Some aspects of the law of evidence in Ancient Athens

Hellenic Australian Lawyers Association

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Introduction

The aim of this brief paper is to highlight some aspects of the evidence that was presented to Ancient Athenian courts in criminal and, to some extent, other cases to observe that some of the problems that confront Australian courts today were also problems that confronted the courts of Ancient Athens. The areas that we will touch upon are relevance, hearsay, character evidence and impeaching the credibility of witnesses.

Robert J Bonner, in the preface to his book, 'Evidence in Athenian Courts', commented that the English law of evidence differed widely from the Athenian system. Nevertheless, Bonner used the language of the law of evidence, as we know it, to analyse the Athenian system. We will take the same approach in this paper.

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1 Robert J Bonner, Evidence in Athenian Courts (The University of Chicago Press, 1905) 3.
The trial

At the outset, it must be acknowledged that the sources of evidence law in Ancient Athens are far from extensive. There was no system of binding precedent, no comprehensive legislation dealing with evidence and no textbooks. Much of our knowledge is derived or inferred from the hundred or so trial speeches attributed to the Ten Attic Orators.² Of these, about 25 concern what we would describe as criminal cases.³ Before turning to each area of evidence, it is necessary to say a little about the shape of a criminal trial in Ancient Athens. What follows is very general in nature. The papers presented to this conference by Professor Lanni and Professor Hall are more detailed.

A criminal trial in Ancient Athens was adversarial and not inquisitorial in nature. It was pervasively amateur, consistent with the democratic aims of Athens. It was conducted before a lay jury. Depending on the nature of the proceedings, the jury consisted of 201 or 501 adult male citizens.⁴ The magistrate who presided over the proceedings held office for a year and had no particular training. There was no professional class of lawyers. Litigants, in effect, acted in person. However, litigants could retain the services of a speechwriter. The hundred or so speeches that we referred to earlier, written by the ten Attic Orators,⁵ are speeches of this kind. The orators had some familiarity with the law and procedure. The speech would be delivered by a litigant as if it was his work.

² Jeffrey Omar Usman, ‘Ancient and Modern Character Evidence: How Character Evidence was Used in Ancient Athenian Trials, its Uses in the United States and What this Means for how these Democratic Societies Understand the Role of Jurors’ (2008) 33 (1) Oklahoma City University Law Review 1, 1.
⁵ The ten Attic Orators were Aeschines, Andocides, Antiphon, Demosthenes, Dinarchus, Hypereides, Isaeus, Isocrates, Lycurgus and Lysias.
A criminal case, even for an offence such as homicide and treason, was brought privately. There was no public prosecutor and no police force.

Trials were brief, no more than a day. The evidence presented at trial consisted of testimony reduced to writing and presented by way of affidavit and by oral testimony on oath. According to Bonner, based on a speech by Demosthenes, at least from the time of Isaeus, all evidence was in writing. Competent witnesses were adult males in full possession of civic rights. Women, children, slaves and the parties themselves were not competent witnesses. Written evidence was read to the jury by a person who may be described as the clerk of the court.

It was not customary to cross-examine witnesses, although a juror could ask a question or, at least, interject.

As we have indicated, the parties to the proceedings were required to make their own case. The jury looked to the speaker for the facts and witnesses for corroboration. Thus addresses had evidential value. Sometimes no corroboration was adduced. Unlike juries of today, a jury in Ancient Athens would often have knowledge of the case before them. There are instances where no witness was called by a party and that party relied upon the familiarity the jury had with the case in question.

Trials were brief, no more than a day. Speakers were given strict time limits. Once the speeches were completed, the jury would immediately deliver its

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6 See Bonner, supra note 1, page 46.
7 See Bonner, supra note 1, page 24, 27.
8 See Bonner, supra note 1, page 54.
9 See Bonner, supra note 1, page 58.
10 See Bonner, supra note 1, page 30.
11 See Bonner, supra note 1, ch XVII. As most readers would well know, until comparatively recent times, jurors in England were selected because of their knowledge and not because they were unacquainted with the parties or the matter being tried.
verdict. A simple majority was sufficient. The jury would also choose the penalty to be imposed, between the options presented by the parties. There could be no compromise. There was no right of appeal.

The laws that were applied were not the detailed and lengthy statutes which bedevil us today. Rather, the laws that were applied in ancient Athens were very general and would be, to our minds, very vague.12

Given the amateur nature of the ancient Athenian courts, it is not surprising that, as Bonner put it, 'the rules of evidence [were] comparatively few in number and simple in form. Elaborate exceptions and fine distinctions are entirely wanting'.13 What rules there were, were not able to be adequately enforced.14

**Relevance**

In our Australian judicial system, relevance is the bedrock of admissibility. Irrelevant evidence is always inadmissible. Our sense of relevancy is acute. Non-lawyers often regard it as too strict in that more background information should be introduced to explain the context of events or explain a person's motivations.

By contrast, Ancient Athenian courts (save perhaps for homicide and maritime courts) could not be said to have adopted a too rigid approach to relevance.15 To us, the courts of Ancient Athens took into account evidence and arguments which were distracting and which could not assist in the just disposition of the case. Lanni argues that extra-legal arguments were relevant and important because

13 Bonner, supra note 1, page 12.
14 Bonner, supra note 1, page 13.
15 Lanni, supra note 12, pages 277 - 283.
Athenian juries aimed at reaching a just verdict that took into account the broader context of the dispute, and the particular circumstances of the individual case.\textsuperscript{16} Thus, detailed evidence of the relationship between the main figures in the case, of a kind which we would not permit, was common place.\textsuperscript{17} So too were arguments based upon the consequences of conviction, both for a person accused of a crime, as well as that person's family. Thus, the consequences of the imposition of a penalty, such as a fine or a loss of a citizen's rights, were not something that was lost on an Athenian jury. In contrast, under our system, judges invariably instruct a jury that the consequences of their verdict is not their concern. We believe the consideration of the consequences cloud judgment. That was not a belief shared by Ancient Athenians.\textsuperscript{18}

This is not to say that there were no limits upon the introduction of irrelevant evidence. The speeches of the orators would, from time to time, urge upon a jury to not be fooled by the introduction of irrelevant material. There is evidence that jurors (and even spectators) complained about irrelevant evidence and arguments.\textsuperscript{19} It may be thought that time limits and the danger of inadvertently prejudicing the jury against a litigant's case were natural brakes upon the introduction of irrelevant evidence. Nevertheless, measures to deal with irrelevant evidence were 'clumsy and inadequate' compared with today.\textsuperscript{20} Interestingly, some evidence that we would regard as wholly irrelevant was, in the context of Athenian justice, important. For example, supernatural signs, omens, portents and oracles were relied upon.\textsuperscript{21}

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\item \textsuperscript{16} Lanni, supra note 12, page 281.
\item \textsuperscript{17} Lanni, supra note 12, page 290 - 292.
\item \textsuperscript{18} Lanni, supra note 12, pages 294 - 295.
\item \textsuperscript{19} Bonner, supra note 1, page 16.
\item \textsuperscript{20} Bonner, supra note 1, page 16.
\item \textsuperscript{21} Bonner, supra note 1,pages 19 - 20.
\end{itemize}
Hearsay

Under Australia law, hearsay evidence is inadmissible, subject to certain common law and statutory exceptions. According to Bonner, hearsay evidence was forbidden in Athenian courts.22

Demosthenes spoke of hearsay in two of his speeches, 'Against Stephannus' and 'Against Eubulides'. In 'Against Eubulides', he explained the rationale for the rule against hearsay in terms which resonate today. He said that hearsay evidence was:23

Recognised as so clearly unjust that the laws do not admit the production of hearsay testimony even in the case of the most trifling charges; and with good reason … How can it be right to give credence in matters regarding which even the speaker himself has no knowledge?

The problem with an absolute bar on the introduction of hearsay evidence is that there are many types of hearsay evidence which are regarded as reliable evidence of the truth. Because of this, as we have mentioned, our law has developed a substantial number of exceptions to the rule against hearsay.

Similarly, the courts in Ancient Athens developed exceptions to the rule which largely correspond with some of our recognised exceptions. For example, dying declarations. Bonner cites three instances were orators relied upon statements made by a witness just prior to death as evidence of the identity of their assailant.24

22 Bonner, supra note 1, page 20.
24 Bonner, supra note 1, page 21.
Another exception with which we are familiar relates to records of account. The books and papers of deceased bankers were used to prove or disprove debts.\textsuperscript{25}

A further exception is admissions made against interest. What we would recognise as out of court statements against interest made by a party to proceedings, were admissible in Athenian courts. Thus, a confession to wrongdoing could be used to prove the commission of the offence.\textsuperscript{26}

Interestingly, Ancient Athenian courts allowed admissions made by persons so closely associated with the parties as to be in league with them.\textsuperscript{27} This is analogous to the co-conspirator rule recognised by the High Court in \textit{Ahern v The Queen}.\textsuperscript{28}

\textbf{Character evidence}

In criminal proceedings in Australia, an accused person may adduce evidence of their good character. Leaving aside the vexed issue of propensity evidence, the prosecution may not lead evidence of bad character unless an accused has put his or her character in issue.

Evidence of good character is relevant to both credibility and to whether the accused has committed the charged offence.\textsuperscript{29}

Ancient Athenians believed a person's character to be stable and unchanging. It was highly probative as proof of propensity to either commit or not commit certain acts.\textsuperscript{30} As against a citizen charged with the breach of a criminal law,

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\textsuperscript{25} Bonner, \textit{supra} note 1, pages 23 - 24.  \\
\textsuperscript{26} Bonner, \textit{supra} note 1, page 24.  \\
\textsuperscript{27} Bonner, \textit{supra} note 1, pages 24 - 25.  \\
\textsuperscript{28} \textit{Ahern v The Queen} (1988) HCA 39; (1988) 165 CLR 87, 100.  \\
\textsuperscript{29} See \textit{Melbourne v The Queen} [1999] HCA 32; (1999) 198 CLR 1.  \\
\textsuperscript{30} Usman, \textit{supra} note 2, page 11.
\end{flushright}

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testimony which indicated that he had previously committed crimes or otherwise exhibited bad moral behaviour was considered highly probative of whether he was guilty of the crime charged, and whether the jury could accept what he told them in his speech.31

If a charge alleged indecent, corrupt or antisocial behaviour, instances of past conduct, if they existed, were relevant.32 Parties to proceedings often referred to their opponent's prior convictions, past crimes and bad acts to attack their opponent's character.33

In 'Against Timarchus', the defendant was alleged to have prostituted himself and to have squandered his inheritance. In his speech, Aeschines gave a colourful and unflattering narrative of Timarchus and his previous exploits, including his 'most disgraceful pleasures, gluttony and expensive eating', as well as his consorting with 'flute-girls and courtesans'.34

There was also a belief in Ancient Athens that the character of a person resembled the character of their associates, such that linking a litigant to either a reputable or a wicked person was said to demonstrate that litigant's character.35

31 Usman, supra note 2, page 11; Lanni, supra note 12, page 296.
32 Vasileios Adamidis, 'Methods of Providing Evidence From Characters in Athenian Courts' in Character Evidence in the Courts of Classical Athens (Taylor and Francis, 2016), 141.
35 Adamidis, supra note 32, page 148.
Character evidence was also employed to assist the jury to decide whether a person who had committed an offence deserved the penalty for the charge or should be pardoned.\textsuperscript{36} Of course, in our criminal justice system, character evidence is also relevant to the question of penalty.

**Impeaching the credibility of witnesses**

Determining the credibility of a witness is a problem which has always troubled courts. How does a court tell that a witness' testimony is honest and accurate? Under our system, it is important for the fact-finder to see and hear the witness. The demeanour of a witness is regarded by us as a matter to be taken into account. We also place great store in cross-examination as a means of exposing the truth.

Having regard to the reliance upon written testimony and the absence of cross-examination in Athenian courts, it may well be thought that it was difficult for jurors to determine the credibility of a witness. Athenian courts employed a number of measures designed to impeach the credibility of a witness, many of which are used in contemporary Australian courts. Credibility in Athenian courts was determined by such matters as: \textsuperscript{37}

(a) the character of the witness;

(b) whether the witness had prior convictions for perjury;

(c) whether there was a relationship between the witness and the litigant;

\textsuperscript{36} Lanni, *supra* note 12, page 296.

(d) whether the witness had a financial interest in the outcome;

(e) whether the witness had a general reputation in the community for untruthfulness; and

(f) whether the witness had an opportunity of knowing what he had acknowledged in his testimony.

A highly effective way of discrediting a witness was by proving conclusively that their evidence was false. Bonner refers to the case 'Against Callimacus', where Isocrates spoke of an extraordinary case where a woman was produced in court to contradict fourteen witnesses who had testified that she was dead.38

In Australian courts, it is common to seek to impeach the credibility of a witness by showing that the witness has made a prior inconsistent statement. Prior inconsistent statements were similarly used in Ancient Athens. Demosthenes sought to impeach the credibility of witnesses in two cases by using prior inconsistent statements. In 'Against Aphobus I' it was shown that Aphobus had made contradictory statements and that a comparison of the assertions of the guardians concerning the provisions of his father's will revealed material contradictions.39

Prior convictions were also used to discredit witnesses. Demosthenes, in 'Ariston v Conon', pointed out that witnesses for the defendants were guilty of housebreaking and assaults on the streets after nightfall.40

38 Bonner, supra note 1, page 86.
39 Bonner, supra note 1, page 88.
40 Bonner, supra note 1, pages 86 - 87.
Conclusion

It is fascinating that, although some 2,500 years in time separates contemporary Australia from Ancient Athens, our respective legal systems had to grapple with similar problems in respect of relevance, hearsay, character evidence and impeaching the credibility of witnesses. The response of Ancient Athenian courts has some similarities (but also many differences) to the approach of our legal system. Can our legal system gain much from the Ancient Athenians' approach to evidence? Probably not much, although many contemporary lawyers would love to return to a day where written laws were simpler, trials were shorter and the public was more engaged in the criminal justice system.