May I begin by paying tribute, first to Sir Michael Davies after whom this lecture is named and who provides us from time to time on the radio with a degree of rationality about the law; and second to Sir Louis Blom-Cooper who is retiring as Chairman. He has also been a beacon of rationality, especially in the days when, by modern standards, the law was in many respects illiberal. I have respected him for that for many years.

Can I also say what a pleasure it is to be speaking to expert witnesses. Looking back to my days at the Bar, an audience of expert witnesses represents a long succession of helpers and, on occasion, sparring partners. Many have become friends and I have learned a lot from them, not only in their own disciplines: I have learned a lot from them about how to practise law. A good expert is essential to the administration of justice. Sadly, an overassertive dogmatic expert is a danger, not just to the administration of justice, but to the credibility of the legal system as a whole. But I am confident that in reality, these are by far the exceptions.

My topic tonight is the nature of the process of fact-finding and the role of the expert in that process. I will approach it from the perspective of a lawyer who practised at the Bar for 25 years in a country (Scotland) which, procedurally at least and in most other respects, is fully part of the common law world but also from the perspective of a lawyer who has lived for part of those 25 years, and for most of the years since, with a foot on the other side of the Channel in the civil law world.

The approach to fact-finding and the role of the expert is in many respects the determining point of difference between the so-called common law or Anglo-American tradition and the civil law tradition of mainland Europe. Various attempts have been made to encapsulate what the difference is. It is said that the common law system is adversarial or accusatorial while the civil law system is investigative or inquisitorial. Others say that common lawyers are concerned with facts (sometimes obsessively so) while civil lawyers are concerned with truth, or alternatively with the law to the exclusion of fact.

Maybe there is a germ of truth in these generalisations but it seems to me that they are ultimately more confusing and misleading than helpful. The reason is that they presuppose the existence of two parallel systems that are capable of being compared point by point. In reality they are not parallel. For example, while the common law system may be described as adversarial in criminal, civil and commercial cases alike, the French system is inquisitorial only in criminal matters. The French judge does not have such a role in civil, commercial or administrative cases and it would surprise many commentators in this country to
read a judgment of the European court in a Dutch civil case which insists on the “passivity” of the judge.

Again, while it is said that there is a common law world and a civil law world, there are in reality very wide divergences, both in law and procedure, as between England, Scotland, Ireland and the common law countries elsewhere in the world, particularly the United States of America. In the same way, there are major differences between the French system and the German system, and between both of them and the systems of Scandinavia which are not totally alike either.

Somebody once said to me that the legal world of Europe is a zoo, and that is what it is. It is a lawyer’s zoo where you can find all sorts of animals with all sorts of characteristics - giraffes and baboons and elephants (laughter). Some of them may belong to the same genus, but when you get down to the species, you find that they're actually very different.

The consequence is that a truly scientific comparison between legal systems as regards evidence, proof, fact-finding and the role of the expert would have to start from the same or a similar fact situation. Then you would need time to watch how courts in different countries tackle the problem. You would need to understand the language of procedure (the language spoken in court) because procedure is not what is in the books, it is what judges and lawyers do. You cannot fully understand procedure if you do not understand the language. As well as sitting in court, you would need to have access to the pleadings and documents and to spend time talking to the lawyers to find out what choices they made, what were their options and why they chose to conduct the case in the way they did. And you would have to talk to the judge to discover the underlying reasons for preferring one view of the case to another.

At the end of the day, even if you did all that, I think the result would still be largely impressionistic. Some years ago Sybil Bedford wrote a book (“Faces of Justice”) looking at the way the law works in different countries. In it she said:

"The law, the working of the law, the daily application of the law to people and situations, is an essential element in a country’s life. It runs through everything; it is part of the pattern like the architecture and the art and the look of the cultivated countryside. It shapes and expresses a country’s mode of thought, its political concepts and realities, its conduct. One smells it in the corridors of public offices and one sees it in the faces of the men who do the customs. It all hangs together, whether people wish it or not, and the whole is a piece of the world we live in."

Going back two centuries to 1807, when the Whig government wanted to change the structure of the Scottish legal system to make it more like the English system, Sir Walter Scott (who was a member of the Scots Bar) said the proposals were
“founded on what I would venture to call Anglomania, a rage of imitating English forms and practices, similar to what prevailed in France about the time of the Revolution, as regard manners and dress. We may very effectually destroy our own integrity of judicial system, but we can no more make it the English law than a Frenchman could make his feelings those of an Englishman, by wearing boots, a drab great coat, and a round hat instead of a cocked one.” (laughter)

The way the law works has deep roots in national traditions and national character. Because lawyers grow up within their own national systems, they start from different assumptions about the way the law works and, perhaps even more importantly, how it ought to work. Consciously or not, they share a fundamental loyalty to the system with which they are familiar. Because they start from these assumptions, they do not feel it necessary to articulate them. They take them for granted and regard the characteristics of their system as essential to due process. What we have to try to do, if possible, is to articulate what these assumptions are and explain them.

It may be suggested that this is unnecessary. In the European Court, irrespective of what country or tradition we came from, we very often agreed what the result should be and disagreed only about procedure or method. Surely, if the end result is the same (and it usually will be in any rational legal system faced with the same facts), differences in method cannot be very important. Indeed, legal systems are converging and the differences in practice are not as great as they once were. You now have judicial case management in England and examination and cross-examination in criminal cases in Italy.

Nevertheless, apparent similarities can obscure more fundamental differences of approach that may prove very important, especially from the point of view of the expert witness. It is only by knowing know where the lawyers and judges are coming from that the expert knows what he or she is expected to do and how to do it. As I have said, procedure cannot be learned wholly or even mainly from books because it is about what people do and not about what the theory is. When I went to the Bar in Scotland the most up-to-date treatise on Court of Session Practice had been written in 1913 but it would have been absurd to suggest that the practice of the Court of Session in 1962 was anything like the practice of the Court 50 years earlier.

All I can do tonight is to give you my impression of the differences between the civil and common law approaches to evidence, proof and fact-finding. Put another way, going back to Sybil Bedford, I would like to leave you with a smell in your nostril rather than an academic explanation.

Looking first at the common law system, what are its special characteristics? It seems to me that they have their origins in the belief that trial by jury was and to some extent still is the proper method of determining criminal guilt and civil liability. That, of course, remains in the US Constitution but it was felt very strongly in this country in the late 18th Century and the beginning of the 19th and
EVIDENCE, PROOF, FACT-FINDING AND THE EXPERT WITNESS

was one of the reasons why the Whig government was trying to introduce the reforms of the Court of Session to which Walter Scott objected.

The idea that trial by jury is the proper method of investigation explains why procedure in the common law countries is essentially the same in criminal cases and in civil and commercial cases. To some extent, the same attitude has been carried over into the procedure of tribunals (employment tribunals and so on).

What are the consequences of this idea? First, the legal process is assumed to centre on a single, once for all, continuous event called the trial. At the trial, evidence is led by two or more equally matched adversaries who examine and cross-examine the witnesses. They then make oral submissions to the judge as to what facts have been proved and how the law is to be applied.

I draw your attention to the fact that several of the words used in that brief description - trial, evidence, witness, examination, cross-examination and proof - have no precise parallel in the French language or, indeed, in most of the other languages of the world. (The word preuve in French may mean evidence or proof or, in some contexts, witness.)

Second, in the common law system, everything that goes before the trial is preparatory or incidental to it. Correspondingly, the appeal process is concerned with what happened at the trial and what conclusions are to be drawn from that.

Third, all the material for judgment must be produced orally to all the jurors at one and the same time. The presentation must be contemporaneous and, because you cannot have jurors coming in on Monday morning, Thursday afternoon and the following Tuesday morning, it must be continuous.

Fourth, since the jury cannot be brought back to reconsider their decision, the material produced at the trial must be complete. The relevant documents must be identified and produced in advance and the relevant witnesses identified and brought to the court in good time.

Fifth, because all this material will be presented orally to the jury, the jury must not be misled by hearing evidence which is either irrelevant, because it has nothing to do with the case, or is in some fashion incompetent or unlawful, such as evidence about confidential communications between lawyer and client (legal professional privilege). So there must be a way of filtering the evidence to ensure that only relevant and competent evidence gets to the jury. That leads to the distinction, fundamental to the common law, between evidence on the one hand and proof on the other. You must decide first whether the evidence is competent evidence, and then ask what it proves if you are allowed to produce it.

Lastly, the law cannot be applied by the judge until the facts have been established by the jury. Consequently, fact-finding has to precede application of the law (except in so far as application of the law is involved in the deciding what is competent evidence, or what is the proper procedure).
On appeal, the findings of the jury are traditionally regarded almost as sacrosanct. Although, civil jury trial has largely been abandoned in the United Kingdom (though not in the United States), the judge of first instance is still, in many respects, treated as a kind of surrogate jury. Special respect is paid to the factual findings of the judge of first instance as having had the advantage of seeing and hearing the witnesses and of assessing their credibility. If the judge of first instance gets the law wrong, he is said to have “misdirected himself”. That is a vivid illustration of the view of the judge of first instance as a kind of surrogate juror.

In brief, in its origins and in many of its attitudes, the common law system is a lay system.

What is the role of the expert in this context? As the name of this Institute implies, the expert is essentially a witness. It is true that the rules of evidence and the rules of procedure draw a distinction between the ordinary witness and the expert witness. It is also true that the status of the expert has changed over the years and that there is an increasing tendency of the courts, particularly as a result of the Woolf Reforms, to rely on a single expert or to look for an expert who can, as it were, help the court to assess a conflict of expert evidence between the experts on either side. Nonetheless, at the end of the day the expert remains a witness like all other witnesses.

Having, I hope, identified some of the crucial characteristics of the common law approach, let me turn to the civil law approach. I would like to begin by identifying three fallacies.

First, it is assumed that because fact-finding is so central to the common law system, therefore other systems must have a directly comparable fact-finding procedure. This assumption is illustrated when people say that in France it is the judge who "examines the witness" rather than counsel. It is assumed that what the judge is doing in France is directly comparable to what counsel does in England. It is not.

Second, it is assumed that because the common law system deals with criminal and civil matters in essentially the same way, therefore other systems must do so too. Hence the idea that, because French criminal procedure is inquisitorial, therefore all other French procedure is inquisitorial. Quite the contrary.

Third, it is assumed that because the common law world is relatively homogeneous in this respect, therefore the rest of the world, in contradistinction to the common law world, is also in some fashion homogeneous. But, as I have pointed out, there are major differences between France and Germany, and huge differences between the European "mainland" and the Nordic countries. (Incidentally, I think it is a great pity that the methods of procedure in the Nordic countries are closed off to most of us by language, because we would probably have a great deal to learn from them about simplicity and directness of method.)
EVIDENCE, PROOF, FACT-FINDING AND THE EXPERT WITNESS

Nevertheless, in spite of fundamental differences within the “civil law world”, there are certain common elements, at least as regards the theory of civil and commercial procedure (I will come back to crime). These are, first, the notion of “litiscontestation” inherited from Roman law and, second, the dossier or file.

Litiscontestation is a form of judicial contract by which the parties agree to abide by the decision of the court. What is expected of the parties is that they will set out what it is that they claim, the legal basis for that claim, and the factual and other elements that are necessary to support it, including “offers of proof” – an indication of where the relevant “evidence” may lie. The claim as a whole is assumed to take the form of an Aristotelian syllogism, with a factual premise, a legal premise and a conclusion. That is why, in French law, the form of order sought is called la conclusion. (The premises are les moyens – in Latin, the media concludendi.)

The judge must first decide whether the premises, factual and legal, support the conclusion. Let us suppose that everything that is asserted is true, does the proposition of law that has been invoked lead to the conclusion - will it justify the claim? If not, there is no point in going further. The claim is struck out. If, at least prima facie, the factual and legal premises support the claim, the next question is, what do we need to investigate to complete the work? What facts or other matters need to be ascertained to achieve what the parties have asked the judge to do.

In that connection, there is no point in looking for proof of things that are not relevant (frustra probatur quod probatum non relevat). So, in many continental legal systems, the onus of proof and presumptions play a much larger part than they do in Britain. While the legal onus, as in Britain, rests with the party who affirms something rather than the party who denies it, it will not always be necessary to rely on witnesses to discharge that onus.

A fact may be presumed
- because of its inherent probability (presumptio judicis – a presumption of the judge as an intelligent and informed human being)
- because the law presumes it unless the contrary is proved (presumptio juris – a presumption of the law), or
- because the law requires it to be presumed and disallows any attempt to prove the contrary (presumption juris et de jure – a presumption of the law and required by law).

There is a presumption in favour of personal liberty, a presumption in favour of freedom from legal obligation and, in questions of personal status, a presumption in favour of legitimacy. Also, in the matter of proof, there is a general presumption in favour of documentary evidence on the grounds of what a Scottish author in the 18th century called “the lubricity [slipperiness] and uncertainty of testimonies”. Oral evidence is slippery: much better to rely on the documents.
EVIDENCE, PROOF, FACT-FINDING AND THE EXPERT WITNESS

If the onus and presumptions do not provide the answer, then it is up to the judge to decide how the outstanding issues will best be resolved. Remember that there is a notional contract to submit the dispute to the judge for decision. So the judge will decide whether it would be useful to have a personal appearance of the parties (who are not "witnesses"). Next, the judge may ask for information or documentation, or may ask for a particular witness to come and give evidence. But this will normally be arranged to suit the judge and the particular witness, so the judge may say "Let us hear Mrs So-and-so on Tuesday afternoon at 3 o'clock".

What the witness says will be taken down or summarised and the transcript or summary will be signed by the witness and put in the dossier, which I'll come to in a moment.

The judge may decide that it would be a good idea to have a report from an expert, or perhaps an inspection of an object in dispute or of the place where some significant event occurred. The judge may delegate some of these activities to someone else – perhaps, if it is a three judge court, to one of the judges as rapporteur, or to a member of the Bar as an ad hoc rapporteur or to an expert.

Not only is there is a presumption against oral testimony, in many countries there is an even stronger presumption against unnecessary oath-taking. When we were drawing up the rules of procedure for the European Court of First Instance, several of the judges felt that it was very important that the oath should be taken at the end of the evidence and not at the beginning. Why? Because if somebody is going to be exposed to the pains of perjury, then they must have the opportunity in the course of giving evidence to retract what they have said. It is only when they have completed their evidence that you can ask them to swear that what they have said represents their truthful evidence.

The description I have given may suggest that the judge is very active and in one sense that is true. But the judge remains passive in the sense that it is no part of the judge's function to go beyond the issue which the parties have contracted to submit for decision. The point is, rather, that the procedure is progressive: you do things as and when necessary. Consequently, there is no such thing as a "trial": there is no such event and no need for one.

That brings me to the dossier or file, which is the other essential idea. The dossier is central both to criminal and to civil procedure. In civil, commercial and administrative cases, the dossier contains all the material that has been collected and will form the basis of the judgment - the pleadings of the parties, documents, summaries of the oral evidence of witness, reports of experts, and so on. Similarly, it is the basis for the "trial" in criminal cases, and I would like to explain this.

Article 6 of the European Convention on Human Rights, reads in English:
EVIDENCE, PROOF, FACT-FINDING AND THE EXPERT WITNESS

“Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law”.

The French text reads:

“Toute personne accusée d’une infraction est presumée innocente jusqu’à ce que sa culpabilité ait été légalement établie”.

“Established” rather than “proved”. The English word “proved” implies proof by the adversarial process of the common law. The word “established” implies that a conclusion has been reached following investigation. The reason why it is suggested (quite wrongly) in some quarters that the French system “presumes guilt until innocence is proved” is that, in France, there will not be a “trial” unless the dossier already contains material sufficient to raise a prima facie case of guilt. The purpose of the trial is to allow the judges (or judges and jurors) to reach the inner conviction (intime conviction) that guilt has been established. In that connection on juge l’homme, pas les faits (we judge the man not the facts). The “facts” are in the dossier, what we are now doing is seeing whether we believe that this man or woman really did it. That is why the examination is primarily conducted by the presiding judge and why the first person to be examined may well be the accused.

On appeal, the starting point again is the dossier. Except where the appeal is limited to points of law, the appeal court can reassess everything in the dossier and decide what conclusions should be drawn from it. The appeal court may call for additional material – further evidence from witnesses, rehearing the accused person or, for example, an additional expert report.

The function of the lawyer in this context is not so much to examine and cross-examine witnesses, but to make sure that what gets into the dossier, and so becomes part of the material for judgment, should properly be there (therefore excluding privileged communications) or that other relevant elements are included or correctly reported.

What is the role of the expert in that context? I think the way to put it is this. The expert’s report, the expert’s investigations, are simply one tool in the judge’s armoury of decision-making. They are one way in which a judge may go about deciding on an element in the case that needs to be established one way or another.

Ultimately, the procedure, unlike the “lay” procedure of the common law, is archetypally “judicial” - the judge decides what are the crucial issues and what is the best way of resolving them.

How should an expert come to terms with the difference? If you are asked to work in one system or another, how should you approach it? I think the answer must be very simple: you must be clear what you are being asked to do, why
EVIDENCE, PROOF, FACT-FINDING AND THE EXPERT WITNESS

you are being asked to do it and what are the consequences? What will the judge do with what you produce when you have produced it?

I end with a health warning and that is to say that almost everything I have said is subject to some exceptions, and that almost everything I have said is at most only half true. (laughter, applause).

QUESTIONS

Professor Max Sussman

After many years as an expert, I’ve become more and more uncomfortable about swearing to tell the truth, the whole truth and nothing but the truth, especially when I’ve looked back on cases in which two experts have said exactly the opposite and one’s bound to ask which one was telling the truth? So, for this reason I’ve been toying with the idea that the expert should in fact take a different sort of oath, perhaps one modelled on the declaration of truth that is within our Civil Procedure Rules, that the evidence I shall give will be my true and complete professional opinion. Having heard what you said about an oath taken at the end of the evidence, I wonder if in fact there is a place for some people like us at the end, not only to confirm that what you have said is your true and complete opinion, but to add in something that is what we have represented, where there is a range of reasonable opinion. And so would you, Sir David, support some such oath at the end of the expert’s evidence?

Sir David Edward

Yes, I would. I suppose the reason why we attach so much importance to oath-taking at the beginning is partly because of the jury trial idea and partly the element of terror that is introduced by making a witness take the oath before giving evidence. In Scotland, but sadly no longer, a witness was required to “swear by Almighty God, and as I shall answer to God at the Great Day of Judgment, that I shall tell the truth....” (laughter). That continued well into the 1970s, if not the 1980s. There was a certain element of terror, particularly as the oath in Scotland is always administered by the presiding judge and those of you who remember Lord Cameron who was the sort of Sir Michael Davies of Scotland – that was meant as a compliment – will know that his administering the oath must have put the fear of death into some people. (laughter).

Dr Harry Brunjes

There’s a legendary medical teacher involved with junior students that in the current state of knowledge only half of what he is about to tell them is likely to be true, but that he didn’t know which half. This raises the question because the question of half truth came into your comments, with the different procedures that you’ve outlined, are the outcomes the same with all the different procedures, or is it possible that the application of different forms of proof in broadest terms, the outcomes are likely to be different?
Sir David Edward

Well, I think the outcome is liable to be different in the common law system in two respects. First of all (and I’ve regrettably had this experience), the apparently highly qualified and very confident expert may be shown by cross-examination to be exaggerating, taking chances or, in a few cases, being less than honest. I don’t think there is a better way of getting at that than cross-examination by somebody with the contrary interest. Where the primary examination is conducted by the presiding judge there is almost bound to be a tendency to say (or imply), “Oh yes, Dr So-and-so, you’re very distinguished and I’m not going to do anything to suggest that you aren’t absolutely reliable in everything you’ve said”. There may also be a tendency, especially if an expert is regularly used by the courts, to create a kind of cosy relationship. The way of getting behind that is cross-examination. The other thing the common law system does is to show up the assumptions the expert is making, by requiring him (or her) to set out what are the assumptions he made, what were his instructions, and what are the factual elements being hypothesised, and, through cross-examination, testing those assumptions: “If you change fact so and so, what will the result be?” That is much easier for a cross-examiner who is representing a party than for a judge, because it involves the judge actually identifying what are the possible changes in the matrix that is being discussed. So I yield to no-one in my belief that the common law system, properly and courteously administered as between the Bar and the expert, is more likely to produce a satisfactory result than a system that relies simply on reference to an expert and limited examination by a judge.

Farrukh Hussain

May I briefly ask a very small question involving experts. Now some of the situation has been eased by bringing in the system of joint single expert who, two experts agree on the nomination of a third to present to the judge. Sometimes judges take notice and sometimes they take no notice at all. How do you decide when a single joint expert is believable.

Sir David Edward

Well I don’t have experience of that system, it’s a relatively new idea. My own view is that in many respects it’s a starry-eyed view that if you get a third expert to look at the evidence of the opinions of the first two, you’ll somehow get the answer. I’m not absolutely satisfied that that’s more than wishful thinking.

Farrukh Hussain

But do you think it’s an improvement on the previous system?

Sir David Edward
EVIDENCE, PROOF, FACT-FINDING AND THE EXPERT WITNESS

I think it may be in some cases. What I don't believe, and I'm now merely talking from personal experience of what is now nearly 20 years ago, is that that's the whole answer.