



English Law and Terminology.

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The English Trial System- Adversarial.

what's the
opposite of
ally?



enemy, opponent, foe,
antagonist, rival, detractor,
adversary, separate, alienate,
disunite



Adversarial.

- ▶ *The Adversarial System*- The Oxford Dictionary defines the word 'adversary' as 'one's opponent in a contest, conflict, or dispute'.
- ▶ That definition provides a general overview of the adversarial legal system in the England and Wales under which, essentially, representatives from each party take opposing positions to debate and argue their case, whilst the Judge's role is to uphold principles of fairness and equality and to remain neutral until the very end when he gives judgment.
- ▶ This contrasts with the *inquisitorial legal system* (commonly found in civil law countries e.g. France / Italy) which sees the Judge take a much more active role in preparing evidence, questioning witnesses and finding the truth.

Adversarial System cont.

- ▶ In English Courts it refers to the way in which litigation is conducted before these courts.
- ▶ *Litigation* can be described as the ultimate legal method for settling controversies or disputes between and among persons, organizations, and the State. In litigation process, a case (*called suit or lawsuit*) is brought before a court of law suitably empowered (*having the jurisdiction*) to hear the case, by the parties involved (*the litigants*) for resolution (*the judgment*).
- ▶ The basis of such an adversarial system is found in the historical concept of *trial by battle*- introduced by the Normans.
- ▶ The system holds both parties to a dispute to equal standing- equally matched opponents who “fight” before the court- with the *judge as the independent (unbiased) umpire*.
- ▶ The judge should remain impartial and *passive*, simply listening to the evidence presented to him and only intervening to clarify/ascertain- confusing points.

Adversarial System cont.

- ▶ The judge does not conduct his own investigations- since the responsibility for all the cases' preparation and submission lie with the parties.
- ▶ The parties must make sure that all useful information to the case is presented to the court and presented well.
- ▶ Emphasis is greatly placed on oral evidence therefore the lawyer's performance is important as it can significantly influence the outcome of the case.
- ▶ Critics of the adversarial system point out that not all parties are equally matched- for example when an individual faces a large company or organisation. This disadvantage is used by those who prefer the inquisitorial system.

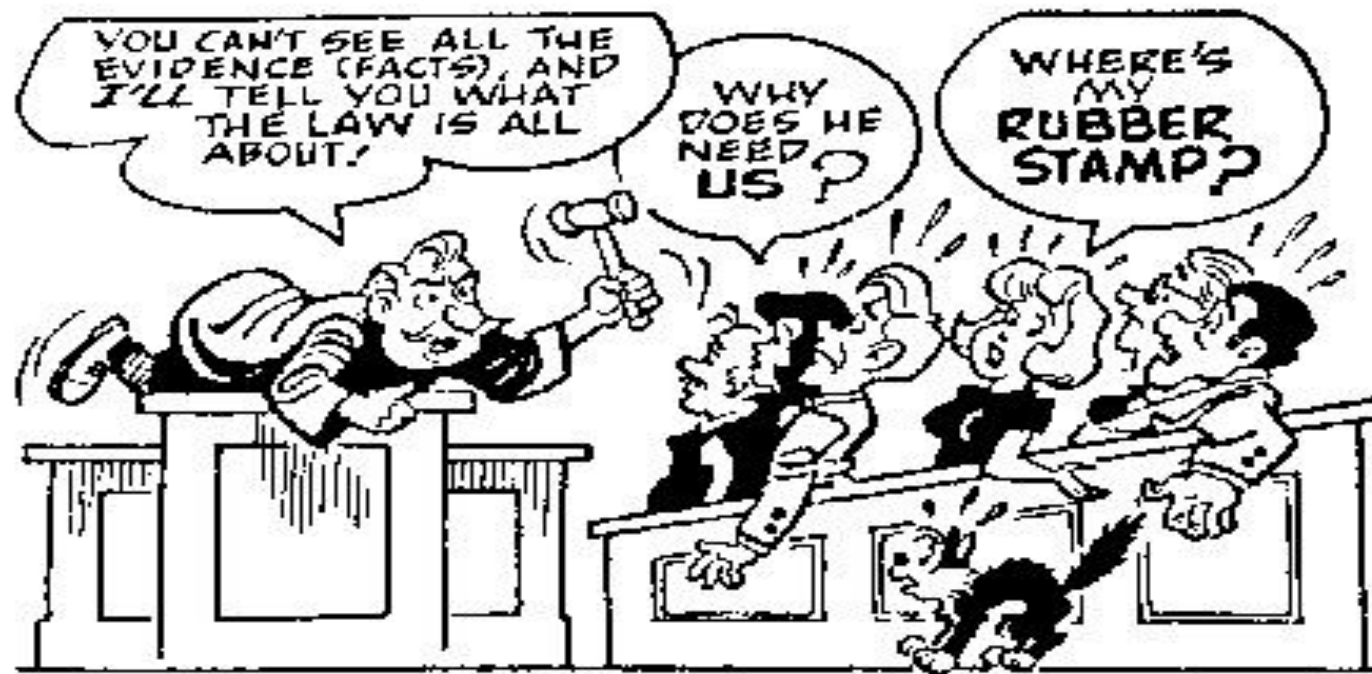
Adversarial System cont.

- ▶ The pointed distinctions between the two systems is oversimplified.
- ▶ This is because, firstly, *parties in a law action before a court is always adversarial* (on opposite sides), the judge is always an independent moderator/referee and not a true inquisitor in the true meaning of the word.
- ▶ Secondly and most importantly, the *Civil Proceedings Rules of 1998* introduced reforms which increased the court's involvement in all stages of the proceedings.
- ▶ Now Judges have a greater influence in case preparation and presentation, thus making them no longer passive:
- ▶ The Court has *very wide case management powers* which are used to ensure that the dispute is resolved efficiently and in accordance with the *CPR's overriding objective of enabling the Court to deal with cases justly and at a proportionate cost*. The Court will do so by excluding unnecessary evidence, managing the parties' costs, and setting *a strict timetable to Trial under threat of sanction should any of the dates be missed*.

Adversarial System cont.

- ▶ This is where the disadvantage of this system is visible:
- ▶ In situations where the parties do not have '*equality of arms*'; a better resourced party may be more able to gather evidence and present a stronger case to the Judge than their opposition.
- ▶ Additionally, because the parties have near complete conduct of the case from start to judgment, they are able to choose what evidence they put before the Court.
- ▶ In comparison, in an inquisitorial system the Judge is involved throughout the process and actually steers the collation and preparation of evidence. He is therefore able to decide what evidence is admitted by both parties, before questioning the witnesses himself and going on to make an informed decision on the outcome.
- ▶ That said, given the importance placed on the investigative role of an inquisitorial Judge, the risk of bias is (arguably) greater in an inquisitorial system.

The Jury.



The Jury.

- ▶ England has a long tradition of jury trial, with the earliest forms probably existing even before the Norman Conquest.
- ▶ Over time two different types of juries developed:
- ▶ 1. *The Grand Jury*- consisted of up to 24 members- it was responsible for deciding what offence a person should be charged with, and to present the accused to the royal judges for trial. These duties were overtaken by the Justices of the Peace, it was abolished in 1948 and at that time, its presence was simply a mere formality.
- ▶ 2. *The Petty Jury*- consisted of 12 persons- this is where the modern jury system stemmed from. The 13th century saw trial by jury replace trial by ordeal. The jury members were really witnesses, chosen due to their inside knowledge of the locality and the parties involved.
- ▶ Eventually their role (petty jury) changed and by the 16th century members of the jury were selected for exactly the opposite reason, namely because they were not personally connected with the case.

Composition of the Modern Jury.

- ▶ Made up of 12 persons selected at random from society to decide questions of fact in civil and criminal cases.
- ▶ They are randomly selected from the electoral register by the *Jury Central Summoning Bureau (JCSB)*- the body responsible for the summoning (calling in/asking) of jurors.
- ▶ The amount of potential jurors summoned depends on the number of cases to be tried.
- ▶ The names are then entered on lists called panels. The actual jury is then selected from the panel for the court in question.
- ▶ In general persons between ages 18-70, registered on the electoral register, ordinarily resident in the UK for at least 5 years from 13 years old- can be chosen for jury service.
- ▶ The *UK Conservative and Liberal Democrat coalition government (2010-2015)* introduced proposals to raise the maximum age for jury service to *75*.
- ▶ *Section 68 of the Criminal Justice and Courts Act 2015* will amend the *Juries Act 1974* to raise the upper limit from *70 to 75* in due course.
- ▶ There are several categories of people who are not allowed or obliged to sit on a jury:
 - ▶ 1. People who are on *bail or sentenced to imprisonment* are disqualified from jury service.
 - ▶ 2. Individuals involved in the *administration of justice are ineligible*- lawyers, police officers & judges. However this changed with the *Criminal Justice Act 2003*- now certain professions are not exempt from jury service including the *clergy*- which formerly was ineligible also.
 - ▶ 3. Now only the *mentally disordered persons*- defined by *Schedule 1 of the Juries Act 1974* amended by the *Mental Health Discrimination Act 2013*, are ineligible.

Composition of the Modern Jury.

- ▶ *Excusal as a right*- is extended to persons who served on a jury within the past two years and to members of the Armed Forces.
- ▶ This exemption allows them to be jurors if they *so choose*, however they can be excused from jury service if they *so request*.
- ▶ Prior to the introduction of the *Criminal Justice Act 2003*, certain persons had *automatic excusal* from jury service- Members of Parliament, members of Religious Societies or Orders & medical personnel- the Act removed this.
- ▶ *Discretionary excusal*- allows the JCSB to excuse persons who would otherwise be eligible to serve on a jury.
- ▶ The JCSB requires that there must be *good reason* for a citizen to be excused from jury service such as a *medical condition*.
- ▶ The JCSB has the power to *defer* someone's jury service instead of excusing them from serving all together.
- ▶ Deferrals can be allowed for the same reasons as a discretionary excusal, the JCSB operates under the position that this is always the preferred option.
- ▶ Deferrals can be granted for reasons such as needing to care for children, elderly relatives or due to work or financial reasons.
- ▶ Jurors receive compensation for loss of earnings, travel expenses and similar expenditures however they are not paid for their jury service.

Challenging of Jurors & Jury Vetting.

- ▶ The prosecution or defence has the right to challenge any juror *for cause*.
- ▶ Challenges for cause are rare- uncommon.
- ▶ The prosecution can ask a potential juror to *stand by the Crown* before they take a juror's oath.
- ▶ A juror asked to stand by the Crown is moved to the back of the queue of potential jurors.
- ▶ Where there are sufficient other jurors left on the panel, the juror in question would not serve.
- ▶ However, where the panel has been exhausted (there is still a need for more jurors), the prosecution must show cause to prevent the juror from sitting on the jury.
- ▶ In theory, stand by is a form of provisional challenge, not a challenge without a cause- as the investigation into cause is only delayed.
- ▶ In practice, the prosecution rarely has to prove that there is a good for challenging a juror- as usually there are enough stand in jurors present.
- ▶ The right of stand by opens the potential for abuse as prosecution can use it to control the way the jury is made up.
- ▶ The Attorney-General has laid down some guidelines to ensure that stand by is not abused and only used to exclude potential jurors who are manifestly unsuitable.
- ▶ This may happen if the case is complex & the juror is illiterate (uneducated) or if a jury check revealed that a stand by is justified.

Challenging of Jurors & Jury Vetting cont.

- ▶ Prior to the random summoning of potential jurors, certain pre-checks are carried out such as criminal record checks- to ensure their suitability.
- ▶ More detailed checks by the police or security services are known as *jury vetting*.
- ▶ When it becomes public that jury vetting has occurred- usually in favour of the prosecution in high profile cases; the AG makes it clear that such vetting only occur in exceptional circumstances.
- ▶ Jury vetting typically takes place in cases in which evidence is heard in private – these involve matters of national security and terrorism.
- ▶ In security cases there is the threat of a juror being vulnerable & thus pressured into disclosing sensitive evidence given in private.
- ▶ In terrorism cases, the political beliefs of a juror may be so biased that a fair & impartial trial would not be possible.
- ▶ These detailed checks for jury vetting are authorised by the AG and they called *authorised checks*.

Use of Jury.

- ▶ In general, juries can be used in both civil and criminal cases though their use in civil cases has dwindled over the last few decades, in fact most civil cases are now heard by a sitting judge.
- ▶ The right to trial by jury in civil cases is now limited to four specific types of cases; actions for fraud, defamation, malicious prosecution & false imprisonment.
- ▶ In other civil cases the Judge has the discretion to decide whether a case should be tried by a jury.
- ▶ The Court of Appeal guidelines state that the judge's discretion should only be used in exceptional circumstances hence- the fact remains that trial by jury is only rarely used.
- ▶ Even in cases where a right to trial by jury exists, the judge may still be of the opinion that it is unsuitable to the case at hand- this may be due to complicated documents needing thorough reading & where there is complex scientific evidence.
- ▶ Where a jury is used, the jurors decide whether a defendant is liable or not & the amount of damages he has to pay.

Use of Jury.

- ▶ Cases decided by individual judges rather than a jury usually results in predictable , more uniform outcomes- particularly in terms of damages.
- ▶ One major criticism of civil jury trials concern the excessive amount of damages (compensation) they award which does not reflect the loss actually suffered- more so in defamation cases where juries usually award unprecedented amounts in damages.
- ▶ Criminal juries are still a well established part of the English legal system. No jury exists in the magistrates' courts but in the Crown court the jury determines questions of guilt. If a defendant is found guilty the judges do the sentencing. Where an accused pleads guilty, the jury does not need to get involved as the judge decides the sentencing.
- ▶ The right of an accused to be tried by a jury of peers is seen as the cornerstone of English criminal justice system. However for justice to be properly administered, jurors must understand the facts in issue & the evidence relied on by all parties.
- ▶ Recently the use of juries in complex cases was questioned; however the Criminal Justice Act 2003 has provisions to allow a judge to hear trials which involve difficult & technical evidence- which might be too much for a jury.

Use of Jury/ Role of Jury.

- ▶ The Government attempted to amend that section of the CJA to ensure automatic removal of juries & replace them with trial by a judge in complex cases.
- ▶ However the House of Lords strongly resisted this effort and so nothing came of it.
- ▶ The CJA allows criminal trials without a jury where the prosecution applies for such at the start of or during the trial.
- ▶ In order for a court case to take place or continue without a jury, there must be real danger of jury tampering that could not be overcome by any other measure.
- ▶ The first application of such- trial without a jury was granted in June 2009.
- ▶ Trial by jury strengthens legitimacy of the legal system by making sure that not all power is placed in the hands of professionals- by involving society at large.
- ▶ Jurors have a passive role during the trial- they sit, listen to the evidence presented by both parties and to the judge's summing-up.
- ▶ In summing-up, the judge reminds the jury of the important issues of fact & law involved in the case. He then informs them about the burden & standard of proof, the elements of the offence in question & will remind them of the evidence they heard. *It is therefore for the jury to apply the law he informs them of to the facts of the case.*
- ▶ The jury then retires to the jury room for discussion & deliberation of the case. Once a decision is reached they then return to the courtroom & the appointed foreman of the jury presents the verdict.

Role of Jury.

- ▶ Generally the decision must be unanimous but where a judge agrees to a majority verdict, they jury can deliver a 11:1 or 10:2 verdict.
- ▶ Where jurors cannot reach a decision & judge does not agree to a majority verdict then the case is declared a mistrial. The jurors are then dismissed & the case may be retried before a new selection of jurors.
- ▶ *Jury secrecy*- an important aspect of jury service is that their discussions in the jury room must be kept absolutely secret. It is in *contempt of court* for jurors to disclose or discuss the case with outsiders or for outsiders to enquire about juror votes or opinions.
- ▶ Juror secrecy & the offence of contempt of court aim to protect jurors from outside pressures & harassment thus ensuring no outsiders know details of the case. The rules also encourage jurors to speak openly & frankly during deliberations.
- ▶ The contempt of court rules have recently been used to prevent jurors from discussing cases on social media & from carrying out their own research.
- ▶ *Rule against double jeopardy*- historically persons tried & acquitted of a criminal charge could not be tried again for that same offence.
- ▶ The CJA removed this rule in limited circumstances- specific qualifying offences such as homicide & serious sexual offences- may require a new trial where new & compelling evidence exist.

Terms.

- ▶ Burden of Proof- obligation on the party who initiate proceedings to prove the truth of their allegations.
- ▶ Jury Tampering-interference with jury by intimidation, bribery or other persuasions.
- ▶ Majority verdict- cannot be a simple majority.
- ▶ Standard of Proof- degree of proof required to establish the truth of a particular fact.
- ▶ Summing-up- summarising evidence by the judge to jury.
- ▶ Unanimous verdict- all jury members are in agreement.
- ▶ Verdict- decision on the questions of fact by jury.
- ▶ Mistrial- a trial deemed invalid due to an error in proceedings, it does not reach a verdict.
- ▶ Defamation- action of damaging the good reputation of someone.
- ▶ False Imprisonment- restriction of one's personal movement without justification or consent.
- ▶ Fraud- wrongful or criminal deceit for personal or financial gain.
- ▶ Malicious Prosecution-legal term for starting a legal action with malice (spite), without probable cause.
- ▶ Balance of Probabilities- more than likely that an event occurred.
- ▶ Beyond Reasonable Doubt- whether doubt does not affect or does affect a reasonable person.