WS Gillbert and Sir Arthur Sullivan's *Trial by Jury* - A Legal Commentary

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William Schwenck Gilbert was a barrister by profession, and legal themes or incidents found their way into many of the libretti which he wrote for his collaborative works with Sir Arthur Sullivan. Some of the better-known examples are the song "When I was a lad I served a term / As office boy to an attorney's firm" in *H.M.S. Pinafore*; "When I went to the Bar as a very young man" in *Iolanthe*, and "All is prepared to sealing and for signing" in *The Sorcerer*. "Some seven men form an association", in the rarely-performed Gilbert & Sullivan operetta *Utopia Limited*, is often quoted by legal writers as evidence that corporate fraud was as common 100 years ago as it is today. But *Trial by Jury*, more than any G & S work, demonstrates Gilbert's knowledge of the legal system, as well as his willingness to poke fun at it.

Trial by Jury is set in the Court of the Exchequer, which was one of the three great common law courts which existed in England until 1875 - the others being the King's (or Queen's) Bench and the Court of Common Pleas. Gilbert alludes to these courts in *Iolanthe*, where the Lord Chancellor asserts that he would never:

> " ... assume that the witnesses summoned in force
> In Exchequer, Queen's Bench, Common Pleas or Divorce,
> Have perjured themselves as a matter of course ... ."

At the time when *Trial by Jury* was first performed, in 1875, the structure of the English court system was in the course of being radically remodelled, and the ancient common law courts were merged into a single new "High Court of Judicature" that very year. So, even as *Trial by Jury* went on stage for the first time, references to the Court of the Exchequer were something of an anachronism.

The Court of the Exchequer had a very different history from the other English courts. It evolved in the Twelfth Century, originally (as its name suggests) as the court concerned with tax and revenue matters, deciding cases between the Crown and taxpayers. By the Fourteenth Century it had acquired a jurisdiction to deal with ordinary civil claims between one subject and another. This was achieved through the use of a legal fiction known as *quominus*, by which a citizen could make a claim against another citizen on the ground that the plaintiff was owed money by the defendant, and the defendant's failure to pay the debt meant that the plaintiff was unable to pay taxes which he owed to the Crown. This remained the basis of the Exchequer's jurisdiction in non-revenue cases until the Nineteenth Century.

Most civil claims in the Exchequer were tried by a jury which, in 1875, consisted entirely of men. This gave Gilbert the dramatic opportunity of pitting a male chorus of jurors against a female chorus of bridesmaids. The presiding judge's rulings on questions of law could be appealed to the Court sitting *in banc* - that is, a Full Bench. Hence Gilbert's tribute to the Judge, which Sullivan set in the style of Handel, comprising the lines:

> "May each decree
> As statute rank
> And never be
> Reversed in banc."

Unlike judges of the King's Bench and Common Pleas, judicial officers in the Exchequer were known as "Baron" rather than "Justice", and the chief judge of the Exchequer was called the "Chief Baron" rather than the "Chief Justice". There were also subtle procedural and technical differences between the three major common law courts, which meant that the Exchequer was more efficient than other courts for recovering debts and monetary damages. This, no doubt, is why Gilbert considered that the Exchequer Court was the appropriate venue in an action for damages for "breach of promise of marriage".

Such actions were not uncommon in the Nineteenth Century. A promise to marry was regarded, in law, as a form of contract, and the breach of such a promise was regarded as a breach of contract. So the technical rules of contract law applied to such a case.

Although the promise did not have to be in writing, the plaintiff had to give some "consideration" - that is, something of value in exchange for the promise. But, until the passing of the *Married Women's Property Act* in 1882, the whole of a woman's property passed to her husband on marriage, so a woman who accepted a marriage proposal was effectively promising to give all of her property to her husband. Thus, there was always sufficient "consideration" for a woman who had accepted a marriage proposal to sue the man who had proposed to her, with the result that such claims were more often brought by women than by men.

However, whilst the ordinary rules of contract law applied to actions for breach of promise of marriage, there were some specific rules unique to such actions. The action could not succeed unless there was some material evidence corroborating the marriage proposal. Gilbert neatly side-steps this problem, by getting the defendant effectively to admit the promise in his song "Oh, gentlemen, listen, I pray".

It was also the rule in such cases that, following the marriage proposal and acceptance, "chastity and modest conduct" was a "condition subsequent", at least in the case of the female party, so that the male was entitled to be released from his promise if he could prove unchaste or immoral conduct by the woman. This aspect is perhaps hinted at in the address by plaintiff's counsel to the Jury, commencing,

> "With a sense of deep emotion,
> I approach this painful case;"

Hence the plaintiff (Angelina) is referred to as "a girl confiding" who "Coyly woo'd and gently won" the defendant (Edwin); she was the one "naming, / And insisting on the day"; he was the one "excuses framing - / Going from her far away". This was said to be "Doubly criminal" because "the maid" had innocently "bought her trousseau". But, beyond these subtle hints, Gilbert's sense of Victorian morality (or prudishness) did not permit even the faintest reference to what might have been the real issues in "this painful case".

Another feature which set actions for breach of promise of marriage apart from ordinary contractual claims was in relation to the assessment of damages. The entire process was based on the rather distasteful proposition that a woman who had once been engaged, and whose engagement had been broken off, may be regarded socially as

"soiled merchandise"; that her reputation would be seriously injured; and that her prospects of attracting another suitable marriage proposal would be irreparably harmed. In particular, if the defendant had "seduced the plaintiff under cover of his promise", that significantly increased her damages - even more so if, in the process, he had communicated a disease to her.

On the defendant's side, damages could be reduced by showing that he was a person of bad character, of coarse and brutal manners, or of insufficient means to keep the woman in the style to which she was accustomed. And, given that the essence of the claim was the impact on the woman's reputation and future marriage prospects, damages could be mitigated by proving her "want of chastity", her reputation as "an immodest woman", and other evidence of her "bad conduct". Needless to say, most of these themes would have been entirely unsuitable for the London stage of 1875, even though they were the subject of daily discussion in London's courtrooms.

Gilbert therefore focussing on the one "plea in mitigation" which could be discussed in polite society, namely the defendant's coarseness and brutality. In Angelina's and Edwin's duet, she emphasises her love for him, whilst he emphasises what an unsuitable husband he would make:

> "I smoke like a furnace - I'm always in liquor,
> A ruffian - a bully - a sot;
> I'm sure I should thrash her, perhaps I should kick her,
> I am such a very bad lot!"

In Gilbert's original text, the Jury have these lines which are omitted from many modern recordings:

> "We would be fairly acting,
> But this is most distressing!
> If, when in liquor he would kick her,
> That is an abatement."

Gilbert introduces an interesting twist, when he puts in the defendant's mouth the unusual proposal:

> "But this I am willing to say,
> If it will appease her sorrow,
> I'll marry this lady to-day,
> And I'll marry the other to-morrow."

Presumably the plaintiff's counsel is taken by surprise by this unusual suggestion, responding with the submission that "To marry two at once is Burglaree". Perhaps, in his surprise, counsel confused the term "burglary" with the term "bigamy"; or perhaps the word was intended in a very generic sense, as meaning simply a very serious criminal offence. Then, after consulting a law book, counsel offers the more considered submission that:

> "In the reign of James the Second,
> It was generally reckoned
> As a rather serious crime
> To marry two wives at a time."

Even this submission is not quite as learned as it may appear to be: in fact, it was an Act of James the First, in 1603, which made bigamy a criminal offence - before that, it was merely an ecclesiastical offence.

Gilbert's ultimate solution - to have the Judge propose marriage to Angelina - is not only delightfully theatrical, in Gilbert's unique "topsy turvy" way, but is also legally satisfying. Once the Judge (presumably a man of some financial and social standing) offered to marry the plaintiff, Angelina could hardly persist with a claim that her broken engagement to Edwin had harmed her reputation or marriage prospects. As the Judge remarks:

> "Though defendant is a snob,
> I'll reward him for his fob.
> So we've settled with the job ... ."

Trial by Jury is, of course, a period piece. The Court of the Exchequer no longer exists. Juries are no longer comprised entirely of men. Actions for breach of promise of marriage have been abolished, both in England in 1970, and in Australia by amendment to the Federal *Marriage Act* in 1976. Even before they were abolished by legislation, such actions had already become extremely rare, in a changed social environment where a failed engagement no longer involved a significant social stigma, and substantial damages could not therefore be recovered.

Even so, the issues raised by such cases are of continuing relevance in the law. Earlier this year (2002), the High Court of Australia had to consider whether a widow, claiming damages arising out of her husband's death, should have her damages reduced on account of her future marital prospects. As the highly respected Justice Michael Kirby observed in the course of argument:

> "... the question of the approach of the courts of Australia to the prospect of remarriage of a widow [is] something that is apt for reconsideration, given that relationships have changed, prospects of marriage, independence of women is different, financial independence ... . A lot of the jurisprudence on this was written in a bygone age. It is like a breath from another time."

Similarly, *Trial by Jury* is in many ways "a breath from another time". Yet, allowing for some dramatic licence and Gilbert's trademark "topsy turvy" plot, it remains a fairly accurate depiction of England's legal system in 1875. Unlike so many "court-room dramas" which are shown in movies and on television, there is nothing in *Trial by Jury* which can offend the astute legally-trained observer, as being historically or legally inaccurate.