



# Chapter 9

## “What Is Your Verdict?”

“When a court of law acts as a so-called *trier of fact*,” Nick began, “it is charged with deciding about the truth or falsity of a claim about some past event.<sup>1</sup> Did John Jones run through a red light and collide with the car driven by Jim Smith, as Jim Smith claims? Is Fred Brown guilty of armed robbery? Did Sue Green break her contract with the Acme Corporation? In a typical situation, there is a claimant and his attorney who say that some particular event happened and that it happened in a certain way. The claimant usually alleges that he was damaged by the event. And, there is a defendant and his attorney. The defendant is alleged to have been the cause of the event and is thus responsible for the damage. Either the claimant or the defendant can be a state body. They can also be corporate entities. In a criminal case, the defendant is alleged to have been guilty of a criminal act, the two sides are the state and the defendant, and a prosecuting attorney represents the state.”

“What about the judge and the jury?” Sam asked.

“First, the jury,” Nick said. “Evidence is introduced to it by each side—much like scientists wrangling over each other’s facts and theories. It is through this adversarial process that the court attempts to ‘get at the truth’.”

“I suppose your phrase ‘attempts to get at the truth’ is short-hand for ‘attempts to label something true’,” Sam guessed.

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<sup>1</sup>The discussion in this chapter of American legal and judicial procedure is based on material in Miguel Mendez, *Evidence: the California Code and the Federal Rules—A Problem Approach*, West Group, 2d ed. 1999.

“You’re catching on just fine,” Nick said. “Anyway, each side attempts to introduce evidence to prove its case and to disprove the other. Evidence is introduced by questioning witnesses or by depositing with the court specific exhibits, such as a murder weapon.”

“In the American legal system, a judge referees the process by making decisions about whether or not evidence can be introduced,” Nick continued. “Typically, a jury, hearing and seeing the evidence presented by the attorneys and following specific instructions given by the judge, then decides in favor of either the claimant or the defendant. This decision, for example that the defendant is or is not responsible for the alleged event, is taken henceforth to be a ‘fact’—unless it is overturned in an appeal process. So, for example, before the jury’s decision, a newspaper reporting on the event always says ‘so-and-so is *alleged* to have committed such-and-such.’ If the jury decides in favor of the claimant, the paper can then say ‘so-and-so *is guilty* of such-and-such,’ because, in effect, it has been labeled as a fact.”

“Unlike the less formal processes of scientific criticism and debate,” Nick went on, “legal argument in a courtroom is conducted according to quite strict rules about what evidence can be considered.”

“Why exclude *anything* that might be useful for establishing what happened?” Sam asked. “That doesn’t sound very scientific.”

“There are various reasons,” Nick replied. “Tradition is one of them. But more importantly, most democratic societies put great value on protecting the rights of the defendant. After all, the defendant usually has a lot at stake, and society wants to make sure that any judgment against him or her or it is really justified and is not the result of capricious prosecution. In a criminal case, courts start with the hypothesis that the defendant is *not* guilty, and it is this hypothesis that must be overturned by the prosecution. Another reason for caution is that the process of trying a fact in a court is compressed in time compared with the more leisurely pace of scientific arguments. And, unlike in science, the result of the process is often practicably irrevocable.”

Science is always gaining new information. The law is the opposite. It has to make a decision so people can get on with their lives.<sup>2</sup>

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<sup>2</sup>Quoted in “The Courts vs. Scientific Certainty,” By William Glaberson, *The New York Times*, p. 5, Section H, June 27, 1999.

"Right, Gio," Nick said. "Rules have evolved to help produce this more rapid and usually conservative decision. Mainly, the rules act to limit the evidence that can be introduced by either attorney in his or her efforts to confirm or refute the matter at hand. The rules are used principally to help the trier of fact reconstruct an historical event that is *contested* by the parties. No evidence need be introduced to attempt to establish something to which both parties agree."

"If either party thinks that some piece of evidence ought not to be considered, that party can object to its introduction," Nick went on. "And, reasons must be stated for any objection. The other party can try to persuade the judge that the objection should be overruled. After hearing the reasons for and against the objection, the judge then sustains it or overrules it. Otherwise, all evidence offered by a party will be admitted. A good trial lawyer should always try to eliminate the introduction of unfavorable information."

"That doesn't sound like 'ransacking reality'," Sam concluded. "Scientists would be criticized for ignoring evidence."

"An analogy in science might be unscrupulously suppressing experimental data damaging to one's pet theory," Nick said. "So courtroom processes, as they are presently practiced, would have to be considered different from the methods scientists should use."

"May an attorney object to *anything* that hurts his case?" Sam asked.

"Only if he or she can cite a rule on which to base the objection," Nick answered.

"So what are some of these rules?" Sam asked.

"The most important rule is that evidence must be relevant to the matter before the court," Nick replied. "As an example, an attorney defending a client being tried for murder might ask a defense witness if the defendant regularly frequents a restaurant where the witness is a waiter. The question may be objected to as irrelevant, and the defense attorney would have to establish why the answer is relevant in order to persuade the judge not to sustain the objection."

"That rule sounds ok," Sam admitted.

"But even helpful information may be excluded if it is unduly

prejudicial or substantially outweighed by countervailing concerns," Nick said. "For example, a prosecutor might want to ask a bank employee witness whether or not the defendant in a check fraud case has a history of writing bad checks. The question may be objected to as prejudicial because it is attempting to establish that the defendant is 'the kind of person' who writes bad checks. That is, the question is attempting to introduce evidence about the defendant's character. Whether or not the defendant is that kind of person *in general* ought not to be evidence about whether or not he wrote a bad check in the *case at hand*."

"But general information could affect the probability that he wrote the bad check in the case at hand," Sam said. "And, as we talked about a while back, probabilities like that can influence the final conclusion."

"I suppose so," answered Nick. "But the law prefers specific information in order to protect the defendant."

"Information may also be excluded if it is thought to be unreliable," Nick continued. "As an example, the hearsay rule excludes evidence whose reliability cannot be tested through cross-examination. Without cross-examination, the evidence would not be subject to the full force of the adversarial process—which is at the heart of 'getting at the truth.' So, if a witness says that the defendant told some friend of the witness that he, the defendant, wrote a bad check, that 'evidence' would be disallowed because it is hearsay."

"Any more rules?" Sam asked.

"Just a few," Nick replied. "Information that is obviously relevant may be excluded if its introduction undermines some other goal considered more important—such as client/attorney privilege. As an example, the defense attorney cannot be asked whether or not his client told him that he was guilty."

"Some objections are the product of lessons learned over decades, even centuries, of litigation," Nick continued. "A party can object to compound questions and to questions that assume facts that are not in evidence."

"Examples?" asked Sam.

"Sure," Nick answered. "A witness cannot be asked a question like 'did you see the defendant on the night of the crime *and* was he wearing a blue suit?' That's a compound question. You can only ask one thing at a time."

And a question like ‘when did you move away from the defendant’s neighborhood?’ cannot be asked if it has not yet been established that the witness has moved away.”

“Finally,” Nick concluded, “leading questions—ones that suggest answers to the witness—are inappropriate on direct examination. So are questions that call for a narrative answer, questions that are argumentative, or questions that are beyond the witness’s competence to answer.”

“Sounds pretty complicated,” summarized Sam.

“That’s one reason attorneys need to go to law school,” Nick replied.

“And it also sounds like the rules for excluding evidence give plenty of room for attorneys to avoid the truth,” Sam said.

“I guess that’s the price society is willing to pay in order to give adequate protection to defendants,” Nick replied. “Protection from wrongful convictions apparently requires that, on occasion, ‘truth,’ as you call it, must be sacrificed.”

I love murder—always one less witness to worry about.  
—Murray Richman, *Defense Attorney*<sup>3</sup>

“But, also can’t the rules be used by skillful and ambitious prosecutors to wrongly convict a defendant?” worried Sam.

“Yes, unfortunately that happens too,” Nick said. “For example, there are several instances in which eye-witness accounts have been instrumental in convicting people who were later proved to be innocent. I recall a *New Yorker* article about the unreliability of eyewitness accounts.”

“Yes,” Gio said. “Atul Gawande<sup>4</sup> was the author. He mentions staged experiments that show that eyewitnesses quite often misidentify people and get facts wrong. Here’s how he summarized the results of a famous German experiment conducted in 1901.”

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<sup>3</sup>Quoted in “Profiles: The Crime Lover,” by Philip Gourevich, *The New Yorker*, p. 160, February 19 & 26, 2001.

<sup>4</sup>From an article by Gawande, Atul, “Under Suspicion,” *The New Yorker*, p. 50, January 8, 2001. See also: Michael J. Saks, and Jonathan J. Koehler, “The Coming Paradigm Shift in Forensic Identification Science,” *Science*, Vol. 309, pp. 892-893, August 5, 2005.

The results were dismal. The most accurate witness got twenty-six per cent of the significant details wrong; others up to eighty per cent. Words were put in people’s mouths. Actions were described that had never taken place. Events that *had* taken place disappeared from memory.

“And, he says the problem still exists.”

Each year, in the United States, more than seventy-five thousand people become criminal suspects based on eyewitness identification, with lineups used as a standard control measure. Studies of wrongful convictions—cases where a defendant was later exonerated by DNA testing—have shown the most common cause to be eyewitness error.

“So maybe percept models, as you and Mia called them, ought not to be given such high priority after all,” worried Sam.

“I’m sure that’s right,” Nick agreed. “Fortunately, there are other sources of evidence to consider, and it’s the combined weight of all evidence that helps uncover what really happened.”

“Lots of people besides juries are interested in finding out what happened in the past,” Nick continued.

“I’ve got to run,” Sam said, “let’s talk about that next time.”