On Civil Procedure

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12 The expert, the witness and the judge in civil litigation: French and English law[1]

There is a presumption that the judge knows the law. There is no need, in theory, for the parties to provide him with the materials and information necessary for the decision of questions of law. No similar presumption is possible in relation to questions of fact. *Jura novit curia* may be plausible; *facta novit curia* is absurd. Nevertheless, as has been pointed out in a previous chapter,[2] at the end of the day, decisions of fact are as much for the judge as are decisions on the applicable law. It is the purpose of this chapter to examine the way in which French and English law, respectively, deal with the particular problem that is raised when the judge is called upon to decide technical questions, that is, questions of fact which, because of their scientific, technical or technological character, cannot be understood or resolved by a non-specialist without the assistance of an appropriately qualified specialist.[3] Before turning to that, however, it is necessary to say something about the nature of questions of fact in general.

Questions of fact

It is a general principle as much of French as of English law that each party must prove the facts necessary to the success of his claim or defence. Since nothing is literally 'proved' in litigation, however, what is meant by the general principle is that the party carrying the burden of proof must discharge it by producing materials – evidence or proofs – which will persuade the judge to decide the issue in his favour.

[1] Based on a lecture delivered to the Assemblée générale of the Société de législation comparée in Paris, published in 1977 Rev.int.dr.comp. 285. The comparison in the main part of the chapter is between the French law and the English law as it was before introduction of the C.P.R. Such a comparison is a necessary preliminary to consideration of the new law, for which see the postscript to this chapter.

[2] Chap. 11, p. 211.

[3] See *L'expertise dans les principaux systèmes juridiques d'Europe*, published under the auspices of the Centre français de droit comparé with the assistance of the CNRS, Paris, 1969.

It follows that, at this stage, the mind of the judge must be engaged, for it is rare that he can be offered a mode of proof – a document, a witness, an item of real evidence – which relates directly to the legal right that is in contention. Motulsky correctly insisted that legal rights are generated by facts,[4] but the facts which generate a given right are themselves defined by law. In most cases the raw facts that gave rise to the proceedings are not those to which the law refers in terms: they must be related to those facts, they must be qualified – that is, 'translated' – by the advocates and ultimately by the judge, into the language of the law. Suppose, for example, an action for damages in which, at the end of the *instruction*, or after the evidence has been heard, as the case may be, the judge is persuaded that the defendant householder made no attempt to remove accumulated snow from his steps, and that that was the cause of the injury of which the plaintiff complains. To hold the defendant liable under a rule imposing liability for fault, the judge must qualify the defendant's omission as *faute*, within the meaning of article 1382 of the French civil code, or as a breach of the common duty of care within the meaning of the English Occupiers Liability Act.

It is of no importance for present purposes whether the question of the qualification of facts is classified as a question of law, as it is by the Cour de cassation, or as one of fact, as it is by the House of Lords;[5] what is important is that in either case it is a question which the judge must answer. But the judge also has to answer questions of pure fact, as distinct from the qualification of fact, which are capable of solution only by the application of an element of logic. Is he justified in drawing the conclusion that an otherwise unknown fact is established by the existence of other facts which are known? The judge is persuaded, for example, that a component of a washing machine broke on the first use of the machine: should he draw the conclusion that the machine suffered from a concealed defect, or was not of satisfactory quality, at the time of sale, which are the facts that generate the buyer's right against the seller in such circumstances?[6]

In both of the examples used above, the existence of certain 'raw' facts has been supposed. In other words, it has been supposed that the judge's reasoning had a certain point of departure already known to him. Otherwise the hypothesis that the judge is 'persuaded' of something would be unfounded. It is not unusual, however, for there to be

[4] 'La cause de la demande dans la délimitation de l'office du juge', in *Ecrits*, p. 101 (D. 1964, Chron. 235) and works cited at n. 4 of that work; 'Prolégomènes pour un futur Code de procédure civile', D. 1972, Chron. 91. See chap. 10, p. 187.

[5] *Qualcast (Wolverhampton) Ltd* v. *Haynes* [1959] A.C. 743.

[6] French code civil, art. 1641; Sale of Goods Act 1979, s. 14(2) as substituted by the Sale and Supply of Goods Act 1994, s. 1.

disagreement between the parties on the raw facts – one party alleges 'white', the other 'black' – and the judge must say which of them is right or, conceivably, reach an independent conclusion that both are wrong and that the truth is grey or even yellow.

Three types of question

It is implicit in what has just been said that there are three different kinds of question of fact. The first, which may be called the simple perception of fact, arises where a party alleges a relevant fact and the question is simply whether the allegation is true or false. The second, which may be called perception by presumption, arises where a party alleges that the established existence of one fact justifies a decision that another fact also exists; it involves the perception of a relevant fact by way of presumption. The third arises where facts that have been perceived or presumed must be given their legal qualification.

Whichever the category to which a question of fact belongs, it is the judge who must resolve it, but, normally, he is neither required nor allowed to decide questions of the first or second categories save on the basis of evidence or proofs put in by the parties.[7] When it comes to questions of the third category, on the other hand, evidence or proof is beside the point. The parties may, of course, present argument through their advocates, but argument is quite different from evidence, and it is the opinion that the judge forms for himself, after hearing argument, which is decisive. There is also a difference between the first category and the second: in the first, the only question at the end of the day is whether the judge, having heard the evidence, believes or disbelieves the allegation. In the second, on the other hand, the intellectual processes of the judge himself are crucial. There is no question of belief or disbelief where it is claimed that one fact is to be presumed from the existence of another: there is only the question whether the judge agrees or disagrees with the reasoning for an affirmative answer.

This, then, is the theoretical division: the parties supply the judge with the materials necessary to his decision of questions of fact, but it is the judge who qualifies them and draws from the established facts such relevant conclusions as he considers justified. Though most litigation presents questions belonging to all three categories, which means that the theoretical division cannot be rigidly maintained in practice, the division nevertheless provides a useful tool for examination of the

[7] For the possibility that the judge may himself bring 'evidence' into the proceedings, see chap. 11, p. 215.

different methods adopted by different systems for dealing with technical questions.

Technical questions

It is axiomatic that no judge is omniscient. We do not – and we cannot – in reality demand of a judge a universal knowledge even of the rules of law in force in his own jurisdiction. Certainly we demand of the judges a certain initiative on legal issues, but, above all, we demand that they have the ability to understand and evaluate legal reasoning put forward by others – the advocates and, for the judges of appellate courts, the reasoning of their colleagues in the courts below.[8] As regards the facts, since we cannot demand of the judges that they have knowledge of every branch of science, of every art and of the mysteries of every profession, we cannot demand either that they resolve questions of fact requiring such knowledge unless they have help from suitably qualified experts. The point is obvious, but the relevance of technical knowledge to each of the three categories of question of fact requires examination.

First category – simple perception of a relevant fact. Even if the judge may actually make his own observations, by, for example, visiting the *locus in quo*,[9] this is likely to be pointless if he lacks the technical knowledge to benefit directly from his observations. If a judge inspects a ruined building, he can see that it has collapsed, but he cannot see, or discover for himself, that the foundations had been built in accordance with, or contrary to, the architect's instructions.

Second category – perception by presumption. If it were proved, for example, that the ink used in a manuscript was of a particular chemical composition, a suitably qualified expert, but not a judge, would be able to say that the manuscript could not have been produced before a certain date.

Third category – qualification of the facts. Although French law explicitly requires the judge to give or restore to the facts their correct qualification,[10] it is only possible for a judge to do this unaided where the facts come within his own experience. He can, for example, qualify, or decline to qualify, as negligent the act or omission of a motorist, or of a pedestrian crossing the street, since he understands the norms of vehicular or pedestrian traffic. On the other hand, he can qualify, or

[8] For the significance of this, see below, p. 233.
[9] N.c.p.c., arts. 179–83; R.S.C., Ord. 35, r. 8; *Tito* v. *Waddell* [1975] 1 W.L.R. 1303.
[10] N.c.p.c., art. 12, al. 2.

decline to qualify, as negligent the act or omission of a surgeon in the operating theatre only if he has expert help.[11]

The classic work of Glasson and Tissier[12] states that 'the procedure of *expertise* is found in every legal system for the simple reason that omniscience cannot be demanded of the judges'. More recently, Motulsky wrote, in his comparative introduction to a volume on the *expertise* in the principal European legal systems, that 'among those consulted, there is no system which has not provided for the working of the *expertise*'.[13] Nevertheless, he found himself obliged to add, in the same paragraph, that 'the position is peculiar in England, where institutions not easily compared with the *expertise*, as understood in countries of codified law, are governed by a few texts and by case law'. In truth, as every comparative lawyer knows, the English and the French systems differ greatly from each other in practice. As it is hoped to show, they differ also in their underlying theory.

In general terms, two forms of procedure for the solution of technical questions are possible. The first leaves it to the judge to inform himself on the relevant technicalities by turning to an independent and impartial expert of his choice. The second leaves it to the parties to supply the judge with the materials and the information that he needs in order to make up his mind on all the questions in issue, no matter how technical they may be. French law has chosen the first system, English law the second.

French law

French law has never known the expert witness of the common law, but, under the old law, a judge could order a procedure, known as *expertise*, whereby expert reports on particular facts at issue in the litigation could be obtained. Unless the parties agreed on a single expert, three were required, all three to be nominated by the parties or, in the event of their failure to do so, by the judge.[14] In 1944, however, it became the general rule that only one expert, chosen by the judge, should be appointed.[15] Though less expensive and time-consuming than its predecessor, this

[11] For the position if the judge happens to have relevant specialist knowledge, see chap. 13, p. 257.

[12] Glasson and Tissier, no. 706.

[13] *L'expertise*, see n. 3, above, p. 14.

[14] Code de procédure civile (ancien), arts. 303–7 in their original version. Until 1961, an expert could be challenged on the same grounds as could a witness: *ibid.*, art. 310. See below, p. 230. For a convenient short account of the old law, see H. A. Hammelmann, 'Expert Evidence' (1947) 10 M.L.R. 32.

[15] Law of 15 July 1944, incorporated in the code de procédure civile as article 305.

form of *expertise* was still over-elaborate for many cases, but the only alternative was the so-called 'constat d'huissier'.

The *constat d'huissier*[16] came into French practice after the First World War and involved an order by the judge, normally at the request of a party, that a judicial officer – a *huissier de justice*[17] – should investigate and provide a purely factual statement, a *constat*, of his findings. In litigation between landlord and tenant, for example, a *constat* could state the condition of property as found by the *huissier*, but it could not go on to draw conclusions or give opinions. For obvious reasons the *constat d'huissier* could not be used where technical skills were required for an investigation.[18]

As things stood, therefore, the *expertise* might be unnecessarily complex and expensive for a given case, while the *constat d'huissier* was of limited value. In 1973 a more flexible system was introduced and is now contained in the new code of civil procedure.[19] Three different procedures are available to the court, one of which is the *expertise*, but that procedure should be used only where neither of the other, less elaborate, procedures will suffice. Where a question arises which requires elucidation by a 'technicien', as he is now known, the judge may commission a person[20] of his choice[21] to enlighten him on such a question by way of 'constatation', 'consultation' or 'expertise'. The three procedures – none of which is possible without an order from the court and all of which are conducted separately from the procedure for taking oral testimony – the 'enquête' – are collectively known as 'mesures d'instruction exécutées par un technicien'.

The *constatation* is an extension of the old *constat d'huissier*: it is still restricted to pure findings of fact, but now it may be used even where only a technically qualified *constatant* is capable of acting. The *expertise* is

[16] Solus and Perrot, nos. 940 and 943.

[17] See L. Cadiet, *Droit judiciaire privé* (1992), nos. 415–19; R. Perrot, *Institutions judiciaires*, 5th edn (1993), nos. 471–4.

[18] The *constat d'huissier* gained legal recognition in 1955: *Ordonnance* of 2 November 1945, art. 1, as amended by decree of 20 May 1955. In 1965 it became possible for a judge of a tribunal de grande instance to order any person of his choice to proceed to *constatations*: see now, n.c.p.c., art. 249.

[19] N.c.p.c., arts. 232–84.

[20] Natural or corporate, for example an association of architects or engineers: n.c.p.c., art. 233, al. 2. In principle only one *technicien*, who must execute his function personally, should be appointed, even for the *expertise*, unless the judge considers more to be required: n.c.p.c., arts. 264 and 265. The *technicien* in an *expertise* may, however, seek the help of another *technicien* in a speciality other than his own: n.c.p.c., art. 278.

[21] Lists of suitably qualified experts who have taken the required oath, known as 'experts agréés', are maintained on a national level by the Cour de cassation, and on a regional level by each Cour d'appel, but the judge is entitled, if he wishes, to appoint a person not on any list: law of 29 June 1971; decree of 31 December 1974.

subject to new regulation but retains its original character; it involves an investigation and report – including opinion and advice – by a *technicien*. The *consultation*, which is new, enables the judge simply to consult and obtain advice from a *technicien* in cases where no complex investigations are required.

When the experts were appointed by the parties, observation of the *principe du contradictoire*[22] was assured automatically, as it is where expert witnesses are used. Now, however, the *technicien* receives his 'mission' from the judge and is answerable to him, not to the parties. It has become necessary, therefore, to insist that the conduct of a *mesure d'instruction exécutée par un technicien*, especially the *expertise*, must conform to that principle. It is not enough that the parties have the opportunity to debate the report of the *technicien* before the judge: any observations or objections they may wish to make must be taken into consideration by the *technicien* and included in his report with an indication of the action taken in response.[23] To this end, the parties must be duly notified of, and given the opportunity to attend, with their legal advisers and even their own experts, one or more 'réunions d'expertise' – meetings at which the *technicien* and the parties can put their respective points of view on the investigations to be undertaken – and on those already carried out.[24]

English law

The original idea of the civil jury in England was that the jurors should decide the questions at issue from their own knowledge[25] and, in a sense, the jury was thus 'expert'. At a later date, Lord Mansfield and other eighteenth-century judges empanelled juries of merchants for commercial cases so as to ensure that the court – judge and jury together – had the required expertise.[26] An expert court of this kind is no longer found save in courts of limited and specialised jurisdiction,[27] but English law does have two procedures which are, according to the actual language of the law, widely available and which conform to the first of

[22] Chap. 9, p. 177. [23] N.c.p.c., art. 276.

[24] Solus and Perrot, nos. 977–9. It is not always easy to know on what occasions the parties should be summoned. In practice, the expert normally summons the parties to a preliminary *réunion*, and to a second when his investigation is sufficiently advanced: *ibid.*, no. 978(b).

[25] W. S. Holdsworth, *History of English Law*, Vol. I, pp. 317–33.

[26] *Ibid.*, Vol. XII, p. 256 and n. 7; C. H. S. Fifoot, *English Law and its Background*, p. 131.

[27] The Restrictive Practices Court, for example, is composed of professional judges and of members qualified by reason of their experience in industry, commerce or public life: Restrictive Practices Court Act 1976, s. 3(1). See further below, chap. 13, p. 264.

the two forms of procedure mentioned.[28] First, the High Court and the Court of Appeal have the right to summon one or more assessors to sit with the judges and to give their advice on technical issues that arise in the course of the litigation.[29] Secondly, the judge can, usually at the request of a party, appoint an independent expert to carry out investigations and research and to present his report.[30] Neither of these procedures has proved popular.

It has for long been the practice of the Admiralty Court to use nautical assessors in cases of maritime collision or other accidents at sea, and, in the past, medical assessors were used in cases under the Workmen's Compensation Acts. Those Acts were, however, repealed and replaced after the Second World War by a system of national insurance in which assessors had no place.[31] When the Law Reform Committee published its report to the Lord Chancellor in 1970 on Evidence of Opinion and Expert Evidence,[32] it somewhat reluctantly approved the continued use of assessors in maritime cases but declined to recommend any general extension of their use elsewhere.[33]

The Committee was equally unenthusiastic about use of the independent, court-appointed expert save in two special categories of case where this was already the practice.[34] On the contrary, having looked at that procedure, the Committee saw in it only disadvantages.[35] Even in patent cases, where the law allows the court to appoint an independent scientific adviser of its own motion,[36] this is rarely done. For all practical purposes, the court-appointed expert is not used by English law.[37] As things stand, English law adheres to the principle, subject only to

[28] Above, p. 226.

[29] Supreme Court Act 1981, ss. 70 and 54(9). *Owners of S.S. Australia* v. *Owners of Cargo of S.S. Nautilus* [1927] A.C. 145; *Richardson* v. *Redpath Brown and Co. Ltd* [1944] A.C. 62. See A. Dickey, 'The Province and Function of Assessors in English Courts' (1970) 33 M.L.R. 494; T. Hodgkinson, *Expert Evidence: Law and Practice* (1990) p. 68.

[30] R.S.C., Ord. 40. J. Basten, 'The Court Expert in Civil Trials' (1977) 40 M.L.R. 174; Hodgkinson, *Expert Evidence*, p. 60.

[31] National Insurance (Industrial Injuries) Act 1946.

[32] Seventeenth Report, Cmnd 4489 (hereafter 'Report'). See also, Evershed, paras. 286–95.

[33] Report, paras. 11 and 12.

[34] Where a report is required on a matter concerning the welfare of a child (now Children Act 1989, s. 7) and in proceedings for nullity of marriage on the ground of incapacity to consummate: Family Proceedings Rules 1991, r. 2.22. See also Family Law Reform Act 1969, s. 20, as amended (tests for establishing paternity).

[35] Report, paras. 13 and 14. [36] R.S.C., Ord. 104, r. 15.

[37] The opinion of Lord Denning M.R. on the merits of the system in *Re Saxton* [1962] 1 W.L.R. 968, notwithstanding. The more recent decision of the Court of Appeal in *Abbey National Mortgages plc* v. *Key Surveyors Ltd* [1996] 1 W.L.R. 1534, suggesting a change in judicial attitudes has been overtaken by the C.P.R. See the postscript to this chapter.

limited exceptions, that it is for the parties to call their witnesses – expert if necessary – on all questions of fact, including the technical, and for the judge to decide the issues between the parties in the light of that evidence. Indeed, in the Law Reform Committee's view, while the expert witnesses should be encouraged to produce an agreed report, where agreement cannot be reached it is the 'constitutional function of the judge' to resolve the differences between them.[38]

Is the French *technicien* a witness called by the judge?

At one time, in France, the grounds on which court-appointed experts could be challenged were the same as those for witnesses,[39] and Glasson and Tissier accept that the roles of expert and of witness can sometimes approximate to one another, especially if a technically qualified witness is called to give information and advice to the court.[40] The same authors stress that the expert does not exercise jurisdiction and that it is a fundamental principle that the expert's opinion does not bind the judge.[41]

There are, it is true, some formal distinctions between expert and witness – the grounds for challenging an expert are no longer the same as those for challenging a witness but are the same as those for challenging a judge;[42] the expert takes an oath that he will perform his task, make his report and give his opinion on his honour and his conscience,[43] while the witness swears to tell the truth.[44] According to Glasson and Tissier, however, the essential difference lies elsewhere. 'The witness called by a party testifies to what he knows about the facts subject to proof; the expert is chosen by the judge to give his opinion, after enquiry, on the points in the case put to him on his appointment.'[45]

The fact remains, however, as just mentioned, that the same authors recognise that a witness can be called, on account of his technical knowledge, to give information and an opinion to the court; such an opinion does not bind the court, and the witness does not exercise jurisdiction, but both statements are equally true of the expert, at least according to the language of the law. An English lawyer might be tempted to say, therefore, that the expert of French law is a witness as

[38] Report, para. 13. [39] Above, n. 14.
[40] Glasson and Tissier, no. 708. [41] N.c.p.c., art. 246.
[42] *Ibid.*, art. 234. Solus and Perrot, no. 909.
[43] Law no. 71–498 of 29 June 1971, art. 6.
[44] N.c.p.c., art. 211. [45] Glasson and Tissier, no. 708.

English lawyers understand the word, albeit a witness independent of the parties and called by the judge. Would he be right to do so?

A French lawyer would deny the parallel, probably basing himself on such particularities of French law as those mentioned above and on the fact that a witness – even if called by the judge – testifies at a special hearing known as an *enquête*,[46] while an expert gives his report either in writing or at the final hearing.[47] A comparative lawyer might well reject these reasons as too technical for his purposes, but does it follow that the French expert should be regarded as equivalent to an English witness? Part of the justification for a negative answer, it is believed, lies in French insistence that the operations of the *technicien* – his investigations, in particular – must be carried out by him in accordance with the *principe du contradictoire*. No similar principle binds a witness, even a witness who is called to give evidence as an expert and who carries out an investigation in the preparation of his testimony.

However this may be, the feature that best distinguishes the witness from the expert is probably to be found in the weight that attaches to a single, non-partisan,[48] expert report. It is, of course, true that the judge is not bound by the findings or the opinion of the *technicien*.[49] It is, however, also true that, exceptional cases apart, there will be nothing to counterbalance the weight of the report: though more than one *technicien* may have been involved,[50] only one report is submitted unless there are irreconcilable differences between them.[51] It may be supposed that something out of the ordinary would be necessary to persuade the judge to disregard the opinion of the *technicien* he has appointed. A party may, for example, appoint a *technicien* of his own choosing to conduct an 'expertise officieuse', and the report of that *technicien* can be put in for consideration in the proceedings. Such a report might justify rejection of the official report, but is unlikely ordinarily to do so. In the first place, the *technicien officieux* is the adviser of just one of the parties, not of the judge; in the second place, his investigations will have been conducted

[46] N.c.p.c., arts. 204–31. [47] *Ibid.*, art. 282.
[48] A *technicien* may not receive from a party even reimbursement of out-of-pocket expenses without the prior authorisation of the judge: n.c.p.c., art. 248.
[49] *Ibid.*, art 246. It is unclear whether the judge must give explicit reasons if he rejects a report. Cf. the views of Solus and Perrot, no. 934 2° and E. Blanc, *La preuve judiciaire* (1974), p. 88. If the judge were to reject a report without explanation, he might incur suspicion of having used his personal knowledge without disclosure, as he might if, faced with a technical question, he declined to appoint a *technicien* in the first place: H. and G. Le Foyer de Costil, 'Les connaissances personnelles du juge', 1986 Rev.int.dr.comp. 517, 525; below, chap. 13, p. 259.
[50] Above, n. 20. [51] N.c.p.c., art. 282, al. 2.

without the safeguards of the law, especially that of observance of the *principe du contradictoire*.[52]

The weight thus carried by the report of a *technicien* is implicitly recognised in the statutory rules, which place limits on the kind of question that may be put to an expert. The law of 15 July 1944, which reduced the number of experts from three to one, that one to be chosen by the judge,[53] prescribed that an expert could be called upon to report only on questions which were 'purely technical'.[54] The new code is more liberal, but it is still the law that the report of a *technicien* can be legitimately obtained only on questions of fact for the solution of which the knowledge and skills of a technically qualified person are required. A *technicien* may not be called upon to deal with questions of fact that a judge can be expected to answer for himself; still less can he be called upon to deal with a question of law.[55]

An English lawyer might see in these restrictions not a recognition of the weight which in practice attaches to the report of a *technicien* but, rather, a parallel with the English rule which prescribes that only expert witnesses may give evidence of opinion, or as to the conclusions to be drawn from known to unknown facts: the ordinary witness may testify only to facts personally known to him.[56] It is suggested, however, that the parallel, if it exists, lends no support to the idea that the French *technicien* is in reality a witness called by the judge. The English and the French rules serve quite different ends.

It may be that the English rule that only expert witnesses may give evidence of opinion strengthens the idea that expert witnesses, like *techniciens*, should be used only where technical questions of fact are raised, but there is no more to the parallel than that: the principal reason for the English exclusion from evidence of the opinions of ordinary witnesses is simply that such opinions are useless for the purposes of the litigation.[57] Opinions which are of use are admissible, and the utility of certain opinions, including opinions on questions of law, is clear. What do advocates do if they do not give opinions – not independent and impartial opinions, it is true, but opinions – on the questions of law in the case? What is more, though the judge may take points of law of his

[52] Solus and Perrot, no. 958. The *technicien officieux* resembles the expert witness of the common law much more closely than does the judicially appointed *technicien*.
[53] Above, n. 15.
[54] Incorporated in the code de procédure civile, art. 302. See P. Hébraud, 'Commentaire de la loi du 15 juillet 1944 sur les rapports d'experts', 1945 D.L. 49.
[55] N.c.p.c., arts. 232 and 238. Solus and Perrot, no. 916.
[56] R. Cross and C. Tapper, *Evidence*, 8th edn (1995), pp. 543–5.
[57] *Ibid.*, pp. 545 and 549–50; *Wigmore on Evidence*, 3rd edn (1940), Vol. II, para. 557 and Vol. VII, para. 1918.

own motion, ordinarily his role in relation to questions of law is to assess the arguments of the advocates and to judge their respective merits. For English law, there is more even than that: so far as decisions of the House of Lords are concerned, importance is attached not only to the arguments of the advocates before the House, but to the judgments of the courts below, especially of the Court of Appeal.[58]

What is the value of those judgments to the House of Lords? They cannot control the decision of the House; it is not a court of cassation but a court of appeal that must give its own decision on the case as a whole. The answer is that they serve as the opinions, the advice, of expert lawyers on the questions of law before the House, and as such they make valuable contributions to the formation by the judges of the House of Lords of their own views.[59]

It is unlikely that a French judge, if asked, would deny that expressions of opinion by others can be useful, and, of course, legal argument is always admissible. There is nothing improper in the admission in evidence of the opinions, the advice, of anybody on anything. The explanation of the restrictions imposed by French law on the use of *techniciens* lies elsewhere: it lies in the basic requirement of the administration of justice that a judicial decision must be the work of the legally appointed judge who has been assigned to the case, and no one else. However free the judge may be to disregard the opinion of a *technicien*, however free he may be to substitute his own opinion, it will only be in exceptional circumstances that he is capable of doing so, and that is why French law restricts the role of the *technicien* to questions which the judge is incapable of resolving without help. The restriction exists to prevent excessive delegation of the powers and the duties of the judge.[60]

The conclusion has to be that, whatever the form of the law, and exceptional cases apart, in practice in France it is the *technicien* who makes the decision on those questions that are committed to him. The English expert is a witness, but in France the *technicien* is nothing of the kind: he is an extension of, and contributes directly to, the decision-making process of the court. He does not actually exercise jurisdiction since he acts under the control of the judge who may reject his opinion, but he shares with the judge the task of deciding questions of fact, to which end he is permitted to receive information, written or oral, from anybody and, with the support of an order from the judge, if necessary,

[58] Evershed, para. 495. Administration of Justice Act 1969, ss. 12–15, especially s. 12(3).
[59] In this respect the judgments of the courts below are comparable to the *conclusions* of the avocat général in the Cour de cassation and of the Commissaire du gouvernement in the Conseil d'Etat.
[60] Solus and Perrot, no. 916.

he can obtain the production to him of documents held by the parties or others.[61] If he is not a judge, he is much more like a judge than like a witness. It is logical that the grounds on which he may be challenged should be the same as those for a judge, and it is right that he should be included amongst the 'auxiliaires de justice' and classed as 'auxiliaire du juge' as distinct from those who are classed as 'auxiliaires des parties' such as, in particular, the *avocats*.[62]

A divergence of approach

As an *auxiliaire du juge* who is chosen by the judge, who is called upon only where a case raises a technical question of fact which the judge cannot resolve unaided, and whose mission is defined and entrusted to him by the judge, the *technicien* of French law lends his knowledge and skills to the court to supplement those of the judge. He is, for all practical purposes, best seen as an extension of the court. English expert witnesses, on the other hand, may be urged to present evidence to the court which 'should be and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation',[63] but they are selected and called by the parties; and it is the parties, not the judge, who determine the subject matter of their testimony. They are, inevitably, identified with the parties, not with the court of which they cannot, on any intelligible analysis, be said to form a part.

It was indicated earlier that the powers of the French judge in relation to fact-finding procedures are greater than those of his English counterpart,[64] but it remains the basic principle in both systems that the parties must prove the facts on which they rely;[65] it is not for the court to conduct its own investigations. On the other hand, it is for the court to decide for itself what inferences should be drawn from known facts and it is for the court to decide for itself how established facts should be qualified.[66] How, then, do the English and French approaches to the solution of technical questions correspond with this general principle?

On the first category of question – simple perception of fact – it is clear that the English solution conforms more closely to principle. The French gives to the court – judge and *technicien* together – the task of producing evidence, a task which properly belongs to the party alleging

[61] N.c.p.c., arts. 242 and 243.
[62] Cadiet, *Droit judiciare privé*, nos. 371–5; Solus and Perrot, no. 898.
[63] *Whitehouse* v. *Jordan* [1981] 1 W.L.R. 246, 256–7, *per* Lord Wilberforce.
[64] Above, chap. 11, p. 221.
[65] Above, chap. 11, p. 220. [66] Above, p. 223.

the fact. A party alleges, for example, that a machine suffers from a certain (specified) defect. In principle it is for him to prove the defect by the evidence he adduces, including, if necessary, evidence given by an expert after examination of the machine. It is, of course, for the judge to say whether the evidence is convincing, but it is not for him, with or without expert help, to examine the machine. Yet, in France, the examination of the machine will be entrusted to a *technicien*.

For the second category – perception by presumption – things are more complex. Where conclusions must be drawn from known facts to unknown facts, it is for the judge, not the party, to say whether a conclusion can properly be drawn. If the judge lacks the necessary knowledge or understanding to do so unaided, he should seek help from his own expert, not from experts chosen and called as witnesses by the parties. Theoretically, therefore, for this category of question a mixed procedure is required. Suppose an action in which one party alleges that the cause of an accident was the unforeseeable breakdown of a component of his car. The car was destroyed in the accident, and only an expert motor engineer is capable of carrying out a useful investigation of the remains or of drawing useful conclusions from what he finds. The general principle requires that engineers chosen by the parties should carry out the investigation and report their findings by giving evidence as witnesses; a different engineer, chosen by and working with the judge, should advise him on the conclusions that can be drawn about the cause of the accident.

For the third category – qualification of the facts – the French solution is correct; the English contravenes the general principle. Here there is no question of the perception of facts and there is no question of drawing inferences from known to unknown facts: by hypothesis the facts have already been established and the only thing left is their qualification. On that, the parties may present argument, but argument is the business of an advocate, not of a witness. The decision is for the judge, and if he lacks the knowledge to do it alone he should be assisted by an expert of his choosing. The English system is paradoxical: it allows the expert witness to testify on the qualification of facts, and so allows him to act as an advocate. There is confusion of two different functions.

Since questions of all three categories are likely to arise in any case requiring the solution of technical questions, the mixed system using both expert witnesses and court-appointed *techniciens* should, in principle, be employed. For obvious reasons of economy, if nothing else, however – and save in some specialised tribunals and in those rare instances in which an English judge sits with assessors – the mixed

system is not found in either England or France. French procedure has chosen the system of the court-appointed *technicien* for all three categories of question, while English procedure has chosen the system of expert witnesses.

The divergence between the two systems is not just one of practice; they diverge in their understanding of the respective roles of the parties and the judge. When it comes to the solution of technical questions, French law departs from the general principle by giving to the court what properly belongs to the parties; English law departs by giving to the parties what properly belongs to the judge. The English system has been converted into a curious hybrid,[67] but in the years leading up to that conversion, developments in the law of both countries have accentuated rather than reduced the divergence.

Developments in the law

England

One of the incidental inconveniences of the use of expert witnesses comes from the temptation that it offers to a litigant to call as many experts as he can, in the hope of persuading the court by weight of numbers. This is avoided by the exercise by the court of its power to limit – normally to two – the number of experts allowed to each party.[68] On the point of principle, this makes no difference.

A second inconvenience comes from the general rule of English law that no party is – or, rather, was – obliged to let his opponent know in advance what his witnesses will say at the trial.[69] Until the trial, the expert of one party knew nothing of the investigations, the opinions or the conclusions of the expert on the other side. It was not uncommon, therefore, that experts were summoned to attend the trial at which it emerged, for the first time, that no technical questions were actually in dispute.

To avoid what came to be seen as useless expenditure of time and money, it has for some time been the practice for the court to order that the parties agree, if possible, on a single written expert report that can

[67] See the postscript to this chapter.

[68] R.S.C., Ord. 38, r. 4. The rule became statutory in 1954, but entered judicial practice in 1927: *Graigola Merthyr Co.* v. *Swansea Corp.* [1927] W.N. 30.

[69] Winn, paras. 368–9. In 1953, even the suggestion that the parties should be required to exchange lists of the names of the witnesses they proposed to call was rejected: Evershed, paras. 299–302. Since the introduction, in 1992, of R.S.C., Ord. 38, r. 2A (C.P.R., r. 32.4) providing for the exchange of witness statements, the general rule stated in the text has lost most of its force.

be used at the trial and the attendance of expert witnesses thereby avoided.[70] Until 1972,[71] however, the practice was unsupported by any sanction. In that year it became the law that, subject to agreement to the contrary, no expert witness may be called to give evidence at the trial unless application has first been made to the court for a decision whether a summary of the expert's report should be disclosed to the other party in advance. Such disclosure is now normal in many classes of case,[72] and the court has power to direct a meeting of experts with a view to obtaining maximum agreement between them.[73]

Desirable though these changes may have been in the interest of promoting economy, one of their byproducts has been to reinforce the idea that it is for the parties, not for the court, to find the expertise necessary to the solution of their litigation and even, if possible, to relieve the court of technical questions altogether: if the parties' experts reach agreement, the court is informed by way of an agreed expert report and nothing more is ordinarily required. Only if the experts fail to reach agreement will they be called as witnesses, and it then falls to the court to resolve the controversy between them.

France

If the English reforms enhance the role of the parties, the French enhance that of the judge. As has been noticed, since 1973 there have been added to the procedure of the *expertise* two other, less elaborate, procedures, the *constatation* and the *consultation*.[74]

Article 249 of the code empowers the judge to charge a person appointed by him to make *constatations*. The role of the *constatant* falls clearly within the scope of the first category of question – the simple perception of relevant facts: the *constatant* must not express any opinion on the conclusions of fact or of law that may flow from the facts he has established.[75] Since the *constatant* is more a judge of fact than a witness and since the *constatation* is a considerable expansion of the *constat d'huissier*,[76] its introduction increases the extent of the transfer to the

[70] See *Harrison* v. *Liverpool Corporation* [1943] 2 All E.R. 449. It has been pointed out that difficulties may arise if the judge has to rely on a written expert report without having the opportunity of obtaining explanations from an expert present in court: *Jones* v. *Griffith* [1949] 1 W.L.R. 795; *Mullard* v. *Ben Line Steamers* [1970] 1 W.L.R. 1414.

[71] Civil Evidence Act 1972; R.S.C., Ord. 38, rr. 35–44.

[72] Disclosure of medical reports in most cases of personal injury (R.S.C., Ord. 38, r. 37) and of the reports of motor engineers in cases of accident on land (*ibid.*, r. 40) is mandatory.

[73] R.S.C., Ord. 38, r. 38 (C.P.R., r. 35.12).

[74] Above, p. 227.

[75] N.c.p.c., art. 249, al. 2.

[76] Above, p. 227.

court of what belongs to the parties – the proof of the facts they have alleged.

The *consultation* is more difficult to assess, since the governing text seems ambiguous.[77] It may be that the *consultant* acts as a mere adviser to the judge, in which case he acts as a true auxiliary of the judge, helping him to perform his proper role. But the new code specifies that a *consultation* may be ordered when a technical question does not call for 'complex investigations': it does not say that a *consultation* may be used only where a technical question does not call for 'additional investigations'. On this basis it is possible for the *consultation* to be used as a kind of 'mini-*expertise*',[78] and if that is right, the role of the *consultant*, like that of the *expert* carrying out the full procedure of the *expertise*, includes that of finding the materials – the evidence – on which the actual findings of fact will be based.

Conclusion

It is sometimes a matter of surprise outside the common law world that the system of expert witnesses requires the judge – who is not an expert – to resolve disagreements on technical matters between witnesses who are experts, and that he must do this, a few exceptions apart, without the assistance of a technical adviser of his own. The procedure of cross-examination, to which there is no equivalent in French law, helps the judge in the performance of his task and so, probably, do the arguments of counsel, but there is nevertheless a deep underlying difference in the thinking of the two systems. French law, accepting the evident truth that the judge lacks technical competence, provides him with an auxiliary for the determination of technical questions even if that means that it is the auxiliary, more often than not, who really makes the decision. English law insists, in practice as well as in theory, that the judge alone must resolve every controversy of fact arising between the parties, whatever its nature.

If this is right, comparison of this aspect of English and French procedure provides one more indication that, while neither is 'inquisitorial' and neither is entirely self-consistent, French law comes closer than English law to the idea that the court's role is to discover where the truth lies between the rival contentions of the parties. In France, where the court – judge and *technicien* together – has transferred to it matters which, in England, are left to the parties, less attention is paid to deciding whether a party has discharged a burden of proof placed upon

[77] N.c.p.c., arts. 256–62.

[78] This seems to be the opinion of Solus and Perrot, no. 950.

him and more is paid to deciding the question of fact as such. In England, where the parties are left to deal even with matters that properly belong to the judge, and where expert witnesses are required to respond on questions that are properly the subject of argument, not evidence, concentration on the burden of proof is inevitable. The French and the English procedures for the resolution of technical questions of fact in the course of litigation differ from one another not only in their techniques, but in their underlying theory.

Postscript

Lord Woolf's Interim Report records widespread concern at the expense, delay and increased complexity caused by the parties' need to engage experts, and it attributes the problem largely to the fact that experts are usually recruited as part of the team which investigates and advances a party's contentions. This is said to make it difficult for the expert subsequently to adopt an independent attitude.[79]

That an expert is brought in by one party or another, at a time and for a purpose of that party's choosing, is inherent in a system that treats experts as *witnesses* called by the parties. If, then, the system is thought to be a source of serious difficulties, the logical solution would be to adopt the alternative system, using an expert independent of the parties, who is appointed and instructed by the court: such an expert is not a witness. To adopt that solution, however, would be to adopt the continental solution, and that seems to be sufficient to persuade most English lawyers to reject it out of hand. Lord Woolf does not advocate it, even though his criticisms of the existing system received a large measure of agreement. At the same time, however, the proposals actually made in the Interim Report met with strong opposition.[80] They were, therefore, modified for the Final Report,[81] and have since been modified yet further.[82] Nevertheless, the new law is undoubtedly intended to, and does, bring about major changes.

Lip service, at least, is paid to maintenance of the adversary system;[83] such power as the court has to appoint an expert itself is

[79] Woolf Interim, pp. 181 and 182. This means, according to Lord Woolf, that the expert subsequently has to change roles to provide the independent advice which the court is entitled to expect.

[80] Woolf Final, p. 137.

[81] Summarised in Woolf Final, p. 152.

[82] LCD Working Paper, *Access to Justice: The Fast Track and the Multi Track*, July 1997 (hereafter 'LCD'), para. 6, p. 38. C.P.R., r. 35.

[83] Or, rather, it is claimed that the new law is consistent with it: Woolf Final, p. 140; LCD, para. 6.7, p. 40. See chap. 19, p. 391.

restricted;[84] and even where it exercises its power to direct use of a single expert, its powers to give instructions to the expert are also restricted.[85] On the other hand, the new Civil Procedure Rules make their intention perfectly clear: before descending to detail they lay down the general principles that it is the overriding duty of an expert to help the court impartially on the matters relevant to his expertise, and that this duty overrides any obligation to the person from whom he has received instructions or by whom he is to be paid.[86] As shown by an anticipatory decision of the Court of Appeal, this carries the implication that the expert enjoys immunity from suit, even by his own client, in respect of work done in preparation for the trial.[87]

Cardinal features of the new system are, first, that no party may call an expert or put in evidence an expert's report without the court's permission;[88] secondly, that the court may direct that only one expert may be used on a given issue;[89] thirdly, that, unless the court otherwise directs, the expert is not to be called but may provide only a written report.[90] This is taken so far that provision is actually made for a kind of written interrogation of the expert.[91] The emphasis throughout is on the avoidance, to the maximum possible extent, of conflicts or contradictions in the expert reports or evidence that are put before the court. The court may direct disclosure of experts' reports,[92] and also that the experts, if more than one, shall meet,[93] and there are provisions for the use by one party of an expert's report disclosed by another.[94]

[84] If the court has directed that one expert only may be used, and if the parties are unable to agree who should be the expert, the court may appoint an expert from a list prepared by the parties or it may direct some other method of appointment: C.P.R., r. 35.7(3).

[85] Each party is entitled to give instructions to the expert while the court may do so only in relation to fees and expenses and to any inspection, examination or experiment the expert may wish to carry out: *ibid.*, r. 35.8. On the other hand, the expert may ask the court for directions and this he would be likely to do in the event of conflicting instructions from the parties: *ibid.*, r. 35.14.

[86] *Ibid.*, r. 35.3. The expert is required to certify, amongst other matters, that he understands and has complied with his duty to the court: *ibid.*, r. 35.10(2).

[87] *Stanton* v. *Callaghan* [1998] 4 All E.R. 961, where the defendant expert had met with the expert instructed by the opposing party to determine and indicate the matters not in issue between them.

[88] C.P.R., r. 35.4. The court cannot call for the assistance of an expert of its own motion, but it does retain the power to appoint an assessor (above, p. 229) who may be called upon not simply to 'assist' the court but specifically to prepare a report for the court 'on any matter at issue in the proceedings': *ibid.*, r. 35.15. This opens the possibility that the assessor will develop into a genuine court-appointed expert.

[89] *Ibid.*, r. 35.7. [90] *Ibid.*, r. 35.5. [91] *Ibid.*, r. 35.6.

[92] *Ibid.*, rr. 3.1, 35.11 and 35.13.

[93] *Ibid.*, r. 35.12. There is no provision for the parties to be present or represented at a meeting of experts (cf. the French *réunion d'expertise*, above, p. 228), but the content of the discussion at such a meeting may not be referred to at the trial.

[94] *Ibid.*, r. 35.11.

This part of the C.P.R. is evidently intended to provide a system that will normally ensure that the court receives a single uncontradicted expert report, and to secure the advantages of such a system, without at the same time offending the sensibilities of die-hard adherents of the traditional adversary style.[95] Only time will tell whether this objective will be achieved, but it is feared that the system envisaged will fall into, rather than bridge, the gulf between the common law system of the expert witness and the continental system of the expert appointed by the court.

At one point Lord Woolf expressed his intent to distinguish between the fact-finding and the opinion-giving roles of experts,[96] but this did not lead him to propose that each role should be performed by different people. The phrase 'expert witness', used in earlier drafts of the C.P.R., has been dropped in favour of 'expert', but this is at best cosmetic; the 'expert' of the new system still gives evidence, and that is the function of a witness and of no one else. Yet the Rules impose on the expert the overriding duty to help the court impartially on the matters relevant to his expertise. Is there not here a failure of analysis and so a failure to appreciate the incompatibility of the roles of witness, on the one hand, and of 'auxiliaire du juge',[97] on the other?

There is nothing new in attempts to increase the area of agreement between the parties on technical matters arising in their litigation, and the time may now be propitious for further such attempts, particularly with reference to what have above been called 'questions of perception':[98] there is no reason why the parties who might agree, say, that a machine suffered from a certain defect, should not instead agree that the condition of the machine will be taken to be as found by an expert after examination of it.

When it comes to perception by presumption and the qualification of the facts, however, the expert 'witness' of English law plays the role of an advocate, not that of a witness. That is anomalous, but it is not inconsistent with the adversary system as usually understood. But if, as a matter of general principle subject only to limited exceptions, the judge is to be assisted by one expert opinion only on such questions, it cannot be for the parties, even in agreement with one another, to determine from whom that opinion will be obtained. At this stage, the expert is 'auxiliaire du juge' and as such should be selected by the judge, if necessary over the objection of the parties. It may be objected that in the French and other continental systems a court-appointed expert has

[95] See Woolf Final, p. 138 for Lord Woolf's attempt to win over the die-hards.

[96] Woolf Interim, p. 181.

[97] Above, p. 234. [98] Above, p. 225.

excessive influence on the ultimate decision, but is the objection any less forceful in a system in which the court orders the use of a single expert only, the parties then agree on the selection of an expert, and the expert then comes under an overriding duty to the court?

It is suggested, therefore, that the system envisaged by the C.P.R. is flawed in that it attempts to combine two incompatible systems. It may work more or less satisfactorily for a time, and while it does so it may prove cheaper in operation than its predecessor. Eventually, however, the inherent inconsistencies in its underlying structure are likely to bring serious practical difficulties in their train. There is, in the last resort, no half-way house between an expert witness and an expert 'auxiliaire du juge'.

13 The use by the judge of his own knowledge (of fact or law or both) in the formation of his decision[1]

The subject matter of this chapter lies at the heart of the judicial process, and, perhaps for that reason, is one to which the rules of positive law seldom refer in explicit terms. It is more intractable than many: in the last resort it is concerned with the mental processes of the judge himself, and those processes cannot ordinarily be known save to the extent that the judge is willing to disclose them in his exposition of the reasons for his decision or in the course of the proceedings leading up to his decision. Nor is it possible rigidly and accurately to enforce such rules as there may be which purport to restrict use by the judge of knowledge that he happens to have: only an Orwellian 'Thought Police' equipped with futuristic 'thought detection' devices could do that. For the time being, only two means of control exist – a judge possessed of knowledge of which he cannot make legitimate use in a given case can be disqualified, and a decision which is seen to be based in part on such knowledge can be set aside by a court of appeal or cassation.

The inadequacy of these controls is shown in the report for France. Following an account of a number of cases in which the French Cour de cassation quashed the decision of a lower court for improper use by the judges of their 'personal knowledge', it is observed that

> la nature de ces décisions et le libellé des formules censurées révèlent, à l'évidence, de la part des juridictions de fond une franchise ingénue, de la maladresse, et une parfaite, mais peut-être excessive, bonne foi; elles eussent échappé à la cassation si ces mêmes juges, affirmant souverainement, n'avaient pas cité les sources de leur motivation.[2]

[1] Based on a Report to the XIIth International Congress of Comparative Law in 1986, published in E. K. Banakas (ed.), *United Kingdom Law in the 1980s* (1988), 3. The chapter draws on the national reports listed at the end of this chapter. All are held on file by the International Academy of Comparative Law and many have been independently published, as shown. For conformity, page references in the following text are to the original versions.

[2] France, p. 8.