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# Dispute Resolution Centre News Volume 24

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# Recent Activities of Bond University Dispute Resolution Centre

**Basic Mediation Course 12-15 October 2006 –** held in conjunction with the Leo Cussen Institute, Melbourne, presenters, Professors Laurence Boulle and John wade.
Evaluations

**Basic Mediation Course 30 November–3 December 2006 –** held at the Sofitel Gold Coast, taught by John Wade and Laurence Boulle.
Evaluations

**LAURENCE BOULLE**

| | |
|---|---|
| 12 October 2006 | Guest speaker at 10th Anniversary of Victorian Bar Mediation Centre. Attended by approximately 60 barristers. Chairman of the Bar Mediation Committee is Ross Maxted an early graduate of the Bond DRC training. Approximately half of the other attendees had attended Bond workshops. Presentation at "What mediators offer, what clients want" to monthly meeting of Victorian ADR Association, chaired by Carol Grace and attended by approximately 60 mediators. |
| 21 October 2006 | Facilitated a workshop for members and staff of the Administrative Appeals Tribunal at O'Reilly's. This was organised by former Bond Professor Bernard McCabe, recently reappointed a senior member of the Tribunal and Bernadette Rogers, long time instructor with the Dispute Resolution Centre. Among the participants were the AAT President, Justice Garry Keith Downes AM, a Judge of the Federal Court of Australia, a graduate of DRC mediation training and a number of other workshop graduates. |
| February 2007 | Teaching mediation courses in Berlin, Germany. |

**JOHN WADE**

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|---|---|
| 14-18 August 2006 | Five Day Mediation and Dispute Resolution Course at SMU Texas. Evaluations. |
| October 2006 | Negotiation training, Blake Dawson Waldron, Perth. |
| 8-12 January 2007 | Five day Advanced Mediation Course, SMU, Texas. |
| January 2007 | Negotiation Training Blake Dawson Waldron, Canberra. |
| January 2007 | Negotiation Workshop for heads and teachers Anglican Grammar School, Brisbane |
| March 2007 | Presenter on "Hard Bargaining", Queensland Bar Association Conference, Sheraton Mirage, Gold Coast. |

**PAT CAVANAGH**

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|---|---|
| 30 August 2006 | One day mediation program for Queensland Law Society on ADR Workcover Legislation |
| September 2006 | One day workshop Freehills Melbourne, Ten Common Mistakes of Negotiation |
| October 2006 | One day workshop Leo Cussen Institute Melbourne, Commercial Negotiation |
| November 2006 | Taught *Advanced Commercial Negotiation* intensive course for Law Faculty |

# Visitors to the Dispute Resolution Centre

**Oct-Nov 06** – **Miryana Nesic –** renowned solicitor, mediator, author and ADR consultant from London. She has worked on ADR projects around the world and has a special expertise in designing dispute resolution systems. She trains lawyers and corporate representatives throughout Europe on dispute resolution techniques and has mediated a range of civil/commercial disputes. Miryana taught the under-graduate subject *Alternative Dispute Resolution* in intensive mode.

# Recent and Forthcoming Publications

# New DVD

### Negotiation Process and Skills – The Bounty

This DVD depicts a negotiation between a bank and borrowers who are in regular default in repaying their loan. The bank wants to reduce the size of the loan as soon as possible, while the borrowers want to retain their capital and business.

Included at the end of the DVD are eight short 10 second scenarios where one negotiator makes a standard move (eg ambush report, "I'm leaving"; etc need to consult outsiders). The scenario then freezes to enable participants to practise a range of possible immediate responses to take predictable behaviours.

This DVD illustrates frequently used negotiation skills and processes. The first sequence shows common steps used by skilled negotiators who go straight to possible solutions – this is sometimes known as "positional".

The second sequence shows common steps used in the same fact pattern by skilled negotiators who defer solutions for a while; and attempt to listen for extra goals and "chips" before beginning to package offers. This is sometimes known as "interest-based" bargaining.

Both positional and interest-based bargaining are common; each can be conducted in diplomatic or aggressive fashion. Each can be conducted with low or high concern for the goals of the counterpart negotiators.

Competent negotiators should try to become skilled and comfortable with BOTH forms; and be able to switch back and forth as is considered to be appropriate.

If you insert this DVD into your computer you find the detailed facts for this negotiation which can be printed out; and also a flow chart for the two kinds of negotiation process.

Educationally, it is helpful to pause this DVD at various stages, and discuss where the negotiators are in the process; and what skills you see.

Fill in the order form below or download **ORDER FORM** and send to:

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|---|---|
| The Administrator<br>Dispute Resolution Centre<br>Faculty of Law<br>Bond University<br>Queensland 4229<br>AUSTRALIA | Fax: +61 7 5595 2036<br>Email: drc@bond.edu.au |

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# Forthcoming Courses of the Dispute Resolution Centre

| Bond University Short Courses | | | | |
|---|---|---|---|---|
| 22-25 March | Melbourne | Short course 4 days | Advanced Mediation course, in conjunction with Leo Cussen Institute. Registration form | Boulle, Wade |
| 29 March – 1 April | Holiday Inn, Gold Coast | Short course 4 days | Basic Mediation Course Registration form | Boulle, Wade |
| 26-29 July | Sofitel Gold Coast | Short course 4 days | Basic Mediation Course | Bryson, Wade |
| 13-16 September | Marriott, Gold Coast | Short course 4 days | Advanced Mediation Course | Boulle, Wade |
| 18-21 October | Melbourne | Short course 4 days | Basic Mediation course, in conjunction with Leo Cussen Institute. Phone (03) 96023111 email: lpd@leocussen.vic.edu.au | Boulle, Wade |
| 29 November-2 December | Marriot, Gold Coast | Short course 4 days | Basic Mediation Course | Boulle, Wade |
| * This course also has a Family Mediation stream, run in conjunction with AIFLAM (Australian Institute of Family Law Arbitrators and Mediators) | | | | |

# Thoughts and Themes

## FACT HANDLING

"Fact Handling" and "factual investigation" are topics which are the daily activities of lawyers, mediators, negotiators, judges, arbitrators politicians and diplomats (et al). However, the history of attempting to teach/learn these topics at university (especially at law school) is dismal. William Twining has written helpfully on this stop-start-stop law school history; and David Binder at UCLA has written a book on the topic! Why is "fact handling" (or some equivalent) not a compulsory core course at every law school?

Matthew Hooper, a student at Bond University Faculty of Law, has assembled a helpful summary of some of the "schools" of history, philosophy and law which address "fact handling". This work is at a preliminary stage for John Wade in the hope of devising some helpful bridges between the riches of the theories and practices (and vice versa) of "fact handling", especially by lawyers, negotiators and mediators. John is attempting to teach "fact handling" at Bond Law Faculty, and as predicted by Twining's history, has found this to be somewhat challenging.

Matthew's preliminary summary is set out below FYI. Anyone interested, feel free to contact me at jwade@bond.edu.au for mutual encouragement and/or consolation in the task of teaching/learning/systematising "fact handling".

## HISTORY

**Discipline:** HISTORY

**School**: Historical Relativism

**Popular name**: Subjective History

**Sources**:

1. Louis Gottschalk, *Understanding History* (2nd ed, 1969)
2. Jerome Frank, *Courts on Trial* (1973)
3. Carl Becker, 'What are Historical Facts?' (1955) 8 *The Western Political Quarterly* 327
4. M Postan, *Fact and Relevance* (1971)
5. Marinus C Doeser and John N Kraay (eds), *Facts and Values* (1986)
6. Hayden White, *Tropics of Discourse: Essays in Cultural Criticism* (1982)

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A historical fact is something that is verisimilar to an actual event. It is a credible account of what actually happened. Historians use both objects and testimony to determine the facts. Given that testimony is an intangible, history is thus a subjective inquiry.

Carl Becker asked three questions about historical facts:

(1) What is the historical fact (HF)?

- Becker is not a philosophical sceptic, he said facts can be hard/objective (e.g. In 49 BC Caesar crossed the Rubicon)

- But such a seemingly simple fact is made up of a thousand and one lesser facts (e.g. we mean Caesar crossed with his army, and the crossing would encompass *many* acts and words and thoughts of *many* men)
- Historian gives meaning and significance to past facts
- Facts are shaped by historian's **selection, interpretation and arrangement** (stuck with the personal equation – historian's prejudices, purpose, etc.)

(2) Where is the HF?

- The historical fact is in someone's mind... (even paper records were not made by the event itself, made by a person who had something in mind)

(3) When is the HF?

- The event *was* an actual event, but is *now* an HF (which is part of the present)

Becker recognised that a historian must judge an event from one single performance. He cannot deal with the event itself, he can only deal with statements about it (which may affirm the fact that the event occurred). For Becker, the HF is not the past event, it is a **symbol** which enables us to **recreate an event imaginatively** (symbol can't be true/false, better to use appropriate/inappropriate).

Charles Beard's outlook was very similar to Becker's. He felt that history reflects the thoughts of the author in his time and cultural setting. He defined history as thought about actuality, instructed and delimited by history as record and history as knowledge. While recognising the subjective nature of historical method, he thought that some standards of truth and objectivity were always necessary.

Gottschalk also recognises the limitations on historical fact or truth. A historian "tries to get as close an approximation to the truth about the past as constant correction of his mental images will allow, at the same time recognizing that that truth has in fact eluded him forever" (Gottschalk at 47). Gottschalk continues:

> "Sometimes objects like ruins, parchments, and coins survive from the past. Otherwise, the facts of history are derived from testimony and therefore are facts of meaning. They cannot be seen, felt, tasted, heard or smelled...they have no objective reality of their own. In other words, they exist only in the observer's or historian's mind (and thus may be called "subjective"). To be studied objectively...a thing must first be an object; it must have an independent existence outside the human mind. Recollections, however, do not have existence outside the human mind..." (Gottschalk at 42)

Jerome Frank argued that a historian's work is much like that of a trial court. It involves conjectural science – a **conjectural reconstruction** of the facts. He agreed with Becker that the historian makes his own constructive imagination of the past (from the available but incomplete data). Given that each historian will have different interpretations of the available data (and will write in accordance with his/her own personality) it is thus a **subjective** art. Frank said that most history is 'twistory'.

Postan notes that "...historians devoted to 'facts as they were' accept by implication the fundamental postulates of philosophical realism. They must presuppose that human knowledge directly corresponds to the objective reality of the world..." (Postan at 48) This is consistent with the agreement between relativists and objectivists that objective knowledge of the world is possible.

Postan describes the historical facts as being "...no more than relevances: facets of past phenomena which happen to relate to the pre-occupations of historical inquiries at the time of their inquiries." (Postan at 51)

Walsh contends that even if a historian were able to detach his personal views, the subjective element of history still cannot be removed. This is because history is dependent on the time or epoch in which the historian writes, as well as 'what has happened in the interval between the events described and the time of writing'. (WH Walsh, 'Fact and Value in History' in Doeser and Kraay, at 50).

> "...Past reality generally is not present before us awaiting our discovery; it has to be reconstructed (or perhaps just constructed) on the basis of existing knowledge." (Walsh at 58)

White refers to historical writings as translating fact into fiction. White says that "...the historical narrative does not *reproduce* the events it describes; it tells us in what directions to think about the events with different emotional valences" (White at 91).

**Discipline**: HISTORY/LAW

**School**: n/a

**Popular name**: Courts as historians

**Sources**:

1. Louis Gottschalk, *Understanding History* (2nd ed, 1969)
2. Jerome Frank, *Courts on Trial* (1973)
3. William Twining, *Rethinking Evidence* (1990)
4. Susan Haack, 'Truth, Truths, "Truth" and "Truths" in the Law' (2003) 26 *Harvard Journal of Law and Public Policy* 17

Twining notes (at 106) that the historian and legal scholar have shared interests in:

(1) Whether knowledge of past events is possible
(2) How to prove the past is true
(3) What kind of reasoning is involved in reasoning towards conclusions of fact
(4) Whether it is possible to formulate canons of evidence and standards of proof

Gottschalk likens the role of historian to that of a trial court making its decision on the facts. However he notes that the two are not exactly the same. "The historian, however, is prosecutor, attorney for the defense, judge, and jury all in one. But as judge he rules out no evidence whatever if it is relevant." (Gottschalk at 150).

Jerome Frank is of a similar opinion – "the task of the trial court is to reconstruct the past...Thus the trial court acts as an historian...The historian, too, tries to reconstruct the past, but usually he relies on second-hand or third-or-fourth-hand reports of dead witnesses." (at 37) A historian is thus disadvantaged by lapse of time, and an inability to examine witnesses directly.

Haack also notes the unique nature of adjudicative fact-finding. "[B]ecause it is constrained not only by epistemological desiderata, but also by considerations of policy, by formal rules of evidence, and by the need to arrive at a decision in a reasonably short time, its procedures are very different from those of ordinary scientific or historical inquiry, or even investigative journalism or detective work." (at 19)

Generally historical inquiry is far less restricted than judicial inquiry. The historian will find all available evidence (not just what the parties present). However, the judge must decide on the evidence before him and that evidence alone. That evidence is presented passionately by the parties in an adversarial contest.

A historian "...can take as much time as he wants to gather his evidence, and to reflect on it, while a trial in court cannot go on endlessly...the historian is free to consider any kind of evidence but, in court, some kinds of evidence, for wise or unsound reasons, are excluded." (Frank at 40) A judge must select and interpret facts according to the rules.

Twining notes (at 106-7) that the historian's aim is to describe and give significance to unique past events. On the other hand, the judicial process requires events to be described in terms of concepts that are at a level of generality such that it is possible to determine whether an events fall within the scope of general rules.

**Discipline:** HISTORY

**School**: Objectivist History

**Popular name**: Facts can be tested

**Sources**:
1. DH Fischer, *Historians' Fallacies* (1970)
2. H Meyerhoff (ed), *The Philosophy of History in our Time* (1959)

Leopold von Ranke exemplified the objectivist school of thought when he said the historian should describe things 'exactly as they happened' (cited by Meyerhoff at 13).

Fischer criticises the relativist approach of those like Becker and Beard (see Historical Relativism School).

Fischer offers the following criticisms of relativists–
- They confuse the way knowledge is acquired with the validity of that knowledge
- They mistakenly argue that because an account is incomplete it must be false
- They make false distinctions between history and the natural sciences (e.g. Beard's attack on the use of hypotheses in history)

A final argument against the subjective nature of history is proffered by Fischer:

> "'Subjective' is a correlative term which cannot be meaningful unless its opposite is also meaningful...Nothing can be short, unless something is tall. So also, no knowledge can be subjective unless some knowledge is objective." (Fischer at 42-3)

Essentially the relativists and objectivists agree that a 'complete' account of past events is not possible. This is because history involves selection, interpretation and arrangement of facts so there is a personal element involved. Neither of the sides are philosophical sceptics (both acknowledge the possibility of objectively true facts).

What the objectivists argue (in contrast to relativism) is that it is possible to formulate criteria for determining the scientific adequacy of historical facts. Objectivists believe there can be warranted explanations for historical facts.

> "...it is correct to argue that no historian can hope to know the totality of history as it actually happened. But it is wrong to conclude that objective historical knowledge is therefore impossible...'a historian cannot know what *really* happened, but he has a duty to try.'" Fischer (at 42-3).

Fischer here recognises that it is impossible to determine fully and completely all of the historical facts which exist. However the thrust of his argument is that this does not negate the existence of objective historical facts.

# PHILOSOPHY

**Discipline:** PHILOSOPHY

**School**: British Empiricism (sub school of Cognitivist Epistemology)

**Popular name**: Knowledge through Experience

**Sources**:

1. Bunnin and Tsui-James, *The Blackwell Companion to Philosophy* (2nd ed, 2003)

This theory holds that experience, principally through use of the senses and aided when necessary by scientific instruments, is the source of knowledge. Proponents of this theory included the philosophers Locke, Hume, Kant and Berkeley.

Locke rejected the suggestion that knowledge could be innate; rather, experience is the fountain of all knowledge. He states that it is the senses which give rise to ideas (not immediate knowledge) and these ideas are the materials of knowledge.

Kant and Hume employed transcendental arguments to bridge the gap between the grounds for a claim, and the claim itself (see *Blackwell's* at 52-3)

Hume felt that human nature is such that we simply cannot help having the beliefs which scepticism challenges us to justify. For example, the belief that there is an external world, that causal relations hold between events and that inductive reasoning is reliable.

Kant expanded on this, arguing that knowledge can be justified by setting out the facts about how experience is constituted. Kant's theory was that the concepts the sceptic asks us to justify are constitutive features of our capacity to have any experience at all.

Berkeley took a slightly different approach. He argued there is no gap, as experience and reality are one and the same. He considered that physical objects (i.e. reality) are collections of sensible qualities. Sensible qualities are ideas and ideas only exist if perceived. Therefore the existence of objects consists of their being perceived (i.e. experience). (see *Blackwell's* at 53-4)

**Discipline:** PHILOSOPHY

**School**: Coherence Theory (subschool of Cognitivist Epistemology)

**Popular name**: Accepted belief sets

**Sources**:

1. Bunnin and Tsui-James, *The Blackwell Companion to Philosophy* (2nd ed, 2003)

*The Blackwell Companion to Philosophy* defines knowledge as 'justified true belief'.

**Coherence theory**

- Developed in response to problems with foundationally
- A belief is justified if it coheres with those beliefs in an already accepted set
- The theory is based on notions of consistency and interdependence, but dependence is difficult to specify criterion for
- A good criterion might be that a belief coheres with an antecedent set if it can be inferred from that set (or from some significant subset within it) as being the best explanation in a given case

**Discipline:** PHILOSOPHY

**School**: Externalism (subschool of Cognitivist Epistemology)

**Popular name**: Justification outside the human mind

**Sources**:

1. Bunnin and Tsui-James, *The Blackwell Companion to Philosophy* (2nd ed, 2003)

*The Blackwell Companion to Philosophy* defines knowledge as 'justified true belief'.

**Externalism**

Generally, the view that what makes a person justified in believing something might not be anything to which the person has cognitive access. (see *Blackwell's* at 43-4)

Reliabilism is one example of externalism which posits that:

- A belief is justified if it is reliably connected with the truth
- A reliable connection will exist if supported by reliable belief-forming processes which have:

  (a) a high success rate in producing true beliefs (e.g. normal perception under normal conditions), and

  (b) would not produce the said belief in a relevant counterfactual situation

**Discipline:** PHILOSOPHY

**School**: n/a

**Popular name**: (definitions of facts within philosophy)

**Sources**:

1. FH Bradley in *Appearance and Reality* (1897)
2. Marinus C Doeser and John N Kraay (eds), *Facts and Values* (1986)
3. Kenneth Russell Olson, *An Essay on Facts* (1987)
4. David Nicholson, 'Truth, Reason and Justice: Epistemology and Politics in Evidence Discourse' (1994) 57 *Modern Law Review* 726
5. Peter Albert Railton, *Facts and Values: Essays Toward a Morality of Consequence* (2003) [e-book through Bond Library Catalogue]
6. Ted Honderich (ed), *The Oxford Companion to Philosophy* (2nd ed, 2005) [also online through Bond University Library Catalogue]

Ludwig Wittgenstein said that 'the world is the totality of facts, not things.' (cited in Olson at iii-iv).

*The Oxford Companion to Philosophy* defines 'fact' as

> "...the worldly correlate of a true proposition, a state of affairs whose obtaining makes that proposition true...Facts possess internal structure, being complexes of objects and properties or relations (though facts themselves are abstract even when their constituents are not). Thus the fact that Brutus stabbed Caesar contains the objects Brutus and Caesar standing to one another (in that order) in the relation of stabbing. It is the actual obtaining of this state of affairs that makes it true that Brutus stabbed Caesar."

*The Oxford Companion* notes that the term 'brute fact' has two meanings. The first

> "...signifies the terminus of a series of explanations which is not itself further explicable. Thus, for example, it is often said that while the behaviour of matter can be explained by reference to laws of nature the existence and character of those laws is itself a 'brute fact'.

The second and more technical meaning:

> "...indicates an underlying situation partly constitutive of the truth of a claim...A set of facts *S* is 'brute' relative to a description *D* when the truth of *D* is constituted by the holding of those facts in a certain context and under normal conditions."

For example, the fact that I inscribe a piece of paper, in a context constituted by banking conventions, is brute relative to the description 'J.H. signed a cheque'. Hence the status of brute and non-brute facts is a relative one.

In the opinion of Lucas what counts as a fact depends on the question at issue:

> "Facts are defined negatively...contrasted with fictions, sometimes with forecasts, sometimes with laws, sometimes with interpretations, sometimes with comment. The world "fact" thus has a counter-chameleon-like quality. It takes on its colour in contrast to its surroundings." (JR Lucas, 'Dubious Doubts' in Doeser and Kraay at 24)

Olson argued that 'fact' is a metaphysical category in its own right. He notes (at 1):

> "Facts belong...to the world itself, and not merely to the apparatus by means of which we represent it. It is chiefly this that separates them from those other alleged entities, propositions, which are so often mentioned in the same breath with facts..."

FH Bradley in *Appearance and Reality* (1897) used the word 'fact' in 3 different senses which were dependent on context (cited in Olson at 51-2):

(1) any existent, as opposed to a mere content taken in abstraction

(2) a self-existent entity

(3) an object of immediate awareness, as opposed to a theoretical construct

The totality of facts about a thing (any thing) is inexhaustible. Thus the number of facts about any given thing is infinite. Rescher goes on to say that a fact (in contrast to a truth):

> "...is *not* a linguistic entity at all – it is an actual circumstance or state of affairs obtaining in "the real world." Any objective circumstance that is correctly statable in some *possible* language is a fact." (at 232)

Facts are abstract entities. Facts are ways in which the world can be considered. No conscious mind is actually required to consider a fact for that fact to exist. All that is necessary for the concept of a fact is that it be observable in principle.

According to Railton (at 45):

> "Facts are part of a world that is causally responsible for our experience, a world most of whose features do not depend upon our conception of it or our aspirations in it. Reason, then, does not make facts hard; it finds them hard."

**Discipline**: PHILOSOPHY

**School**: n/a

**Popular name**: Fact-value distinction (arguments pro and con)

**Sources**:

1. Marinus C Doeser and John N Kraay (eds), *Facts and Values* (1986)
2. Peter Albert Railton, *Facts and Values: Essays Toward a Morality of Consequence* (2003) [e-book through Bond Library Catalogue]
3. William Twining, *Rethinking Evidence* (1990)
4. Ted Honderich (ed), *The Oxford Companion to Philosophy* (2nd ed, 2005) [also online through Bond University Library Catalogue]

According to Doeser, '[t]he world consists of facts and things, trees, rivers, children. Value judgments are not part of this.' (Marinus C Doeser, 'Can the Dichotomy of Fact and Value Be Maintained?' in Doeser and Kraay at 3)

*The Oxford Companion to Philosophy* notes that the 'fact-value distinction' depends on:

> "...the idea that 'good', like 'other evaluative terms', has a special function in language. According to Ayer and Stevenson it expresses feelings and attitudes, and...On this basis a contrast was drawn between these 'evaluative' uses of language and 'descriptions of the world'; the latter, but not the former, being supposed to 'state facts'...There was therefore a 'logical gap' between 'fact' and 'value', and this was taken to explain and support the idea (derived from Hume) that no 'ought' can be deduced from an 'is'..."

Many modern writers on moral philosophy agree with the above distinction.

However, some philosophers (e.g. Anscombe) challenge the account of evaluation on which the distinction draws, and doubt whether value stands in opposition to any clear notion of fact.

Peter Railton also considers that the distinction can be overcome. In his opinion this can be done by 'hardening up' values (at 43). In explaining the distinction he notes (at 44):

> "...[g]enuinely factual disputes, it is claimed, can be resolved by appeal to reason and experience...By contrast, it is claimed, two entirely rational individuals who differ in their values may be able to confront all possible experience and argumentation and still find their normative disagreement intact....Does deductive logic tell us what it is rational to believe? No, it tells us only which propositions follow from other propositions..."

Twining contends that fact and value cannot be separated in normative enquiries (such as judicial fact-finding). He says that it is acknowledged (even within the Rationalist Tradition) that triers of fact are regularly and unavoidably involved in making evaluations.

Similar to Twining's observation, Doeser comments that:

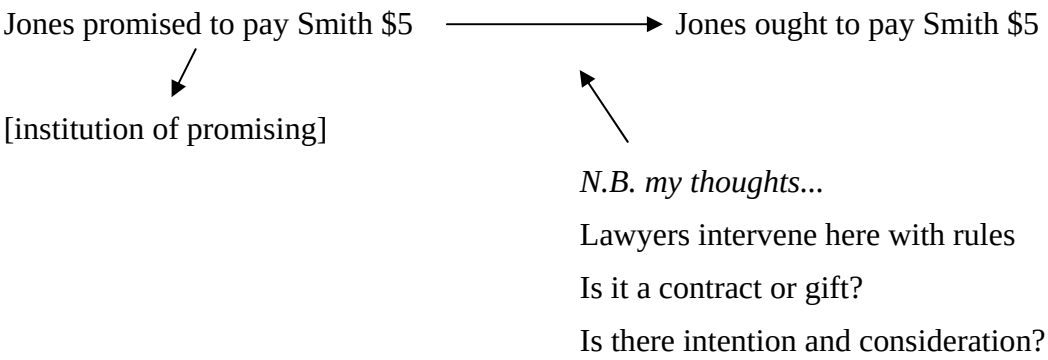
> "When we look for knowledge of the world we are imprisoned in the framework of our language, our conceptual schemes, our theories, our expectations and

> prejudices...all our knowledge of the world is, in part, determined by all sorts of values...” (Doeser at 7)

In seeking to bridge the gap between fact and value, Doeser refers to Searle who distinguished between brute facts and institutional facts. Institutional facts depend on the existence of human institutions (e.g. ‘Sydney Swans beat Brisbane Lions’ is only a fact against background institutions of AFL and competitive games).

Doeser argues that a transition from an institutional fact (is) to a value (ought) is possible.

For example:




Thus we have gone from the fact ‘Jones promised to pay Smith $5’, which can only be understood against the background of the institution of promising, to ‘Jones ought to pay Smith $5’.

**Discipline**: PHILOSOPHY

**School**: Foundationalism (sub school of Cognitivist Epistemology)

**Popular name**: Self-evident beliefs as building blocks

**Sources**:

1. AJ Ayer, *The Problem of Knowledge* (1956)
2. David Nicholson, 'Truth, Reason and Justice: Epistemology and Politics in Evidence Discourse' (1994) 57 *Modern Law Review* 726
3. Bunnin and Tsui-James, *The Blackwell Companion to Philosophy* (2nd ed, 2003)

*The Blackwell Companion to Philosophy* defines knowledge as 'justified true belief'.

**Foundationalism**

This school argues that foundational beliefs, which are self-justifying or self-evident, support our ordinary beliefs. Like a chain, the links from any given belief go all the way down to some foundational belief.

The theory involves the idea of absolutely certain, irrefrangible (i.e. unbreakable or indestructible) premises on which the whole structure of objective factual knowledge can be erected.

Foundationalism is related to the rationalist school, which justifies the acquisition of knowledge through reason. Objects of knowledge are eternally, immutably and necessarily true (e.g. maths, logic) and these can only be acquired by reason.

For example, for Descartes it was his famous statement, 'I think, therefore I am' which was the foundational basis of knowledge. This works because logic dictates that by thinking, one must have knowledge of one's own existence. (see Ayer at 44-45)

Foundationalism is adopted by the rationalist tradition [of evidence] stemming 'from the latter's historical link with the Enlightenment and its faith in Reason, Science and Progress..." (Nicholson at 729)

Nicholson notes that, as with scepticism generally, "...an anti-foundationalist approach to truth involves a self-referential inconsistency, in that the denial of objective truth is itself an assertion of such a truth." (at 730) He uses the example that to politicise everything is to politicise nothing, thus "if there is no truth, there can be no morality." (at 730)

**Discipline**: PHILOSOPHY

**School**: Philosophical Scepticism

**Popular name**: Impossibility of Knowledge

**Sources**:

1. AJ Ayer, *The Problem of Knowledge* (1956)
2. P Unger, *A Case for Scepticism* (1975)
3. Nicholas Rescher, *Scepticism* (1980)
4. William Twining, *Rethinking Evidence* (1990)
5. David Nicholson, 'Truth, Reason and Justice: Epistemology and Politics in Evidence Discourse' (1994) 57 *Modern Law Review* 726
6. Nicholas Bunnin and EP Tsui-James (eds), *The Blackwell Companion to Philosophy* (2nd ed, 2003)

Philosophical scepticism encompasses three different types of scepticism:

1. Epistemological scepticism (denies possibility of knowledge of any kind)
2. Ethical scepticism or subjectivism (judgments of value are entirely relative)
3. Irrationalism ('no one is ever *justified* or at all *reasonable* in anything' – Unger at 242-3)

Ayer notes the four main bases of the sceptical argument:

1. We depend entirely on the premises for our knowledge of the conclusion
2. The relation of premises and conclusion is not deductive
3. The relation is not inductive either, even if inductive reasoning is legitimate at all
4. Since these inferences cannot be justified either deductively or inductively they cannot be justified at all

Epistemological scepticism is of most interest in relation to facts in the law. It effectively entails that 'legal knowledge' of past facts is impossible. Scepticism opens a gap between the grounds a putative knower has for some knowledge claim and the claim itself.

Unger argues that if anyone knows some *p*, then he or she can be certain that *p*. But given that no one can be certain of anything no one can know anything. Rescher agrees that when something is said to be known it is indeed 'claimed to be certain, exact, incorrigible, etc. And this absolutism...makes the substantiation of knowledge claims a relatively demanding enterprise.' (at 248-9)

Often arguments advanced to show we can never know (or be certain of) anything are because of factors such as error, delusion or dreaming. Usually we are not aware of these three factors and thus we may unwittingly make a claim which is not justified. For knowledge to be possible we thus need better grounds than we take ourselves to have.

Some philosophical sceptics even go so far as to question whether the world be said to exist independently of perception at all – does a tree falling in the woods make a sound if there is no one there to hear it?

However, if we know nothing, then we do not know that we know nothing. In this way scepticism can be seen as self-defeating. Thus, scepticism is better described as a challenge directed against knowledge claims (in the sense of requesting justification

for such claims). Indeed Nicholson notes (at 729) that "theorists who deny the existence of objective truth are 'rare birds'."

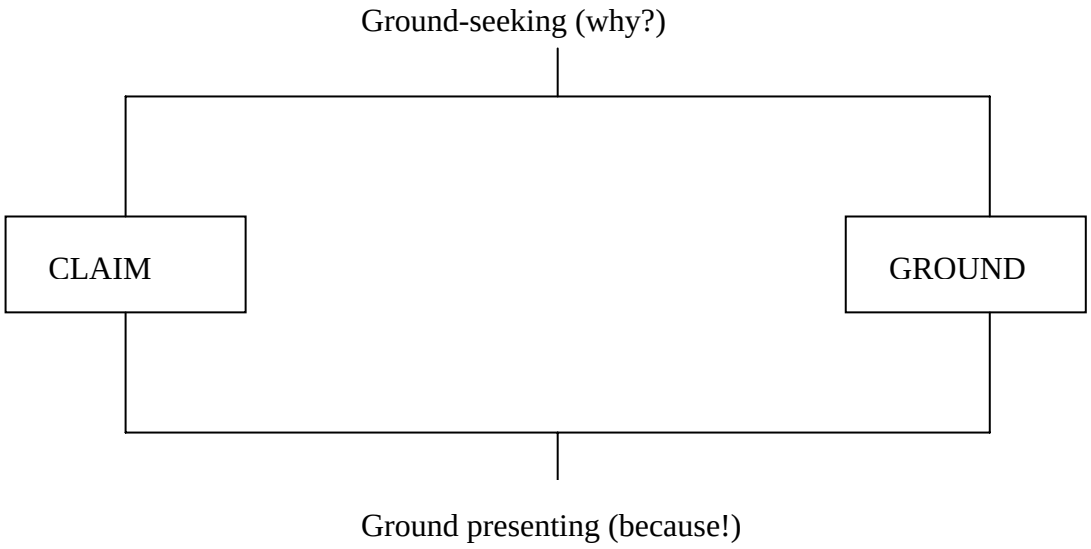
Critics of epistemological scepticism, such as Rescher, are willing to accept that our knowledge is incomplete, and that

> "...we have little alternative to regarding it [our knowledge] as presumptively *incorrect and corrigible*...The sceptic is right in his insistence on the 'evidential gap' as a fact of life that assures the theoretical fallibility of all objective factual claims." (at 237)

According to Rescher, it is a case of the sceptic winning a few battles, but nonetheless losing the war in his attempt to dispute the possibility of knowledge per se. What the sceptics' arguments have managed to exhibit is the inherent limitations of knowledge.

Twining concedes that while the cognitivist believes in the possibility of knowledge, he is well-qualified to be sceptical on the adequacy of our knowledge, as well as the institutions and procedures for discovering truth/facts. (at 102)

*** Here is a diagram I like (it may not be wholly on point, but anyway). It just goes around and around...so no claim to knowledge can ever be justified...



**Discipline**: PHILOSOPHY

**School**: n/a

**Popular name**: (definitions of truth within philosophy)

**Sources**:

1. Nicholas Rescher, *Scepticism* (1980)
2. David Nicholson, 'Truth, Reason and Justice: Epistemology and Politics in Evidence Discourse' (1994) 57 *Modern Law Review* 726

According to Nicholson, "[t]ruth is seen as a construct of language or discourses, rather than a matter of external reality." (at 729)

Rescher states that:

> "A "truth" is a *linguistic* entity – the formulation of a fact in some language or other. Any correct statement in some (actual) language formulates a truth. And the converse obtains as well: a truth must be embodied in a statement, and cannot exist as a disembodied ghost..." (at 232)

There are a number of relevant theories on the relation between truth and fact:

- Correspondence theory posits that a statement is true if it corresponds to a fact (present world is revealed directly through our senses, it is only through our senses that there is certainty about the world)
- Coherence theory says that something is a truth where it coheres with some specified set of sentences, propositions or beliefs.
- Social constructivism holds that truth is constructed by social processes, and is historically and culturally specific. Perceptions of truth are viewed as contingent on convention, human perception, and social experience.
- Pragmatic theory considers that truth is verified and confirmed by the results of putting one's concepts into practice.
- Redundancy theory (one of the deflationary theories) posits that facts and true statements are the same thing.

# LAW

**Discipline**: LAW

**School**: Epistemology in Law

**Popular name**: Forget philosophy in law

**Sources**:

1. Doreen McBarnet, *Conviction* (1981)
2. Zenon Bankowski, 'The Value of Truth: fact scepticism revisited' (1981) 1 *Legal Studies* 257
3. William Twining, *Rethinking Evidence* (1990)
4. Justice Peter McClellan, 'Who is telling the truth? Psychology, common sense and the law' (2006) (available at http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_mcclellan020806)

Twining argues that the law is not concerned with ultimate questions about philosophical concepts of truth. He contends (as do the Rationalists) that the legal system simply assumes there is a real world which is accessible to human mind, and that the truth of statements can be tested by evidence.

> "The mode of argumentation appropriate to proof in legal contexts is induction, as it is found in everyday practical reasoning. Thus scepticism about the possibility of induction and theories of induction is also directly relevant to a theory of EPF [Evidence, Proof and Fact-finding]. Conversely questions about the existence of physical objects or of other minds or scientific laws, although they have particular applications in legal contexts, seem at first sight to be less generally relevant to a theory of EPF."

In jurisprudence epistemological scepticism is virtually unknown. This is because in order to 'get on with the job', one has to proceed as if there is a real world, as if legal argument really is argument and as if one is pursuing rationally defensible ends by rational means, whether or not one believes this to be the case. (Twining at 102, fn 54)

In a similar vein, McBarnet says: "The courts are there not to engage in the impossible absolutes of philosophy or science but to reach decisions – quickly." (at 13)

> "The philosophical problem of how one reproduces 'reality' thus becomes a sociological one: how is it that in such a situation of ambiguity, conflict, subjectivity, fading or moulded memories, the judges of facts can so readily find themselves convinced beyond reasonable doubt?" (McBarnet at 12)
>
> "Adversary advocacy helps solve the philosophical problem of reproducing reality quite simply by not even attempting it. Instead the search for truth is replaced by a contest between caricatures. Advocacy is not by definition about 'truth' or 'reality' or a quest for them, but about arguing a case." (McBarnet at16)

Although not as extreme as McBarnet, other writers also point out the limited role which epistemology has to play in the law. MacCormack uses the example of the test of coherence (i.e. which party presents a more coherent story in a dispute) as our

method of verifying beliefs about the past. He contends that the coherence test has nothing to do with 'coherence' or 'correspondence' theories of truth. (DN MacCormick, *Legal Reasoning and Legal Theory* (1979) cited in Bankowski at 259)

Justice Peter McClellan also notes the general unwillingness of those in the law to draw upon common themes across disciplines, and instead forge its own special path:

> "Law and psychology can be uneasy partners. The law has traditionally devised its own rules of human behaviour and created its own norms for interpreting that behaviour...

Justice McClellan notes that it can never be known whether a decision-maker's perception of the truth actually reflects the real truth. However, he says that this does not matter – the decision will be made.

In this sense participants in the adjudicative process accept that the law is not concerned to satisfy philosophical criteria of truth. Justice McClellan believes that the judge's objective must be to ensure that perceived truth is, so far as is possible, the real truth.

**Discipline**: LAW

**School**: n/a

**Popular name**: (definitions of facts in law)

**Sources**:

1. Albert S Osborn, *The Problem of Proof* (1922)
2. Zenon Bankowski, 'The Value of Truth: fact scepticism revisited' (1981) 1 *Legal Studies* 257
3. Stefan Krieger and Richard Neumann, *Essential Lawyering Skills* (2nd ed, 2003)
4. Andrew Ligertwood, *Australian Evidence* (4th ed, 2004)

(see also Facts in Philosophy for more detail)

Osborn noted that "[w]hat is called "the law" is quite definite and well understood, while the term "the facts" is a somewhat elastic term which covers nearly everything in the case which is not included under the term "the law"." (at 6)

Bentham considered facts to be events or states of things. Frank said 'facts are human achievements, human feats'.

Krieger and Neumann define fact as 'what actually happened' and they define evidence as 'the source of our knowledge that a fact really is true'. (at 61)

Bankowski made the following observations (at 262-3):

> "The facts we know are constructs, partly determined by the procedures of discovery which in turn depend upon procedures of justification. The search for truth is something we only undertake through institutional procedures which give us criteria enabling us to describe our activity as truth seeking. Now these criteria...are normative...
>
> ...the activity of epistemology is a normative activity and the radical separation of the 'is' from the 'ought' is not so easy in a world where 'is' statements are so by reference to normative criteria."

**Discipline**: LAW

**School**: Fact-Scepticism

**Popular name**: Impossible Objectivity

**Sources**:
1. Doreen McBarnet, *Conviction* (1981)
2. Gerald P López, 'Lay Lawyering' (1984-5) 32 *UCLA Law Review* 1
3. Andrew Ligertwood, *Australian Evidence* (4th ed, 2004)

While Jerome Frank's form of legal fact-scepticism is given its own summary page, other forms of scepticism about the legal system will be combined in this summary. This combination makes sense as each author is essentially critical of the same thing – claims to objectivity in fact-finding.

Fact-sceptics argue that reality is unbounded, multi-faceted, confusing and subject to many interpretations. Thus fact-finding cannot hope to be objective.

The Rationalist Tradition of Evidence Scholarship is criticised on a number of grounds–

- Common-sense generalisations (from human experience) are not purely factual, they contain a mixture of evaluation and bias
- Rationalists (like Wigmore) underplay the fact that all adjudicators use not only probabilities, but also value judgments in the decision-making process
- Rationalists assume that there is a widespread consensus among reasonable men

The Rationalists pursue rectitude of decision through accurate reconstruction of the facts. However, the sceptics argue that there can never be a wholly accurate reconstruction because this would require:

- Possession of all relevant information, and
- Witnesses to have complete and correct observations, given fully, honestly and without ambiguity, and
- Inferences to be drawn only where no other inference was possible.

Nicholson argues that the human and political element which does exist in adjudication is

> "conveniently obscured, thus allowing the process of law and fact 'finding' to be portrayed as mechanical and value-free...Moreover, the only way we have of working with those things we call 'facts' is through language and other forms of discourse. Clearly these discourses do not provide a value-free means of mechanically representing the world out there." (at 737)

McBarnet vehemently asserts the subjective nature of a case at trial:

> "[a trial] is not just edited into a minimal account – a microcosm of the incident – it is an account edited with vested interests in mind...a case is a biased construct, manipulating and editing the raw material of the witnesses' perceptions of an incident into not so much an exhaustively accurate version of what happened as one which is advantageous to one side." (at 17)

López states quite succinctly that in the law "a versionless version of what happened – the whole truth – is unknowable..." (at 41). He also notes that "there emerges over

time a conventional definition of what truly happened...it typically equates truth with what the...finder of fact labels as truth." (at 42)

Ligertwood points out that events which we do not ourselves experience are discovered through inference. In turn, the risk of error increases as we also rely upon the experiences of others, and upon the inferences we draw from their reports and from any physical remnants we have directly experienced. Thus it becomes harder for us to say with a confident degree of certainty that some fact does or does not exist.

**Discipline**: LAW

**School**: n/a

**Popular name**: Interesting thoughts and quotations

**Sources**:

1. Rabelais, *Gargantua and Pantagruel* chs 37-43 (trans. Sir Thomas Urquhart, 1913)
2. David Nicholson, 'Truth, Reason and Justice: Epistemology and Politics in Evidence Discourse' (1994) 57 *Modern Law Review* 726
3. IH Dennis, *The Law of Evidence* (1999)

**Pyrrho of Elis (c360 – c270 BC)**

Pyrrho said that because enquiry is arduous, monotonous and unending, one should give up trying to judge what is true and false or right and wrong; for only thus will one achieve peace of mind.

The Academic Sceptics (Plato's successors in his Academy) thought Pyrrho was right that certainty must elude us. However they felt that the practical demands of life must be met so we should accept those propositions which are more probable.

**Judge Bridlegoose (fictional story by Rabelais):**

Judge Bridlegoose was tried for passing sentence on the Subsidy-Assessor, Toucherounde 'which did not seem very equitable to that Centumviral Court'.

Bridlegoose explained in his defence that as his sight was failing, he must have misread the dots on his dice which he threw to decide cases. He would read the papers provided by each side and then throw small dice (complex cases) or large dice (simpler cases).

Therefore, on average he would have reached the 'correct' decision in 50% of cases. The story is now seen as a challenge to the legal system to achieve the correct result in more cases than would be if the process were left to chance.

**Nicholson:**

> "...certain research suggests that the legal trials are not about finding the truth, nor even about providing a civilised forum for dispute resolution, but resemble instead forensic lotteries, sporting contests, degradation ceremonies or constitute bourgeois obfuscation" (at 742-3)
>
> "...both types of sociological study suggest that the function of fact-finding in the legal arena is primarily about the maintenance of the social order..." (at 743)
>
> "...had there been a more sceptical epistemology, a recognition of the different types of truth at play in fact-finding, a wider notion of rationality and a conception of justice which does not conflate justice with the values of substantive law, one could expect issues of ethics, justice and politics to be more at the forefront of the concerns of academics, students and practitioners." (at 744)

**IH Dennis** – Perfect knowledge is unattainable in an imperfect world.

**Discipline**: LAW

**School**: Jerome Frank's Scepticism

**Popular name**:

**Sources**:
1. Jerome Frank, *Courts on Trial* (1973)
2. Zenon Bankowski, 'The Value of Truth: fact scepticism revisited' (1981) 1 *Legal Studies* 257
3. William Twining, *Rethinking Evidence* (1990)

Twining correctly identified that Jerome Frank was not a philosophical sceptic. Frank accepted the possibility of objective knowledge. Frank simply wanted to highlight the obstacles which stand in the way of objectively true judgments.

Frank's scepticism focused on:
- the Rationalist's optimistic aspirations to unattainable ideals of objectivity, and uniformity, and
- the Rationalist's belief in axioms which misdescribed the realities of legal process.

Frank's main arguments:
- The process of adjudicative fact-finding is haphazard and contingent
- "The court, from hearing the testimony, must guess at the actual, past facts." (at 15-16)
- "The facts...are not objective. They are what the judge thinks they are." (at 55)
- "The task of the trial court is to reconstruct the past...Thus the trial court acts as an historian." (at 37)
- "trial-court fact-finding is the soft spot in the administration of justice." (at 74)
- The assumption that 'the truth will come out' ignores elements of
    - subjectivity and chance
    - bias
    - faulty/subjective memory/imagination
    - honest witness who seems untruthful because frightened/irascible/over scrupulous/exaggerates
    - mistaken witness honestly and convincingly testifies
    - honest witness inadvertently misstates recollection
    - dishonest witness/perjury
    - dead or missing witnesses
    - missing or destroyed documents
- The facts as they actually happened are therefore twice refracted – first by the witnesses, and second by those who must "find" the facts

Frank termed himself a 'fact-skeptic'. He said that all fact-skeptics were also rule-skeptics (at 73). Both feel that formal legal rules are just paper rules which are unreliable guides in the prediction of decisions – one needs to look behind these rules. However, the difference is that rule-skeptics only focus on upper courts, not trial courts (e.g. Llewellyn)

The crux of fact-skepticism is that:

> "...it is impossible, and will always be impossible, because of the elusiveness of facts on which decisions turn, to predict future decisions in most (not all) law-suits not yet begun or not yet tried. The fact skeptics, thinking that therefore the pursuit of greatly increased legal certainty is, for the most past futile – and that its pursuit, indeed may well work injustice – aim rather at increased judicial justice." (at 74)

Some of Frank's other arguments include:

- Fact-finding depends on how thoroughly each case is prepared and how conscientious fact-finder is in evaluating them
- All human interpretations of experience are "just-so" stories
- There are few uniformities in human nature.

In Frank's view, 'facts are guesses'. The decision of a court is, at best:

> "only what the trial court...thinks happened. What the trial court thinks happened may, however, be hopelessly incorrect. But that does not matter – legally speaking. For court purposes, what the court thinks about the facts is all that matters. The actual events, the real objective acts and words...happened in the past. They do not walk into court. The court usually learns about these real, objective, past facts only through the oral testimony of fallible witnesses." (at 15-16)

> "Now...the trial judges and juries suffer from the same human weaknesses as other witnesses...The facts as they actually happened are therefore twice refracted – first by the witnesses, and second by those who must "find" the facts...the facts as "found" by a trial court are subjective...A trial court's findings of fact is, then, at best, its belief or opinion about someone else' belief or opinion." (at 22)

Frank emphasised that facts are not waiting somewhere to be discovered or found. Facts are made by the court on the basis of its subjective reactions to the witnesses' stories. (Frank at 23-4)

Frank chose to outline the fact-finding process in three steps (at 318):

(1) Witnesses select only some of the many brute facts presented to them (because infinite number of brute facts presented to us through our senses)
(2) The trial court selects those facts it believes and does not believe
(3) Through a process of abstraction the court selects only the relevant facts (that is, facts which fit into a well-settled rule or new rule made by the court)

Frank (at 320-321) discussed the legal reasoning works of Edward Levi and Fred Rodell, who emphasised that rules are discovered by determining the similarity or difference between fact scenarios. Lawyers put cases with similar facts into batches. When the 'essential' facts are the same, general principles will apply.

However, the problem for Frank is that lawyers and judges determine when these essential facts are the same, which is an arbitrary and wide-open process. Frank convincingly explains the difficulty:

> "[H]ow, when the testimony is oral, can anyone know whether the facts of two cases are alike? We can only know whether the facts as "found" in the two cases are similar." (at 327)

One of Frank's main aims at reform was the adversarial system. According to him, the fight theory means each party will keenly bring everything of importance to the

court's attention, in this way no detail goes unnoticed (as it may in a dispassionate inquiry). But the problem with this system is that it blocks all of the vital evidence from coming out, or distorts the evidence which is presented.

Consequently, Frank advocated (as did Bentham before him) for the abolition of exclusionary rules of evidence and for the substitution of a truth-theory for the fight-theory of adjudication. "His whole critique is based no the idea that it is possible to get really true facts about the world but that the adversarial or accusatorial system is the wrong way of going about it." (Bankowski at 260)

**Discipline**: LAW

**School**: Michael and Adler

**Popular name**:

**Sources**:
1. Jerome Michael and Mortimer Adler, *The Nature of Judicial Proof* (1931)
2. Jerome Michael, *The Elements of Legal Controversy* (1948)

Michael and Adler consider that facts will appear to be more or less complex and may thus be viewed as a whole of composed parts. The parts of a complex fact are themselves facts; further analysis may in turn reveal each of these facts to be a fact of some degree of complexity. (at 1)

A fact either is or it is not. A fact cannot be probable; however, propositions about facts may be true or false or probable. (Michael and Adler at 3)

Our knowledge of facts is often never completely adequate nor completely inadequate.

> "A true proposition is not probable, neither is a false proposition...probability is the value assigned to propositions expressing inadequate knowledge...truth is the value assigned to propositions expressing adequate knowledge" (Michael and Adler at 8)

It follows from this statement that Michael and Adler consider the truth will rarely be discovered by a court. In *Elements of Legal Controversy*, Michael stressed the need for some knowledge about knowledge, including awareness of the distinction between direct/perceptual and indirect/inferential knowledge because:

> "...propositions are actual or potential knowledge, since, if they are truthful, the parties to legal controversy assert, and witnesses report, their knowledge, and since knowledge is of various sorts..." (Michael at 6-7)

The process of inference is one where the mind goes from it knows (as expressed by propositions it is able to assert as true or probable) to what it previously did not know (as stated by a proposition it was unable to assert. (Michael at 202)

> "Epistemologically, therefore, a conclusion of fact is inferential rather than perceptual knowledge, knowledge obtained indirectly through the exercise of the reason in inference rather than directly through the exercise of the senses in perception...
>
> ...it is never legally significant that something can or has *appeared* to be the case but only that something *is* the case. But perceptual knowledge is always knowledge of appearances; what *is* the case can be known only indirectly." (Michael at 212)

"The logical structure of a trial of questions of fact must not be confused with the psychological processes of the tribunal, of the lawyers, and of the other human beings involved therein." (Michael and Adler at 25, *I don't know what they mean here – MH*)

**Discipline**: LAW

**School**: Cognitive Heuristics

**Popular name**: Decision-making filters

**Sources**:

1. Albert Moore, 'Trial by Schema: Cognitive Filters in the Courtroom' (1989-90) 37 *UCLA Law Review* 273
2. Stefan Krieger and Richard Neumann, *Essential Lawyering Skills* (2nd ed, 2003)

Two people who see the exact same event can have different accounts of 'what really happened'. This is because our perception and recall of facts are both filtered and organised through 'schemas'. A schema is the framework, or mental blueprints, we use for quick assessments of what we think should be happening in particular situations. (Krieger and Neumann at 130)

Moore states that "a schema is a category in the mind which contains information about a particular subject...schemas help us assign meaning to incoming information..." (at 279) For example: a man with a stocking on his head points a gun at the clerk in a convenience store, schema ⟶ we know that is a robbery.

Moore says that schemas also assist us in selecting the information we pay attention to. For example: you know the police will want to identify a robber so you might look at his distinctive features, or you know innocent bystanders sometimes get shot in robberies so you might look for a place to hide.

Moore notes that "schemas also allow us to draw inferences, based on our schematic hypotheses, about what is likely to happen in the future and what has happened in the past." (at 280)

For example: if we think the clerk would be nervous when the gun is pointed at him, we say he was nervous even though we didn't actually look and see this.

Therefore our construction of what reality or truth or the facts is dependent on the schemas which we use to interpret our world as we experience it. (Moore at 340)

Our construction of reality also relies on memory. Memory is not a process of reproducing or retrieving stored information, rather it is a process of active, creative reconstruction. Memory depends on temperament, biases, expectations and past knowledge of witness. (Krieger and Neumann at 131)

**My thoughts**

Most disputes revolve around the oral testimony of witnesses giving their recollections of an event. Thus any theory on "facts" necessarily involves consideration of cognitive heuristics, and theories about memory, perception, recall and reconstruction of events.

(n.b. I haven't gone into any more depth on this area as I don't think I would be able to add anything to your existing knowledge on the subject)

**Discipline**: LAW

**School**: Rationalist Tradition

**Popular name**:

**Sources**:

1. Gerald Postema, 'Facts, Fictions and Law' in William Twining (ed), *Facts in Law* (1983)
2. William Twining, *Theories of Evidence: Bentham and Wigmore* (1985)
3. William Twining, *Rethinking Evidence* (1990)
4. David Nicholson, 'Truth, Reason and Justice: Epistemology and Politics in Evidence Discourse' (1994) 57 *Modern Law Review* 726
5. IH Dennis, *The Law of Evidence* (1999)

The central features of the Rationalist Tradition (also known as optimistic rationalism) can be summarised as follows–

- Assumption that events and states of affairs occur and have an objective existence/reality independent of human observation
- Assumption that present knowledge about past events is in principle possible (cognitive epistemology)

- Accurate judgments are necessary to do justice (rectitude of decision)
- Procedures can be framed in a manner which maximise the prospects of making accurate judgments

- Truth can only be a matter of probability

- Reasoning from relevant evidence to probabilities (inductive reasoning) affords the best chance of accurate judgment (deduction plays a limited and secondary role)
- Judgments about probable truth must be based upon an available stock of knowledge (including scientific generalisations, expert opinions and common sense generalisations based on experience of members of society)

Nicholson comments (at 729):

> "A core assumption of the rationalist tradition is that there exists an objective truth 'out there' waiting to be discovered. Such an epistemology may be termed 'foundationalist' because it attempts to provide unshakeable foundations for knowledge, morality, justice, etc."

For Bentham and Wigmore, experience was the foundation of all knowledge (like Locke and Hume). Bentham in particular stated that experience is the basis of all knowledge and language is the instrument (at once misleading and necessary) by which all experience is apprehended and ordered.

According to IH Dennis, Rationalists adopt a correspondence theory of truth in reconstructing reality. Given that facts have an objective existence in the physical world, and are capable of being experienced by human beings using their senses, facts

can be reported to a court. The court uses the process of inference to arrive at an accurate reconstruction of the facts, which corresponds to the reality of past events

Bentham felt that probability is not an objective property; rather it expresses the degree to which one is persuaded of the truth of a proposition.

- Hume argued that probability was nothing more than the degree of assurance a person felt about a proposition.
- Conversely, Liebniz deemed there to be only one correct assessment of a proposition, which is obtained by logical relation between the propositions entirely independent of any personal opinion.

Bentham fell between the two views, believing that why a person holds a certain persuasion can be critically analysed, whether it is rationally held or not.

It is interesting that Wigmore may have been hinting at an underlying scepticism when he said, '[w]ith reference to the State's force...the Court's determination upon a question of fact makes that fact for practical purposes a reality.'

**Discipline**: LAW

**School**: n/a

**Popular name**: (Relevance of Facts to Lawyers)

**Sources**:

1. Albert S Osborn, *The Problem of Proof* (1922)
2. Robert Marx, 'Shall Law Schools Establish A Course on "Facts"?' (1952-3) 5 *Journal of Legal Education* 524
3. Jerome Frank, *Courts on Trial* (1973)
4. David Nicholson, 'Truth, Reason and Justice: Epistemology and Politics in Evidence Discourse' (1994) 57 *Modern Law Review* 726
5. Justice David Ipp, 'Problems with Fact-finding' (2006) (available at http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_ipp020906)

Jerome Frank argued that contested law-suits turn on the facts (at 22). Judge Samuel S Leibowitz agreed when he said that "a trial...is more of a fact suit than a law suit. The troublesome problem confronting the court and jury is not so much *what the law is*, as *what happened*." (cited in Marx at 525)

Therefore facts are highly relevant to lawyers, as facts are what makes it difficult to predict outcomes for clients. The court guesses at the facts, and so lawyers must make guesses about those guesses to predict outcomes. Frank argues that in most trials the law is fairly well established – it is the facts which will influence the decision. Frank articulated the rule *Decision = Rules* x *Facts* or more correctly *D = R* x *Subjective Facts*.

Justice Ipp of the NSW Supreme Court agrees:

> "Fact-finding is labour on the factory floor of the judicial system. It is not glamorous work. Judgments on fact go unreported; they have no enduring fame. Nevertheless, justice depends on correct factual findings, and a fundamental measure of a legal system is the accuracy and skill with which facts are found."

Frank went on to describe 'The Upper-Court Myth' – the myth that upper courts are the heart of court-house government. (at 222). Frank said that "our law schools do practically nothing to educate men to become trial judges. Yet, as I said, the role of the trial judge is far more important, and his task is far more difficult." (at 245) He continued, "[o]ne of the principal reasons for the backwardness of judicial fact-finding is that the law schools have shirked their obligation to teach those skills." (at 246)

Thus fact handling skills are relevant to law students and lawyers because the system needs good *trial* judges (not just good library-lawyers to sit on appellate courts).

Justice Ipp is concerned that experience in court as a barrister (and on the bench) is useful, but not enough of itself. He realises the need for study of cognitive heuristics and cross-disciplinary education:

> "[M]y observation after more than 40 years experience in the field, is that the time spent over many years observing evidence being led, and witnesses being questioned, is of great assistance to a trier of fact. One cannot help but develop

> antennae sensitive to deliberate untruths. Although truthful but inaccurate evidence remains extremely difficult to detect, it is beneficial to be aware of this painful fact from one's own practice of the law. The recent movement to broaden the reservoir of judicial appointments means that more and more judges will be devoid of this experience. [i.e. practicing at the bar]"

Even earlier than the abovementioned writers, Osborn was apt to notice the difference between the advisory lawyer (who works with legal rules, statues and their direct application to the affairs of men) and the trial lawyer (who with facts and law works with and through the minds and emotions of people).

"Success with him [the trial lawyer] depends not only on his knowledge of the law, but on his knowledge of men and of facts." (Osborn at 8)

Nicholson explains that while fact-handling is neglected in law schools, it is "a task which paradoxically takes up far more of a lawyer's time and may be far more crucial to the outcome of legal issues than legal argument." (at 726)

> "Practitioners spend far more time on investigating facts, on drawing, supporting and negating inferences from facts, and on constructing persuasive stories than on arguing about admissibility. In addition, issues relating to facts, evidence and proof go well beyond the arena of the litigated case to include other activities and legal fora such as negotiation, alternative dispute resolution, small claims courts, administrative tribunals, decisions to prosecute, bail hearings, inquests, etc." (Nicholson at 741-2)

**Discipline**: LAW

**School**: Knowledge in Science

**Popular name**:

**Sources**:

1. Carnap, 'Probability and Content Measure' in Feyerabend (ed), *Mind, Matter and Method: Essays for Feigl* (1966)
2. Sir Richard Eggleston, *Evidence, Proof and Probability* (1978)
3. Karl Popper, *Conjectures and Refutations* (5th ed, 1989)

The social scientist realises that a hypothesis (on what happened, i.e. fact) can never be proven and can never be true. All that can be done is to gather data consistent with the hypothesis (from your lecture slides citing *Research Methods in Social Relations*)

Eggleston (at 346) states:

> "...if a particular proposition is inductively certain on given evidence, the truth of the corresponding generalization is a possible object of knowledge...Yet according to most modern philosophers of science the truth of any such generalization is utterly unknowable."

Included amongst the modern philosophers referred to by Eggelston is Karl Popper. Popper held that instead of finding a justification for his belief, the scientist can really only aim for the strongest unrefuted conjecture.

Likewise Carnap believed that all knowledge is guesswork. Instead of seeking proof, a scientist cultivates rationality of decision and evaluates probabilities in a way that is guided by expectations of appropriate utilities.

In summary, Eggelston claims that modern philosophers of science have '...denied that the truth of a scientific generalization over an unbounded domain is a possible object of proof or knowledge." (at 347)

**Discipline**: LAW

**School**: Sociology of Knowledge

**Popular name**: Facts are social constructions

**Sources**:

1. Peter Berger and Thomas Luckmann, *The Social Construction of Reality* (1967)
2. William Twining, *Rethinking Evidence* (1990)
3. David Nicholson, 'Truth, Reason and Justice: Epistemology and Politics in Evidence Discourse' (1994) 57 *Modern Law Review* 726

The Sociology of Knowledge encompasses the study of the social origins of ideas, and of the effects prevailing ideas have on societies. According to this school all statements of fact are constructed. Reality is but a social construction and not something out there to be found.

Sociologists of knowledge are not so much concerned with the possibility of objective knowledge (few deny this possibility). Rather, this school asks the question:

> "How did what passes for knowledge in any given society come to be socially established as reality?" (see Berger and Luckmann at 15)

In fact-finding, the question of relevance involves the sociology of knowledge. Only relevant facts are admissible. The test of relevance is whether a fact supports or negates one of the ultimate facts in issue. This connection of support will be determined on the basis of 'the available social stock of knowledge' in a given society.

According to Mannheim, all knowledge is a product of social processes. Thus he doubts whether there can be objective knowledge of reality independent of particular social contexts. Ultimately Mannheim stressed that he subscribed to relationism, as opposed to an extreme relativism (which denies the possibility of any objective knowledge).

Nicholson even goes so far as to say that "...the social construction and relativity of knowledge is now generally accepted..." (at 729)

**Discipline**: LAW

**School**: n/a

**Popular name**: (some teaching methods)

**Sources**:
1. Albert S Osborn, *The Problem of Proof* (1922)
2. John Henry Wigmore, *Principles of Judicial Proof* (1913)
3. William Twining, *Rethinking Evidence* (1990)

**Wigmore's Chart Method**

All relevant evidence is put into a number of simple propositions of fact. Each proposition is given a number.

Then map, using a limited number of symbols, all the significant relationships between all the propositions, and indicate the author's belief about the probative force of each proposition in relation to its immediate fact in issue.

The result is a rational reconstruction of the chart-maker's belief about the significance of each item of evidence and its bearing on the case as a whole. This method (for students or practitioners) provides a systematic and analytical approach to complex cases.

Twining notes that Wigmore's Chart Method (utilising the logic of proof) takes out the touchy-feely, theatrical and rhetorical aspects of advocacy. It makes clear the operation of subjective values, biases and choices at almost every stage of complex intellectual procedures. (Twining at 7)

*** N.B. we did a similar exercise in one of David Field's Evidence tutorials, where we labelled facts according to Wigmore's classification and placed them in a logical order

**Classroom intruder**

(You mentioned this to me) A scene is acted out during the lecture. Some students are then asked to immediately write down what happened, some do so a week later, and the remainder do so after an even longer period of time. Results can then be compared.

**Chair of Facts**

Osborn's famous suggestion was "to establish something equivalent to a Chair of Facts in the law school with lectures on the facts of representative trials, with special reference to this question of preparation for trial on this important phase of a law case" (at 21)

Osborn also though that such a course should include study of the five senses, as well as memory, observation, psychology, human nature and so on.

**Twining**

Twining suggested that students should learn about "the nature of probabilistic reasoning in forensic contexts, how judgements about the weight of different items of

evidence are to be combined, 'holistic' versus 'atomistic' approaches, how 'reality' is constructed in the court-room..." (at 19)

**Anti-teaching attitudes**

- Facts are common sense and therefore cannot be taught. It is simply a matter of clear thinking and general knowledge (after all we entrust some of our most important fact-finding decisions to unskilled and untrained jurors)
- The logic appropriate to reasoning about evidentiary issues is the ordinary inductive reasoning used in everyday practical affairs.
- Cannot study facts in isolation from law
- Concept of a fact is a crude positivist fiction (positivism = holds that the only authentic knowledge is scientific knowledge)

But Bentham makes a good point in his treatise on Evidence:

> "so obvious are most of the considerations above presented, so much in the way of everybody's observation...But, what a man has had in his mind, he has not always at hand the very moment at which it is wanted..."

*** As discussed in Relevance of Facts to Lawyers, most trial work revolves around the facts, not the law.

It is interesting to think back to Trial Advocacy Class in 052, where Bobette taught us not to talk law to the jury. Our witness examinations and closing arguments were always focussed on the disputed facts, and reference to the law was only ever at a basic level. For example: 'my client hit him in self-defence'; as opposed to 'self-defence is constituted if the existence of elements 1, 2, 3... can be proved.'

**Discipline**: LAW

**School**: n/a

**Popular name**: (definitions of truth in law)

**Sources**:

1. Karl Popper, *The Logic of Scientific Discovery* (1959)
2. Sir Richard Eggleston, *Evidence, Proof and Probability* (1978)
3. Doreen McBarnet, *Conviction* (1981)
4. David Nicholson, 'Truth, Reason and Justice: Epistemology and Politics in Evidence Discourse' (1994) 57 *Modern Law Review* 726
5. William Shields, 'Truth in Legal Practice' (2003) 3 *The Journal of Philosophy, Science & Law* (available at http://www6.miami.edu/ethics/jpsl/archives/newsedit/shieldsA.html)

Shields makes an interesting point that the word 'truth' is rarely used in legal practice. *Black's Law Dictionary* devotes just a few lines to "truth" defining it as "1. A fully accurate account of events, factuality..."

> "By contrast, the definition of "fact" covers about two full pages, with three principal meanings and 42 definitions of specific types of fact. "Evidence" covers five full pages with four principal meanings and 93 definitions of specific types. Even the definition of the crime of perjury avoids the use of "truth"...Perusal of other legal references (treatises, dictionaries, periodicals, etc.) will yield the same results. Where "truth" or "true" is defined, it will be to the effect of "that which is a fact" or "that which is verifiable," leading back to the legal concepts of evidence and proof." (Shields)

Nicholson contrasts the definitions of 'truth' and 'fact-finding':

> "In evidence discourse, truth (like justice, virtue and beauty in other discourses) is portrayed as stereotypically female: desirable, fickle and elusive; whereas fact-finding is undertaken in rational fashion by hard-nosed, practical men who live in the real world." (at 728, fn 9)

In the legal context McBarnet contends that 'what happened' (i.e. the incident in dispute) cannot be conceived of as "some absolute – 'truth' or 'reality' – nor as a simple objective thing...Truth and reality are subjective and relative." (at 11)

In reference to the legal system, Popper says that:

> "...the verdict plays the part of a 'true statement of fact.' But it is clear that the statement need not be true merely because the jury has accepted it. This fact is acknowledged in the rule allowing a verdict to be quashed or revised...
>
> ...even if we...imagine a procedure based solely on the aim of promoting the discovery of objective truth... [disallowing any room for subjective convictions or bias] ...it would still be the case that the verdict of the jury never justifies, or gives grounds for, the truth of what it asserts." (109-111)

Twining makes a similar realisation, in that for some purposes we treat the facts of a case in litigation as if they are true, even if we are not sure or do not know or even believe them to be false.

While one of the central tenets of the Rationalist Tradition is the pursuit of factual truth (as part of rectitude of decision), its critics argue that truth is largely irrelevant in conflict resolution.

Eggleston defines the role of truth in the adjudicative process as such:

> "...the judge first ascertains the truth as to the facts, then decides what the law is, and applies the law so found to the true facts of the case. But the judge does not ascertain the truth in any real sense. What he does is to give a decision on the evidence presented to him" (at 1)

# Bonding to Bond

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