I. The Role and Relationships of the Expert

a. The Expert’s Role

The overall goal of this paper is to develop conformity of ethical principles between medicolegal experts but it is first determine what a medicolegal expert is. In some jurisdictions, the role is at least legally clear. In Ontario, the role of the expert is defined in the Rules of Civil Procedure. The relevant sections are as follows:

53.03 (2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information:

1. The expert’s name, address and area of expertise.
2. The expert’s qualifications and employment and education experience in his or her area of expertise.
3. The instructions provided to the expert in relation to the proceeding.
4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.
5. The expert’s opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert’s own opinion within that range.
6. The expert’s reasons for his or her opinion, including,
   i. a description of the factual assumptions on which the opinion is based,
   ii. a description of any research conducted by the expert that led him or her to form the opinion, and
   iii. a list of every document, if any, relied on by the expert in forming the opinion.
7. An acknowledgement of expert’s duty (Form 53) signed by the expert.

Form 53, as referred to above, requires that the expert acknowledge the following:

- his or her name and place of residence,
- whom he or she has been engaged by or on behalf of,
- that it is his or her duty to provide evidence related to the court proceeding that is
  o “fair, objective and non-partisan,” and
  o “related only to matters that are within [his or her] area of expertise”
- that it is his or her duty to provide “additional assistance as that court may reasonably require, to determine a matter in issue”,
- and that this duty “prevails over any obligation which [he or she] may owe to any party by whom or on whose behalf [he or she is] engaged”.

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There are two complications associated with these regulations. First, obviously is that they do not legally apply outside of Ontario. However, as the focus of this chapter is ethics, the lack of legal application is not necessarily an issue. Secondly, although the definition includes all experts the focus of this chapter is on medicolegal experts and physicians. As medicolegal experts are a subset of all experts, the more expansive nature of the definition is also not necessarily a problem. Thus, these regulations serve merely as a useful starting-point for determining what qualifies someone a medicolegal expert with respect to ethics. In August 2011, the Federal Court of Australia released the Practice Note CM 7 entitled *Expert Witnesses in Proceedings in the Federal Court of Australia*[^1]. This Practice Note is very similar to the changes to rule 53.03 of the Ontario Rules of Civil Procedures, which followed Justice Coulter A. Osborne’s November 2007 Civil Justice Reform Project recommendations on Expert Evidence.

The regulations clearly show that the medicolegal expert’s role is marked by a relationship of trust between the expert and the court. The expert is meant to act first in the court’s interests, and, as clearly defined in Form 53, put all other obligations second. This creates an implied fiduciary duty from the expert to the court, in the sense that the court trusts the expert’s opinions, much as a patient trusts a family doctor. Therefore, the expert owes the court a commitment of his actions in accordance with its requirements. It would not be enough for the expert to refrain from deliberately acting against the court’s interests simply to avoid deliberate negligence. A fiduciary duty is more binding than this, and the medicolegal expert must diligently pursue the requirements of the role in order to live up to the trust that is extended by the court.

At the present time, the College of Physicians and Surgeons of Ontario (CPSO) must accept any patient or claimant's complaint regarding physicians even when the complaint is in

regard to expert testimony given in court. While the court has generally granted immunity from civil liability, Ontario physicians acting as expert witnesses can nevertheless be subjected to a CPSO investigation in regard to the testimony given. It is not clear whether this practice has dissuaded medicolegal experts from testifying or being more sympathetic towards plaintiffs. Forensic psychiatrists are particularly vulnerable to these types of complaints initiated by felons. At the other extreme, the problem of "hired guns" or negligent experts as illustrated by the case of Dr. Charles Smith, forensic child pathologist, behind the public inquiry led by Justice Stephen Goudge had to be addressed. The actions of Dr. Smith lead to questioning of the witness immunity doctrine.

In March 2011, the UK Supreme Court handed down a judgment abolishing expert witness immunity that had been enjoyed for over 400 years. In Jones v Kaney [2011] UKSC 13 the court held, by a majority of 5 to 2, that there is no justification for granting expert witnesses immunity from suits based on their participation in legal proceedings or in relation to any views they express in anticipation of court proceedings. It is unclear at this time whether the Canadian Judicial system will adopt this ruling.

Roles are often defined explicitly by laws or rules. However, these explicit forms are less important than the underlying expectations that produce them. Some attempts at giving explicit definitions of the role of a physician or a lawyer would be obviously wrong, as when there is a conflict with previously-held expectations we have regarding those roles. The medicolegal expert’s role is no exception: when it is defined by regulation, as in Ontario, the

2 http://www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/report/index.html
4 As with all such claims, this is not universally accepted. I have found Alasdair MacIntyre’s discussion of practices in his book After Virtue to be of use.
5 This point draws from similar points H.L.A. Hart makes regarding laws as compared to rules governing socially-acceptable behaviour. See The Concept of Law.
regulations follow from a set of pre-existing expectations of the expert’s actions. The medicolegal expert’s role is a unique one in the medicolegal process. The expert is not a lawyer, a treating practitioner, or a trier of fact. This implies, then, that the expert is not an advocate. The expert is not meant or expected to provide treatment. And the expert is not to render a decision for one side or the other.

In *R v. Abbey*, Dickson J. held:

> Witnesses testify as to facts. The judge or jury draws inferences from facts. With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert’s function is precisely this: to provide the judge and jury with the ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. An expert’s opinion is admissible to furnish the court with scientific information, which is likely to be outside the experience and knowledge of a judge or jury.

The expert’s role, therefore, is to clarify and explain pertinent medical issues to assist the Court in understanding the issues. In order to accomplish this result, the expert must retain a sufficiently detached perspective from which to report the relevant facts. The expert, who assumes the role of advocate, risks no longer being viewed as an expert in the legally correct sense.

The medicolegal expert's relationships with both the claimant and the referral source are of utmost importance and must be addressed.

**b. Expert-Claimant Relationship**

The legal system recognizes a multitude of distinctive relationships in which one party is required to look after the best interests of another in a special manner. Relationships between

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6 If the medical expert does provide treatment, this should be done on an emergency basis only, as discussed below.  
7 *Perricone v Baldassarra* [1994] O.J. No. 2199 at para. 22
solicitor and client, treating physician and patient and parent and child are referred to as fiduciary relationships. Fiduciary relationships entail trust and confidence and require fiduciaries to act honestly, in good faith and strictly in the best interest of the beneficiary (patient). Does the medicolegal expert have a fiduciary duty towards the claimant that in most cases he will see only once? The response is probably no on the basis of the 2011 Supreme Court of Canada's restatement of the fiduciary duty law:

In cases not covered by an existing category in which a fiduciary duty has been recognized, a claimant must show that (1) the alleged fiduciary has undertaken to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons is vulnerable to a fiduciary’s control; and (3) a legal interest or a substantial practical interest of the beneficiary or beneficiaries stands to be adversely affected by the alleged fiduciary’s exercise of discretion or control. Vulnerability alone is insufficient to support a fiduciary claim.9

In order to remain objective, the expert should as a general rule, refrain from providing treatment to the claimant to avoid altering the relationship to a fiduciary one. Medicolegal experts are generally considered to be ethically and professionally bound to address any serious or life threatening medical conditions encountered during an evaluation. In rare instances, the Medicolegal expert may have to administer immediate life saving measures or get an ambulance. In most instances, referring the claimant/patient to an urgent care facility or to the family physician with a note will suffice.

In relationship with the claimant, the expert is expected to carefully consider which virtuous traits of character are necessary, which are optional, and which actually may be viewed as vices or unprofessional to remain ethically diligent in fulfilling the role.

Whichever course of action is chosen, it is clearly unethical to be deceitful or dishonest. Honesty is a general ethical obligation for all of us, and medicolegal experts are no exception.

9 Alberta v. Elder Advocates of Alberta Society, 2011 SCC 24
c. Expert-Referral Source Relationship

With the new Ontario Civil Rules of Procedures, the relationship between the expert and the referral source must be carefully considered. As the evaluation proceeds, it may become necessary for the expert to consult with the referral source for various reasons. It may be that the mandate as requested by the referral source cannot be fulfilled due to key documents not being made available, etc. Whenever necessary, the expert should be able to communicate with the referral source provided that it is subsequently documented and kept transparent. To neglect doing so would create a failure in fulfilling the expert’s role to the Court and all parties.

The expert report should be provided to the referral source within the time frame agreed upon or set out in the regulations. The law of privilege or disclosure rules will dictate the referral source’s course of action.

Figure 1. Roles, responsibilities and relationships

II. Reasoning Ethically

The expert’s role, as discussed in the previous section, is to clarify and explain the relevant medical issues for the trier of fact and the opposing parties. There are many aspects to
this role, and thus many traits and skills the expert must develop in order to fulfill the role in an ethical fashion. First, the expert is expected to develop arguments and draw conclusions relevant to the medicolegal mandate. In order to do so, the expert must be able to reason in a fashion consistent with an ethical obligation to clarify and explain.

Reasoning should, of course, be directed towards truth. The point of reasoning is to try to determine which conclusions are true and which are false – or, at least, which conclusions are most likely to be true. It is important to see that this “should” may have an ethical aspect. There is a (very) long debate on whether it is unethical to draw a conclusion based on limited or insufficient evidence.\(^\text{10}\) The point is controversial when taken generally. It is not clear, for example, that it is unethical to conclude that one’s senses are reliable even though one has little independent evidence that this is the case. However, it seems uncontroversial if taken in the particular case of the medicolegal expert. The role of the medicolegal expert is to clarify and explain the relevant medical issues. Given that, it follows that the expert is ethically required to seek the truth and establish his or her conclusions on the basis of good evidence, to the fullest extent reasonably possible. Otherwise, it is hard to see how the expert could be clarifying or explaining at all.

This broad obligation to reason ethically implies several particular obligations.

Firstly, it implies that the expert is obligated to address when evidence is insufficient to draw a conclusion relevant to the medicolegal mandate. This does not mean that the expert should refrain from drawing conclusions unless evidence is perfect and complete. After all, in the sorts of difficult cases which require an expert’s opinion, it is rare to have evidence that isn’t unclear or conflicting. It does mean, though, that the expert should be open and honest in

\(^{10}\) The debate begins with W. K. Clifford’s 1877 essay “The Ethics of Belief” and William James’ 1896 response “The Will to Believe”. After that, it gets complicated.
acknowledging limitations in the evidence and any consequences for the conclusions that are drawn. If a conclusion is possible but not probable, this should be stated clearly. If the evidence equally supports multiple conclusions, then these conclusions should be stated, and the expert should provide each argument clearly.

In this context, a special problem related to insufficient evidence needs to be addressed, namely that of uncertain or controversial conditions. Certain medical conditions – chronic fatigue syndrome, for example, or fibromyalgia disorder – are not well-understood. Thus, the evidence at hand in a given case will tend to be ambiguous as to whether or not such a condition can be justified. This does not imply that these conditions should not be diagnosed or suggested. It does mean that the expert is obligated to present and explain the controversy. If the expert is entertaining a controversial condition as a hypothetical possibility, then it should be presented as such, and not as a clearly-determined diagnosis.

Secondly, in addition to considering the sufficiency of the evidence, the expert is obligated to consider all the evidence provided. Omitting or overlooking parts of the medicolegal file or examination inhibit clarification of the medical issues at stake. After all, it is hard to clarify something when it is being ignored. The important point here is to remember that the expert is not an employee of the referral source. It is therefore not the role of the expert to minimize or suppress evidence which would negatively affect the referral source’s case. It is instead for the expert to consider conflicting information, acknowledge difficulties or unclarities, and draw conclusions based on all information available. Anything that is inconsistent with the expert’s case should be explained carefully and conscientiously.

Thirdly, the expert is obligated to avoid fallacies and bias in his or her reasoning. The issue of bias relates to the evidence the expert has available. Biased evidence is evidence that, in
one way or another, illegitimately favours a conclusion. Omitting evidence, as discussed above, is a form of bias. Removing evidence that doesn’t favour the desired conclusion tends to produce conclusions that are not supported by the evidence considered objectively and fairly. Distorting evidence is also a form of bias. For example, emphasizing only the evidence that supports a favoured conclusion and denigrating – rather than refuting – evidence that does not is a form of distortion. Of course, not all cases of biased evidence are within the expert’s control. Evidence may be omitted or distorted by the referral source or other party in the dispute. In such a circumstance, the best the expert can and must do is to note the possibility of omissions or distortions where appropriate.

Fallacies, by contrast, relate to how conclusions are drawn from the evidence. It is not possible to discuss fallacies in complete detail in this space, and the following overview is provided instead. A fallacy is an error in reasoning that occurs when either the evidence provided for the conclusion is not relevant to the conclusion, or the evidence provided for the conclusion is not sufficient – or both. Fallacies of relevance include appealing to pity (in Latin, *ad misericordiam*). Whether a claimant is deserving of pity or not is irrelevant to any conclusion regarding the nature of the claimant’s condition. These fallacies also include the appeal to emotion, as in the use of emotionally-charged language in order to persuade an audience to accept a conclusion. Fallacies of sufficiency include the red herring fallacy. This fallacy is committed when a piece of evidence is introduced that distracts from the issue at hand in order to sneak in the desired conclusion. Another such fallacy is the strawman or straw person fallacy, which occurs when opposing arguments are misrepresented in order to make them easier to refute.

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11 Many good guides to fallacies are available. T. Edward Damer’s book *Attacking Faulty Reasoning* is particularly recommended.
What is of importance here is that the expert is ethically obligated to ensure that the evidence will be admissible. The conclusions must be based on good reasoning and evidence that is scientifically sound. This requires avoiding fallacies of all kinds. It also requires providing evidence that is unbiased. If this is not possible, the expert must note where the evidence is biased and control for bias as much as possible. As said above, if the conclusions the expert draws aren’t ones that the expert can defend as being (at least) likely to be true, then the expert’s ability to fulfill his or her role is proportionally diminished.

Figure 2. Reasoning ethically.

| Seek the truth, at least what the evidence shows is likely to be true |
| Note when evidence is insufficient or lacking |
| Be cautious in employing controversial conditions |
| Be open when using hypotheses and possibilities |
| Consider all evidence, even that which is inconvenient or conflicting |
| Avoid biases of omission and distortion |
| Avoid fallacies of relevance and sufficiency |

III. Ethical Actions

It is popularly believed that ethical action is a matter of following rules. When the ethical status of our actions is challenged, we frequently make appeal to some principle or instruction which permits the action. Or, to go the other way, when challenging the ethical status of an action, we frequently make appeal to a principle or instruction which forbids it.

This common thought is clearly not a new one. For example, the Bible is full of sets of instructions for ethically good conduct, most obviously the Ten Commandments. This common thought also still holds significant sway. Codes of ethics proliferate among the professions, medicine and law in particular. Unfortunately, the common thought is wrong. Ethical action is
not a simple matter of rule-following. Following rules may teach one how to behave ethically, but it is not a substitute for genuine ethical reflection and decision-making.

Fundamental to acting ethically is the idea of a justified, or justifiable, action. A justifiable action is one which could be justified, while a justified action is one which has been justified. Justification for action is central to ethics because it is what the various ethical rules are trying to point our attention towards.\textsuperscript{12} When we seek a rule to respond to a challenge to our conduct, we are looking for something that shows the action was one that made sense, namely that it was one that any reasonable person would do in similar circumstances. In other words, we are looking for something that justifies the action. Similarly, when we seek a rule to create a challenge to someone’s conduct, we are looking for something which shows it is not justified, that is, in similar circumstances, a reasonable person would not have performed that action.

Justification is, at heart, a matter of reasons. Rules are a common sort of reason available in ethics,\textsuperscript{13} although not the only one. One could also appeal to consequences of an action as a reason which justifies it.\textsuperscript{14} An action which produces good consequences is, more often than not, a justified one; and an action which produces bad consequences is usually unjustified. Generally speaking, to justify an action is to offer a good reason for that action. And a good reason for action is some consideration or other which shows that the action was reasonable in the circumstances – in short, that it made sense to do it.

A good reason is therefore something that emerges from consensus among similar people.\textsuperscript{15} It is what people who understand the relevant circumstances would accept as showing

\textsuperscript{12} This is a very general point, widely accepted by writers in moral philosophy.
\textsuperscript{13} Developed most extensively by Immanuel Kant in 1785, in \textit{Groundwork of the Metaphysics of Morals}.
\textsuperscript{14} As is done by Jeremy Bentham in 1789, in \textit{Introduction to Principles of Morals and Legislation}, and John Stuart Mill in 1863, in \textit{Utilitarianism}.
\textsuperscript{15} Some may object that this sounds like “moral relativism”. It is actually agnostic between relativism and constructivism. More to the point, relativism – and similar metaethical views – address the existence and nature of
an action made sense. It is, similarly, what people who understand the relevant circumstances would give as showing an action made sense. In other words, a good reason exists as part of an ongoing practice of justifying actions within a relevant community of people. When people within the community agree that some consideration justifies an action, then that consideration is a good reason for acting. When people within the community agree that some consideration does not justify an action, then that consideration is not a good reason. And when there is no consensus, then it is unclear whether the consideration is a good reason or not.\textsuperscript{16}

Figure 3. Conceptual model of ethical action

\textsuperscript{16} Astute readers may notice a commonality here to the work of John Rawls, especially his 1980 essay, “Kantian Constructivism in Moral Theory”.

so-called “all-things-considered” reasons. One might call these not good reasons, but best reasons. The text here speaks only of good reasons – deliberately.
Finding good reasons is therefore necessary in order to conduct oneself in an ethical manner. There are at least three ways in which this can be done: conversation with others, study of relevant articles and books, and careful reflection.

The most obvious way to find good reasons is to engage in dialogue with others. A good reason is, recall, what others do accept. So it makes sense to seek out others and discover what they actually accept – and what they don’t.

Along similar lines, one can engage in dialogues that already exist, and discover a pre-existing consensus. Many of the decisions and actions that arise in medicolegal contexts have been subject to (exhaustive) ethical scrutiny in academic and non-academic publications. So, if colleagues are not available for whatever reason, it is possible to discover which course of action could be justified by researching the problem.

Finally, if neither of the above options is available, then it is always possible to find good reasons through a process of reflection. Reflection is, in effect, a kind of conversation one has with oneself. Since there is no real input from others, it is the least effective method for engaging in ethical action. However, it is often the only method that can be reasonably used – and it does have the advantage of being always available.
IV. Character and Ethics

The final issue to be discussed in the chapter is the role character plays in ethics. Character is etymologically related to ethics, as the Greek word “ethos” translates as “character”. Character also has obvious connections to ethical behaviour – part of what is involved in behaving ethically is being a certain sort of person, a person with a particular kind of character. Furthermore, ethical systems that are based entirely on justifying reasons are relatively recent inventions. The ancient Greeks saw character – in the form of habitual or customary behaviours – as of central importance to ethics.\textsuperscript{17} It is only after the medieval period that this consensus shifts to models based on reasons,\textsuperscript{18} models which were only subject to serious critique in the 1950’s.\textsuperscript{19}

Among the alleged failings of purely reasons-based models of ethics, the most important for the medicolegal expert is their inability to address the so-called “thick” ethical concepts.\textsuperscript{20} The distinction is not hard and fast, and is best made by paradigmatic examples. Thin ethical concepts include fair, unfair, good, bad, right, wrong, justified, and unjustified. Thick ethical concepts include courageous, cowardly, honest, deceitful, kind, and cruel. The best way to capture the distinction is to note that the former are very general and abstract, while the latter are more specific and concrete. The allegation, then, is that reasons-based ethical systems are best suited to general and abstract ethical concepts, while character-based ethics are necessary in order to capture more specific and concrete ethical ideals.

It is important to see that what follows is that the reasons-based approach and the character-based approach, despite occasional intemperate rhetoric on both sides, are not really in

\textsuperscript{17} Aristotle most definitely, but also Epicurus.
\textsuperscript{18} Around the time of Descartes, in the mid- to late 1600’s. Medieval figures such as Thomas Aquinas write of the importance of character.
\textsuperscript{19} Thanks to the work of Elizabeth Anscombe, particularly her 1958 essay, “Modern Moral Philosophy”.
\textsuperscript{20} A point made by Bernard Williams in his 1982 book \textit{Ethics and the Limits of Philosophy}. 14
conflict. They are attempting to elucidate different facets of ethical behaviour. Given that, it is reasonable to conclude this chapter with a consideration of how a character-based ethical system can be developed and applied to the particular circumstances of the medicolegal expert. There are some traits of character – which, following the traditional terminology, will hereafter be called “virtues” – that might be thought to be useful, if not necessary, for medicolegal experts. Two examples will be considered in detail.

First, there is mercy or compassion.\(^{21}\) It seems to make good sense for a medical practitioner to be compassionate, in some sense. It is the practitioner’s role to be sympathetic and kind in his or her dealings with patients. This is consistent with the practitioner’s role as the provider of medical treatment, which can be seen as an expression of sympathy for the patient’s suffering or kindness towards the patient’s illness. However, as previously stated, the expert’s role is not to provide treatment but to clarify and explain the relevant medical issues. Given that, it follows that the expert is not obligated to be compassionate.

In fact, it follows that the expert is obligated to not consider compassion at all – compassion functions as a vice for the person serving as a medicolegal expert, from the perspective of his or her role as a medicolegal expert, and not as a virtue at all.\(^{22}\) Treating a claimant with sympathy affects the expert’s ability to accurately explain the medical condition. The expert may be inclined to introduce bias into the evidence due to compassionate or sympathetic feelings towards the claimant. The expert may also be driven to overlook or ignore evidence which would do the claimant harm. These tendencies may be admirable in other

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\(^{21}\) The Greeks had little time for mercy; Aristotle doesn’t really mention it. Mercy seems to have become part of the traditional set of virtues with the rise of Christianity, and features, for example, in Thomas Aquinas’ *Summa Theologica* (1265 - 1274).

\(^{22}\) The idea of a virtue not always functioning as a virtue is due to Philippa Foot, in her 1978 *Virtues and Vices*. Her example is of the courage which might be displayed by a thief or other criminal during the commission of his or her crimes.
contexts, but an expert in a medicolegal dispute is primarily required to clarify and explain. Thus, they are not admirable at all, but dangerous and to be avoided.

Second, there is courage. It may seem odd to speak of a medicolegal expert exhibiting courage. After all, experts do not fight fires or arrest dangerous criminals. But there is a sort of intellectual or social courage which an expert may be called upon to display. It requires courage to stand against the opinion of one’s colleagues or friends if the evidence does not seem to support it. It requires courage to stand in a courtroom and present one’s arguments in the face of aggressive cross-examination. It requires courage to take on difficult medicolegal cases, requiring many hours of careful and conscientious work. In these, and many other, cases, the expert’s courage is necessary in order to fulfill his or her role. That is, the expert must demonstrate the virtue of courage in order to be able to clarify and explain the relevant medical issues.

There are many other virtues that may or may not be relevant to the medicolegal expert. Long lists have been developed over the years, and some of them are listed below. Some of these virtues are appropriate generally, some are appropriate just to the role of the medical practitioner and some are applicable especially to the role of the medicolegal expert. Generally speaking, as Aristotle taught centuries ago, developing virtues is a difficult project that can consume a lifetime. A medicolegal expert is clearly not expected to do anything this arduous. But the expert is expected to carefully consider which virtuous traits of character are necessary for being ethically diligent in fulfilling his or her role, which are optional, and which actually function as vices. The former should be cultivated as much as possible, and the latter suspended as much as
they can be. In this way, the expert can, as Aristotle put it, do the right thing “to the right person, to the right extent, at the right time, with the right motive, and in the right way”.

Figure 4. Some virtues

- Ambition
- Charity
- Compassion
- Courage
- Curiosity
- Determination
- Diligence
- Faith
- Generosity
- Honesty
- Hope
- Humility
- Integrity
- Justice
- Kindness
- Mercy
- Moderation
- Patience
- Perseverance
- Piety
- Prudence
- Selflessness
- Sympathy
- Temperance
- Thrift
- Trustworthiness

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23 Aristotle, *Ethics*, Book II, Chapter 9. (To be fair, some translators render this passage as referring to feelings rather than actions, but the sentiment seems to be applicable in either case.)