The Methodology of Judging

J.P.O. Barry*

> Finding facts is not based on technique, or, indeed, upon precepts or principles of any kind; it is based on a judge's essentially personal and human qualities of judgment of character, temperament, and reliability, of wisdom, of sympathy and understanding, combined with hard work and concentrated thought — in short, on the faculties, qualities, skills, and experience, that make a juror a good juror....[1]

In this article I propose to discuss the basis upon which persons exercising judicial function determine the credibility of evidence. Are there any common criteria applied by judges? Are there universal tests? If so, where does one find such tests enunciated?

My research reveals no books and few articles on this subject. Although the task is similar to the function juries must daily carry out, there is the significant difference that traditionally juries do not have to give reasons whilst judges do.

Psychological tests and various empirical studies show that the population at large is not very good at detecting deception when it occurs. There is no reason to suppose that without particular training, judges would score any better. How many times has the reader been deceived by the apparently evil but actually good character in television dramas, films or books? For my own part, I would be somewhat mistrusting of any person who asserts that he or she can determine whether a witness is telling the truth or otherwise simply by observation. The reality is that the witness box is generally a far better forum for the con-man (used in its generic sense) or the actor than for the honest citizen forced into the litigation arena.

Society, generally speaking, accepts the decisions of its judges but in many instances the reasons why judges are making findings on questions of credibility are not revealed. Judges should, and most commonly do, give reasons for their determination, but many judgments do not

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* Judge of the Family Court of Australia.

1 Wells J, Supreme Court of South Australia, 'The Finding of Facts', 1983 Canberra Judicial Conference.

explore at any great length the reasons why the judge has accepted or rejected certain material facts.

Where is the difference between a magistrate holding, without further explanation,

> I accept the evidence of the police officer and reject the evidence of the accused wherever there is conflict.

and a judge reciting the evidence at length, recording the fact that he or she has had the opportunity to observe the demeanour of the various witnesses and solemnly finding that he or she accepts the evidence of the police officer and rejects the evidence of the defendant?

The difficulties confronting judges were eloquently expressed by Mr Justice MacKenna in a paper he delivered at University College Dublin in 1973.[2]

> I question whether the respect given to findings of fact based on the demeanour of the witness is always deserved. I doubt my own ability and sometimes that of other Judges to discern from a witness' demeanour or the tone of his voice whether he is telling the truth. He speaks hesitantly. Is that the mark of a cautious man, whose statements are for that reason to be respected, or is he taking time to fabricate? Is the emphatic witness putting on an act to deceive me, or is he speaking from the fullness of his heart, knowing that he is right? Is he likely to be more truthful if he looks me straight in the face than if he casts his eyes on the ground perhaps from shyness or a natural timidity? For my part I rely on these considerations as little as I can help.

If a judge is capable of and willing to describe what mental processes he goes through in determining credibility, it will not be surprising if he or she finds it difficult to find words that embody the descriptions accurately. One would have to resort to platitudes, truisms and clichés and be no further forward. I have never read a judgment where the judge has made observations such as, 'I detected beads of perspiration on the plaintiff's brow', although occasionally judges will give a general description of a witness's evasive demeanour, but this normally reflects the unwillingness of the witness to answer questions being directly put to him.

An analysis of history gives us no comfort as to what we are about. In the Middle Ages, judges presided over trial by ordeal — a process whereby the guilt or innocence of a party was ascertained largely by the ability to withstand pain. If the accused could walk around for a few minutes holding a red-hot ingot of metal in his hands, he was presumed innocent of the charge in which event his accuser was punished, the charge having been proved 'false'. Another method of judicial determination, common to the time, was trial by combat. This initially involved a clash between

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[2] MacKenna J in a paper read at University College, Dublin, 21 February 1973, printed in the *Irish Jurist*, Vol. IX, New Series, p. 1 adopted by Lord Devlin in his book, *The Judge*.

the person making the allegation and the accused. In later years, the respective participants were able to delegate this function of combat to hired help. There were other quaint methods of adjudication in medieval law; one such law declared that if two persons fell under suspicion of crime, the uglier or more deformed was to be regarded as more probably guilty.

It is estimated[3] that between the Renaissance and the Reformation about 500,000 witches were burned to death in Europe. Almost all of these executions were carried out as a result of orders made by courts, principally Ecclesiastical Courts. At the time the practice first started, wheat was inexplicably rotting in the fields; sheep were dying of unknown causes; vineyards were smitten with unseasonable frost. In 1486, in a publication *Mallets Maleficarum* ('the Hammer of the Witches'), Heinrich Instihtor and Jacob Sprenger developed persuasive arguments to convince the population that witches did exist and were responsible for the harm being suffered by society. It was over 200 years later before the rules of evidence were changed to require corroboration of the allegations of witchcraft, and torture was not permitted in order to extract confessions. With the implementation of such basic reform, the rate of convictions for witchcraft rapidly diminished.[4]

These practices, bizarre and irrational though they now appear, were in no sense isolated instances. The above legal procedures were firmly entrenched for centuries throughout the length and breadth of Europe. We are discussing a perfectly valid system of law which extended from England to Italy from the Baltic to the Mediterranean. It was in operation until well into the 17th century. The practice spread to the New World. The Salem witch trials were heard by the Supreme Court of Massachusetts in 1692. Trial by combat was not formally abolished in England until 1819.

In the 19th and 20th centuries, our legal system has made significant advances in rationalising the decision-making process. Most judges have had cases where the evidence of a single witness has been accepted in preference to the evidence of a number of other witnesses asserting contrary facts. There is an old maxim in law, 'one credible witness outweighs any number of other witnesses'[5] — but is this always so and if so, how does one identify the credible witness?

In examining this area of adjudication, I am only too conscious of the comments made by Wells J in the paper previously referred to.[6]

> On the whole, Judges as a race are disinclined to reveal, a fortiori, to discuss, the whole range of principal and subsidiary methods used when undertaking

[3] W.C. Clark, *Witches Floods and Wonder Drugs* (Luxemburg, Austria: International Institute for Applied Systems Analysis, 1981).

[4] For a more detailed account of these historical references, the reader is referred to Peter Huber, *Galileo's Revenge* (HarperCollins, 1991).

[5] *The Wega* [1895] P 156, 159.

[6] *Ibid.*

> that very important judicial process of finding facts. Indeed, it is no exaggeration to say that behind a barrier, which varies from judge to judge, we tend to be secretive about the process.... All such processes are very largely carried on behind an impervious screen, set up, I suspect, to protect our self-esteem against charges of illogicality, or naivety, or bias, or ignorance, or simply lack of worldly wisdom (which would be the most hurtful charge of all).

Paternity suits may serve as a good example. Fortunately for judges, DNA typing has now largely resolved the human factor in such decision making. Previously, a judge needed to be satisfied that there was some corroborative evidence of the mother's allegations. Blood tests could exclude a respondent from being the father, but only rarely did such a test amount to positive evidence to corroborate the mother's version of the facts.[7]

The degree of corroboration required became more liberalised over a period of time. The corroboration even extended to producing the child or photographs of the child in the hope of revealing striking similarity between the child and the father. Many times a judge would be faced with corroborative evidence to establish close association and opportunity for intercourse between the parties,[8] but essentially the decision rested on whether he or she accepted the mother's claim that sexual intercourse had taken place or whether the father's denial was accepted. If the judge was unable to say whom he or she believed, the applicant mother's claim failed as she bore the onus of proof. However, it was not normally open to appeal if a judge made findings that he or she accepted the applicant's evidence, provided the corroboration was considered 'adequate'.

The judge did not have to elaborate on such a finding by observing that the witness looked him or her straight in the eyes or that the respondent's lip quivered when he was making his denials on oath.

An interesting example of an Appeal Court intervening and overruling a primary judge's findings of fact in a paternity suit occurred in 1948 in the 'wrong baby' case,[9] but such interference has been rare.

THE NEED TO GIVE REASONS

In *Soulemezis v Dudley (Holding) Pty Ltd*,[10] the New South Wales Court of Appeal held (by a majority) that the duty of a Judicial Officer to provide reasons for his or her decision in respect of findings of fact from which no appeal lies is sufficiently satisfied by the giving of grounds for and not the detailed reasoning in support of his or her findings. The findings of the trial judge were in the following terms:

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7 *Hobson v. Hobson* (1942) 59 WN (NSW) 85.

8 cf. *Ex parte Frost* (1920) 20 SR (NSW) 382; *Ex parte Brown* (1932) 32 SR (NSW) 165.

9 *Morrison v Jenkins* (1949) 80 CLR 626.

10 (1987) 10 NSWLR 247.

> I am satisfied on the evidence that the applicant was totally incapacitated from 21 December 1982 to 17 January 1984 and fit for all work thereafter. I am satisfied that at the date of the CAT scan report the applicant was fit for all work.

At the heart of the appellant's argument was the suggestion that his Honour's judgment contained no more than an assertion of his conclusion without exposing adequately the reasoning process by which he reached that conclusion.

Kirby P, in his dissenting judgment, comments:[11]

> This decision [his dissenting judgment] does not require of trial judges tedious examination of detailed evidence or a minute explanation of every step in the reasoning process that leads to the judge's conclusion. But the judicial obligation to give reasons, and not to frustrate the legislative facility of appeal on questions of law, at least obliges a judge to state generally and briefly the grounds which have lead him or her to conclusions reached concerning disputed factual questions and to list the findings on the principal contested issues. Only if this is done can this Court discharge its functions, if an appeal is brought to it. Where nothing exists but an assertion of satisfaction on undifferentiated evidence the judicial obligation has not been discharged.

Mahoney JA, in a separate majority judgment, stated:[12]

> The weight which a judge will give to the evidence of a witness will often be not capable of rationalisation beyond the statement: having heard him, I am not satisfied that I should accept what he says. The weight which a judge gives to a particular fact may be affected by, as it has frequently been put, his experience and, in particular, his experience of the significance of that fact in the order of things.... In explaining the weight which he has given to a fact in a particular decision of fact, the judge is not, I think, required to detail why he sees, for example, the significance of a CAT scan, as being greater than, for example, the opinion of a particular treating doctor. His reasons, in the particular case, may partake as much of intuition based on experience as on formal and deductive reasoning.
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> That leads to, as I have described, the subjective element in the fact finding process. A fact is found in a particular case if the judge is satisfied that it is so.... I do not mean by this that decisions are, or are to be, made upon the basis of matters essentially idiosyncratic to the particular judge. The determination of facts is assumed to be objective. But it would be to misunderstand the basis of a decision, and in particular decisions in matters of assessment, weight and the like, to assume that decisions can always, or perhaps ordinarily, be justified by objective rather than subjective considerations. And, if such be true of the reasoning process, it is, in my opinion, a mistake to conclude that a judge should or can set forth the reasoning process he has followed from one fact to another.

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[11] *Id.* 259.
[12] *Id.* 273–4.

This decision relates to the giving of reasons for the ultimate issue the judge must decide. A judge is not required to give reasons in procedural applications,[13] though it is suggested that as a matter of courtesy and common sense a judge would normally give brief reasons for any ruling made during the course of the trial. The extent of such interlocutory rulings should not be underestimated. During the course of an average hearing, a judge is called upon to make 40 or 50 rulings. These can vary from the serious to the banal. They include objections to the admissibility of evidence, objections to the types of question being asked, whether witnesses may be interposed, whether pleadings should be struck out, or amendments to claims allowed.

Similarly, it is not necessary for a judge who is exercising a discretionary judgment to detail each factor which he or she has found to be relevant or irrelevant. It is not necessary to itemise, for example, in the assessment of damages for tort, each of the factual matters to which he or she has regard — nor is a judge required to make an explicit finding on each disputed piece of evidence. It will be sufficient if the inference as to what is found is appropriately clear.[14]

In *McCaskie v Trainer*[15] in 1993, the Full Court of the Family Court was confronted with a not dissimilar situation to that which arose in *Soulemezis'* case, in that it was claimed the trial judge had not sufficiently articulated the reasons for his decision. The facts were rather convoluted involving, as they did, lesbian relationships, artificial insemination and allegations of child sexual abuse. The Full Court held:

> Often in general and usually in custody and access cases it is impractical for a trial judge to give reasons for preferring one witness over another. Such reasons may be based on experience and intuition and be incapable of rationalisation beyond a statement to the effect that one witness' evidence is accepted whilst that of another is not.

ASSESSING FACTS

The matters which I raise in this part are essentially subjective though gleaned, in part, from discussions with other judges or from the reading of their judgments. MacKenna J, in the paper previously referred to, gives the following summary of his judicial method:

> This is how I go about the business of finding facts. I start from the undisputed facts which both sides accept. I add to them such other facts as seem very likely to be true, as, for example, those recorded in contemporary documents or spoken to by independent witnesses like the policeman giving evi-

[13] *Capital and Suburban Properties Ltd v Swycher* [1976] Ch 319, 325–6.
[14] Mahoney JA, *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 273–4.
[15] Full Court of Family Court of Australia, 1993, unreported.

> dence in a running down case about the marks on the road. I judge a witness to be unreliable if his evidence is, in any serious respect, inconsistent with these undisputed or indisputable facts, or of course if he contradicts himself on important points. I rely as little as possible on such deceptive matters as his demeanour. When I have done my best to separate the true from the false by these more or less objective tests, I say which story seems to be the more probable, the plaintiff's or the defendant's?[16]

Wells J, in his paper, commented in not dissimilar terms:

> One reaches conclusions about individual witnesses by considering them as persons and by drawing conclusions about them from the substance of their testimony.
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> I suppose the most subjective function a judge is called on to perform is to assess the personal worth of a witness; we must assess whether he is frank and honest, whether he can be relied on to report accurately and comprehensively what he has been asked to recall. It would not be possible short of writing a full scale thesis to examine all the various forms of expression or demeanour or circumstance which lead us to reach conclusions about the credibility of a witness. We each, I am sure, have our own highly personal reasons for accepting or rejecting a witness; all we can be sure of is that those reasons will vary from person to person, and from case to case. I have found somewhat to my surprise that it is only comparatively rarely that the credibility of a single witness determines the outcome of an entire case. So often the overwhelmingly clear structure of the facts taken as a whole will, disengaged from the testimony of the particular witness under evaluation, provide a setting in which the value of the witness' testimony may be readily fixed. It is for that reason it is so important by the preparation of a chronological table and a recapitulation of facts not in dispute to build a broad picture of the events or causes of conduct under inquiry so that every piece of evidence in the case can be reviewed in context and not in the void.[17]

THE PATTERN OF THE EVIDENCE TO EMERGE

Based on my own experiences, I would endorse the observation of Wells J that it is comparatively rare that the credibility of a single witness determines the outcome of an entire case.

I can recall years ago being called upon to determine the issue of property settlement between a married couple in Cairns. A considerable percentage of the parties' capital had been dissipated in the period immediately prior to separation. The husband blamed the wife for the missing funds, claiming that she had spent it all in her unproductive pottery business. The wife blamed the husband, suggesting that he had spent most nights either at expensive restaurants or brothels or both. For his part, the husband claimed that he had been working in his office late at nights. I

[16] *Ibid.*
[17] *Ibid.*

was quite at a loss to know which witness to believe. I was more inclined to accept the wife's version, but where the evidence was one on one, it was very difficult to be so confident of accepting the wife's account that I could reject the husband's evidence out of hand. Late in the cross-examination, the husband was shown a large bundle of automatic teller machine (ATM) slips. It had earlier been established in the course of cross-examination that the husband was the only person with access to this particular bank account. The ATM slips are not only date stamped, they are time stamped. All the slips showed withdrawals of cash in amounts of $100, $150 or $200 anywhere from 11 p.m. to 3 a.m. Here was positive confirmation of the wife's allegations, and the pattern of evidence became a lot clearer. To this day, I am uncertain what I would have found if the wife had not removed the ATM slips from the husband's suitcoat each morning and been able to produce them to the court as part of the evidence for me to consider.

It is quite extraordinary the extent to which litigants will exhaust themselves on disputed facts which have little relevance to the overall issue. In most instances, such disputes are found to be immaterial and may safely be left unresolved by the trial judge. A cautious judge would normally advert to the fact that he has found such issues irrelevant and has deliberately not attempted to resolve such conflict.

When assessing facts in a particular dispute, judges have a wide number of options open to them. A judge might find a witness honest and reliable, or honest and unreliable. The courts are full of witnesses whose memory, as time passes, becomes more and more certain and less and less accurate. A judge does not have to reject all of a witness's evidence simply because he or she rejects part of it. However, if a part of a witness's testimony is found to be at odds with other reliable evidence, it will cause a judge to scrutinise the remainder of such evidence with special care.

A judge may find the conflict in the evidence is insoluble, in which case he or she falls back on the legal maxim 'he who asserts must prove', together with a consideration of the relevant onus of proof.

A judge is not bound to act on evidence placed before him or her even if such evidence is unchallenged or uncontradicted, but, once again, a cautious judge would articulate why he or she refuses to rely on such testimony.

I turn now to discuss various techniques judges utilise in assessing facts. The examination by no means purports to be exhaustive.

EXAMINING THE EVIDENCE ACCORDING TO THE TIME AT WHICH IT CAME INTO EXISTENCE

A judge will ordinarily consider evidence which falls into one of three categories:

1. The course of events up to but excluding the point where a difference between the parties arose;
2. The course of events (including the emergence of a difference between the parties) up to but excluding the point where the differences have led to a serious legal dispute;
3. The course of events up to the eve of trial.

In normal circumstances, a judge attaches significantly more weight to evidence predating the dispute. The evidence may be in the form of letters, conduct or merely an absence of action. Once the second and third stages have been reached, the trial judge must put herself/himself upon inquiry into motives and much will depend upon the association the witness has had with the parties in the case.

MOTIVE

Barry J of the Victorian Supreme Court, in adjudicating a motor vehicle claim, noted the tremendous consistency with which occupants of a vehicle supported the version of their driver. He referred to it as *'les esprit des autos'*.

The motive of the litigants themselves is, in most instances, readily apparent. After all, most litigation is about either making demands for money or involves a penalty of some kind.

A witness's evidence is frequently coloured by the fact that he or she was first approached by a particular party. He or she has had an insight into the barristers' conferences, the pre-trial tensions, and the personalities of the parties. It is not the function of this article to open up this area but simply to advert to the occasional unconscious bias of a witness as being part of a team effort — *'I want my team to win'* — though the witness may otherwise appear neutral or uninvolved.

DEMEANOUR

Judges frequently adopt this catch-all word as being sufficiently descriptive of why they have preferred the testimony of one witness to that of another. No doubt, it encompasses the degree of eye contact, blushing, stammering, the witness's capacity for forgetfulness or evasiveness, body language exhibited by the witness, anxiety, as well as fear or anger displayed in response to certain issues. I am not suggesting that in all cases judges should be more detailed as to the exact nature of the demeanour relied on, but a judge should scrutinise his or her reasons to establish exactly what aspect of a witness's demeanour it was that convinced, or failed to convince, him or her.

A judge is entitled to take account of a witness's demeanour outside the witness box, particularly when witnesses sit in the rear of the court after they have given evidence. A recent decision of the Full Court of the Family Court indicates that if a judge intends to take account of such demeanour outside the witness box, then as a matter of natural justice he or she should alert the legal representatives to the observations he or she has made to allow opportunity for comment.[18]

INHERENT IMPLAUSIBILITY

This is a test judges frequently apply, though very little analysis takes place to explain why the particular conduct in question is said to be implausible. A judge is entitled to be cynical of someone who claims to have lost or won $20,000 at the races but is unfortunately unable to recall the race meet, the horse or the bookmaker. The test of inherent implausibility is a worthwhile one, but given the wide spectrum of human behaviour, it is suggested that there should be a greater examination of why it is felt the particular story is seen to be implausible. In many instances where a judge regards a certain account to be inherently implausible, he or she will treat it as self-obvious to anyone reading the judgment and will not elaborate why that particular body of evidence was rejected.

CONFIDENCE

It is, without doubt, a factor in courts, as in life, that the person who appears more confident is normally more persuasive. A witness displaying nervousness and/or shyness makes nowhere near the same impression as a person who is able to give evidence confidently. There are, however, extensive psychological tests[19] which indicate that the confidence with which a person asserts a proposition bears no relationship to its truth. People who put forward testimony in a diffident manner are just as likely to be telling the truth as those who assert the same proposition in a confident manner.

TONE/LANGUAGE

Psychologists claim that when a person is lying, the voice is more high-pitched. Lie detector tests have been developed using voice patterns, although more frequently they rely on pulse rates. For my own part, I have

[18] *Zantiotis v Zantiotis* [1993] FLC 92-367.

[19] Muller Blackman Chapman (ed.), *Psychology and Law — Topics from an International Conference* (1984).

never been able to detect with any confidence whether someone is being dishonest by merely listening to the voice, although it is said to be a common enough experience with adults observing children.

However, one can often gain some insight into the accuracy of a witness's evidence by an analysis of both the tone and the language. This is particularly so in affidavit material. Often there is a recounting of a particular episode which has such a ring of truth about it that the witness would need the talents of a David Williamson to have fabricated such a version. Judges regularly rely on this 'ring of truth' factor as reinforcing an impression otherwise obtained as to the honesty of a witness.

IS THE EVIDENCE OF THE WITNESS IN CHARACTER?

Whilst judges may be no better than the rest of the population at being able to detect deception, it is suggested that during the brief period available to observe people in the witness stand, there is the opportunity to make general observations about the personality of the person before the court and to observe some of the traits that the person exhibits. For example, it is normally not too difficult to differentiate between an aggressive person and a shy person, an intelligent as against an unintelligent person, a depressed person or a happy person. Judges will often examine the statements attributed to a witness by others to see whether it appears in keeping with the general character which has been observed.

CONSISTENCY OF A WITNESS'S EVIDENCE

This is frequently used by judges as a basis for accepting testimony. Anyone who has spent time in the criminal courts, however, is aware of the likelihood of two police officers giving evidence in parrot fashion and the evidence appears to be consistent throughout.

On such occasions I was often reminded of the saying attributed to Davy Crockett. Davy Crockett was camped in the woods with a friend, the evening was dark, and in the distance there was the sound of a twig breaking. The friend asked Davy Crockett, 'What's that?' Davy Crockett is said to have replied, 'If you hear somethin' that's nothin'; if you hear nothin' that's an Indian.' In the ordinary course of events, it is to be expected that there will be inconsistencies in a litigant's evidence, both internally and with the testimony of other witnesses. It is always a matter for the individual judge what emphasis he or she places on consistency or lack of it. For my own part too much consistency can indicate that the witnesses have rehearsed the evidence and are not giving their individual recollections.

EXPERT EVIDENCE

Experts giving evidence in court are subject to the ordinary consideration upon which the evidence of any witness may be impugned.[20] The expert's expertise may be impugned, his or her credit may be attacked, previous inconsistent statements or opinions may be elicited in cross-examination.

Most litigation at the present time involves an evaluation by the court of expert testimony of one kind or another.

In personal injury cases, the courts regularly hear from a variety of specialist doctors. Land Courts are called on to evaluate conflicting opinions of valuers. The Family Court commonly sees either accountants in property settlement matters, or psychologists, social workers and court counsellors in custody/access disputes. In copyright cases or suits for plagiarism, courts take testimony from artists, writers or musicians. The extent of expert evidence that courts can be called upon to evaluate is virtually limitless.

An expert who fails to disclose limitations on his or her methodology can be very dangerous, particularly in the criminal sphere.

I vividly recall a government medical officer giving evidence in a murder trial in North Queensland in 1974.[21] The accused was a 17-year-old female who had just left school. Her account was that she had been raped by three men. Her boyfriend came on the scene shortly afterwards and on hearing the news shot all three. The government medical officer gave evidence that he had carried out a medical examination of the girl to detect the presence of spermatozoa some 24 hours after the shooting and did not detect the presence of same. Des Sturgess, as counsel for the girl, elicited from the doctor the fact that he had only tested for the presence of live sperm and after 24 hours it would be unlikely for any live sperm to be still present. There was a test available for detecting dead sperm, but the doctor had not carried out such a procedure.

On the cross-examination of experts, Jeffrey Miller QC similarly observed:

> I have seen cases in which semen taken from the vagina of a victim has been recorded as revealing a particular blood group consistent with that of the accused but omitting the critical qualifying fact that because the victim herself had also had the same blood group body fluid secreted by her may well have mixed with the semen and caused the resultant analysis to be consistent with the blood grouping of the victim herself.[22]

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[20] *Samuels v Flavel* [1970] SASR 256, 257–8.

[21] *R v Brolese*, 1974 Circuit Court, Mackay (unreported).

[22] Cross-examination of experts — 'Winds of Change' Conference 1987, Australian Legal Convention, September 1987, Western Australia.

There are some issues a court must consider which are peculiar to expert witnesses.

1. Is the witness qualified?

In *Bugg v Day*,[23] a motor car repairer with ten years' experience was permitted to give evidence as an expert about the condition of a motor cycle damaged in a collision. No objection could be taken to that, but the witness went on to say that he deduced from the damage that the car which struck it was travelling at 40 mph. That opinion was inadmissible. Dixon J (as he then was) said:[24]

> This opinion was received in evidence over the objection of the defendant's counsel. In my opinion it ought not to have been received in evidence.... his conclusion would involve a problem far beyond his capacity and qualifications and one to which he did not purport to address himself. It was not evidence based upon a branch of knowledge or an art in which the witness was skilled but a wild and unsophisticated conjecture.

In *Clark v Ryan*,[25] the High Court had to consider the admissibility of evidence from a consulting engineer with years of experience investigating accidents for insurers. Dixon CJ said:[26]

> If it had been desired to prove how, in fact, semi-trailers of a kind driven by the defendant Clark do in practice behave, perhaps a witness or witnesses experienced in their actual use might have given admissible evidence, not of opinion, but of the fact.... If it had been desired to give technical evidence of the physics involved and of any relevant opinions deduced therefrom, possibly that may have been done by a qualified witness....

In some instances, the distinction between experts and non-experts is blurred, but the court must do its best to limit the expert's testimony to their particular field of expertise. This is particularly so because of the rule which allows experts to express opinions. The courts principally find themselves in difficulties where an expert strays outside their field of expertise and is allowed to give opinion evidence on matters not competent to do so.

2. Expert evidence of fact and expert evidence of opinion

There is a distinction to be drawn between an expert giving evidence of facts and evidence of opinion based on such facts.

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[23] *Bugg v Day* (1949) 79 CLR 442.
[24] *Id.* 462.
[25] *Clark v Ryan* (1960) 103 CLR 486.
[26] *Id.* 491.

> A radiographer giving evidence to prove a CAT scan might describe sophisticated radiological and computer equipment and identify a photographic plate recording the result of a test, or an analytical chemist may describe the process by which the particular investigative test was performed and the result achieved. Subject to the court being satisfied that human error did not creep into the operation of the machinery employed and that the proper methodology was followed there should be little or no room for bias as subjective judgment or interpretation is not involved. Often the results of tests described in evidence can be checked. The risk of subjective manipulation of the result may often be remote in the extreme. On the other hand when the expert evidence is of opinion the possibility that the witness has allowed his evidence to be swayed by allegiance to a party or a cause is regrettably one to be considered. It is a fact that lies at the heart of the argument periodically advanced that experts should be appointed or called by the court.[27]

J.J. Doyle QC, Solicitor General for South Australia, is more sceptical of the so-called distinction between fact and opinion. He observes:

> A moment's reflection will disclose, however, that at times a distinction is far from clear. The most widely accepted view is that an opinion is an inference drawn from observed data. But even simple propositions such as that 'the day is hot', ' a man is unusually tall', or 'a motor car was travelling very fast', contain elements of opinion, they are not simply statements of fact.... Whatever the problems of distinguishing fact and opinion it is with respect doubtful whether this approach will lessen the problems in this area.
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> In truth as others have said the distinction between fact and opinion is one of degree. By and large judges are able to draw the distinction. As long as the elusive nature of the distinction is remembered it should be unnecessary to pursue it further for present purposes.[28]

3. Must the court understand the process of reasoning leading to the opinion given by the expert?

Von Doussa J, in his paper, suggests that this is fundamental. He argues that on general principle, if the court does not know or cannot understand the process of reasoning if it were to adopt the opinion, it would abdicate its function of deciding the case to that of decision making by experts. With the greatest respect, I accept that this is so where the basis of the expert's evidence is challenged. For example, where it is the first time that DNA typing is being relied on, it would be reasonable for counsel to challenge the reliability of this procedure. On the other hand, where no such challenge is made to the procedures adopted by the expert, it

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[27] Von Doussa J, paper presented to the 24th Australian Legal Convention, September 1987, Perth, Western Australia, reported in the Law Council of Australia publication, *Winds of Change*, 175.

[28] J.J. Doyle QC, 'Admissibility of Opinion Evidence', being a paper presented to the 24th Australian Legal Convention, September 1987, Perth, Western Australia, printed in Law Council of Australia publication, *Winds of Change*, 175.

does not seem to me to be greatly important that the court understands the process involved in arriving at the result of the DNA tests.

LIMITATIONS ON EXPERT TESTIMONY

There are a number of recognised limitations on the giving of expert testimony developed by the courts. The principal ones are as follows:

1. Novel scientific propositions are excluded without widespread acceptance from the scientific community.
2. The common knowledge rule: experts are not permitted to give evidence of matters within common knowledge.
3. The ultimate question rule: a witness may not be asked questions, the answers to which determine the ultimate issue.

CONCLUSION

Some judges have adopted an extremely cautious approach to adjudication where the evidence is one on one with the applicant asserting and the respondent denying and there is no corroborative evidence. In these circumstances, rather than risk adjudicating on mere *'demeanour'*, a judge would find the claim not proved. In many instances, this is unjust to the person carrying the onus of proof, but one can sympathise with the judge for failing to take up the challenge to play God in determining who is telling the truth.

What makes a credible witness? Why does a judge accept the evidence of the one witness and reject the evidence of the others? It is this question that I have attempted to grapple with during the course of this article.

In my experience, the assessment of a witness's worth really involves a two-tier process. The judge must first make an aesthetic judgment — which version of the facts do I prefer? Why do I prefer that version — is it based on logic, intuition or experience? Judges at art exhibitions or wine shows make judgments on an aesthetic basis, but this judgment is limited to taste rather than credibility.

As noted by Wells J, it is rare that a case calls for determination based on the evidence of a single witness.

After the aesthetic judgment, the judge makes a practical judgment — what are the plaintiff's injuries worth? In what percentage terms should the property of the parties be divided?

A conclusion in reaching an aesthetic judgment is largely instinctive, which a judge must rationalise in the course of his or her findings. Sometimes it is easy; most times it is difficult, very difficult.

The process of adjudication is a little akin to writing or painting — too much concentration on technique inhibits the spontaneity of natural intuition wherein lies true inspiration.

Advice for Contributors

Contributions to this Review are welcomed and should be sent to:

The Editor
James Cook University Law Review
Faculty of Law
James Cook University of North Queensland
TOWNSVILLE QLD 4811
Telephone: (077) 81 4264
Facsimile: (077) 81 4080
Email: Law.Review@jcu.edu.av.

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