

ETHICS OF EXPERT EVIDENCE

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Abstract.

The use of expert evidence in courts has been problematic for many years and a focus on the ethics of witnesses has given rise to the widespread introduction of rules governing how experts may behave. But, in addition to the ethics of witnesses, the ethics of expert evidence also encompasses the ethics of lawyers; the financial and other costs of using experts; the use, or misuse, of science; the way claims to truth are made; and the impact on the law itself. In short, despite recent clarification of rules for witnesses, there remain significant issues with how the legal system makes use of expert testimony. This paper explores some of those issues.

INTRODUCTION

The reliance on and reliability of expert evidence, and the ways in which experts are used, have proven to be significant problems in courts over many years. For example, in the 1999 Freckelton Report² on expert evidence, of the 244 judges who responded to the study 85 per cent said ‘they had encountered partisanship in expert witnesses’ ...Of those... ‘40 per cent said that this was a significant problem for the quality of fact-finding in their court,’ and 25 per cent of respondents said they encountered bias often.³

In a speech referring to that report Justice Sperling noted that

In the ordinary run of personal injury work and to a lesser extent in other work, the expert witnesses are so partisan that their evidence is useless. Cases then have to be decided on probabilities as best one can.⁴

Since Justice Sperling’s speech there have been significant changes in the way experts are used in Australian courts.⁵ Many of the worst abuses of the process of using expert evidence have begun to

¹ An earlier version of this paper was presented at the Annual Conference of Planning and Environment Courts and Tribunals. Dunsborough, Western Australia in August 2012. I am grateful to the participants for suggestions.

² Freckelton I, Reddy P and Selby H, *Australian Judicial Perspectives on Expert Evidence: An Empirical Study* (Australian Institute of Judicial Administration, 1999).

³ Sperling H, Expert Evidence: the Problem of Bias and Other Things (Paper presented at the Supreme Court of New South Wales Annual Conference, Terrigal NSW, 1999), http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwPrint1/SCO_speech_sperling_030999. Accessed August 2012.

⁴ Sperling, n 3.

⁵ See for example: (1) The Law Society of Western Australia, *Ethical and Practice Guidelines*, (Perth WA, 2012) which, in S.10 urges practitioners to familiarise themselves with the WA Bar Association’s Best Practice Guide (2009), which itself is incorporated into the Supreme Court Consolidated Practice Directions at 109 [4.5(9)]. S.10.2 of the *Guidelines* states that ‘The golden rule is never to “coach” a witness’; (2) *Legal Profession Act 2008* (WA) and the *Legal Profession Conduct Rules* (2010) issued pursuant to that Act. Note especially Rule 5,

be addressed, but many problems remain and some of them go to the heart of our legal system itself.

I will address these in various ways in what follows, but want to note that I approach this topic as a moral philosopher. And while I must necessarily address the way the law views, constrains and uses expert evidence, the focus is the *ethics* of expert evidence.

The Australian Family Court⁶ has characterised the problems of expert evidence primarily in terms of the ethics of witnesses, viz: partisanship or lack of objectivity; experts exceeding their area of expertise; clarity of evidence; but also notes there are issues with costs and delays. However, the ethical issues can be characterised in a number of ways in addition to the ethics of witnesses. They can be seen, for example, in terms of: the ethics of lawyers; the costs of using experts; the use, or misuse, of science; misrepresentation of expertise; the way claims to truth are made; and the impact on the law itself as claims to truth accepted in a court become precedents.

Opinion evidence is usually acceptable only from witnesses with special skills or knowledge. In Australia this is spelled out in the Evidence Act (Commonwealth) 1995 which permits the use of opinion evidence from a person possessing 'specialised knowledge based on the person's training, study or experience,' provided the opinion is 'wholly or substantially based on that knowledge'.⁷ In the United States, from where much of the literature on the ethics of expert evidence emanates, clarification of the use of expert opinion can be found in Rule 702 of Federal Rules of Evidence (1974).

EPISTEMOLOGY AND EVIDENCE

As the Australian jurist Sir Owen Dixon observed, the law relies on particular technique and logic⁸. As far as logic goes the law requires, for example, syllogistic reasoning when it first finds the applicable law, then interprets and applies the law⁹; and it requires analogical reasoning when arguing on the

which requires that 'a practitioner's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty...'; Rule 32(2)(b) 'if the practitioner is aware of any persuasive authority that the practitioner reasonably believes might be against the client's case, inform the court of that authority'; Rule 39 (1) 'A practitioner must not suggest to or advise a witness that the witness should give false evidence', (2) 'A practitioner must not make a suggestion to, or condone a suggestion being made to, a prospective witness about the content of evidence which the witness should give at any stage of the proceedings'; and Rule 40 which prohibits practitioners from conferring with two witnesses together if such a conference may affect the witnesses' testimony.

⁶ Family Court of Australia, *The Changing Face of the Expert Witness* (2002).

⁷ Family Court of Australia, n 6, p 2.

⁸ Dixon O, "Concerning Judicial Method" in Woinarski S, (ed), *Jesting Pilate and Other Papers and Addresses by the Rt Honourable Sir Owen Dixon* (2nd ed, Lawbook Co, Sydney, 1997).

⁹ Preston B, "The Art of Judging Environmental Disputes" (2008) 12 S Cross U Law Rev p 108.

basis of precedents¹⁰ (the judgement in a past case should apply to the current case because the cases are similar in specified respects).

When opinion evidence is presented, the Courts require that it be based on sound claims to fact. But although relying on experts' claims to fact is important, it may not be enough. In the epistemological approach dominant in the Western world, to make a claim that a statement is true involves the interrelationship of three elements: belief, truth and justification. While each of the three conditions is necessary and together give knowledge a normative dimension,¹¹ justification has become the major focus in science and the courts. We commit 'epistemic irresponsibility'¹² if we assert knowledge without adequate justification. Joseph Sanders argues that

behavior that is irresponsible in this way is unethical when it occurs within settings where individuals hold themselves...out as having knowledge upon which others rely. It is unethical for expert witnesses to hold or express unjustified beliefs.¹³

Justification has become the major focus for evaluating knowledge claims, but how are the courts to know how well-justified a claim is? Two American precedents are instructive here, the 1923 case *Frye vs United States* (293 F. 1013, 1014 [DC Cir, 1923]) and the 1993 case *Daubert vs Merrell Dow Pharmaceuticals Inc* (509 US 579 [1993]). *Frye* basically 'passes the buck' back to the expert field and accepts the standards – the intellectual rigour – the expert field imposes on itself.¹⁴ *Daubert* moves beyond the requirement for experts to apply the same rigour for the courts that they would apply in other areas of their professional lives and asks in addition whether the expert evidence is itself based on a sufficiently rigorous foundation. For David Faigman,

... The whole point of *Daubert* was to require courts to assess the fields themselves and not defer to the guilds that bring their so-called expertise to the courtrooms.¹⁵

If courts rely on professional associations to determine the basis on which the quality of expert evidence is to be judged, they are likely to run into two sorts of problems: if the expert's discipline sets a low bar for justification then the standards may be too low for legal purposes; and if the professional standards of a discipline are too stringent then experts may be prevented from reaching the sorts of opinions as to facts that should be used in civil trials.¹⁶

The courts need, in effect, to establish a 'Goldilocks' zone where the level of justification is 'just right'. How the courts can do so is problematic, but they at least need to recognise that there are

¹⁰ Preston, n 9

¹¹ Sanders J, "Expert Witness Ethics" (2007) *Fordham Law Rev*, 76(3) 1543.

¹² Williams M, "Problems of Knowledge: a Critical Introduction to Epistemology" (2001) 16-19 in Sanders, n 11, p 1541.

¹³ Sanders, n 11, p 1542.

¹⁴ Sanders, n 11, p 1546 n 29.

¹⁵ Sanders, n 11, p 1547, citing Faigman D L, "The Law's Scientific Revolution: Reflections and Ruminations on the Law's Use of Experts in Year Seven of the Revolution" (2000) *57 Wash. & Lee Law Rev* pp 661, 667.

¹⁶ Sanders, n 11, p 1547.

limits to what can legitimately be asked of experts and the logic on which their assertions are based. For example, science may be able to establish an empirical fact, but encounters logical problems with what can be done with those facts because there are problems with any use of inductive logic – the process used to take us from singular facts to theories. As Karl Popper observed:

no matter how many instances of white swans we may have observed, this does not justify the conclusion that *all* swans are white.¹⁷

An expert called to provide evidence may be able to demonstrate that sand particles or seed pods were found with a deceased person and may be able to show that the sand or seeds share significant characteristics with sand and seeds collected at the deceased's house, but is likely *never* to be able to say with certainty, based on the presence of the sand and seeds in the deceased's clothing, that the deceased was at her home when she died. It is not within the *ability* of science to make a claim of certainty on the basis of such evidence. An expert witness simply cannot attest to being certain about a theory based on singular facts, and to ask a witness to do so is asking him or her to defy logic. Counsel is likely, under our system, to push an expert to confirm that *he cannot be certain* that the presence of X or Y means that event Q happened at place P – as was done in the murder trial of Perth barrister Lloyd Rayney (*The State of Western Australia v Rayney* [No 3] [2012] WASC 404 (INS 83 of 2011)).¹⁸ Counsel has simply asked the expert to confirm a truth of inductive logic – that no series of observations can generate a theory we can assert with perfect certainty – but in so doing has introduced an imputation that the evidence is somehow flawed.¹⁹ This may point to a mismatch between the requirements of the law and the capacity of science, but there is an ethical issue when counsel introduce such an imputation knowing that science *cannot* deliver certainty of the type requested.

In addition to any problems with relying on theories based on a series of singular facts, there are further problems with claims to knowledge based in experience. For the American logician Willard Quine modern empiricism has been conditioned by two false dogmas: The first is 'a belief in some fundamental cleavage between truths which are *analytic*, or grounded in meanings independently of

¹⁷ Popper K, *The Logic of Scientific Discovery* (Routledge, London, 1992) p 27.

¹⁸ See, for example, Jones C and Emery K, "Scientist Is Quizzed on Forensics" in *The West Australian* (Perth), 14 August 2012. The lead paragraph states "A scientist called by prosecutors in Lloyd Rayney's trial for wilful murder agreed yesterday that he could not say with certainty that sand particles found in a seed pod on Corryn Rayney's body had come from the couple's Como home or that her boots were dragged across the front yard."

¹⁹ We are left with an opinion based on the balance of probabilities. But there is a problem with the appeal to probability too, as Popper shows. 'If a certain degree of probability is to be assigned to statements based on inductive inference, then this will have to be justified by invoking a new principle of induction, appropriately modified. And this new principle in its turn will have to be justified, and so on.' Popper, n 17, p 30.

matters of fact, and truths which are *synthetic*, or grounded in fact'.²⁰ The second false dogma, the dogma of reductionism, is relevant here. That dogma comes down to 'the belief that each meaningful statement is equivalent to some logical construct upon terms which refer to immediate experience'.²¹ If Quine is right, and his argument is widely acclaimed, then a process that relies heavily, if not completely, on claims based in immediate experience may well be flawed. We should recognise that science and its methods are valuable, but should not ask of science what it cannot deliver. We must beware to rely on good science, but also be aware that even the best science may not generate complete certainty.

We, as a society, need also to understand that science has been taken up as an ideological force akin to a religion, where the claims of science are taken as necessarily true and unimpeachable – and, more worryingly, that science is the only correct way of knowing. There are many ways of knowing, but a legal system that ties itself too closely to truth claims based in experience will fail to see this. Traditional knowledge in indigenous communities, for example, will likely fail the objectivity test of science, but still have a valid claim to be considered knowledge. And the same may be said of the beliefs within many other cultures and communities.

There is also the problem of what we are *able to do* with scientific evidence once we have it. Science is frequently appealed to as an arbiter, but no matter how good the science is we are always faced with what has become known as Hume's law:²² the view – hotly contested, but still live – that it is impossible to derive an 'ought' from an 'is'. In other words, there is no logical bridge over the gap between fact and value. For Hume, moral distinctions are not derived from reason, but from some moral sense. This leaves science able to make a claim about what *is* – that is, to assert a fact – but unable to tell us what we *ought* to do with any fact.

It is important to keep an open mind about the sorts of claims science can make, how science makes those claims and what we should do with the claims. We need also to be aware that science can be misused. The lack of certainty inherent in inductive claims – general propositions that are derived from specific examples – may be used disingenuously to assert that one set of claims may well be as sound as another. This is a trap because there is no necessary equivalence between the claims of poor science and those of methodologically sound science. We *can* legitimately say that one set of claims is stronger, has a greater claim to be true, than others. We are not bound to accept the equivalence of claims, indeed, we must not be so bound. The issue of climate science is one instance where, to our collective detriment, views opposing the idea of anthropogenic climate change are

²⁰ Quine W, "Two Dogmas of Empiricism" in Quine W, *From a Logical Point of View* (Harvard University Press, Cambridge, Mass, 1980) p 20.

²¹ Quine, n 20.

²² Hume D, *A Treatise of Human Nature* (1739) Selby-Bigge L (ed) (2nd ed, Clarendon Press, 1978). Book III, Part 1, sections i, ii.

introduced in a way that asserts that they have equal validity to the vast amount of science that shows humans have influenced the climate of the planet, and continue to do so. And when climate change skeptics assert that human-caused climate change is an unproven claim they exploit, and misrepresent, one of Popper's key propositions about science – that the theories generated by scientists cannot be proven true, they may only be falsified.

Bad science can emerge as well as good, and it is possible for any party to use bad science in the service of a client. For example, the tobacco industry has, for 40 years, 'exploited the margins of science' and 'used scientists to conduct studies for it establishing the *absence* of a link between cancer and the use of tobacco.'²³ Bad science may take many forms and knowing what is good and bad is difficult for non-specialists, which is why courts may need to rely on experts. But experts – despite a requirement to 'provide independent assistance to the court by way of objective unbiased opinion in relations to matters within [their] expertise'²⁴ – may mislead the court: for example, by relying on science that has not been adequately tested; by emphasising some elements of research findings and excluding or de-emphasising others; or through misrepresentation. And despite requirements to serve the court²⁵ and not one or other of the parties, expert witnesses will feel significant pressure to take on an advocacy role rather than a disinterested educative role. I will look at that pressure shortly.

If experts mislead the court – whether intentionally, unintentionally, by omission, by emphasis or other means – it is not just the case at hand that may feel the effects. It is possible for 'a particular form of scientific testimony [to] gain legal acceptance without ever undergoing independent rigorous scientific or legal scrutiny.'²⁶ And the (untested) claims made in such testimony may find their way into other cases through precedent.

COSTS OF EXPERT EVIDENCE

In addition to the already-mentioned problems for courts in hearing expert evidence, there are significant costs associated with the use of experts. This is an ethical issue for the courts as unfettered use of experts may extend proceedings unreasonably and give wealthier parties a distinct advantage.²⁷ Costs may be more than financial. Selective use of expert testimony can skew cases and

²³ Sales B, "Institutional Constraints On The Ethics Of Expert Testimony" (1993) *Ethics & Behavior*, 3 (3-4), p 231. Sales cites Freedman A and Cohen L, "Smoke And Mirrors: How Cigarette Makers Keep Health Question 'Open' Year After Year", *Wall Street Journal* (New York, 11 February 1993) p A60.

²⁴ *The Ikarian Reefer* (1993) QB (Comm Ct) 2 Lloyd's Rep. 68.

²⁵ *Guide for experts giving evidence in the State Administrative Tribunal* (2012) http://www.sat.justice.wa.gov.au/files/Expert_Evidence_Brochure.pdf accessed April 2013.

²⁶ Sales, n 23, p 232. One of the examples Sales gives is the so-called 'battered woman' defence to murder.

²⁷ The Family Court of Australia notes that "uncontrolled use of expert witnesses is costly" and can add to the length of a trial. It further notes that the financial costs of employing experts provides a strategic advantage to

lead to judgments that are less than just. There may also be costs to the judicial system itself when ordinary people feel they have been 'done over' by the expert evidence of opposing parties and lose trust in the legal system. This cost to the legal system itself can best be understood through the notions of role morality, moral distance and narrowed moral universe.

Most expert witnesses are likely to be professionals of one sort or another: medical doctors; engineers; planners; social workers and so on. To be a professional is to take on a social role, but professions, in the main, also operate from what might be called a role-morality which involves both moral distance²⁸ from the concerns of ordinary or private morality and a significantly narrowed moral universe that, in some respects, is easy to inhabit because it is less complicated and less ambiguous than the moral world of ordinary daily life.²⁹

One aspect of the role morality is that built in to the very role of a professional is the need to 'prefer in a variety of ways the interests of the client or patient over those of individuals generally'.³⁰ Each professional who comes to a court as an expert witness brings his or her own professional morality and a strong inclination – some might say obligation – to prefer the interests of clients over others. But expert witnesses also enter the environment of lawyers where representing a client in a preferential way is a duty that comes with their profession. That preferential treatment of the client in an adversarial legal system can tend to make the lawyer appear amoral or even immoral when dealing with others. And the narrowed moral universe and role morality of lawyers is not always obvious to them: they have become accustomed to the normalised practices of a normal working day and become used to what they do. In the words of G.K. Chesterton

...they do not see the prisoner in the dock; all they see is the usual man in the usual place. They do not see the awful court of judgment; they only see their own workshop.³¹

Privileging a role-based responsibility can put lawyers into the position of being regarded by the public as, in effect, 'amoral technicians.'³² When these 'amoral technicians' bring expert witnesses to aid their client's case the witnesses are mere instruments of the case and in simply doing what they are meant to do, lawyers will inevitably put pressure on their experts to adopt the normalised practices of the law. As professionals already pre-disposed to prefer the interests of the client over others, little pressure is likely to be needed for an expert witness to move from independent to partisan evidence. They already have an interest in presenting evidence that suits the contracting

wealthier parties, without necessarily serving the interests of justice. Family Court of Australia, "The Changing Face of the Expert Witness" (Discussion paper) (Family Court of Australia, 2002) p 8.

²⁸ Postema G, "Moral Responsibility in Professional Ethics" (1980) 55 *New York University LR* 63 in Luban D (ed), *The Ethics of Lawyers* (Dartmouth, 1994).

²⁹ Wasserstrom R, "Lawyers As Professionals: Some Moral Issues" in Luban D, n 28.

³⁰ Wasserstrom, n 29, p 7.

³¹ Chesterton GK, "The Twelve Men" in Postema G, n 30, p 69n.

³² Wasserstrom, n 29, pp 7-10.

party's case: do a good job and solicitors are likely to seek you out for more work. A good job is most likely to be construed as doing or saying that which is likely to help the case succeed.

ETHICS OF WITNESSES

What counts as an expert and how should they and their legal teams behave?

The Family Court of Australia discussion paper noted earlier³³ identifies three types of expert witness: an expert witness who is called by one of the parties and who provides their evidence for the benefit of the party calling them; a single expert appointed by and instructed by both parties; and a court-appointed expert. The Planning and Environment Court in Queensland has another way to use experts: where experts are brought together before being briefed by their respective counsel. The State Administrative Tribunal in Western Australia recently instituted chaired conferrals of expert witnesses (through a change to standard order 47). And the Supreme Court Rules and the Civil Procedure Rules³⁴ tell us also that as well as being engaged to give evidence on behalf of a party, experts may also be engaged as advisors to the court. Experts as advisors are not involved in the litigation and their identity need not be revealed to the other parties or to the court. The Civil Procedure Rules give the court control over the use of expert evidence and the court must give its permission for expert evidence to be called.³⁵

It is most common in our adversarial legal system for each party to employ its own experts. And whilst it is at the court's discretion that a witness can be considered an expert, and thus be able to present opinion evidence, it is part of the duties of legal counsel to prepare the witness for the court. This is an area of considerable importance for the ethics of expert evidence.

As science and technology become more complex, the role of expert witnesses has become increasingly important and across the common law jurisdictions 'the selection and preparation of the expert witness has been and will prove to be at the cornerstone of much successful litigation'.³⁶ However, as Sydney barrister Hugh Stowe notes, preparation of expert witnesses creates an ethical tension that goes to the heart of the legal culture in jurisdictions such as Australia. 'Witness preparation,' he says, 'is both an essential tool for the elucidation of truth in an adversarial system,

³³ Family Court, n 27.

³⁴ Supreme Court (Australia) Rules Part 36, r13C(1), Civil Procedure Rules Part 35, r35.2.

³⁵ The same applies in the United States where Rule 104 of the Federal Rules of Evidence (1974) states that the court decides whether someone can be admitted as an expert. The US Federal Rules of Evidence also give guidance on experts at Rule 702, which says that

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

³⁶ Bogorich R and Goldstein L, "Reflections On The Role Of The Expert Witness" (Bogorich and Associates, 2003). <http://www.bogoroch.com/media/pdf/expert-witness.pdf>. Accessed August 2012.

but also a possible tool of truth's distortion.³⁷ Despite the clear injunctions in Australian jurisdictions that the expert is there to serve the court, and that practitioners have a paramount duty to the court and the administration of justice, there remains dramatic divergence in the way practitioners regard and respond to the need to prepare expert witnesses.

Preparing witnesses is an important part of the ethical duty of solicitors who: need to ensure that the opinion is expressed in a way that can be admitted into evidence; need to test the soundness of the reasoning on which the opinion is based; and need to help witnesses be able to articulate their evidence in a way that can support a case.³⁸ There are also specific ethical duties for barristers covering how they should deal with witnesses. In Western Australia, where I am writing this, a number of relevant duties are expressed in the Western Australian Bar Association's Conduct Rules,³⁹ under Integrity of Evidence (Rules 43-49). Rule 48 is noteworthy in that it covers the commonly-held notion that there is no property in a witness.⁴⁰ That there is no property in a witness implies that counsel may confer with any witness willing to do so – including expert witnesses. But these duties of barristers do not prevent adversarial bias: a bias based in the fact that the expert is giving evidence for one party, a party that has chosen the expert and that will be invoiced for the expert's services. This bias may arise from: selection bias, selecting an expert whose known views suit the contracting party's case; deliberate partisanship or; unconscious partisanship.

While it is the case that under Australian advocacy rules counsel are not allowed to *suggest* the content of evidence, or coach or encourage the witness to give evidence different from the evidence that he or she believes to be true, the questions they ask and the way they are asked will necessarily slant evidence. Solicitors may even feel that they are justified in preparing a witness at the limit of ethical acceptability (or beyond) if they know they are likely to face especially skilled opposition and brutal cross-examination. That preparation may even, properly, include helping experts write their

³⁷ Stowe H, "Preparing Expert Witnesses: A Search For Ethical Boundaries" 72 (May) Law Society Journal (2007) pp 71-78.

³⁸ Stowe, n 37, p 73.

³⁹ Western Australian Bar Association. Conduct Rules (2006)

http://www.wabar.asn.au/images/WABA_Conduct_%20Rules_as_at_15_Feb_2006.pdf. The duties can be characterised as negative duties in which the following are to be avoided: conferring with witnesses together; coaching witnesses; intimidating or coercing witnesses; asserting property in a witness or; communicating with a witness during cross examination.

⁴⁰ *Harmony Shipping Co SA v Saudi Europe Line Ltd* [1979] 1 WLR 1380, 1386, 1387; *Wimmera Industrial Metals Pty Ltd v Iluka Midwest Ltd* [2002] FCA 653, [46]. For these cases and the relation of Rule 48 to expert witnesses I am indebted to Steytler C D, "Prescriptive and Proscriptive Duties of a Barrister" (Speech delivered at the Western Australian Bar Association CPD weekend, Western Australia, 31 Oct. 2009).

[http://www.wabar.asn.au/images/Prescriptive%20and%20Proscriptive%20Duties%20of%20a%20Barrister%20\(The%20Hon%20Christopher%20Steytler%20QC\)%203.pdf](http://www.wabar.asn.au/images/Prescriptive%20and%20Proscriptive%20Duties%20of%20a%20Barrister%20(The%20Hon%20Christopher%20Steytler%20QC)%203.pdf).

reports at least so that their evidence addresses the legal tests of admissibility.⁴¹ However, as Stowe notes, ‘the ethical and legal limits to the role of lawyers in drafting expert reports are very controversial’ and it has become common practice in some jurisdictions ‘for lawyers to be involved in the actual drafting, either during or following a conference with the expert.’⁴² Some sort of template for appropriate help in drafting reports is needed⁴³ because the more that lawyers are thought to be involved in the preparation of a report the less likely it is that experts will be thought to be independent and impartial and the less weight a court is likely to give to the experts’ evidence.

However, we should not be surprised that experts are prepared, even coached, by counsel. As Justice Sperling noted

the actual role of the expert witness, particularly in major litigations, is that the expert is part of the team. He...contributes to the way the case is framed and indirectly to decisions as to what evidence is to be got in to provide a basis for his opinion. His report is honed in consultation with counsel. Then, when it comes to the trial, he is a front line soldier, carrying his side’s argument on the technical issues under the fire of cross-examination. Natural selection ensures that expert witnesses will serve the interests of their clients in this way.⁴⁴

Most Australian judges encounter evidence that is not in a comprehensible form, so preparing witnesses is necessary, in particular preparing experts so that they may present evidence in a way that the court may readily understand. However, preparing witnesses and assisting them to present the team’s message can damage justice. How can that damage be limited?

ENSURING TRUSTWORTHINESS

It may seem that the best approach to limiting the damage done by improper preparation of a witness is to tighten the rules covering conduct. However, such a strategy may stumble over what noted British philosopher Onora O’Neill calls the paradox of trust.⁴⁵ Trust is central to the whole question of the ethics of expert evidence, but it is unlike other ethical concepts because it is more basic than a principle or value and should be seen more properly as part of the necessary ground on which a society rests and on which a profession depends.⁴⁶ Trust is glue that helps hold a society together.

⁴¹ Stowe n 37, p 75, citing *Harrington-Smith v Western Australia* (No 7) [2003] FCA 893.

⁴² Stowe, n 37, p 75.

⁴³ Stowe, n 37, p 75.

⁴⁴ Sperling, n 3.

⁴⁵ O’Neill O, *Autonomy and Trust in Bioethics* (Cambridge University Press, 2002).

⁴⁶ Millett S, “Trust, Responsibility And Being Professional”(Paper presented at the 2nd International Conference on Engineering Professional Ethics and Education, Kuala Lumpur, 17-19 May 2011).

A useful view of trust is 'to say "A trusts B" means that A expects B will not exploit a vulnerability A has created for himself by taking the action.'⁴⁷ Those who trust take a risk. We can seldom be certain that this or that person is trustworthy and we must take a risk that they are, in fact, trustworthy.

Trust is the basis of fiduciary relationships both moral and legal. And fiduciary relationships underpin professional obligations. Yet these very relationships can also undermine justice as the fiduciary obligation to act in the interests of the client may well impede an expert from making a truly independent statement to the court because, while the various codes of conduct for witnesses require that an expert provide unbiased assistance to the court, the reality is that he or she is usually paid by one of the parties and will feel an obligation to the party paying the bill – not least because there may be future work as an expert witness at stake.

Trust is something that all involved cannot do without and *trustworthiness* is a characteristic that should apply equally to the lawyers and the experts in cases where expert evidence is called.⁴⁸ It may seem that to strengthen trust we should simply legislate for such things as compliance or create enforceable codes designed to ensure it. But any attempts to legislate or codify for trust come up against a paradox in which the more formal effort is put into ensuring trust – efforts such as compliance audits, codes of ethics and the like – the less likely is it that trust will be enhanced as 'increased demands for trustworthiness and stronger regulation of professionals... have lead (sic) not to a restoration of trust but to claims of escalating mistrust'.⁴⁹ In effect, members of the public will ask: if members of that profession are trustworthy, why does the profession need legislation or rules which, if broken, will likely lead to punishment? The paradox is coupled with a dilemma: don't legislate or create tighter rules and there may be little to ensure that X can be trusted to act in certain ways; or do legislate and undermine the community's perception of X's inherent trustworthiness. Despite the paradox and the dilemma, trust remains a sort of social glue. And while all those in a society have an obligation to be trustworthy, professionals have a greater obligation to do so than others.

⁴⁷ James H Jr, "The Trust Paradox: A Survey Of Economic Inquiries Into The Nature Of Trust And Trustworthiness" (2001) <http://129.3.20.41/eps/mic/papers/0202/0202001.pdf>.

⁴⁸ In interviews conducted by Perth legal academic Robin Tapper, one respondent said that trust is "a basic and perhaps the most important quality of a good lawyer The judge must be able to trust the lawyer to be honest. The fairness of process is basic, and the ability to trust is basic to the fairness of process. Some lawyers take so partisan a stance for their clients that you can't trust them to be fair in terms of the process. Trust is a part of peacekeeping. Parties lose trust if the process is unfair." Tapper R, "The Peacemaking Virtues Of Good Lawyers In The Adversarial Process" (Paper presented at the Third International Conference on Therapeutic Jurisprudence, Perth, June 2006).

⁴⁹ O'Neill, n 45, p 144

CONCURRENT EVIDENCE

In the Civil Procedure Rules expert evidence must, where possible, be in written form. Despite this, damage to testimony and to the witness may still occur through cross-examination. This is particularly acute in jurisdictions that have not brought in strategies to mitigate such problems. One of the significant methods by which the problems of using experts can be mitigated is the use of concurrent evidence. In Australia the practice of giving concurrent evidence was brought into the mainstream in 2003, principally by Justice Peter McClellan who introduced it into the New South Wales Land and Environment Court and then when he moved to the Supreme Court of New South Wales introduced the practice there in 2006.⁵⁰ Concurrent evidence is now most widely used in the State Administrative Tribunal⁵¹ where the guidelines are based specifically on the expert witness practice directions of the New South Wales Land and Environment Court.⁵²

The SAT has adopted an expert evidence model with four main elements that: spell out expert witnesses' obligations to the Tribunal; require written statements of expert evidence; require experts to confer and present joint statements; and require experts to give evidence concurrently at the final hearing.⁵³

The SAT's guide advises experts that they have

'an overriding duty to assist the Tribunal impartially on matters relevant to the expert's area of expertise' that they have a 'paramount obligation ... to the Tribunal and not to the party engaging the expert'; [and that] 'an expert witness is not an advocate for a party'.⁵⁴

SAT deputy president Judge David Parry notes that 'one of the benefits of concurrent expert evidence is that it provides expert witnesses with a considerably more comfortable and professional experience than the traditional method of taking expert evidence' in which there is a 'forensic battle with counsel'.⁵⁵ However, concurrent evidence does not prevent partisanship and intransigence and the joint submissions prepared in conference will still likely contain areas of disagreement. The presentation of concurrent evidence does not create a consensus document and nor does it preclude experts being pressured by their own side or from being fiercely cross-examined by the other side – where each expert will need to be alert to the bias that may be implicit in questions put by counsel. More experienced witnesses will develop strategies to sidestep biased questions but

⁵⁰ Parry D, "Concurrent Expert Evidence" (*Brief*, August 2010) pp 8-12.

⁵¹ <http://www.sat.justice.wa.gov.au/> (accessed August 2012)

⁵² State Administrative Tribunal, n 25.

⁵³ Parry, n 50, p 9. The SAT standard order 46 allows for unchaired conferral of witnesses; standard order 47 was revised in December 2012 to allow for chaired conferral of expert witnesses. Both chaired and unchaired conferrals are in the absence of the parties and their representatives. State Administrative Tribunal <http://www.sat.justice.wa.gov.au/apps/News/detail.aspx?uid=7826-5889-3859-2167&id=972> accessed 29 April 2013.

⁵⁴ State Administrative Tribunal, n 25, p 10.

⁵⁵ Parry, n 50, p 9.

doing so may aid partisanship more than avoid it. Expert witnesses will likely perceive that they have a fiduciary obligation to the party who pays them and will likely continue to put a case that is at least minimally partisan.

CODES

We may think that professionals can be trusted, in part, because they have professional codes. But relying on professional codes faces a problem similar to relying on professionals employing the same intellectual rigour in court as they would in their daily professional lives. If we adapt the test spelled out in *Frye vs. United States* we might see that even if a professional were to follow the ‘same ethical rigour’ as required by a professional code it may not be enough because some of the professional codes tend to be ‘vague and broad and do little to enforce ethical conduct by experts’.⁵⁶ There is too much moral ‘wriggle room’ in that the professional may justify certain behaviours in court as being consistent with the code. Relying on extant professional ethics codes may not be enough.

If we adapt *Daubert vs Merrell Dow Pharmaceuticals*, we might argue that the courts should *not* defer to the ethical codes of professional associations. British, Australian, Canadian and some other jurisdictions, have been able to achieve this by adopting or adapting the principles of expert evidence established by Mr Justice Cresswell in the 1993 UK shipping case *The Ikarian Reefer*.⁵⁷

Codes of conduct for expert witnesses have been created and implemented in a number of Australian jurisdictions and by a number of bodies. These include the New South Wales Supreme Court Rules, part 39; New South Wales Uniform Civil Procedure Rules⁵⁸; Federal Court Practice Direction; the Family Court of Australia; the Western Australian State Administrative Tribunal; and the District Court of Western Australia⁵⁹. These are based predominantly on the principles established in *The Ikarian Reefer*. These principles can be summarised as:

1. Expert evidence should be the independent product of the expert, uninfluenced by the needs of the litigation
2. The expert witness should provide independent assistance to the court by way of objective unbiased opinion
3. An expert should state the facts or assumption on which his opinion is based
4. An expert witness should make it clear when a question or issue is outside his expertise
5. If an expert opinion is not properly researched because he considers insufficient data is available then this must be stated with an indication that his opinion is provisional

⁵⁶ Murphy JP, “Expert Witnesses At Trial: Where Are The Ethics?” (2000) 14 217 Georgetown Journal of Legal Ethics p 218.

⁵⁷ *The Ikarian Reefer*, n 24 .

⁵⁸ New South Wales Uniform Civil Procedure Rules (2005) Schedule 7.

⁵⁹ District Court of Western Australia, Consolidated Practice Direction – Civil Jurisdiction (2005, revised 2007) Annexure C.

6. If for any reason an expert changes his view on a material matter this should be communicated to the court and all parties without delay
7. Where expert evidence refers to photographs, plans, calculations, survey reports or other similar documents these must be provided to the opposite party at the time reports are exchanged.⁶⁰

The *Ikarian Reefer* guidelines do not remove the problems,⁶¹ but they are a good start.

VIRTUOUS LAWYERS

Attempts to mitigate harms generated by an adversarial system are important, but there needs also to be some effort taken to undertake what William May considers ‘the reshaping of the professional character and virtue’⁶² of lawyers, starting with reconsidering the extent to which a lawyer is to be a partisan for the client and the extent to which ‘zeal’ for the client should be replaced with something like ‘diligence’. It needs also to address deepening the Aristotelian virtue of ‘practical wisdom’, or *phronesis*.

Phronesis, sometimes called the queen of virtues, is the amalgamation of skills or technical know-how, and the intellectual and moral virtues. A virtuous lawyer would bring together: the skills of communication, active listening and persuasiveness; the intellectual virtues of professional competence, professional judgment and a sense of balance and; the moral virtues of honesty, integrity, respect for people, trustworthiness, diligence and so on.

Exercising practical wisdom needs also to be coupled with sympathy, but sympathy understood in a particular way. The concept of sympathy has a long history going back to at least the ancient Chinese philosopher Mencius. And for both David Hume and Adam Smith moral sentiments – in essence something we *feel* – are the foundation of human morality, and sympathy is a moral sentiment. A very useful contemporary understanding of sympathy that builds on the history of the concept is from Stephen Darwall for whom sympathy is:

a feeling or emotion that (a) responds to some apparent threat or obstacle to an individual's good or well-being, (b) has that individual himself as object, and (c) involves concern for him, and thus for his well-being, *for his sake*.⁶³

⁶⁰ Family Court, n 27, Appendix E.

⁶¹ Speaight A, “The Cresswell Principles Of Expert Evidence” in Factsheet 4 (Expert Support Services of the UK Register of Expert Witnesses, 2000). <http://www.pcn.org/ExpertWitness/FS04.pdf>. Accessed August 2012.

⁶² May W, *Beleaguered Rulers: The Public Obligation of the Professional* (John Knox, Westminster, 2001) p 75.

⁶³ Darwall S, “Empathy, Sympathy, Care” (1998) 89 *Philosophical Studies* pp 261, 262.

Darwall's approach involves an agent reaching out to understand the other's individual situation; and having concern for the other's wellbeing for the other's sake. Sympathy is felt from the perspective of 'one-caring': the key issue, though, is that concern is *for the other's sake*.

How this can operate in an environment where perceived fiduciary duty to a client dominates is an issue for the legal profession as a whole, but goes to the heart of the role-based morality that has the capacity to undermine the public's trust in the law and lawyers.

CONCLUDING REMARKS

It should be clear that the ethics of expert evidence encompasses the ethics of those giving evidence, those preparing the expert witness, those examining the witness, and those who must decide on the evidence. It should also be clear that the ethics of expert evidence is played out within a context in which, ultimately, the law holds the trump card.

The ethics of giving expert evidence are influenced by conflicting duties: duties to the court generally, and specifically as described in the various codes for witnesses; fiduciary duties to a client, duties the interplay of which determine whether a witness survives a process that Justice Sperling calls 'natural selection';⁶⁴ and a moral fiduciary duty on all parties to ensure that there continues to be public trust in the law.

The ethics of those who must work with the evidence (and opinion) will be influenced by many factors. But with respect to expert evidence there is an especially strong need for those involved to challenge the ideology that paints science as *the* arbiter of truth and fact, and the methodology of the science used in evidence, lest poor science or poor arguments using science be the basis of a decision both of the case at hand and of future cases through precedent.

Those preparing, examining and cross-examining a witness have competing fiduciary obligations: a generalised obligation of trust to the community at large; a fiduciary duty to their profession and the court; and a specialised fiduciary obligation to the client. The manner by which they negotiate these obligations of trust will, in part, be a demonstration of their moral virtue and that of their profession.

⁶⁴ Sperling, n 3.