THE ANTHROPOLOGIST ON TRIAL

By Ian Freckelton*[1]

Anthropologists and the Courts

With the limited exception of Canada and the United States, anthropologists have had comparatively little involvement with the court system throughout the common law world. In Australia this has begun to change in ways which have significance both for anthropology as a discipline and for the ways in which evidence from representatives of the social sciences is treated by courts and other judicial and non-judicial bodies. Even now, while anthropologists have had a considerable impact in the Northern Territory, they have had limited effect in the courts along the eastern seaboard[2], the courts with the greatest bulk of litigation and probably the least acquaintance with Aboriginal problems. Since 1976, anthropologists' most frequent contact with the law has been with the work of the Aboriginal Land Commissioner[3] in the course of Aboriginal land claims. This article contrasts the rigour with which the rules of evidence are applied to experts in ordinary criminal proceedings in the Eastern States with the often more flexible attitude adopted in the Northern Territory in the courts and in land claim hearings. In so doing, it looks to the problems which anthropologists may expect to encounter in their contact with the court system and makes suggestions about the different attitudes which may develop toward expert witnesses in Australia and elsewhere in the common law world.

Aboriginal Land Claims

In land claims the role played by anthropologists has been integral in assisting the Commissioner to a more effective understanding of the issues involved. That role has varied from collating, recording and evaluating what has been said to them in their field work by traditional Aborigines[4] for the purpose of

* B.A. (Hons.) L.L.B. (Syd.), Dip.Th.M. (A.N.H.) Senior Law Reform Officer Australian Law Reform Commission.

[1] The author would like to acknowledge the helpful views and criticisms expressed by Professor J. Crawford, T. H. Smith, M. Fisher and P. Hennessy. The views expressed in this article, though, are his own and not necessarily those of the Australian Law Reform Commission.

[2] Recently, though, see the issues raised in *R. v. Newberry* (unreported) District Court of Queensland, 24 July 1984; *R. v. Watson* (unreported) District Court of Queensland, 24 July 1984.

[3] Under the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) See Hanks, P. & Keon-Cohen, B. (ed.), *Aborigines and the Law* (1984) 90ff. Compare the use of anthropologists in suits brought before the Indian Claims Commission in the United States — Rosen L., 'The Anthropologist as Expert Witness' (1977) 79 *American Anthropologist* 555, 556.

[4] *Alyawarra & Kaititja Land Claim* (30 November 1978) A.G.P.S., 1979, para. 58.

giving formal expert evidence, to acting in a number of advisory capacities to the Commissioner, particularly in relation to the preparation of the Claim Book. There are differences of opinion about how entrenched the position of anthropologists is in the Northern Territory land claim procedure, but it is quite clear that for practical purposes their expertise has become indispensable to the application of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth). This is especially so in relation to the interpretation of terms of art such as 'local descent group', 'spiritual affiliations' and 'primary spiritual responsibility for [a] site' as well as the application of such terms to particular peoples in particular areas at particular times.

The land claim hearings are, of course, very different to proceedings within the courtroom. Although the Land Commissioner is a judge[5], he or she does not act in a judicial capacity during land claim hearings. The hearings are not intended to be adversarial; they are conducted 'broadly along the lines of conventional court proceedings although with less formality':

> Witnesses will be asked to take an oath or make an affirmation before giving evidence and ordinarily will be subject to cross-examination.[6]

The Commissioner's Practice Direction Number 25 makes it clear that the Commissioner need not adhere strictly to the 'ordinary rules of evidence':

> In particular as a general proposition hearsay evidence will be admitted, the weight to be attached to it to be a matter for submission and determination.[7]

Relevancy is said to be the 'controlling test for the admissibility of evidence'; once evidence meets this criterion, the question is one of weight rather than admissibility.[8] Thus, in land claims, the anthropologist is not constrained by the technical laws of evidence that have been the cause of so much complaint by social scientists coming into contact with the courtroom in recent years.[9] He or she may present a written report, may on occasion cross-examine, may address the most important issues in the claim, may, if it would be helpful, talk about matters of 'common knowledge' and may use whatever information is customarily employed by anthropologists.

The Anthropologist in the Courtroom

The courtroom can be an entirely different venue for anthropologists. Although their expert evidence has been proferred and quite frequently accepted in the Northern Territory, recently in Queensland, and, to a lesser extent, in South Australia and Western Australia, the relaxed attitude toward the rules of evidence at times displayed in those States may well not be repeated elsewhere.

5 Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) s. 53.
6 Aboriginal Land Commissioner, *Annual Report 1978-1979* (Cth Parliamentary Paper 48/1980) 13 (Practice Directions 21,24).
7 *Ibid.*
8 *Borroloola Land Claim* (3 March 1978) A.G.P.S., 1978, para. 47-8.
9 Haward, L.R.C., *Forensic Psychology* (1981) 176; Re, L. and Smith, T. H., *Manner of Giving Evidence* A.L.R.C. Evidence R.P.8, 68-9. See also Plueckhahn, V. D., *Legal Dilemmas in the Use of Medical Experts*, Discussion Paper, Supreme Court Judges' Conference, 1982.

Developments have taken place in the last few years in the Northern Territory where group evidence has been admitted[10] and reports of expert evidence have been given from the bar table in Aboriginal cases. In addition, it is not unusual for a relaxed attitude to be taken to the hearsay and opinion rules.[11] However, a number of factors are involved, the most important of which is that these so-called 'irregularities' generally occur in the magistrates' courts where technicalities are less likely to be insisted upon by the bench. In addition, departures from the strict rules of evidence may well not be objected to as strenuously as they would in Sydney, Melbourne or Canberra by solicitors or counsel appearing for either side. In relation to expert evidence, it is also notable that the anthropologist has most frequently been called at the sentencing stage where the rules of evidence are in any event not stringently applied.[12] However, cases can arise where the anthropologist has a good deal to contribute to the determination of the substantive issues before a court. Already these are quite extensive, but are likely to be increased in scope if the recommendations of the Law Reform Commission in its reports on Aboriginal Customary Law and on Evidence are adopted by the Government.[13] The legal issues in which the testimony of an anthropologist could be relevant include:

1. where Aboriginal customary laws or culture are relevant to the defence of provocation[14];

10 *R. v. Isobel Phillips* (unreported) Northern Territory Court of Summary Jurisdiction, 19 September 1983 (Murphy S. M.).

11 See *R. v. Charlie Limbiari Jagamara* (unreported) Supreme Court of the Northern Territory, Alice Springs, 28 May 1984 (Muirhead J.) where an anthropologist testified about the accused's drinking habits *etc.* at a time when she did not know him. Compare the words of Young C.J. of the Victorian Supreme Court: '[A] psychologist who sees an accused only after the event has no expertise which will enable him to say what the accused's condition was at the relevant time or whether he had acted voluntarily': *R. v. Haidley & Alford* [1984] V.R. 229, 234. See also *R. v. Darrington and McGauley* [1980] V.R. 353, 378. In *R. v. Charlie Limbiari Jagamara* expert evidence was adduced in proof of the following facts: (a) that the accused followed traditional law and was traditionally married; (b) that the accused's wife was seen to behave in a way which could lead somebody to believe that she was engaged in a tabooed relationship; (c) that the accused would have to have seen his wife's actions as involving a very serious transgression that would require a response from him; (d) that the accused merely intended to teach the deceased a lesson; and (e) that the accused held a highly important position within the community and that his presence was critical for the continuance of certain ceremonies.

12 Taking matters of customary law into account at the time of sentencing has now become general, especially in the Northern Territory. See *R. v. Larry Baker* (unreported) Supreme Court of South Australia, Adelaide, 12 April 1985, *R. v. Charlie Limbiari Jagamara* (unreported) Supreme Court of the Northern Territory, Alice Springs, 28 May 1984 (Muirhead J.) *cf.* the similar case of *R. v. Jacky Jagamara* (unreported) Supreme Court of the Northern Territory, Alice Springs, 24 May 1984 (O'Leary J.) and the clear law of *Atkinson v. Walkely* (1984) 27 N.T.R. 34, 37. See also Bell, D., *Exercising Discretion: Sentencing and Customary Law in the Northern Territory*, paper presented to the XIth International Congress of Anthropological and Ethnological Sciences: Commission on Folk-Law and Legal Pluralism, Vancouver, 1983. See also *R. v. Sampson* (1984) 53 A.L.R. 542.

13 See, in particular, Australian Law Reform Commission, *Aboriginal Customary Law — The Criminal Law, Evidence and Procedure*, D.P.20, 1984; Law Reform Commission, *Aboriginal Customary Law — Marriage, Children and the Distribution of Property*, D.P. 18, 1982; Fisher, M., *The Recognition of Traditional Hunting, Fishing and Gathering Rights*, A.L.R.C. Aboriginal Customary Law R.P. 15; Crawford, J.R., *Legal Pluralism and Comparative Law*, paper presented to the Australian National University Canberra Law Workshop VII, 6-9 September 1984; Australian Law Reform Commission, *Interim Report on Evidence*, A.G.P.S., Canberra, 1985; Australian Law Reform Commission, *Aboriginal Customary Law*, A.G.P.S., Canberra, 1986.

14 *R. v. Patipatu* [1951] N.T.J. 18, 20; *R. v. Muddarubba* [1956] N.T.J. 317, 322; Crawford, J.R. and Kirkbright, C.J., A.L.R.C. *Aboriginal Customary Law* R.P.6, 1982, *The Substantive Criminal Law*, 76ff.

2. where the ability of an Aborigine to form the requisite intent to commit a crime is affected by his or her Aboriginality[15];
3. where Aboriginal customary law may be relevant to the defences of duress or necessity[16];
4. where a claim of right in relation to goods stolen is asserted[17];
5. where it is asserted that an alleged confession ought not to be admitted[18];
6. where Aboriginal customary law should be regarded as constituting a partial or complete defence to a charge[19];
7. where traditional marriage is a question in issue by reason of, for example:
   (a) eligibility and consent to adopt;
   (b) compellability of spouses to give evidence;
   (c) entitlement to workers' compensation, accident compensation, superannuation, or social security benefits;[20]
8. where questions of traditional ownership of property or access to land are in issue (for example, in cases of civil and criminal trespass);[21]
9. where it is argued that traditional distribution of property should take place (in the Northern Territory and Western Australia there is provision for a traditional Aboriginal spouse to share in a distribution of property if the dead person did not make a will[22]); and
10. where certain matters of administrative law are relevant to proceedings.[23]

The increased relevance of expert anthropological evidence in contexts other than sentencing highlights a number of important legal and ethical questions. Many of these relate to the ways in which the courts have traditionally controlled the admissibility of expert evidence. The entry of anthropologists

15 *Mamarika v. R.* (1982) 42 A.L.R. 94; *Jadurin v. R.* (1982) 44 A.L.R. 424 *Williri v. Walkely* (unreported) Supreme Court of the Northern Territory, 15 February 1984 (O'Leary J.).

16 *R. v. Isobel Philips* (unreported) Northern Territory Court of Summary Jurisdiction, 19 September 1983 (Murphy S. M.)

17 *R. v. Craigie and Patten* (unreported) District Court of N.S.W., 31 October-3 November 1979 (No. 1201 of 1979).

18 *R. v. Newberry* (unreported) District Court of Queensland, 24 July 1984; *R. v. Watson* (unreported) District Court of Queensland, 24 July 1984.

19 Australian Law Reform Commission, *Aboriginal Customary Law — The Criminal Law, Evidence and Procedure*, D.P.20, 1984, para. 21ff. *Mamarika v. R.* (1982) 42 A.L.R. 94; *Jadurin v. R.* (1982) 42 A.L.R. 424. Note its role in the sentencing context under the Criminal Law Consolidation Act (N.T.) s. 6A repealed by the Criminal Code Act 1984, as interpreted, for example, by *R. v. Sampson* (1984) 53 A.L.R. 542.

20 See, for example, the Compensation (Commonwealth Government Employees) Act 1971 (Cth) where the definition of 'spouse' includes an Aborigine 'recognised as the husband or wife of [another Aborigine] by the custom prevailing in the tribe or group . . . to which [he or she] belonged'; the Status of Children Act (N.T.); the Family Provisions Act (N.T.); the Administration and Probate Act (N.T.). See also Crawford J.R., Australian Law Reform Commission, *Aboriginal Customary Law — Marriage, Children and the Distribution of Property*, D.P. 18, 1982, 15ff.

21 Traditional hunting, fishing and gathering practices particularly affect questions of access. See Crown Lands Act 1979 (N.T.) s. 24(2) and the legislation implementing C/12 of the 'Torres Strait Treaty'. See Fisher, M., *The Recognition of Traditional Hunting, Fishing and Gathering Rights*, A.L.R.C. Aboriginal Customary Law R.P. 15, 1984, 51ff; Ryan, K.W. & White, M.W.D., 'The Torres Strait Treaty' (1981) 7 *Australian Year Book of International Law* 72.

22 For the possibility of extension of such entitlements see A.L.R.C. *Aboriginal Customary Law* D.P. 18, *Marriage, Children and the Distribution of Property*, 1982, 16ff.

23 See the Aboriginal Affairs Planning Authority Act 1949 (W.A.) and the Aboriginal Heritage Act 1949 (W.A.). See also Davies, L., *The Anthropologist as Expert Witness: Contribution Paper*, paper given to the A.N.Z.A.A.S. Congress, 1983.

into the courtroom brings into sharp focus a number of the issues examined by the Australian Law Reform Commission in both its Interim Report into the Federal Laws of Evidence and its Report on Aboriginal Customary Law.[24] In particular, the recommendations of the Aboriginal Customary Law Report[25] would, if accepted, increase the circumstances when the testimony of anthropologists would be relevant to proceedings in the courtroom. It is proposed to analyse some of the difficulties that may confront forensic anthropologists when the rules of expert evidence are strictly enforced, a possibility in any court in Australia and a probability in some at least of the superior courts.

Experts and Opinion Testimony

As a matter of general law:

> The opinions, inferences or beliefs of individuals (whether witnesses or not) are inadmissible in proof of material facts.[26]

There are a number of exceptions to the rule proscribing opinion evidence; of these, that relating to experts is the most important. Subject to five restrictions, experts may give opinion evidence in the courtroom. The five restrictions are:

- the expert must be an expert;
- the field of expertise rule;
- the basis rule;
- the ultimate issue rule; and
- the common knowledge rule.

When Is an Expert an Expert?

An expert witness must be possessed of some form of specialised knowledge, skill, training or possibly experience sufficient to enable him or her to supply information and opinions not generally available to members of the public; otherwise he or she is not regarded as of help either to the judge or jury. The law views the duty of the expert as an auxiliary one: to furnish the fact-finding body with the 'necessary scientific criteria for testing the accuracy of their conclusions'.[27] Thus, the expert's 'expertise' must be appropriate for the case — an expert pathologist may well not be able to give evidence that requires expertise in anatomy, even though he is a doctor.[28] It is important, too, that the data that form the basis of the expert's views be appropriately up-to-date. Unfamiliarity with current developments has been recognised as a problem in some cases.[29]

[24] A.L.R.C., *op. cit.* n. 13. p.262.
[25] *Ibid.*
[26] *Phipson On Evidence*, (12 ed. 1976) 483. See also Gobbo, J.A., Heydon, J.D. & Byrne, B., *Cross on Evidence*, (2nd Aust. ed. 1979) 422; Schiff, S.A., *Evidence in the Litigation Process*, (1978) Vol. I, 438; Heydon, J.D., *Cases and Materials on Evidence*, (1975) 368.
[27] *Davie v. Edinborough Magistrates* (1953) S.C. 34, 40 per Cooper L.P.
[28] See 'Chamberlain Case', *The Canberra Times* 16 October 1982; Murdoch, L., 'Judge Rules Out Professor's Opinion on Blood', *Age* (Melbourne) 16 October 1982. Rosen cites the instances of an ethnomusicologist testifying in a child custody case and a social scientist with a degree in 'World Cultures' testifying on the archaeological record of a California Indian tribe.
[29] See Maddock, K., in Hanks, P. and Keon-Cohen, B., (ed.), *Aborigines and the Law* (1984) 218.

It may well be that an expert, however formally qualified, will not be accepted as an expert generally upon a question of, for example, Aboriginal customary law. The degree to which the person involved is able to be of assistance to the court will depend upon the amount of time which that person has spent with the particular Aboriginal people concerned. A situation could arise where a court refused to hear an expert anthropologist who had no special knowledge of the people involved in the particular case and had not even visited the area. At the least, the shortness or absence of the anthropologist's experience in the subject land would be relevant to the weight which would be accorded to his or her evidence.[30]

A difference of opinion appears to exist between the courts of England and Australia about the acceptable mode of acquisition of expertise.[31] In England it has consistently been held that experts need not have formal qualifications so long as their specialised testimony will be of assistance to the tribunal of fact,[32] whereas in Australia there are definite indications that the courts view the existence of formal academic training as a prerequisite for the giving of expert evidence.[33] This is of potential significance for anthropologists in that the primary training of an 'anthropological expert' may be in 'linguistics', 'sociology' or even 'archaeology'. The question may well arise as to whether expertise acquired through experiential means is sufficient to constitute a witness an expert for the purposes of giving opinion testimony that would not be allowed from a 'lay' witness. The view that an anthropologist when testifying about Aboriginal customary law may be said to be an expert by reason of 'habit and experience', as opposed to a course of study, may gain some support from the analogous question of expertise under foreign law.[34] Aboriginal customary law is not, of course, a law foreign to Australia, but the analogy has often been drawn between indigenous customary law and foreign law for the purposes of proof.[35] So far as foreign law is concerned, it is established that:

> Expert evidence as to foreign law may be given by witnesses who have acquired a special experience therein. It is not necessary that they should be professional lawyers, but it is sufficient if they occupy a post which gives them experience in the law of the foreign country.[36]

The law has adopted a less rigorous approach to the qualifications of experts in foreign law than it has in other contexts. The approach is a flexible one, looking to the substance of the expert's knowledge rather than to the way in which

30 See *Milirrpum v. Nabalco Pty Ltd* (1971) 17 F.L.R. 141, 160.

31 Freckelton, I., *The Trial of the Expert*, (1986); *Opinion Evidence*, A.L.R.C. Evidence R.P. 13, 1983, para. 13ff.

32 *R. v. Silverlock* [1894] 2 Q.B. 766.

33 *Clark v. Ryan* (1959-60) 103 C.L.R. 486; *Weal v. Bottom* (1966) 40 A.L.J.R. 436; *cf. McAllister v. Richmond Brewing Co.* (1942) 42 S.R. (NSW) 187. See also *R. v. Oakley* [1979] R.T.R. 417 for the English reaction to what was perceived as the Australian approach.

34 See Crawford, J.R., *The Proof of Aboriginal Customary Law*, A.L.R.C. Aboriginal Customary Law R.P. 14, 1983, 29ff; Australian Law Reform Commission, *Interim Report on Evidence*, A.G.P.S., Canberra, 1985; *Report on Aboriginal Customary Law*, A.G.P.S., Canberra, 1985.

35 *Ibid*. 7.

36 *Luder v. Luder* (1963) 4 F.L.R. 292, 295 per Joske J. For a recent discussion of expert evidence as to foreign law see *Scruples Imports Pty Ltd v. Crabtree & Evelyn Pty Ltd* (1983) I.P.R. 315, 323ff.

it was acquired.[37] It may well be that the courts would take a similarly functional approach to the reception of expert evidence relating to Aboriginal customary law. Certainly in *Milirrpum v. Nabalco Pty. Ltd.* (the *Gove Land Rights Case*)[38] Blackburn J. characterised the admissibility of the expert evidence as by reason of 'the witnesses' experience in anthropology, and in particular their knowledge of the Australian Aboriginals'. This generally seems to be the approach when experts testify as to fact, rather than offering opinions.[39]

Most recently, the difference between the two forms of testimony in this context was highlighted in *R. v. Yildiz*[40] in which the Crown called an expert to give evidence of the attitude of the Turkish community both in relation to homosexuality in general and in relation to the differences between the active and passive roles of male participants in homosexual activity for those of Turkish extraction. The 'expert' was of Turkish origin, was closely involved in the Turkish community and acted as an interpreter for the Turkish community in Australia. He gave evidence that while homosexuality is not generally regarded as an acceptable lifestyle by Turks in Australia, the Turkish community treated the passive participant in such relationships with particular harshness, and that to describe a person as playing the passive role in a homosexual act would be regarded as extremely insulting. It was submitted to the court by counsel that the evidence given was expert opinion evidence that the witness was not qualified to give in the absence of formal qualifications. Murray J. rejected the argument and went on to point out that the cases upon which counsel relied were all decisions involving the giving of opinion evidence by experts. Instead, the court looked to whether the witness was 'fit' to answer the questions. As experiential, acquired skills in this instance were clearly relevant, the court made no objection to allowing expert evidence *as to fact* from the witness whose expertise had not been acquired 'academically'.

In its Interim Report on Evidence, the Australian Law Reform Commission in 1985 has recommended, in effect, that an expert should be defined as a person who has sufficient specialised knowledge, skill, experience or training.[41] Such a person would be allowed to testify in the form of opinions. If the Commission's proposals are accepted, this would refocus the admissibility question in regard to expert evidence both as to fact and opinion and concentrate upon the likelihood of assistance actually being given to the court by the witness.

37 See A.L.R.C. Evidence R.P. 13, 1983, para. 20. See also Gobbo, J.A., Heydon, J.D. & Byrne, B., *Cross on Evidence* (2nd Aust. ed. 1979) 648-51; Dicey, A.V. & Morris, J.H.C., *The Conflict of Laws*, (10th ed. 1980) vol. II, 1206-16.

38 (1971) 17 F.L.R. 141, 163.

39 Freckelton, I., *The Trial of the Expert*, (1986).

40 (1983) 11 A. Crim. R. 115.

41 A.L.R.C. 26, cl. 68. See also Freckelton, I., *Opinion Evidence* 27; Crawford, J.R., *The Proof of Aboriginal Customary Law* (1983) A.L.R.C. Aboriginal Customary Law R.P.14, 28-30.

Academic versus Practical Expertise

It has been held that the expert must possess *at least* theoretical knowledge if not theoretical *and* empirical knowledge.[42] But a number of decisions have also insisted that the witness have some personal experience of his or her subject. Generally, this is not regarded as a discrete criterion for admissibility of the evidence but it is a crucial factor in assessing the reliability or general value of the testimony. This is especially so in the case of evidence given by anthropologists and social scientists generally. An interesting case involved an Associate Professor of anthropology giving evidence as to the 'Aboriginal rights' of the Squamish Indians to hunt in Squamish Valley. Professor Duff gave his 'opinions' in response to a hypothetical question which was not predicated upon any fact adduced in evidence. It was, therefore, most difficult to assess the worth of his opinions. In consequence, he was said by the court to be providing mere conjectural evidence. In this case counsel did not object to the actual admissibility of the evidence, although there are suggestions that it may have been a successful tack for him to have done so.[43] In another context, Watermeyer J.[44] pointed out that the very nature of professional knowledge necessitates the drawing of understanding from a wide variety of data — 'hence a reliance on the reported data of fellow scientists learned by perusing their reports in books and journals'. It may well be that the courts will have regard to the following factors in making their decisions either as to admissibility or to the weight which should be attached to 'academic', non-experientially acquired learning:

- professional experience, giving the witness a knowledge of the trustworthy authorities and the proper source of information;
- the extent of personal observation in the general subject, enabling the witness to estimate the general plausibility or probability of soundness of the views expressed; and
- the impossibility of obtaining information on the particular technical detail except through reported data in part or entirely.[45]

Most recently, Ian Barker Q.C. used the technique of characterising evidence as 'academic', in contradistinction to 'practically useful', in an effort to impugn expert evidence of the defence witness, Professor Boettcher in the *Chamberlain Case*:

42 *Eagles v. Orth* [1976] Qd R. 313, 320.
43 *R. v. Discon* (1968) 67 D.L.R. (2d) 619, 624.
44 *S v. Kimimbi* (1963) 3 S.A.L.R. 250, 251.
45 Wigmore, J.H., *Evidence in Trials at Common Law* (1979), 665; *S v. Kimimbi* (1963) 3 S.A.L.R. 250, 251-252.

> The defence side found experts to disagree and Professor Boettcher came along and criticised Mrs Kuhl and criticised the quality of the anti-serum without ever asking her if he could test the actual anti-serum which she used. Professor Boettcher, whose academic university life was pr[e]ceded by life as a school teacher, and who has never been actively engaged in the day to day routine work of testing blood stains, whose qualification to enter the arena seemed to be based in part upon a lofty concept of what he was pleased to call the scientific method, who teaches and engages in pleasant research and writes for learned journals about learned articles, never about forensic biology. Never about the dirty side of the profession. The sex crimes and the murders, the old blood stains. He's never been confronted with the difficulties which the poor old practical hard working forensic biologist is confronted with. A biologist who we say does an honest and competent day's work and goes to court to offer her honest opinion and finds herself confronted with the criticisms of academics who have probably never in *their* lives entered a forensic science laboratory. Because such things do not exist in the quiet halls of institutes of academic learning. And I say this with very great respect, but perhaps when Professor Boettcher has tested a few thousand trace samples of blood, and when Professor Nairn has scratched around in a car for a few days, testing it for blood, and when Professor Nairn takes time off from research and manages to test more than one blood sample a week, then, each may be qualified to criticise Joy Kuhl . . . they should recognise that there are scientists who work at teaching, and there are scientists who work at testing blood, and they should leave the field to the professionals.[46]

Certainly, the *Chamberlain* case highlights the fact that even defence experts, be they medical or anthropological, are likely during cross-examination to face no-holds-barred impugning of their fitness as witnesses. An expert without demonstrably relevant practical, as well as academic/theoretical qualifications, will be in peril either of having his or her qualifications to testify rejected out of hand or of being vigorously discredited by opposing counsel. This would only in part be affected by the recommendations of the Australian Law Reform Commission. Were an expert not to be sufficiently qualified to be able to give evidence 'likely to assist the courts', his or her testimony would not be admissible.[47]

Field of Expertise Rule

A number of decisions in the 1970s and 1980s have made it apparent that the courts may be willing to exclude expert testimony because it does not constitute an acceptable 'field of expertise'. The most important judgment in this regard was that of Street C.J. in the N.S.W. Court of Criminal Appeal when faced with the decision of whether to admit spectographic voice analysis evidence:

> Notwithstanding a more narrowly expressed view in Wigmore *On Evidence*, 3rd ed., vol. II, page 641, para. 561, it is clear enough that an appellate court in this country has jurisdiction to review, in appropriate cases, both the question whether or not the particular witness qualifies as an expert, and the question of whether the field in respect of which his evidence is sought to be tendered is such as to be properly the subject of expert testimony.[48]

Earlier Dunn J. of the Full Court of the Queensland Supreme Court held that 'the study of seat-belts' had become a 'recognised field of specialist knowledge'[49] and Blackburn J.[50] spoke of anthropology generally as a 'valid field of

[46] 3160-1 of the transcript; see Selinger, B., 'Science in the Witness Box' (1984) 9 *Legal Service Bulletin* 108. See also Andrewartha, G., 'Psychological Communications in the Courtroom' (1984) 19 *Australia Law News* 34-5.

[47] It might well be ruled out as not being sufficiently relevant.

[48] *R. v. Gilmore* [1977] 2 N.S.W.L.R. 935, 938-9. See also *R. v. McHardie and Danielson* [1983] 2 N.S.W.L.R. 733, 753 where the N.S.W. Court of Criminal Appeal echoed the words of Street C.J. in *Gilmore*.

[49] *Eagles v. Orth* [1976] Qd R. 313, 320.

[50] *Milirrpum v. Nabalco Pty Ltd* (1971) 17 F.L.R. 141, 161

study and knowledge'. The criteria by which one determines whether testimony is indeed within a duly constituted 'field of expertise' have not been explored to any great extent by the Australian courts. However, there are indications that the controversial approach of the United States courts will be that which is adopted in Australia. The leading United States court decision is that of *Frye v. United States*:[51]

> Just when a scientific principle crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone, the evidential force of the principle must be recognised, and while the courts will go a long way in admitting expert testimony deduced from a well recognised scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

Not surprisingly, determination upon when a field of endeavour has emerged from the experimental to the demonstrable, and is so regarded generally within the appropriate scientific community, is both difficult to make and to predict. In addition, problems exist in identifying the relevant 'scientific field'[52] and in recent times it has been claimed that the application of the *Frye* rule is excluding much valuable and reliable scientific evidence.[53] The danger associated with the test is that the courts will constantly lag behind the advances of science, waiting for novel techniques and theoretical approaches to win 'general acceptance' within the appropriate expert community. United States courts have been divided upon the merits and demerits in present conditions of the *Frye* decision. The question comes to be whether the rule imposes a standard for admissibility, or whether it should merely give guidance as to the weight to be attached to expert testimony whose reliability cannot be completely guaranteed. A consistent approach in the United States is hard to discern. In 1981 the Iowa and Louisiana Supreme Courts rejected the *Frye* test, the latter calling it 'an unjustifiable obstacle to the admission of polygraph test results', and in 1978 the Second Circuit Court of Appeals also rejected the *Frye* standard, preferring a balancing test which weighed the probative value, materiality and reliability of expert evidence against its tendency to mislead or prejudice the jury.[54] However, the Supreme Court of California adopted the *Frye* rule in 1982[55], rejecting the admissibility of hypnotically induced testimony, and in the same year a New York appellate court[56] applied *Frye* and reached the same conclusion.[57]

51 293 F. 1013, 1014 (1923).
52 Gianelli, P.C., 'The Admissibility of Novel Scientific Evidence, *Frye v. U.S.*, a Half Century Later' (1980) 80 *Columbia Law Review*, 1197.
53 Imwinkelried, E.J., 'A New Era in the Evolution of Scientific Evidence — A Primer on Evaluating the Weight of Scientific Evidence' (1981) 23 *William and Mary Law Review* 261, 265.
54 *State v. Hall*, Iowa 297 N.W. 2d 80, 84 (1981); *State v. Catanese*, 368 So 2d 975, 981 (1981); *United States v. Williams*, 583 U.S. 2d 1194 (1978).
55 *People v. Shirley*, 31 Cal. 3d 18, 641 P. 2d 775, 181 Cal. Rpt 243 (1982).
56 *People v. Hughes*, 88 A.D. 2d 17 (1982), 452 N.Y.S. 2d 929 (4th Dep't).
57 Galban, J., 'Evidence' (1983) *Annual Survey of American Law* 203ff. For more extensive analysis of the direction of this aspect of the law in the United States, see Freckelton, I., *The Trial of the Expert*, (1986).

The extent to which the 'field of expertise' controversy has application to expert anthropological evidence remains to be clarified. However, if views expressed by an expert could be characterized as contrary to those generally accepted within his or her discipline, it may be that such evidence would be held inadmissible. Anthropology, like most social sciences, is a dynamic discipline, characterized by sometimes dramatic differences of opinion. Different understandings of women's relationship to the land and their role in Aboriginal customary law[58] have caused ongoing controversy, as have issues related to traditional government and politics[59] or to the importance of religion in the Aboriginal context.[60] Were it to happen that a new and generally unaccepted view of an aspect of, say, Aboriginal customary law emerged among a few anthropoligists and one of this group were called into court, it is *possible* that his or her evidence could be excluded as not yet constituting a 'field of expertise'.

It is difficult to say what would be a 'field of expertise' for the purposes of anthropology. Blackburn J. spoke in terms of anthropology generally being a field of expertise[61] but this seems somewhat simplistic. Anthropologists often specialize in 'narrowly defined regions or subjects' and it would for this purpose[62] be better to characterize more restricted areas of anthropology as 'fields of expertise'. An arbitrary and uncertain exclusionary mechanism such as the 'field of expertise rule' could raise difficulties for the giving of testimony upon some of these restricted areas. This could be unfortunate — the available evidence might be of real assistance to the courts. For these reasons in particular, the Australian Law Reform Commission has recommended against the inclusion of any 'field of expertise rule' in future Commonwealth legislation.[63]

The Basis Rule

So long as experts provide evidence as to 'fact', what they themselves have experienced, they are subject to the same rules as bind the lay witness. However, when they are in the 'special' position of being allowed to give opinion testimony, the courts have placed particular controls over the way in which they give their evidence. For example, they are in no special position as to the

58 Gale, F., *Women's Role in Aboriginal Society* (3rd ed. 1978); Bell, D. & Ditton, P., *Law, The Old and the New* (1980) 16ff. See also Bell, D., *Daughters of the Dreaming* (1983).

59 Some attribute a governmental function to an information council elders of whose influence depended on knowledge of secret matters, ritual status and personal respect (Berndt, R.M., 'Law and Order in Aboriginal Australia', in Berndt, R.M. & C.H., (ed.) *Aboriginal Man in Australia* (1965) 167, 177 and see Elkin, A.P., *Aboriginal Australians* (1976) 114. Others hold the view that the tribes had no formal apparatus of government and no recognized political leaders (Hiatt, L.R., *Kinship and Conflict* (1965) 141-147; Meggitt, M.J., *Deserts*, (1976) 248-250; Wilson, J., *Authority and Leadership in a 'New Style' Australian Aboriginal Customary: Pindan, W.A.* M.A. Thesis, University of Western Australia (1961)).

60 Australian Law Reform Commission, *Aboriginal Customary Law — Recognition*?, D.P. 17, 1980, para. 13. *cf.* the views of Dr L. Hiatt expressed at Australian Law Reform Commission — Australian Institute of Aboriginal Studies, Report of a Working Seminar on the Aboriginal Customary Law Reference, Sydney, 7-8 May 1983, Law School, University of New South Wales, 9.

61 *Milirrpum v. Nabalco Pty. Ltd.* (1971) 17 F.L.R. 141, 161.

62 Perhaps a different one to that of Blackburn J. It is arguable that in the field of expertise debate any field needs to be precisely defined.

63 A.L.R.C. 26. *Interim Report on Evidence* para. 743.

hearsay rules of evidence. They cannot assert that what someone else said is thereby the truth.[64] However, much of an expert's testimony must necessarily be based upon what other people have said to them, what they have learned from the work of others, and what they have read in the literature of their profession. It is unsatisfactory that experts should simply regurgitate what they have seen and heard elsewhere. They are not called to the witness stand to be mere conduits of the industry and information of others. Thus, in England, a number of cases have suggested that if the material upon which an expert relies in giving opinion testimony is neither admitted nor admissible in evidence, then the opinion itself is inadmissible. It is this that is called the *basis rule*. It may well be that this rule is restricted to application in criminal trials, at least not being applied with the same stringency in civil cases. Support for this is given by the summation by Phipson:

> An expert may give his opinion on facts which are either admitted, or proved by himself, or other witnesses in his hearing at the trial, or are matters of common knowledge, as well as upon hypotheses based thereon. His opinion is not, in general, admissible on materials which are not before the jury, or which have been merely reported to him by hearsay.[65]

Dr Pattenden has echoed this view, submitting that 'at least in criminal cases both the opinion and an account of the facts on which it relies are inadmissible'.[66] Australian authority on the matter is scant, but in the civil case of *Sych and Sych v. Hunter,*[67] Bray C.J. excluded opinion evidence based on what a psychiatrist had learned from the plaintiff's mother who was not called to give testimony:

> I can understand how desirable it may be in a scientific sense for the psychiatrist to acquaint himself with the opinions, the attitudes, and the personalitites of the patient's close relatives and friends, but it cannot be too clearly emphasized that from the point of view of the law, all this, if it takes place in the parties' presence is hearsay or opinion founded on hearsay and has to be excluded in justice to those who have no opportunity of testing it.

The situation is confused by the fact that the leading Australian case[68] excluded evidence by a medical expert of statements made to him by patients whom he examined which he had considered in coming to his conclusion. The judge acted when it became clear that the defence had no intention of calling the patients to give evidence. It is unclear whether the evidence was excluded as being inadmissible as a matter of law or simply in the exercise of the judge's discretion.[69] However, it was not suggested in *Ramsay v. Watson* that the evidence of opinion was inadmissible and should, therefore, have been excluded — it was the evidence that was given by the doctor to prove the basis of his opinions that prompted the concern of the court. Most recently, though, Kaye

64 *Ramsay v. Watson* (1961) 108 C.L.R. 642, 648.
65 *Phipson on Evidence* (12th ed. 1976) para. 1209.
66 Pattenden, R., 'Expert Opinion Evidence Based on Hearsay' (1982) *Criminal Law Review* 85, 88. See *R. v. Haidley & Alford* [1984] V.R. 229, 250-1.
67 (1974) 8 S.A.S.R. 118.
68 *Ramsay v. Watson* (1961) 108 C.L.R. 642.
69 Presumably as an exercise of the relevance discretion; the judgment of Wanstall A.C.J. in *R. v. Schafferius* [1977] Qd R.213, 217 appears to have interpreted the act of the judge in *Ramsay* as emanating from the exercise of a discretion. See also Pattenden, *op. cit.* 88. Presumably this was some unarticulated version of the relevance discretion.

J. of the Full Court of the Victorian Supreme Court cited *Ramsay v. Watson* as authority for a basis rule.[70] In addition, Young C.J. commented in passing that:

> It would have been necessary to prove by admissible evidence the facts upon which such an expert may base his opinion before the opinion can be recieved.[71]

Uncertainty, therefore, exists as to the status of opinion evidence based upon such inadmissible material. In the civil case of *Milirrpum v. Nabalco Pty Ltd*,[72] Blackburn J. asserted that the consequence of not proving the factual basis of an expert opinion goes to the weight of that opinion and not to its admissibility; it is likely in those circumstances to be accounted as 'of little or no value'. In *Milirrpum*, Blackburn J. was considering the basis upon which an anthropologist had given his evidence as an expert. He made an interesting distinction:

> The anthropologist should be able to give his opinion, based on his investigation by processes normal to his field of study, just as any other expert does. To rule out any conclusion based to any extent upon hearsay — the statements of other persons — would be to make a distinction, for the purpose of the law of evidence, between a field of knowledge not involving the behaviour of human beings (say chemistry) and a field of knowledge directly concerned with the behaviour of human beings, such as anthropology. A chemist can give an account of the behaviour of inanimate substances in reaction, but an anthropologist must limit his evidence to that based upon what he has seen the Aboriginals doing, and not upon what they have said to him.[73]

His Honour went on to note that the expert was the one most qualified to distinguish between the relevant and irrelevant and the worthwhile and the worthless. While prepared to affirm the existence of a policy that demands that 'every opinion must be shown to be based either on proved facts or on stated assumptions',[74] His Honour preferred to view the situation in a flexible way:

> It seems to me that the question is one of weight, rather than of admissibility, of the evidence, and that the court must be astute to inquire how far any conclusion proffered by an expert is indeed based on facts and to weigh it accordingly.[75]

His Honour looked to the normal methods by which social scientists arrive at their opinions:

> I do not think it is correct to apply the hearsay rule so as to exclude evidence from an anthropologist in the form of a proposition of anthropology -- a conclusion which has significance in that field of discourse. It could not be contended — and was not — that the anthropologists could be allowed to give evidence in the form: 'Munggurrawuy told me that this was Gumatj land.' But in my opinion it is permissible for an anthropologist to give evidence in the form: 'I have studied the social organisation of these Aboriginals. This study includes observing their behaviour; talking to them; reading the published work of other experts; applying principles of analysis and verification which are accepted as valid in the general field of anthropology. I express the opinion as an expert that proposition X is true of their social organisation.' In my opinion such evidence is not rendered inadmissible by the fact that it is based partly on statements made to the expert by the Aboriginals.[76]

Thus, by focusing upon the nature of anthropological research, a process which includes gathering people's views and attitudes and then assessing them, Blackburn J. concluded that anthropologists should be able to give their opinion, based on their investigation by processes normal to their field of study.

70 *R. v. Haidley & Alford* [1984] V.R. 229, 250-1.
71 *Ibid.* 234.
72 (1971) 17 F.L.R. 141.
73 *Ibid.* 161.
74 *Ibid.* 162.
75 *Ibid.* 162-3.
76 *Ibid.* 161.

just as are other experts. This is not to say, however, that the evidence of anthropologists as to what has been said to them could be used to prove the truth of those statements. Rather, Blackburn J. held that the opinions of those experts who arrive at their conclusions customarily by means of interviewing others and then 'considering'[77] what they have said will not be rendered inadmissible by dint of the fact that their opinions are based to some extent upon hearsay. Should the basis of those opinions not be proved, that will go to the weight which will be accorded to the expert evidence.

The one thing that can be said with certainty about the status of the basis rule in Australia is that it is uncertain. There are a number of indications that the rule does exist in criminal cases in England, the latest in 1983.[78] In Australia, the clearest examination of the problem is that of a single judge of the Northern Territory Supreme Court in *Milirrpum*. This decision, however, was a civil one and it is a matter for speculation whether it will be applied by superior courts in relation to civil actions and even less clear whether it will be applied in criminal cases. If anything, present indications are that, at least in the criminal context, a basis rule may well be emerging, a situation that could make the testimony of anthropologists and other social scientists extremely difficult. There are lessons to be learned. As much as possible, anthropologists when giving evidence should rely upon what they themselves have seen or, less satisfactorily, heard. They should not assert the truth of what has been said to them by others unless those 'others' are themselves going to be called to give evidence. Furthermore, they should explain the basis of theory or experience upon which their conclusions rest so that the court can assess the value of their opinions.[79] The courts are likely to take a restrictive position upon this aspect of evidence law when experts are giving their testimony before a jury. The courts' concern is that because of the authoritative position of experts there is a danger that the jury may pay undue attention to what they have said when they are simply repeating the words of others. It may be difficult or even impossible for the jury to gauge what constitutes the expert's input, and then the value of that input, if the anthropologist is acting as a conduit of others' views. In England the question has even been viewed as one relating to ethics; Lawton L.J. has gone so far as to say that it was the *duty* of counsel calling experts to ask them during examination-in-chief to state the facts upon which their opinion was based.[80]

A particular problem that could arise were the basis rule to be insisted upon in Australia would be that there are circumstances where experts testify on the basis of material that is not or that cannot be adduced as evidence because of its secrecy. Were expert evidence to be rendered inadmissible by reason of the

[77] *Ibid.* 161. The statements cannot, though, be used for a hearsay purpose.

[78] *R. v. Abadom* [1983] Criminal Law Review 254.

[79] *R. v. Jenkins; ex Parte Morrison* [1949] V.L.R. 277, 303; *R. v. Haidley & Alford* [1984] V.R. 229, 234-5; *Milirrpum v. Nabalco Pty Ltd* (1971) 17 F.L.R. 141, 163.

[80] *R. v. Turner* [1975] 1 Q.B. 834, 840; see also Devlin L.J. in *Glinski v. McIver* [1962] A.C. 726, 780-1.

technicality of the basis rule, the courts could be deprived of potentially very useful evidence. In the context of anthropological evidence, therefore, for a variety of reasons the basis rule is singularly inappropriate.

The Interim Report of the Australian Law Reform Commission has recognised the difficulties that exist for social scientists when giving their evidence if all of the major bases of that evidence have already to be proved. The Report argues against the need for a 'basis rule' and contends that evidence whose basis is either not proved or not adequately proved ought to be admitted and its value left to be gauged by the court. It contends that if evidence is given by an expert on the basis of all kinds of unproved 'facts' and hypothetical assumptions, the court will generally be able to recognise the limitations inherent in the expert opinion testimony.[81]

The Ultimate Issue Rule

It is commonly stated that a witness may not be asked to testify on an 'ultimate fact in issue'. This is generally construed to refer to an important question which the judge or jury has to determine, a central dispute as to fact or law. It is variously said that such testimony would not be helpful, that it would 'usurp the function of the court' or that it would be unnecessarily confusing. The rule has been abolished by statute in some United States and Canadian jurisdictions[82] and judicial inroads have been made in others.[83] Generally, though, it remains in wait for the unwary, a creature of uncertain and unpredictable interpretation and application. Fundamental uncertainties pervade any formulations or discussions of the ultimate issue rule. Critical among these is the question of what precisely constitute 'the issues' for the purposes of the rule. *Prima facie* it covers the giving of opinions touching upon any of the issues in dispute in a criminal trial where the onus rests upon the prosecution to prove all material facts beyond reasonable doubt. Looked at in this way, the rule covers the giving of opinions upon ultimate issues in general; that is, upon anything materially in dispute in a criminal trial, and not merely upon *the* ultimate issue. Were the rule to be pursued to its logical extreme, many extremely helpful expert opinions would not be able to be given. More recently, the controversy and uncertainty relating to the rule has extended even beyond its formulation and come to question its very existence.[84]

The ultimate issue rule has been used by the courts to exclude evidence that they fear could asssume undue weight in the mind of the jury, thereby leading to an imperfect adjudication upon the issues of fact. It is conventionally said

81 A.L.R.C. 26, para. 750*ff*. See also Crawford, J.R., *The Proof of Aboriginal Customary Law*, 1983, A.L.R.C. Aboriginal Customary Law R.P. 14, 1983, 39-40; A.L.R.C. *The Criminal Law, Evidence and Procedure*, 1984, Aboriginal Customary Law, D.P. 20, 23.

82 704 of the United States Federal Rules of Evidence; Canadian Evidence Code s. 69.

83 *D.P.P. v. A. & B.C. Chewing Gum Limited* [1968] 1 Q.B. 159, 164 per Lord Parker C.J. See also MacPhail, I.D., *The Law of Evidence in Scotland* (1979) 17.04.

84 *Fisher v. R.* (1961) 130 Canadian Criminal Cases 1, 19-20 per Aylesworth J. (Ontario CA); *R. v. Palmer* (1980) 1 A. Crim. R. 458, 463-4 per Glass J.A.

the the expert's testimony upon the ultimate issues runs the risk of 'usurping' the function of the court.[85] The rule has been applied where the court has felt that the expert was tending to act as an advocate or to seek to determine the proceedings. Although it has been the subject of much criticism, it continues to be applied unpredictably, particularly in criminal cases.[86] Often the application of the rule comes down to the use of particular words by an expert witness. For example, it has been held that experts should not use the actual words, the '*ipsissima verba*' of a statute. It appears that testimony can probably be given on an ultimate issue in the cases of insanity and diminished responsibility.[87]

Thus, it is important for experts to be most careful in their use of 'legal terminology'. Failure to do so may endanger the admissibility of possibly the most important part of their testimony. The use of the words in a statute under which an accused is charged, expressions such as 'diminished responsibility', 'testimonial incapacity', 'negligence' and 'fraud' and technical legal phraseology generally should be avoided wherever possible. It is clear that many of the problems relating to testimony on crucial issues in the case can be avoided by counsel being careful about the phrasing of their questions and experts refraining from the usage of certain potentially proscribed expressions. However, at least on one occasion the circuitous eliciting of opinions which are in fact about an ultimate issue has attracted a caveat from Jenkinson J. of the Victorian Supreme Court, with Young C.J. agreeing:

> If there now be such a rule, its operation is not in my opinion to be avoided by such devices as posing the question as one concerning the capacity to do an act or to conceive an intention in lieu of one as to whether the fact was in fact done or the intention in fact conceived.

The Australian Law Reform Commission has recommended abolition of the ultimate issue rule.[88] Its only concern was with the situation where an expert expressed his or her opinion 'as to the effect in law' of a state of affairs; in other words, when an expert expressed an opinion upon an issue crucial to the determination of a case using technical legal terminology. However, it pointed to the difficulties and the arbitrariness in proscribing certain words meaning the one thing and not others meaning the same. The recommendation of the Commission in its Interim Report opted for complete abolition of the ultimate issue

[85] The expression was employed by LT-C Inglis in *Morrison v. Maclean's Trs* (1862) 24 D. 625, 631 where medical witnesses were asked to state their opinions on the issues although no question of medical science was involved.

[86] The ultimate issue rule was not applied in the *Isobel Phillips* case where the expert anthropologist was permitted to testify upon the likelihood of the accused having acted under duress — a central question in issue in the case. This highlights the erratic nature of the application of the ultimate issue rule.

[87] *R. v. McEndoo* [1981] 5 A. Crim. R. 52; *R. v. Tonkin & Montgomery* [1975] Qd R. 1, 39.

[88] A.L.R.C. 26, cl. 69.

rule as had the United States Supreme Court in its drafting of the Federal Rules of Evidence ten years before.[89] It has sought the expression of views on this drafting option.

Common Knowledge Rule

Because the fact-finding tribunal, be it the judge or jury, is assumed by the law to have ordinary powers of intellect and a certain reservoir of general knowledge, it has been asserted by the courts that there are a number of fields of human endeavour in which there is no need for expert assistance. These fields in which the court is said to have sufficient competence are classified as 'areas of common knowledge'. Expert testimony on matters of 'common knowledge' has for a long while been held inadmissible. A typical example of a way in which courts in modern times have interpreted this exclusionary mechanism is to be found in the judgment of Matthews J. in *Eagles v. Orth* where His Honour held:

> If a person claiming no special knowledge is able to appreciate the nature of a seat belt and the general restraint of movement on the body of the wearer which results from its use, the opinions of persons professing to have acquired special skills in that behalf should not be admitted.[90]

Thus it is not asserted that, for the presence of the requisite knowledge, the jury need have *as* extensive an appreciation of the particular subject as the expert, but rather that it should have an understanding *sufficient* for general comprehension. The question is at times said not to be whether the jury can receive useful assistance from the witness but whether it already has an acceptable grasp of the area.[91] Predictably, the task of defining the capacities and level of understanding of the average juror has proved extremely problematical. The average person's acquaintance with different areas of common law and human knowledge will wax and wane according as technology and different standards of education have their effects, so the process of attempting to form something resembling an identikit picture of the 'ordinary juror' at any one time becomes extremely difficult if not impossible.

Nevertheless, the common knowledge rule continues to operate as one of the major exclusionary mechanisms upon expert testimony. It has become clear law that experts may speak on 'abnormality' but not on 'normality'. However, the determination of what constitutes 'normality' and 'abnormality' at any one time or in a particular community is no easy task. Lord Pearce

[89] Freckelton, I., *Opinion Evidence*, A.L.R.C. Evidence R.P. 13, Sydney, 1983, 30. There are certainly difficulties in determining the ambit of the background paper's prohibition of opinions as to the 'effect in law' of a state of affairs. See also Australian Law Reform Commission, *The Criminal, Evidence and Procedure*, (Aboriginal Customary Law) D.P. 20, 1984, para. 40; Crawford, J.R., *The Proof of Aboriginal Customary Law*, A.L.R.C. Aboriginal Customary Law R.P. 14, 1983, 30ff. Note, however, that Congress in Public Law 98-473, 98 Stat 2067, the Insanity Defence Reform Act 1984, amended Rule 704 of the Federal Rules of Evidence to prevent testimony by an expert on on ultimate issue in a criminal case with respect to the mental state or condition of a defendant. See also *United States v. Dyer* 84-3021 (CA 11th February 8 1985).

[90] [1976] Qd R. 313, 315.

[91] Odgers, S.I., *Common Law Areas of Disagreement and Uncertainty*, A.L.R.C., Evidence R.P. 2, 1981, 139-141.

attempted to draw the lines in the leading case of *Toohey v. Metropolitan Police Commissioner*:[92]

> Human evidence shares the frailities of those who give it. It is subject to many cross-currents, such as partiality, prejudice, self-interest, and, above all, imagination and inaccuracy. Those are matters with which the jury, helped by cross-examination and common-sense must do their best. But when a witness through physical (in which I include mental) disease or abnormality is not capable of giving a true or reliable account to the jury, it must surely be allowable for medical science to reveal this vital hidden fact to them.

In 1975 the English Court of Appeal came to consider the issue once more.[93] It held:

> We all know that both men and women who are deeply in love can, and sometimes do, have outbursts of blind rage when discovering unexpected wantonness on the part of their loved ones: the wife taken in adultery is the classic example of the application of the defence of 'provocation'; and when death or serious injury results, profound grief usually follows. Jurors do not need psychiatrists to tell them how ordinary folk who are not suffering from any mental illness are likely to react to the stresses and strains of life.

An expert sociologist, anthropologist or mental health professional has been held not to be an expert on the 'ordinary man', as this is said to be the exclusive province of the jury.[94] Who, though, is 'the ordinary man'? What characteristics does this individual possess? This can be particularly important in the Aboriginal context. Many Australians have very restricted contact with Aborigines. They know little about their living conditions and still less about the pressures under which they live either in urban, town-camp or rural areas. These areas can be quite different to the experience of the average Australian and unlikely properly to be comprehended without some form of expert assistance. The problem is that the 'common knowledge rule' has tended to be interpreted very narrowly. For example, expert evidence that a person is not violent, but is susceptible to provocation in the 'ordinary way', has been held not to be admissible.[95] The danger, traditionally asserted, is that, if the evidence is not about a person suffering from a recognised psychiatric illness, the jury may be misled into attaching excessive weight to the expert opinion even when that evidence is upon 'normality', so the evidence is excluded. Evidence may be given as to the circumstances in which a confession was made but the courts have stressed on a number of occasions that the defence is not at liberty to call an expert to testify as to the likelihood of the accused's having confessed because of being, for example, weakwilled, vacillating, a poor judge of others, obsequious, submissive or dependent.[96] So long as it is not being alleged that the accused was insane, suffering from diminished responsibility or mentally retarded, the courts will not countenance expert evidence as to character designed to show the unreliability of what can be a critical piece of evidence. This is said to be the issue for the jury[97] and it has been repeatedly asserted that 'expert witnesses cannot be permitted to usurp the jury's function'.[98]

92 [1965] A.C. 595, 608.
93 *R. v. Turner* [1975] 1 Q.B. 834, 841.
94 *R. v. Chard* (1972) 56 Cr. App. R. 268; *R. v. MacKenney* (1981) 72 Cr. App. R. 78, 80.
95 *R. v. Turner* [1975] 1 Q.B. 834, 841-842.
96 *R. v. McEndoo* [1981] 5 A. Crim. R. 52, 54.
97 *Ibid.* 55.
98 *Ibid.* See also *R. v. Ashcroft* (1965) Qd R. 81, 85 per Gibbs J.

Two other important restrictions imposed by the common knowledge rule have been placed upon the material which is said to be within the ordinary ken of the juror. The Queensland Court of Criminal Appeal has refused evidence of psychological research on memory which was said to be a matter 'well within the field of juries'.[99] In addition, the courts have been loath to allow expert opinion testimony upon the ability of an accused to form the requisite intent relevant to the crime:

> The intention with which a person acts is not a question of medical science or a question upon which a psychiatrist or any other professionally qualified person has any greater claim to express an opinion than an unqualified person. It is a question which a layman can as well answer as a psychiatrist. To put the matter in another way, the question is within ordinary human experience and accordingly opinion evidence is not admissible in relation to it.[1]

In one case in the Court of Criminal Appeal in Western Australia, the appellant argued against his conviction for wilful murder on the ground that the trial judge had erred in ruling inadmissible evidence sought to be called from a psychologist and a psychiatrist to establish that the appellant was 'of borderline mentally defective intelligence' and that his 'IQ' was somewhere between 69 and 78. The appellant's submission was that the evidence was relevant to the question of intent. Burt C.J. prefaced his ruling by noting that a jury can safely be left unaided to pass judgment upon the ordinary man but that in this case the evidence, if accepted, would have taken the appellant outside the range of the ordinary man, leaving him in a 'special class'. The Chief Justice held that:

> . . .[W]hen intent is an issue, the accused may call expert evidence to establish any abnormal characteristic which he may have, which affects, or which at the relevant time may have affected, the operation of his mind, and to establish again, in general terms, what that effect was or may have been.[2]

But he held that the expert could not go further and express opinions about the effect of the appellant's abnormality upon his or her capacity to form the requisite intent in a particular instance. In this he was influenced by considerations of the ultimate issue rule.

There are, therefore, a number of circumstances in which expert witnesses will not be allowed to give opinion testimony because their views will trespass upon an area of 'common knowledge'. It is uncertain what the parameters of 'common knowledge' are. A number of decisions, however, have indicated that the courts are unwilling to allow experts to testify on matters which traditionally juries have been thought capable of assessing. It is unclear whether the courts will have particular regard to testimony which, for example, relates to an Aborigine's ability to form the intent necessary to commit a crime because special circumstances peculiar to his or her conditions were operating upon his or her mind. It may well be that the courts will adopt a reasonably

99 *R. v. Fong* [1981] Qd R. 90, 95. It has been suggested, accordingly, that expert evidence may well not be able to be given on the dangers of eye-witness identification. This is in marked contrast to the situation in the United States where such evidence is welcomed if it is likely to assist the trier of fact

1 *R. v. Carn* [1982] 5 A. Crim. R. 466, 469.

2 *R. v. Schultz* (1981) 5 A. Crim. R. 234, 239; See also *R. v. Honner* [1977] Tas. S.R. 1.

sensitive stance to the situation by acknowledging that circumstances peculiarly Aboriginal are not within the 'common knowledge' of non-Aboriginal juries. However, the case law as it stands would need to be distinguished in order to allow an anthropologist, for example, to testify about the state of mind of an Aborigine, perhaps acting under the dictates of Aboriginal customary law. The way lies open for this by the courts holding that such Aborigines are in a 'special class'.[3] Such an approach, however, would entail many ramifications in a multi-cultural Australia[4] and the matter remains to be resolved by appellate courts in Australia. If Aborigines were held by the courts to constitute a 'special class', about which expert assistance for the courts was helpful and, on occasions, necessary, it would have to be asked how many other such 'special classes' exist within multi-cultural Australia. It cannot be denied that ethnic minorities on occasions have very different standards and expectations, and even kinship groupings, to those usual among white Anglo Saxon Protestants.

A less restrictive interpretation or abolition of the common knowledge rule could well be the single most significant factor in bringing more anthropologists as experts into the Australian courts. The Australian Law Reform Commission's *Interim Report on Evidence* recommended the abolition of the common knowledge rule.[5]

Judicial Attitudes Toward Experts

The courts have traditionally been uneasy about the role of experts in the courtroom. Sir George Jessel in 1876 summed up the fear that many judges still articulate:

> A man may go, and does sometimes, to half-a-dozen experts. I have known it in cases of valuation within my own expereince at the bar. He takes their honest opinions, he finds three in his favour and three against him; he says to the three in his favour, will you be kind enough to give evidence? And he pays the three against him their fees and leaves them alone; the other side does the same. It may not be three out of six, it may be three out of fifty. I was told in one case, where a person wanted a certain thing done, that they went to sixty-eight people before they found one.[6]

Ironically, along with judicial mistrust of experts, a myth has for a long while existed in the legal system that the expert functions as the impartial, non-partisan information-supplier to the courts assisting them disinterestedly when asked. However, the reality is quite different.

Inherent in the adversarial system as it presently operates is the danger that the expert, whose 'independent' opinion the tribunal of fact may rely upon, is going to be partisan in the views which he or she expresses. That remuneration comes from the party for whom the expert testifies is in itself a factor in aligning the expert with his or her source of funds and in militating toward at the

3 This was the technique consistently adopted in relation to testimony about homosexuality: *Thompson v. R.* [1918] A.C. 221; *R. v. Sims* [1946] 1 K.B. 531; *R. v. McMillan* (1976) 23 C.C.C. (2d) 160.

4 Kirby, M., *Reform the Law* (1983) ch. 5.

5 A.L.R.C. 26 achieves this by broad acceptance of expert evidence in its draft legislation, subject to the judicial discretions.

6 *Thorn v. Worthing Skating Rink Co.* (1877) 6 Ch. D 415n.

least a subconscious empathy with the 'employer's' cause. The contrast between the gentle examination-in-chief that experts receive at the hands of their own counsel and the potentially hostile cross-examination to which they may be subjected by opposing counsel also tends to throw them further into the arms of the party who has called them. There is a real danger that an expert, who after all does have command of a field of expertise, may adapt views and even interpretations of the facts so as to assist those who have called him or her. Sir George Jessel put it this way:

> An expert is not like an ordinary witness, who hopes to get his expenses, but he is employed and paid in the sense of gain, being employed by the person who calls him. Now it is natural that his mind, however honest he may be, should be biased in favour of the person employing him, and accordingly we do find such bias . . . Undoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very natural, and is so effectual that we constantly see persons, instead of considering themselves witnesses, rather consider themselves as the paid agents of the person who employs them.[7]

Concern has also traditionally been expressed about the accessibility of experts who are prepared to give opposing testimony. This applies particularly to expert evidence provided by social scientists. In Scotland, Lord President M'Neill exclaimed, apparently in despair:

> I have hardly ever seen a case in which evidence of opinion was required, except perhaps the plainest case of murder by cleaving a man's skull with an axe or something of that kind, in which a different opinion was not expressed on both sides. And in civil questions, I have hardly ever seen a case in which there was not a conflict of scientific evidence on both sides.[8]

The multiplicity of views clearly available in all manner of circumstances has led many judges to be somewhat mistrustful of the quality of expert evidence. This has disturbing consequences when it is realised that the forensic expert may well be especially credible and imposing as a witness. It is clear that counsel are now seeking out as experts not only those who are particularly esteemed within their scientific community, but more especially those who are likely to present forcefully and persuasively the views which counsel would like to see accepted by the court. This is leading to an escalation in the articulacy and credibility in the 'forensic expert'. As a phenomenon, this may be yet more reason for concern. The danger is that the expert who appears in the courtroom will be the showperson and, while superficially very believable, may well not be genuinely representative of the discipline of which he or she is part. In these circumstances a distorted impression can be given to the jury without their having the opportunity of realising it.

Juries are all too often subjected to a barrage of expert opinions whose complex arguments they are expected both to understand and to assess one against another.[9] The technical difficulties of coming to terms with the often esoteric issues have been drawn to our attention recently by the problems in the

[7] *Lord Abinger v. Ashton* (1873) 17 L.R.Eq 358, 374. See also *Plimpton v. Spiller* (1877) 6 Ch. 412, 416; *Moore v. R.* [1963] S.C.R. 522, 537-8; MacDonald, D.C., 'Opinion Evidence' (1978) 16 *Osgoode Hall Law Journal* 321, 331.

[8] *Davidson v. Davidson* (1859-60) 32 S.J. 305, 307; Scots R.R. 1206.

[9] Rosen, *op. cit*, 569ff.

Splatt[10], *Chamberlain*[11] and *Helen Smith* cases.[12] There is a real possibility that juries who are unable properly to comprehend the testimony of the witnesses appearing before them will take into account irrelevant considerations and fail to give due regard to relevant ones. It may be that jurors will tend to believe those witnesses who are the more impressive in their presentation or more articulate and confident in what they say. This does not assist the accurate and effective trying of cases.[13]

Danger of Expert Testimony

It is because the courts have been concerned about both the quality of expert evidence and the powerful position of the expert in presenting evidence that they have been conscious of a need to maintain controls over expert testimony. It is probably because of these fears that the courts have tended to talk of the problem of experts 'usurping the function of the courts'. While technically experts can never make the decision for the jury[14], they may well be in a position, by dint of their authority, articulacy and expertise, to offer opinions which are in reality determinative of the case. Thus, the courts have been reluctant to allow them to express their opinions upon matters central to the determination of the guilt or innocence of an accused. This is just one manifestation of the courts' concern to reduce the situations in which expert evidence can assume a status to which it is not entitled.

The United States Experience

All of these difficulties have been experienced and acknowledged in the United States where the volume of litigation is much greater than it is in either Australia or England. The approach there has so far been quite different to that in Australia. The 1975 Federal Rules of Evidence codified largely what was the previous situation in regard to the giving of expert testimony. As a result of that codification, the fetters of the common knowledge rule, the ultimate issue rule and the basis rule were abolished as a matter of Federal law. The United States Federal Rules have been adopted by a majority of the State legislatures since 1975. Thus, experts are much freer to testify than they are in England and Australia. Indeed, the attitude toward experts is one which recognises the fact that there are frequently differences of opinion among those who are called

10 South Australia Royal Commission *Report Concerning the Conviction of Edward Charles Splatt*, (1984).

11 *Chamberlain v. R.* (1984) 51 A.L.R. 225.

12 Foot, P., *The Helen Smith Story* (1983)

13 Freckelton, I., *Opinion Evidence op. cit.* para. 87ff. There is also the related argument about the appointment of court experts that they may well not be truly representative of the scientific community which they purport to represent. See Freckelton, I., 'Court Experts, Assessors and the Public Interest' (1985) 8(2) *International Journal of Law and Psychiatry*. This has already been a cause of some controversy in Northern Territory Land Claim hearings.

14 This was well pointed out by the N.S.W. Court of Criminal Appeal in *R. v. Duncan* (1969) 90 W.N. (N.S.W.) 150, 155. See also the comments of MacPhail, I.D., *The Law of Evidence of Scotland*, Scottish Law Reform Commission, 1979, para.17.05ff.

upon to give this form of testimony. The American legal magazine, *Trial*, tells the story. There are often forty or more different advertisements by those prepared to give expert forensic testimony on any subject ranging from amusement park accidents to employability and loss of sexual compatibility. In the United States an expert may be a forensic expert by profession. It is a major industry. Seminars are held ever year in which those employed as expert witnesses are taught to be better forensic experts and advocates are boned up on how better to examine and cross-examine experts. Forensic experts advertise the number of winning sides by which they have been employed and the sizes of the verdicts that their testimony has been responsible for extracting. Most professions whose members appear regularly in court have professional associations, self-regulated standards and codes of ethics.[15]

The United States position is essentially one which is much more 'up-front than our own; it could be said to be more honest. It acknowledges that expert witnesses are employed by the side which calls them and that they are remunerated according as their testimony will assist in the litigation. This is not to imply that anything improper occurs. Rather, American law recognises the fact that there are in any one case a plethora of experts available to testify for either side and that this is particularly evident when social scientists' testimony is involved. An important difference between Australia and the United States is that experts are not held in the same regard. In the United States, understanding of the limitations of the expert means that there is not the same mystique when an expert is called into the witness box and, accordingly, there is not the same danger that improper weight will be given to his testimony. For this reason, fewer controls upon the matters with which an expert can assist the court are needed. Greater public consciousness of the 'expert witness industry' has meant that fewer illusions are harboured.

More Scope for the Anthropologist

The approach of the Australian Law Reform Commission in its Evidence Report was to try to reduce the arbitrariness and the uncertainty that it has perceived in the development of the common law rules of expert evidence. The task entrusted to it was both to modernise the law of evidence as it is applied in the federal courts and to promote the cause of uniformity where possible.[16] Thus, its 1985 Interim Report recommended the abolition of the prohibition of testimony on matters of common knowledge and on ultimate issues. In addition, the Report recommended that the criteria for qualification as an expert be less restrictive and that no basis or field of expertise rule should apply. In addition, a number of the recommendations of the Aboriginal Customary Law

[15] See, for example, the American Anthropological Association's Code of Ethics, 1973.

[16] Smith, T.H., 'Evidence Law — The Need for Reform?', paper prepared for the Annual Conference of Victorian Magistrates, 29-30 July 1982; *Evidence Law Reform — Uniformity?*, paper prepared for Third Biennial Convention, Australian Stipendiary Magistrates Association, 11-14 June 1982, Canberra.

reference are likely to be in favour of creating fields in which anthropologists will be encouraged to assist the courts by acting as expert witnesses. Thus, if the Government is sympathetic to the proposals of the A.L.R.C. in its Evidence and Aboriginal Customary Law Reports, a number of fetters circumscribing the giving of expert testimony on matters of anthropology will be removed and, in fact, the areas where such testimony will be relevant will be increased.

Need for Professionalism: Confidentiality

Legislation, though, is only one aspect. The way ahead will undoubtedly be toward the development of a forensic expert industry in which there will be anthropologists and scientists belonging to a number of disciplines who earn a considerable proportion of their income from testimony in the courtroom. Even in Australia this has well and truly begun. A search through the law society journals or even the telephone directory will reveal that, among others, forensic psychologists are already advertising for business. With the assertion of this role, though, comes a need for professionalism among anthropologists likely to be associated with the courts or like bodies and a need for the development of formal codes of ethics such as are to be found in the United States.[17]

proceedings or land claim hearings to disclose matters that he or she believes should remain secret. There are certainly situations in which anthropologists would be loath to produce all of their field notes for public examination: they may have been particularly privileged to receive the information or there may even have been strings of secrecy attached to it on whose condition it was imparted. This recently became an issue in the Warumungu Claim where the Northern Territory Government attempted to subpoena a large number of field work notes from an anthropologist and two linguists.[18] In the land claim context, it is noteworthy that the Commissioner has the power to compel any 'person whom he believes to be capable of giving information relating to a matter being inquired into by the Commissioner in carrying out his functions'[19] to answer questions. Not even the privilege against self-incrimination applies.[20] In general, although a formal privilege does not exist to protect the confidentiality of communications between anthropologists and either Aborigines or other subjects whom they are working with, it is arguable that some provision exists under the law to allow anthropologists to refuse to disclose the details of their discussions during field work. In Australia, this aspect of the law has received little close attention, the most prominent decision probably being that

17 The American Anthropological Association's Code of Ethics, 1973. Some aspects of this are discussed by Rosen, L., 'The Anthropologist as Expert Witness' (1977) 79 *American Anthropologist* 55.

18 Counsel for the Central Land Council attempted to reach a compromise by arguing that the subpoenas were unwarrantably broad. They met with initial success. See the reasons for decision of the Commissioner, 1 October 1985. See also A.L.R.C. 26, cl. 103.

20 Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) s. 54(3). See also Freckelton, I., 'Witnesses and the Privilege Against Self-Incrimination' (1985) 59 *A.L.J.* 204.

of the New South Wales Supreme Court in 1965[21] in which it was held that the Court did not possess a discretion to excuse a witness from answering questions in such a situation. However, the law in England in the 1970s and 1980s has developed quite differently and the majority view would appear now to be that unless the interests of justice '*demand*' that confidentially entrusted information be disclosed, the courts will attempt to preserve this form of privacy of information.[22] Their preferred approach will be to attempt to elicit the evidence in an alternative way, if that is reasonably possible, and, if not, to balance the public interests in favour of compulsory disclosure against those against. The possibility of disclosure to a limited audience has on occasion been resorted to. However, the courts, even in England, have traditionally been willing to order disclosure of confidentially entrusted information if the interests of justice have been threatened by non-disclosure[23] so in such a situation the presumption will be in favour of compulsory disclosure unless good reasons can be shown why the exercise of balancing public interests should be entered into.

Once that exercise begins, it is incumbent upon anthropologists, just as it is upon psychiatrists, ministers of religion and journalists, to demonstrate the importance of the study in which they are engaged, the role that confidentiality plays in the success of that study and the adverse consequences both to that study and to similar projects if the courts insist upon the public disclosure of the information sought for the tribunal of fact. A factor most relevant to this would be the generally accepted attitude of anthropologists toward confidentiality and evidence of the importance that they customarily attach to it. If anthropologists are unable to put themselves in the same position as, for example, mental health professionals, ministers of religion and journalists by having a code of ethics to point to, whose mandates they would be disobeying by revealing confidentially entrusted information, they run the risk of having both the courts and land claim hearings attempting to extract from them by threat of contempt proceedings information which they feel ought not to be aired in public.[24]

Although it must be acknowledged that anthropology as a discipline is not in all of its aspects comparable to the mental health professions, medicine or

21 *Re Buchanan* [1964-5] N.S.W.R. 1379, 1381.

22 *Attorney-General v. Clough* [1963] 1 Q.B. 773; *Attorney-General v. Mulholland* [1963] 2 Q.B. 477; *British Steel Corporation v. Granada* [1981] A.C. 1096; *Attorney-General v. Lundin* (1982) 75 Cr. App. R. 90; *Secretary of State for Defence v. Guardian Newspapers* [1984] 1 All E.R. 453. See also Cripps, Y., 'Judicial Proceedings and Refusals to Disclose the Identity of Sources of Information' (1984) 43 *Cambridge Law Journal* 266.

23 See, for example, the decision of the House of Lords in *Norwich Pharmacal Co. v. Customs and Excise Commissioners* [1974] A.C. 133 and even the police informant cases such as *Marks v. Beyfus* (1890) 25 Q.B.D. 494. See also the analogy drawn to the police informant cases for social workers in the child abuse context in *D. v. N.S.P.C.C.* [1978] A.C. 171.

24 Freckelton, I. & Smith, T. H., *Privilege* (1983) 390-408, 492-467, 481-5, 508-22; Freckelton, I., *Therapy, Confidentiality and Privileged Communications: A Law Reform Perspective*, paper presented to the The Network of Alcohol and Drug Agencies Conference, 30th June 1984 (1984) *Connexions*; 'Family Planning Centres, Sex Therapists and the Courts' (1984) 3 *Healthright* 25. For a useful discussion of recent cases involving Aborigines and secrecy see Neate, S., 'Keeping Secrets Secret' (1982) 5 *Aboriginal Law Bulletin* 1 and the decision on women's ceremonies in the Daly River (Malak Malak) Land Claim. The concept of a 'ceremonial privilege' has been floated — see Freckelton, I. & Smith, T. H., *Privilege*, 1983, para. 361ff.

journalism, and might be said for the purposes of confidentiality to be highly personalised, various and idiosyncratic, nevertheless a statement of aims, priorities and preferred conduct is both a realisable goal and highly desirable. In the context of protection of the confidlentiality of anthropologists' sources and information, the finalisation of a code of ethics which includes provision for maintenance of privacy in a defined variety of contexts is most important. When that is accomplished, the courts and other bodies not bound by the rules of evidence are much more likely to recognise the need to protect the confidentiality of anthropologists' studies and field notes, whenever that will not interfere seriously with the 'interests of justice'.

The Future

As in the United States, the forensic expert industry will no doubt be extremely competitive and it is probable that anthropologists will find themselves right in the middle of the melee. The American experience suggests that the most effective experts will be those who are articulate, confident and attractive.[25] It can be expected that the law in Australia will adapt to this industry in a manner somewhat similar to the United States experience and that more, rather than less, expert testimony will come before the courts. In the meantime, however, when anthropologists appear before the courts in the eastern States, they must recognise that their experience may well be different to that in land claim hearings. Often they will not be able to proffer a written report, detailing all that they think relevant to the issues, with the result that important aspects of their opinions and information will never come before the courts. They may not be able to testify on the most important issues before the courts. They will not be able to testify on matters that the courts arbitrarily determine are 'matters of common knowledge'. They may not be able to use information garnered from what others have told them as they normally would in the assembling and reporting of their opinions. They may, even if their views are only shared by a few of their colleagues, have their testimony impugned as not being within an acceptable field of expertise.[26]

In light of these difficulties, advice is not easy. Certainly, the language employed by the forensic anthropologist should be as non-technical and as non-legal as possible. In addition, counsel examining his or her own anthropologist should be thoroughly briefed as to the means by which anthropologists generally come to their opinions and how in this instance the views of the testifying anthropologist were arrived at. The anthropological witness should be careful

[25] For an analysis of this see Freckelton, I., *The Trial of the Expert*, (1986). see Hovland, C. I. & Weiss, W., 'The Influence of Source Credibility on Communication Effectiveness' (1951) 15 *Public Opinion Quarterly* 635; Feldman, W.S., 'Do You Sound Credible?' (1981) 9 *Legal Aspects of Medical Practice* 1. For problems relating to women's testimony see Progrebin, L. D., 'Down with Sexist Upbringing' (Spring 1972) *Ms*; O'Barr, W. M. & Conley, I. M., 'When a Juror Watches a Lawyer' (1976) 3 *Barrister* 8; Moenssens, A., 'The "Impartial", Medical Expert: A New Look at an Old Issue' (1978) 25 *Medical Trial Technique Quarterly* 63, 67; Chaiken, S., 'Communicator Physical Attractiveness and Persuasion' (1979) 37 *Journal of Personality and Social Psychology* 1387.

[26] Even this was called into question in *Milirrpum v. Nabalco Pty. Ltd.* (1971) 17 F.L.R. 141, 161.

to ensure that his or her testimony should throughout appear of assistance to the court. A tightrope must be walked between testimony seeming unduly technical and unduly commonplace. Either could lead to exclusion.

The increased scope for testimony by anthropologists and the concomitant likelihood of their involvement in the courtroom throughout Australia, including in the appellate courts, will mean that anthropologists are on occasion subjected to rigorous cross-examination and application of the technical rules of evidence in the same way as are other expert witnesses. Anthropologists must be prepared for the possibility of attacks by counsel designed to demonstrate lack of credibility. These may identify the anthropologist with a particular ideological position thus implying consistent bias, they may seek to align the witness with particular political affiliations or may allege that the anthropologist is a professional 'hired gun', a mercenary ready to adapt his or her views to the rewards offered. There is no ready defence to any of these charges. The anthropologist-witness must just rely on his or her record and try to be as 'professional' and 'believable' as possible. Such interrogation is an occupational hazard for expert witnesses of all kinds.

Nevertheless, the opportunities for involvement on the part of anthropologists in courtroom procedure are showing signs of considerable expansion. It may not be long before anthropologists are able to be as effective and as useful in the courtroom as they have proved to be in land claim hearings. It could well be that the testimony of anthropologists will be sought after by lawyers in the near future both in relation to the social groupings and operation of ethnic minorities as well as matters Aboriginal. Reform of evidence law, as well as of Aboriginal customary law, promises to create a number of additional areas where anthropologists' testimony will be admissible in evidence. Modernisation and clarification of the rules relating to the giving of expert testimony should also enable the anthropologist more effectively to provide useful information to the courts. All of this will bring anthropologists further into public and courtroom limelight, making them more accountable as experts and, it is to be hoped, more ready for the challenges to anthropology as a professional discipline of the 1980s. Law reform is doing its part. Now it is the turn of anthropology in Australia to formulate its codes of ethics, its professional associations and its professional standards.[27]

[27] Jackson and Powell (Jackson, R. M. & Powell, J. L., *Professional Negligence*, (1982) 1-2, usefully address the nature of professionalism:

> A definition of 'the professions' is pre-eminently a matter for social historians or for sociologists rather than lawyers Generally speaking, however, the occupations which are regarded as professions have four characteristics:
> (i) *The nature of the work.* The work done is skilled and specialised A substantial part of the work is mental rather than manual. A period of theoretical and practical training is usually required, before the work can be adequately performed.
> (ii) *The moral aspect.* Practitioners are usually committed, or expected to be committed to certain moral principles, which go beyond the general duty of honesty. They are expected to provide a high standard of service for its own sake. They are expected to be particularly concerned about the duty of confidentiality. They also, normally, owe a wider duty to the community, which may on occasions transcend the duty to a particular client or patient.
> (iii) *Collective organisation.* Practitioners usually belong to a professional association, which regulates admission and seeks to uphold the standards of the profession. Such associations commonly set examinations to test competence and issue professional codes on matters of conduct and ethics.
> (iv) *Status.* Most professions have a high status in the community. Some of their privileges are conferred by Parliament. Some are granted by common consent.

See also Portwood, D. & Fielding, A. 'Privilege and the Professions' (1981) 29 *Sociological Review* 749.