-interest to discover the truth.

Most of these arguments are well known and little is served by repeating them at any great length. It is enough to point out that the parties' self-interest does not aid the search for truth in a system where it is routine:

(1) for opposing testimony to be discredited regardless of whether it is true or not;

(2) for the incompetence of opposing counsel to be exploited;

(3) for material facts to be omitted from pleadings or withheld due to privilege;

(4) for probative evidence to be excluded; or

(5) for counsel to indulge in sophistry and rhetorical manipulation of which the primary aim is to obscure the truth.

One can theorise for a lifetime about the pros and cons of the theory behind the adversarial system, but what really matters is what happens in practice. In practice, it is commonly accepted by lawyers that the adversarial model is primarily designed to resolve disputes, rather than discover truth. Lawyers recognise this and adjust their behaviour accordingly.

A client might approach a lawyer with his or her version of events. The lawyer's job is to mould this raw version of events into a narrative which is most credible and capable of withstanding the exigencies of legal process. The opposing lawyer will engage in exactly the same process.

The purpose of shaping and refining these narratives is to win the case for the client, not to find the truth. Perhaps the truth is not forgotten, but it can be easily

1 *Jones v National Coal Board* (1957) 2 QB 55, 63.

2 Ibid 63.

neglected. As one United States judge put it, the process 'often achieves truth only as a convenience, a by-product, or an accidental approximation.'[3]

The observations I make should not be seen as a criticism of practitioners: lawyers are just doing their job. Their approach is a rational response to a system which not only permits lawyers to take liberties with the truth, but actually encourages it. Still, I think the general public would be somewhat surprised to see the scepticism and even occasional disdain, which lawyers hold for the notion that the adversarial model has a truth-seeking objective.

Speaking personally, as counsel, I had no difficulty in holding back information. However, during my career as a judge, there have often been times when I have felt frustrated by the limitations of my role. In many cases the evidence is incomplete. All I can do is suggest where critical evidence may be found and invite the parties to investigate. But I am required to leave it to the parties to obtain and present that evidence. If they do not take up the advice, I cannot intervene.

I know that I am not the only judge who feels this way. Judge Frankel, a former judge of the United States District Court for the Southern District of New York, wrote a marvellously and disarmingly frank account of his transition from the bar to the bench. Judge Frankel spoke of the 'palpable … novelty'[4] he felt as a new judge, as he made genuine attempts to seek the truth, having been accustomed to the partisan role of the attorney. He observed that 'many judges, withdrawn from the fray, watch it with benign and detached affection, chuckling nostalgically now and then as the truth suffers injury or death in the process.'[5]

He recalled the disillusionment that then followed, as it became evident to him that the search for truth fails too often. It seemed to him that 'the rules and devices accounting for the failures come to seem less agreeable and less clearly worthy than they once did. The skills of the advocate seem less noble, and the place of the judge, which once looked so high, is lowered in consequence.'[6]

To be sure, in the last few decades there has been an increasing awareness of the need to improve the truth-seeking function of our legal system. At the same time, there has also been considerable reluctance in making any wholesale changes to the adversarial model. One judge has argued that we must be careful to avoid 'over-zealous copying of the inquisitorial system.' This view holds sway, even among reformers. So while there has been no shortage of discussion papers and reports calling for reform, as well as some revision of court rules, there has been no important, let alone fundamental, change.

The best example of change is case management. As a rather bald generalisation, arguably the only key reform to civil procedure in the common law world over the last twenty years or so has been the rise of the managerial judge. Here, the

3 Marvin E Frankel, 'The Search for Truth: An Umpireal View' (1975) 123(5) *University of Pennsylvania Law Review* 1031, 1037.

4 Ibid 1033.

5 Ibid 1034.

6 Ibid.

adversarial model has incorporated inquisitorial notions of a more active judge, although only up to a point. A judge now actively manages the progress of the case, but still remains essentially passive in the way evidence is gathered and presented.

While reforms such as case management are to be applauded, they do not directly address the issue of truth-seeking. Case management may well have indirectly improved the courts truth finding ability — for example, by limiting interlocutory trench warfare that not only wastes the court's time but distracts from truth seeking — but direct improvement to the court's truth-seeking function is not so obvious.

We need to carefully consider whether the court should not take the next step, so to speak, and assume a genuinely inquisitorial role. While we cannot blindly mimic the inquisitorial model in all respects, equally, we need to distance ourselves from some of our cultural or historical attachments to the adversarial model which have no sound rational basis.

When considering whether a more inquisitorial approach should be adopted, what must be borne in mind is that a purely adversarial or purely inquisitorial system can only exist in the abstract. The relevant question is whether Australian courts should adopt a mix of adversarial and inquisitorial measures which is less weighted towards partisan control. This is not an 'either/or' proposition. A judge could have a greater role in truth-seeking without depriving the parties of their participation in the process.

III SUGGESTED REFORMS

My proposals for reform fall into two broad categories: one concerning the role of the judge and the other the role of the lawyer.

A *Changes to the Court's Role*

1 *A More Active Role for the Judge at Trial*

Beginning with the role of the court, an obvious area for reform is the judge's role in relation to the trial. At present, a judge's role for gathering evidence at trial is largely passive. There are certain, limited, exceptions to this rule. A judge may intervene in the interests of justice where a party is self-represented or has an incompetent lawyer. A judge cannot call a witness over the objection of a party, except in very exceptional circumstances. A judge may ask questions of the witness, but not in a way which interferes with counsel's conduct of the case, and perhaps only to clarify an ambiguity or raise a matter which was not raised by counsel.

This passive role of the judge is a reflection of the adversarial mentality. There are concerns over a more interventionist approach. One is that the judge is in

a position of ignorance relative to the parties. Judge Frankel observed that in the adversarial system 'the judge views the case from the peak of Olympian ignorance. His intrusion will too often result from partial or skewed insights.'[7]

A related, and more subtle, objection is that a judge should not blunder about with questioning and in so doing deprive counsel of the force of their examination strategy. A useful illustration of this is the decision of the English Court of Appeal in *Yuill v Yuill*.[8] In that case, the trial judge had effectively assumed control of the questioning of witnesses. On appeal, the court noted that the judge's conduct had not shown a tendency to take sides or press a witness in any way which could be considered undesirable. It was quite plain that the trial judge was endeavouring to ascertain the truth in a convenient manner. Nonetheless, the Court of Appeal was critical of the judge's conduct, observing:

> the judge does not know what is in counsel's brief and has not the same facilities as counsel for an effective examination-in-chief or cross-examination. In cross-examination, for instance, experienced counsel will see just as clearly as the judge that, for example, a particular question will be a crucial one. [Hence] it is for counsel to decide at what stage he will put questions, and the whole strength of the cross-examination may be destroyed if the judge, in his desire to get to what seems to him to be the crucial point, himself intervenes and prematurely puts the question himself.[9]

With respect, I am not sure that, even accepting the adversarial model, the judge's approach warranted this criticism. It is true that a judge who is relatively ignorant should proceed carefully in questioning witnesses at trial, particularly where the judge's intervention could distract from a course of questioning which is honing in on the truth. But I do not think that a judge should necessarily defer to counsel, merely because this may interfere with the strategy adopted by counsel in approaching a factual issue.

The primary role of counsel is to elicit evidence which helps their client's case. Their role is only to elicit the truth to the extent that the truth favours their client. Wigmore's famous boast that cross-examination is 'the greatest legal engine ever invented for the discovery of truth'[10] is not borne out in modern court practice.

As a former barrister, I appreciate the true art of court craft, with all of its cut and thrust, its deft manoeuvring and its subtle manipulations. As a judge, I worry that this court craft hinders, rather than assists, the search for truth. If there is a matter which obviously must be dealt with, then I am not particularly concerned that I raise the matter earlier than counsel would like. I do not particularly care if I deprive an examination of its rhetorical force. The trial is not theatre, although it resembles it with unfortunate regularity. I think there is much to be said for

7 Ibid 1042.

8 [1945] 1 All ER 183.

9 Ibid 185.

10 John Henry Wigmore, *Evidence in Trials at Common Law* (Chadbourne, revised ed, 1974) vol 5, 32.

a judge, in appropriate circumstances, seeking to get to the heart of a matter as quickly as possible. Why beat around the bush about such things?

What changes should be made? Some time ago, Sir Richard Eggleston proposed reforms to the judge's role at trial,[11] a number of which I would adopt. *First*, a judge should have the power to call a witness where the interests of justice so require. *Second*, a judge should be able to question witnesses beyond the judge's presently restricted role. *Third*, the judge, rather than the parties, should have primary control over the questioning of witnesses. When a witness is called, the witness should be able to give evidence to the judge in a relatively uninterrupted manner, as directed by the judge. The judge should then ask questions of the witness to resolve ambiguities. Only then should the parties be allowed to cross-examine and always within appropriate bounds.

All of these suggestions are subject to the overriding qualification that a judge should always be aware of the potential limitations of her or his knowledge of the case, seek the assistance of the parties where necessary and allow the parties proper opportunity to elucidate any points which might have been overlooked.

2 *Pre-trial Examinations*

For judges to play a more active role in trial requires judges to be better informed about the dispute prior to trial. This brings me to my next proposed reform: the introduction of pre-trial examinations by the court.

At the moment, the judge relies on material filed by the parties prior to trial to understand the matter. A prominent feature of modern case management is the requirement that parties prepare written witness statements and the like. While written witness statements are useful in some respects, they suffer from a fundamental problem; the statements are invariably written by a lawyer, not the witness.

Each statement is carefully constructed to create a certain impression or convey a certain message. The witness's own words are only used when convenient and the witness's recollection is presented in a potentially misleading way. There have been times when I have doubted whether a witness statement as a truth telling document is worth the paper it is written on.

One possible solution to the problems associated with written testimony, but in any event to better inform the court, is to introduce the use of pre-trial oral examination of witnesses by court-appointed examiners, a process which will be essentially inquisitorial in nature.

There was once a time when the use of pre-trial examinations was the norm. Prior to the merger of law and equity by the *Judicature Acts* of the late nineteenth century, equity and common law had quite distinct procedure. Equity's procedures were greatly influenced by Roman Canon law traditions and inquisitorial

11 Richard Eggleston, 'What is Wrong with the Adversary System?' (1975) 49 *Australian Law Journal* 428, 437.

measures were common. The Courts of Chancery would often appoint masters or equivalent officers to take a witness's testimony outside of the parties' presence. The recorded narrative of the testimony was kept secret until all witnesses had been examined, so as to minimise the chances of witnesses being 'infected' by the testimony of other witnesses.

At the present time, court rules provide for a form of pre-trial examination. These procedures, and analogous procedures used in other jurisdictions, were reviewed by the Victorian Law Reform Commission in its recent review of the Civil Justice System. The Commission stated that:

> there is scope for expansion of the current rules to permit parties, persons who are to be called as witnesses and other persons to be orally examined before trial as a means of promoting greater disclosure earlier in proceedings.[12]

The Commission went on to recommend the adoption of a US-style pre-trial oral deposition process, which involves parties examining one another. This might help parties to settle cases by being better informed, but it will not assist the court in seeking the truth.

My proposal, which is an extension of the deposition procedure, is that the court should have the power, in appropriate cases, to appoint an independent examiner to question witnesses prior to trial. Some thought would need to be given to the precise mechanics of this process, such as how the independent examiner is selected and informed about the case, or how the questions to be put to witnesses are determined. However, these details should not be too difficult to sort out.

3 *Expert Witnesses*

Moving beyond the use of pre-trial examinations, there is another area where reform is sorely needed so as to enable the court to be properly informed. I am referring to the appointment and use of expert witnesses. In court we see experts of all kinds: doctors in personal injury cases, accountants in insolvency cases, building consultants in construction cases, economists in competition cases, computer experts in copyright cases. The list is endless.

Yet the manner in which experts are utilised under the adversarial model is, quite frankly, of serious concern. Currently, the parties each appoint their expert and set out the terms of the expert's brief. Instead, experts should act independently of the parties retaining them and have a paramount duty to assist the court. In practice, no one seriously believes in the independent expert. In the personal injuries jurisdiction, for example, there are experts who are notorious for being plaintiff or insurer friendly. In the US, expert witnesses are sometimes disparagingly referred to as 'saxophones', instruments playing to the tune of their retaining lawyers. Also, if you have a particularly honest expert who happens to give an opinion which her or his retaining party does not like, then that party will

12 Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008) 387.

choose not to call the expert and can avoid disclosing any communications with that expert by claiming privilege.

Another major problem with party control of experts is that experts are often briefed in a selective manner which may obscure the truth. Experts are instructed to make certain assumptions and, in many cases, to only have regard to a skewed assortment of materials. Needless to say, 'junk in' generally means 'junk out'.

As a judge, I am often confronted with conflicting expert reports. I may be ill-equipped, without the assistance of my own expert, to determine which expert opinion is more plausible. As a result, the probative value of the experts' opinions is necessarily diminished, reducing the prospect of getting to the truth.

While I am not suggesting that parties should have *no* involvement in the expert process, I would suggest that in many cases, it is more appropriate for the court to control the expert process. The German system of managing experts is one we should consider adopting. Under the German process, the court selects and commissions the experts, but with great attention to safeguarding party interests. Briefly, it works like this:

> When, during its investigation of the case, a German court determines that expertise might be of assistance, it can seek expertise on its own motion, or at a request of a party. The court will generally select the expert, although it can request nominations from the parties, and is obliged to use any expert upon whom the parties agree. The court will often select an expert from a list of suitable experts published by official licensing bodies.
>
> The court will then instruct the expert by providing the expert with facts to be assumed or investigated, and by framing questions to be addressed. The parties will generally assist the court in framing these instructions.
>
> There are various safeguards built into the system. The expert is required to make a written report, which is circulated to the parties. The parties commonly file written comments, to which the expert is asked to reply. If the expert report remains contentious, the court will schedule a hearing at which counsel for a dissatisfied litigant can question the expert. If necessary, the court may order a further report by another expert, although this is discretionary. The parties are free to brief their own experts, although that expert's views are likely to be discounted due to lack of impartiality.[13]

It seems to me that there is much to commend the use of something like the German model. The various steps in the process could be incorporated into the pre-trial case management process which is used by many Australian courts. It must surely be in everyone's interest for the court and the parties to jointly seek impartial expert evidence, rather than having the battle of experts which invariably results from partisan control of the process.

13 John H Langbein, 'The German Advantage in Civil Procedure' (1985) 52 *University of Chicago Law Review* 823, 836–9.

Obviously, such a model would require significant amendments to court rules. Some courts already have the power to appoint expert witnesses on their own motion. Unfortunately, this power has traditionally been used rarely. An effective use of the German model will require not only a legislative or rule change, but also a change in judicial attitudes.

B *Changes in Lawyers' Responsibilities to the Courts*

Up until this point I have been addressing the role of the judge in truth-seeking. I would now like to turn my attention to the role of lawyers.

When one considers the role of the adversarial lawyer, one starts with what surely must be one of the more perverse aspects of the adversarial system — it is quite acceptable for parties to present their cases on a selective and potentially misleading basis.

A party is not required to act candidly. Subject to discovery obligations, a party is under no duty to reveal the existence of evidence which is unfavourable and nor is that party's lawyer. The obligations of a lawyer to the court are essentially negative in nature — to not knowingly mislead the court and to not assist their clients in breaking the law.

Many commentators have expressed disquiet about the apparent willingness of the lawyer to pursue her or his client's case with excessive zeal, subject to poorly understood and vague duties to the court, which not uncommonly are observed in the breach rather than in the practice. The shortcomings of this approach are nicely illustrated by a story told by Samuel Williston, a well-known American legal scholar. Williston recalled a case in his time at the bar where the court was delivering judgment. He recounted: 'In the course of his remarks the Chief Justice stated, as one reason for his decision, a supposed fact which I knew to be unfounded. I had in front of me a letter that showed his error. Though I have no doubt of the propriety of my behaviour in keeping silent, I was somewhat uncomfortable at the time.'[14]

Clearly this state of affairs is unacceptable. As Jeremy Bentham said, 'if falsehood is not favoured by the law, why should concealment?'[15] A lawyer should be under a positive duty to assist the court to find the truth. Lawyers already do this, to some extent, when making full and frank disclosure to the court on *ex parte* applications. The precise nature of such a positive duty needs to be carefully defined. In essence, what I have in mind is that a lawyer must disclose to the court the existence of material evidence (particularly if it is prejudicial to the client), to correct any misapprehensions that may arise from witnesses' testimony and to question witnesses in a manner which aims to elucidate the truth.

14 Samuel Williston, *Life and Law: An Autobiography* (Little, Brown, 1st ed, 1940) 271.

15 Jeremy Bentham, *Rationale of Judicial Evidence: Specially Applied to English Practice* (Hunt and Clarke, 1827) vol 5, 311.

This proposal may often conflict with legal privilege. This raises the thorny issue of whether privilege should be paramount over the search for truth. I will confine my remaining discussion to the issue of legal professional privilege.

1 *Legal Professional Privilege*

The rationale for the protection of legal privilege is that it is in the public interest to encourage full and frank disclosure by clients to their lawyers. There is, however, a competing public interest in the court having all relevant evidence available to assist it in seeking out the truth. This is a classic example of where the search for the truth may conflict with other values of our legal system. At the moment, the legal system resolves this conflict by giving paramountcy to legal professional privilege.

Such a position has been the subject of much criticism. The primary criticism is that by making the privilege absolute, there is no room for balancing the needs of other competing interests (such as the truth) against the interest of preserving confidentiality. This is a point that was picked up by Lord Taylor, in *R v Derby Magistrates' Court; Ex parte B*, who said 'if a balancing exercise was ever required in the case of legal professional privilege, it was performed once and for all in the sixteenth century, and since then has applied across the board in every case, irrespective of the client's individual merits.'[16]

With some luck this absolutist approach to privilege will be short-lived. Cracks are slowly starting to appear. I am not the first person to suggest that aspects of legal professional privilege are bringing the law into disrepute by frustrating the court's search for truth. Nor am I the first to propose that, in some circumstances, the public interest in seeking out the truth should prevail.

This leads me to the final reform I will propose which is to give the court discretion to admit privileged evidence, where the interests of justice require. A balancing test is already employed in cases involving public interest privilege and it makes even more sense in the context of legal professional privilege.

IV CONCLUSION

It is my sincere hope that we can look beyond our historical ties to the adversarial system and affirm something that should be self-evident: that the truth should never be a plaything of the parties.

16 [1996] AC 487, 508.