In Common Law systems, juries fulfil a crucial role as assessors of the evidence presented by the contending parties to legal proceedings, and consequently act as finders of fact. In the first place the jury is the source of that vital yardstick ‘the reasonable man’: the instrument through which a relevantly contextualised assessment of things done or said can be confidently and, at least in principle, reliably implemented. Secondly and just as importantly, the jury is and always has been a bastion against overweening authority (including, where necessary, that of judges), and ultimately the over-mighty power of Kings. That is precisely why the right to trial by a jury of one’s peers is a key component of the Magna Carta.

From a thirteenth century perspective, the socio-political structure of contemporary England would be wholly unrecognisable. Not only has a parliament of commoners comprehensively superseded the powers of the Crown, but all aspects of the administration of justice are now handled within the context of a centralised bureaucracy. At the same time the role of the jury has been substantially constrained. Whilst still central to the trial process in the most serious criminal cases, it has long since been abandoned in the civil courts. Even in those cases where the presence of a jury is retained as a finder of fact, its powers have been significantly clipped in favour of a professional judiciary, whilst both its role and its mode of recruitment have been comprehensively transformed. As a leading member of the English bar put it in a contribution to the Harvard Law Review a century ago:

The function of the jury continued for a long time to be very different from that of the jury of the present day. The jurymen were still mere recognitors, giving their verdict solely on their own knowledge of the
facts, or from tradition, and not upon evidence produced before them; and this was the reason why they were always chosen from the hundred or vicinage in which the question arose. On the other hand, jurors in the present day are triers of the issue; they base their decision upon the evidence, whether oral or written, brought before them. But the ancient jurors were not impanelled to examine into the credibility of evidence; the question was not discussed before them; they, the jurors, were the witnesses themselves, and the verdict was, in reality, the examination of these witnesses, who of their own knowledge gave their evidence concerning the facts in dispute to the best of their belief (Stephens 1896: 157–58).

The transformation could hardly have been more dramatic. Where personal knowledge of the litigants and of the context within which they operated was once a positive recommendation for recruitment to a jury, it is now a ground for disbarment from that role; and where once it was taken for granted that jury members would be recruited from within the community to which the litigants belonged (and specifically from amongst their peers if the Crown was directly involved in the proceedings), contemporary practice has moved in the opposite direction. Contemporary juries are drawn at random from the population at large.

4.1 Common Sense in Medieval England

A vision of ‘common sense’ has always been an integral feature of the English tradition of Common Law. Over and above the commonplace observation that a central feature of this mode of legal practice is that judicial decisions are primarily based on considerations of tradition, custom, and precedent, rather than being spelled out with reference to an explicit statutory code, a central feature of the whole edifice is the role allocated to the jury as finders of fact. The basis on which they are expected to do so is quite explicit. When a judge concludes his summing up to the jury – having thus far simply fulfilled the role of referee in an adversarial contest between the prosecution and the defence – he invariably goes on to distinguish between his own role as an advisor to members of the jury on matters of law, and their role as finders of fact. Having done so he then goes on to urge them to assess the details of the evidence laid before them in the light of their own common sense understandings as they go about the process of reaching a verdict.

As with Magna Carta reiterated, a central role of the jury was to provide what we would currently identify as a democratic bastion against the overweening power of the state; a further contemporary function is to restrain the wiles of expensive lawyers employed by wealthy litigants to deploy casuistic tricks in an effort to extricate their clients from awkward