The truth in judging: testimony

(Fifty bare-arsed Highlanders)

Archie Zariski

The dilemmas of inter-cultural testimony.

In the following article, the author offers an account of the difficulty of assessing and valuing testimony when testimony is assessed in a cross-cultural context. The problems experienced by Hume in an Anglo-Celtic colonial setting and Coady's work offer an introduction to contemporary Australian problems with ideas of language, culture, outlook and proof. This article introduces Anglo-Celtic readers to these difficulties with an example drawn from their own cultural antecedents. The theme of how to understand 'otherness' underscores other articles in this issue. [eds]

(As I enter upon this white space with these words I worry, and wonder how this will be judged. But here is my testimony.)

'In search of insight into the subject of this issue I have read a book of which I want to tell you. The author has attempted to survey in broadest terms the status of testimony within the field of the philosophy of knowledge (epistemology) and to relate his findings to the law. His purpose in doing so is to demonstrate and justify the important role of testimony in everyday and legal affairs, a project which might seem beneficial to recognising aboriginal heritages. However, while initially attractive, the arguments this philosopher makes in favour of testimony seem to me to constitute a trap precisely for those concerned with inter-cultural conflict and communication. If testimony is ultimately justified by virtue of its necessary contribution to the coherence and cohesiveness of a Western worldview then giving testimony will be perilous for those who do not necessarily share such a world.'

Now, how will you be convinced of this testimony? Will details add to its credibility? (The book referred to is a philosophical monograph titled *Testimony*, written by C.A.J. Coady and published by Oxford University Press in 1992.) What if I have recourse to the authority of position and status? (The book's author is Boyce Gibson Professor of Philosophy at the University of Melbourne and Director of that University's Centre for Philosophy and Public Issues; the originator of this text is Senior Lecturer in Law at Murdoch University.) Will passing the test of a more mechanical interrogation suffice? (Yes, this has been spell-checked and I have endeavoured to punctuate and paragraph appropriately.) Does it conform to the genre expected here? (Analysis, synthesis and opinion appear to be present.)

At this point let it be suggested that, if anything, it is the overall *effect* (or perhaps *style* if you will) which supports such credibility as this testimony has. Behind the words printed above (which are therefore 'transparent' in more than one way), you may see the working of the Western mind, that rational ego-maintaining agent clothed here in academic and rhetorical prose. This is a creature which you have been raised to venerate or you would not be reading this now. It is the familiar face of the 'common(sense) man' of the law who both gives and receives credible testimony. But it is the face of the same not of the other, the outsider, or the alien. This testimony comes not from

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them but from us. It is a narrative from within a culture trying to look beyond its familiar stories.

Let us retrace together some of the matters already so smoothly and confidently proposed in this cool forum of logic and argumentation.

First a remark about the title. There is indeed ambiguity in it and welcomed as such. What I am concerned with here is not only what it may mean for us to seek the truth in court but also what the Western mind understands as the justice of that process, particularly as it entails evaluating the words of others. As a first approximation to an answer I would say the process of judging testimony follows a distinct program involving these steps: first comes self-knowledge and flowing from that, knowledge of the other. Put another way, the 'light of reason' sparked within the individual illuminates the surrounding world and gives truth to it. Let me now tell you how I have arrived at that description and of the consequences (if I am correct) as I see them for those who are judged. (As for the subtext of the Highlanders, they are hypothetical witnesses to contemporary culture and ancient tradition; but more of them later.)

The worth of testimony

Professor Coady has sought to redeem and justify our attention to the words of others as a source of knowledge equal in dignity to our direct perceptions (for instance, of objects and locations) and the work of our memories. In pursuing that aim he has canvassed various theories of the value of testimony with particular attention to what he calls the 'reductionist' argument. This approach, which Coady considers to be the 'received view' (p.79) has been most prominently formulated by the 18th century Scots philosopher David Hume who is known for his sceptical empiricism. Hume said this of testimony: 'The reason why we place any credit in witnesses and historians, is not derived from any *connexion*, which we perceive *a priori*, between testimony and reality, but because we are accustomed to find a conformity between them'.[1] Paralleling the method of inductive logic in science, this argument suggests that because we have in the past found most of what others have told us to have been true we are justified in relying on future testimony for additional truths. For example, in the epistemic arena of the court this principle is negatively applied in the view that any demonstrated error in a witness's statement should nullify the balance of their evidence. Since their credibility has been shaken, the empirical conclusion of general testimonial truthfulness has been shown to be unwarranted in their case.

Before passing on to consider Coady's proposal for a better view of the truth in judging testimony let us stay awhile longer with Hume, for there is a strong case to be made that his form of empiricism still animates our thinking about the courts. The modern successes of the natural sciences and technology have contributed to the glorification of the scientific method and the inductive logic on which much of it is at least often assumed to be based. It is no wonder therefore that today many should consider the trial as a human experiment designed to apply similar procedures. We are encouraged to think of the truth of events as emerging from disparate testimonial (and other) sources by means of an inference of what links the evidence in a plausible way. Further, it is often the case that theories of probability are associated with this inductive approach to proof in court. In this area also, Hume (a lawyer) had something to say. Speaking of how we judge the existence of causes he analogised to his method of calculating chances, which was to subtract the evidence favouring one conclusion from that favouring another, the result to be determined by the tipping of the scales.[2] One commentator has described the working of Hume's method of discovering the causes of events as follows:

> For example, in a legal context, if there are three equally reliable witnesses, two of whom testify that a certain event occurred at a certain time and place whilst the other testifies that it did not, then the force of the probable argument for the conclusion that the event did occur could be said to arise from our subtracting the disproving testimony from the proving testimony.[3]

Here we may see the basis of the law of corroboration, and perhaps it attracts as an open-minded, possibly even 'democratic', attitude to judging testimony: the majority of witnesses for or against a proposition wins the point. However, before becoming too enthusiastic let us see how Hume himself practised his precepts, which brings us back to the Highlanders. Far from a needless historical digression, I believe this story is an important part of the legacy of Hume which should not be forgotten and perhaps has greater importance for the question of testimony than his more frequently cited philosophical works.

From 1760 to 1763 there appeared in print in England certain epic poems (*Fingal* and *Temora*) said to be translations by one James Macpherson. These were described as English versions of Gaelic verse authored by an ancient bard, Ossian, which had been preserved by way of oral tradition for many centuries in the Highlands of Scotland.[4] The poems were widely acclaimed and translated into several other European languages, and Ossian was hailed as another Homer. True to his sceptical empiricism, Hume called for proof through witnesses of the acknowledgment in the Scottish Highlands of these works as an ancient legacy. He counselled his friend, Blair, who had already written a dissertation on the poems, to go amongst the Highlanders in search of corroborating evidence:

> But the chief point in which it will be necessary for you to exert yourself, will be to get positive testimony from many different hands, that such poems are vulgarly recited in the Highlands, and have there been long the entertainment of the people . . .
>
> Let the clergymen have the translation in their hands, and let them write back to you, and inform you, that they heard such a one (naming him) living in such a place, rehearse the original of such a passage, from such a page to such a page of the English translation, which appeared exact and faithful.[5]

Eventually the tide of opinion turned against the authenticity of these poems and Macpherson was considered to have perpetrated a hoax. Some commentators linked the fraud with a supposed defect in the Scottish character, a point which evidently affected Hume deeply. Cultural dynamics and self-esteem came into play and he authored an essay which attacked the value of any testimony which might have been produced. After reciting various arguments from 'common sense' and 'reasonableness' which demonstrated the falsity of the claims made by Macpherson he declared:

> . . . no wonder they crowded to give testimony in favour of their authenticity. Most of them, no doubt, were sincere in the delusion . . . On such occasions, the greatest cloud of witnesses makes no manner of evidence.
>
> But as finite added to finite never approaches a hair's breadth nearer to infinite; so a fact, incredible in itself, acquires not the smallest accession of probability by the accumulation of testimony.[6]

Hume is also reported to have said to a visitor that he (Hume) 'disbelieved not so much for want of testimony, as from the nature of the thing according to his apprehension. He said if fifty barea-d highlanders should say that *Fingal* was an ancient Poem, he would not believe them.'[7]

What has become of Hume's empirical method of judging truth from testimony? It seems it has been abandoned as useless because of the 'incredibility' of the fact as discerned by Hume's 'apprehension'. My reading of this episode is that as a learned man and a Scot, Hume felt it necessary to protect his own credibility by taking the turn he did. The great sceptic could not let himself or others think he had been duped by his own method. I would say his 'inner testimony' to himself appearing as 'common sense' outweighed the testimony of others who misguidedly believed in Ossian. Here we can see the core of the scientific method revealed: the cartesian framework of proof and probability rests on the prior testimony of the autonomous rational individual to herself. What affronts that primary testimony cannot be acknowledged as truth. The truth in (of) judging in the Western tradition then is the maintenance of the judge of fact as the first witness, a witness to the rationality of the independent intentional agent. Whoever does not corroborate that vision is other: unintelligible, unacknowledged and unbelieved.

The consequence of this view of judging, if it is a correct description, for inter-cultural relations conducted within the confines of Western courts should be obvious. A troubling possibility arises that Western ideas of how truth is to be gleaned from testimony are not robust enough to do justice to witnesses who may not share the same traditions of thought.

A charitable view of testimony

Coady has criticised Hume's approach and advanced his own 'solution' to the problem of justifying and evaluating testimony in the Western tradition. This contemporary philosopher is clearly dedicated to paying due respect to the reports of others: for instance he commends reception of the evidence of Aboriginal witnesses and of anthropologists in the *Milirrpum* case.[8] It remains to be seen, however, whether his formulation of an alternative approach to judging testimony escapes the dangers presented by the presuppositions of Western thought sketched above. I don't think Coady's attempt succeeds and will explain why.

To be sure, Coady attacks the 'egocentric premiss' involved in the idea of the autonomous inquiring individual of traditional Western empiricism. He does this because he recognises that one of the consequences of such mode of thought is to downgrade testimony as a source of knowledge by comparison with personal perception, memory and inferential reasoning. He affirms:

> That the perceptions of others are as good if not better on occasion than my own and their transmission to me as valuable if not more valuable on occasion than my own investigations are conclusions perfectly compatible with their being the outcome of my epistemological investigation. The question 'How can I share in knowledge?' is one only an individual can ask but this does not show that its answer must give priority to individual resources. [pp.150-1]

A clue to the difficulty I see with Coady's 'solution' is that it is found in his chapter titled 'Language and Mind'. Here he links the necessity and value of testimony to the existence of 'shared outlooks' echoed in language and cites Wittgenstein's declaration that, 'If language is to be a means of communication there must be agreement not only in definitions but also (queer as this may sound) in judgments'.[9] If such a degree of consensus already exists it is hard to see that any fundamental disagreements can arise requiring resolution by testimony. On the other hand, if language and outlook is not shared then it seems likely that testimony will not be valued as determinative of an issue.

Where a common outlook (or language) is not obviously present, the principle of 'charity' which Coady then invokes in support of recognising the meaning of alien acts or utterances begins to seem more like a justification for colonisation of one world by another. We are led back to the position that meaning must be agreed upon before dispute can arise and then only within the horizon of intelligibility recognised by that sense which is 'common'. In such a situation I suggest it becomes too easy to 'identify a belief an agent has in terms which need not be entirely acceptable to him', as Coady puts it (p.163). And, I would add, too easy to judge that testimony in reliance on such divergent interpretation.

Coady does seem to appreciate the difficulty caused by the principle of charity when he says, 'If we require the outlooks of others to be too like our own we lose part of the capacity to learn from them; if we insist on their dramatic dissimilarity we lose our capacity to understand them at all' (p.167). Nevertheless, he relies on the charitable impulse in formulating his version of a justification of testimony based on the ideas of 'cohesion' and 'coherence'. Although it is sometimes difficult to distinguish between these two guiding principles when reading Coady, in my view they stand in a similar relation to knowledge as means are to ends and this is a key to their weakness. Both are 'facts' observed by Coady: the first, cohesion, being the beneficial complementarity of all of our sources of knowledge (including testimony); the second, coherence, being the regulating ideal of comprehensive theoretical explanation. It is these principles which argue for the value of listening to others' testimony.

Let us notice certain aspects of Coady's approach and raise first the question whether they might claim to be universal precepts for all humankind. Certainly this justification of testimony is oriented to 'achievement' of a certain type, specifically the erection of a theoretical structure explanatory of reality for the purpose of material success. In part, Coady derives the principles of cohesion and coherence from the observation of universal human needs ('nourishment and reproduction . . . some degree of co-operation and safety . . . the appreciation of some kinds of beauty' (p.167)) which can be achieved through cognitive means and thus he says generate a certain basic communality of thought. Just as Coady acknowledges the possibility of disagreement on some fundamental theses, particularly between communities 'with very different levels of technological sophistication' (p.168), it seems clear that he would consider the beliefs of the more technologically sophisticated as resulting from a greater degree of cohesion in their formation and coherence in their structure. Measured by such criteria of achievement it is difficult to see how one may avoid judging the 'unsophisticated' other as lacking the requisite degree of coherence to be believed in her testimony. Rather than taking evidence, the charitable operation of listening then becomes more like a malign 'education' of the witness. But let Coady speak for himself:

> It can be seen that the cohesion I began speaking of is built into the linguistic resources with which each of us structures and identifies much of the world which we encounter from day to day. It also seems a plain matter of fact that this cohesion, on the whole, is all the stronger and its contribution to cognitive and practical success all the greater in complex, technological societies like our own. [p.171]

In sum, the charitable impulse which leads Coady to adopt the principles of cohesion and coherence as justification for taking testimony seriously seems to have led us astray. We have not yet, it seems, escaped the strictures of Western rationality as the test of coherent and believable reports. The other must give her testimony oriented toward that practical success for which we congratulate our Western selves. Otherwise she will either not make sense or we will consider her as lacking in credibility.

From testimony to teaching

Is there another solution to these dilemmas posed by intercultural testimony? I think there may be, but it will require a reworking of the epistemic structure of legal factual inquiry, a reconstruction of the trial process. First, let me give a theoretical outline of what I believe is necessary.

Some way must be found to circumvent the influence of a uniquely Western approach to gaining knowledge from others: we must attack the problem at its heart — the interrogatory structure of adversarial trial in the common law tradition. The process of question and answer as it occurs in legal fact finding begins, as I have suggested earlier, with those who judge as the first witnesses. In taking their oaths they affirm their autonomous rationality to themselves and proclaim it to the world. They answer first the cartesian question at the centre of modern Western thought ('How do I know I exist?'), and by their answer they become exemplars of purposeful, instrumental thought, the foundation of Western rationality. In affirming themselves as autonomous rational agents they gain the status to inquire into the value of what they are told by others. Interrogation of witnesses then proceeds with such communications having as it were a 'carrier wave' which supports meaningful exchange between questioner and responder. This constant signal is the propagation of that foundational instrumental rationality which authorises those who judge in their task. If that underlying signal is disrupted, as it may be in an exchange partly originating from within an alien culture, then meaning may be lost and there is no hope for justice.

From this I conclude that the process of gaining knowledge across cultures must incorporate less questioning and more 'telling' by the other. Rather than risk the distortion or worse, failure, of the exchange of meaning and insight which may accompany interrogation as a tool of Western rational inquiry, we ought to consider letting others speak more for themselves. In principle we must be prepared to listen more and ask less.

Learning at trial

How might we restructure the trial process to bring about this theoretical vision? For inspiration in making such a goal a practical reality I have looked to the example of another 18th century Scot, William Murray, Lord Mansfield, Chief Justice of the Court of King's Bench of England. It has long been thought that Mansfield did much to change the commercial law of England and that his use of special juries played an important role in that work. The discovery in 1967 and subsequent analysis and publication of Mansfield's trial notebooks has now shed more light on those special juries.[10]

The legal problem facing Mansfield and his predecessor, Lord Holt, was to discover 'mercantile custom'. Common law actions could be brought on the basis of such customs provided they were shown to have existed 'from time immemorial' and to be limited in their scope of application to particular persons or places.[11] Both Holt and Mansfield used special juries to assist them in judging the customs of merchants and it seems they treated them as part jurors, part witnesses, and in part as experts. Here is Mansfield's note of the result of one such jury trial:

> The special jury (among whom there were many knowing and considerable merchants), found the defendant's rule of estimation to be right and gave their verdict for him. They understood the question very well, and knew more of the subject of it than anybody else present; and formed their judgement from their own notions and experience, without much assistance from anything that passed.[12]

With Mansfield in particular it appears special jurors were also considered as respected friends. It is reported that one such merchant who was often included in Mansfield's special juries appeared in court annually on the occasion of the judge's birthday to offer him a bouquet.[13]

One commentator has painted a picture of Mansfield's special juries which seems particularly attractive as a model to be followed in undertaking the task of judging inter-cultural issues:

> Mansfield resolved this dilemma by treating mercantile custom as custom in the sense that social scientists understand that term. It consisted of the folkways of a particular community, a set of practices that remained relatively constant over time, but whose informality permitted them to change in response to changing circumstances. Mansfield's special merchant jury resembled the anthropologist's informants; they answered questions that arose in the course of an ongoing inquiry into their recondite and complex culture. This approach provided Mansfield with a balanced, effective way to use the information that his jurors supplied — it was neither law nor a circumvention of the law . . .[14]

It will be apparent by now that I believe the problem of judging the evidence of witnesses across cultures might be ameliorated by use of an institution such as the special jury as Mansfield understood it. Special juries, drawn from members of the culture concerning which the issue arises, may be treated as combining the roles of witnesses, jurors, experts and respected equals. They should be given the freedom to talk amongst themselves and in the presence of the court (with translators if necessary of course) and not bound to the framework of the usual interrogatory process. An expert 'assessor' from within the culture sitting with the judge might also be necessary to help interpret to the court the story told by such special juries.

It is my belief that decisions reached after listening to such telling of the truth of other lives are likely to be more just than those based on the testimony of individuals in the witness box.

(As I quit this white space I worry, and wonder whether I have done justice to others. But now you have my testimony you judge yourself.)

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'SCIENTIFIC & CULTURAL VANDALISM'

Mark Harris

The Academy's failure to accept the validity of the return of Aboriginal cultural heritage material.

This article examines the recent controversy surrounding the return of Aboriginal cultural heritage materials to the Tasmanian Palawa community in the light of the discursive practices deployed by members of the academy, notably archaeologists from La Trobe University. It is argued that the deficiencies of the current cultural heritage legislation arise more from the failure of non-indigenous Australia to 'locate' Aboriginal peoples within the drafting and implementation of the legislation than the process of constructing Aboriginal people according to certain limited stereotypes. While there is increasing evidence of academics disavowing the eurocentric practices of earlier anthropologists, archaeologists and historians, it is argued that the controversy surrounding the Tasmanian Aboriginal cultural artefacts demonstrated the inability of those within the academy to acknowledge Aboriginal voices and to engage to any degree in what Marcia Langton has termed 'intersubjectivity'.[1]

The dispute

The dispute between the Tasmanian Aboriginal Land Council (TALC) and the archaeology department of La Trobe University arose when a member of the department sought to renew permits for the possession of cultural artefacts that had been removed from four cave sites in the Southern Forests region in Tasmania in the period between 1987 and 1991. The artefacts numbered more than 400,000 pieces and included food remains, stone and bone tools, animal faeces and bits of shell. There was not any skeletal material in the artefacts removed as part of the Southern Forests Collection. Several of the permits which granted Professor Tim Murray and Professor Jim Allen the right to remove the artefacts from Tasmania had expired and, despite certain misgivings on the part of Professor Allen that the TALC 'was going to be hard line', he sought to renew the permits.[2] The basis of Professor Allen's concerns was the fact that the Tasmanian Government had promised to return control of cultural heritage materials to the Tasmanian Palawa community. The application for renewal was rejected in mid-1994 and there seemed a strong likelihood that the cultural artefacts would be returned to TALC.

In the ensuing months negotiations continued between the La Trobe academics and TALC, although there seems to have been no attempt to convene a meeting between representatives of the two parties. The La Trobe archaeology department viewed the threat of TALC forcibly removing the artefacts with sufficient gravity to prompt the closure of the department on Friday, 30 June 1995. Defending the decision to send the department's students home, the head of the School of Archaeology, Professor Tim Murray, noted that 'we had heard they were looking for a truck to take the stuff back'. In response the TALC chairman, Mr Roy Sainty, observed that the department was a 'dinosaur' in its refusal to return cultural artefacts.[3]

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be 'polyvocal', it seems clear from the *TALC* case that the only voices of Aboriginal peoples will be those which the archaeologists will agree to. The stories being told in a post-Mabo Australia will remain those of non-indigenous Australians.

Conclusion

While the respondents in the *TALC* case were archaeologists, it was not intended that this article should seek merely to focus on one particular group of white 'experts'. The same tendencies to construct representations and to 'locate' Aboriginal people as different are evident in the discursive fields of anthropologists, historians and lawyers. Insofar as the *TALC* decision can provide lessons for the future, it is clear that the current review of the operation of the Commonwealth cultural heritage legislation under Elizabeth Evatt is long overdue. Similarly, the meeting of the Archaeologists Association of Australia in December 1995 could realistically be expected to take cognisance of Aboriginal rights to control, limit or exclude research in cultural heritage materials.[35] It can only be hoped that the recommendations from both forums take heed of the need for Aboriginal people to control cultural heritage materials in a meaningful way. In 1983 Rosalind Langford observed that; 'We say that it is our past, our culture and heritage and forms part of our present life. As such it is ours to control and it is ours to share on our terms . . .'[36] These views of Langford are even more pertinent today.

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