The Effectiveness of Expert Evidence

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Introduction

1. Much in modern litigation is saturated in science of one form or another. The practice of the law faces developing theories in many different sciences that can affect or influence the outcome of litigation. Judges often make factual determinations about specialised areas of knowledge. Courts and litigants rely heavily on sciences such as medicine and psychiatry, forensic accounting, architecture and engineering.

2. This has been prevalent since the seminal decisions of Lord Mansfield permitting evidence to be taken from 'experts', whether in a patent case,[1] or on the construction of a sandbank and its effect on a harbour: "In matters of science, the reasonings of men of science can only be answered by men of science… I cannot believe that where the question is, whether a defect arises from a natural or an artificial cause, the opinions of men of science are not to be received".[2] Despite occasional doubts, expert opinion evidence seems to have become almost indispensable to the conduct of much modern litigation.[3]

3. However a concomitant has been the criticisms made by Judges on a range of issues, including concerns about cost and transparency, and:

   3.1. Whether a particular witness is 'expert', or the 'basis' for the opinion has been articulated or established;

   3.2. Whether the 'expert' is giving objectively reliable evidence or pronouncing what Mr Spicer might have recently described as 'alternative facts', or bias.

4. It would seem that most common law countries encounter problems with expert evidence. This suggests at least some doubts about its perceived effectiveness. Why do doubts remain? The response has been the adoption of collective safeguards in most jurisdictions, but some are used exclusively by particular countries. Australia is not alone in grappling with expert evidence problems.

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1 *Liardet v Johnson*, 18 July 1778, featured experienced and eminent architects, plasterers and builders giving evidence of both novelty and utility regarding a form of stucco developed by Mr Liardet; see Norman S Poser, '*Lord Mansfield, Justice in the Age of Reason*' 2013, p330-332

2 *Folkes v Chadd* (1782) 3 Doug. 157; 99 ER 589, 590

3 *Fox v Percy* (2003) 214 CLR 118, [106], [149]-[151] per Callinan J

5. There are some well-known Australian examples which have provided opportunities to emphasise and entrench the applicable principles. These include:

    5.1. *Clark v Ryan* (1960) 103 CLR 488, 492 involved debate about the admissibility of the 'expert' evidence of Mr Foster Joy about the way in which articulated vehicles 'jack-knife' on corners. As Dixon CJ explained:

    > If it had been desired to prove how in fact semi-trailers of the kind driven by the defendant Clark do in practice behave, perhaps a witness or witnesses experienced in their actual use might have given admissible evidence, not of opinion, but of the fact. But Mr. Foster Joy did not possess that experience. If it had been desired to give technical evidence of the physics involved and of any relevant opinions deduced therefrom, possibly that might have been done by a qualified witness although one may doubt how intelligible to the jury the evidence would have been and what useful purpose it would have served. But it certainly does not appear that Mr. Foster Joy was qualified to give such testimony and in fact he did not essay to do so. What in truth occurred was to use the witness to argue the plaintiff's case and present it more vividly and cogently before the jury.

    5.2. *Fox v Percy* (2003) 214 CLR 118, [122] was another motor accident case, in which the High Court considered the objective evidence of skid marks against oral evidence which had been preferred by the trial judge. The trial judge had also accepted the 'expert' evidence of a Mr Tindall which was regarded as "inadmissible" ([125]-[128], and who had, according to Callinan J:

    > …purported to express opinions far beyond his asserted expertise, of a speculative kind going directly to the issue itself, of little or no probative value, and objectively simply not credible. [And] he purport[ed] to express opinions about the intelligence and propensities of both riders and horses…

    5.3. In *Universal Music v Sharman* [the Kazaa case] (2005) 220 ALR 1, [226] Wilcox J rejected the evidence of a computer expert, Professor Ross, because the solicitors instructing him had, by their emailed instructions, shaped not merely the expression but also the content and course of the opinion. This was one of the cases relied on in *Harris Scarfe v Ernst & Young (No 6)* [2006] SASC 148, [44] by Bleby J when he ordered the production of draft audit negligence reports, which had been destroyed, even if it was necessary to recreate them from computer metadata:

    > **[19]** The history of r 38.01 and judicial comments on the purpose of that Rule were referred to by Gray J in *Kenneally v Pouras*…. It is evident from that history, the content of r 38.01, the Practice Direction which accompanied it, the subsequent enactment of r 38.01A and

Practice Direction 46A and their content that the Rule and Practice Directions have a number of purposes. One is to ensure full and effective disclosure of an expert's opinion and of the material on which it is based well before trial. Another is to emphasise that experts are not engaged for the purpose of moulding their opinion to suit the needs of the client, but that they are there to assist the Court and to provide an independent opinion based solely on the proper exercise of their professional or other expertise. Another is to ensure that where an expert has changed or qualified his or her opinion, that change or qualification is made known to all interested parties. Yet another is to ensure transparency between experts and those instructing them so that where a client or their solicitors may have made some suggestion or questioned the opinion, resulting in some change or qualification, that change or qualification and the reason for it is revealed. Another purpose of the Rule was to effect a change of culture among some groups of experts and those instructing them who perceived the function of the expert to be to act solely in the interests of and for the benefit of the client in forming and moulding their opinion.

[20] It was for those reasons that, not only were experts then required to state the factual basis and assumptions on which their opinions were based, thereby reflecting their instructions, but that they and their instructors were thenceforth required to list and supply copies of all documents referred to or prepared by or at the direction of the expert ... Among other things, the Rule was designed to expose the type of change to or formulation of an expert's opinion exposed in the course of cross-examination in *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd*.

…

[24] It also follows that, if the Rule is complied with, the grounds of successfully challenging an expert's opinion may, in some cases, be expanded. In others, where the expert has maintained true independence and integrity in forming the opinion, the wider requirements of disclosure may well reinforce the strength of the opinion, even where that has resulted in some change of or qualification to the original opinion.

5.4. More recently the High Court reviewed the 'basis rule' and s 79 of the *Evidence Act* 1995 (NSW) in a dust disease case, *Dasreef v Hawchar* (2011) 243 CLR 588, [9]. In that case a challenge was made to the evidence of Dr Basden:

Dr Basden's evidence was not admissible to establish that Mr Hawchar's exposure to silica dust in the course of working for Dasreef was greater than the level prescribed as the maximum permissible level of exposure. To the extent to which Dr Basden expressed an opinion about the numerical or quantitative level (in the sense explained later in these reasons) of respirable silica dust to which Mr Hawchar was exposed in the course of working for Dasreef, his evidence was not "wholly or substantially based on" "specialised knowledge based on [his] training, study or experience". These reasons will further demonstrate that the

> Court of Appeal was wrong to conclude that the primary judge was "permitted", as he put it, "to take into account my experience that this disease [silicosis] is usually caused by very high levels of silica exposure".

5.5. His evidence was therefore excluded. Nonetheless the appeal was dismissed because there was no dispute that the plaintiff, Mr Hawchar, suffered from silicosis and an expert pathologist, Professor Henderson, gave admissible, uncontested evidence that this silicosis was attributable to a history of exposure to silica during the period of employment with Dasreef.

5.6. In separate reasons Heydon J undertook a masterly analysis of the common law relating to expert evidence, pointing out at [55]-[57]:

> The construction of s 79 is important for several reasons.
>
> First, for generations judges have complained about the partiality of expert opinion witnesses. In 1843 Lord Campbell[4], in 1873 Sir George Jessel MR[5], and in 1963 Walsh J[6] lamented their "bias". Indeed many litigation lawyers can doubtless recall instances of experts who say one thing in one case and a contradictory thing in another, each time to the supposed advantage of the party paying them. In 1849 Lord Cottenham LC[7] and in 1876 Sir George Jessel MR[8] drew attention to the skewed manner in which experts are selected, as each side rummages through a group of experts until the most favourable one is found. In 1935 Lord Tomlin complained of the propensity of experts to offer opinions on matters which are questions for the court[9] – or, as Lord Justice Auld said more recently, to give opinion evidence "masquerading as expert evidence on or very close to the factual decision that it is for the court to make."[10] In 1986 Judge Posner complained of expert opinion which[11]:
>
> > "was the testimony either of a crank or, what is more likely, of a man who is making a career out of testifying for plaintiffs in automobile accident cases in which a door may have opened; at the time of trial he was involved in 10 such cases. His testimony illustrates the age-old problem of expert witnesses who are 'often the mere paid advocates or partisans of those who employ and pay them, as much so as the attorneys who conduct the suit. There is

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4 *The Tracy Peerage* (1843) 10 Cl & F 154 at 191 [8 ER 700 at 715].

5 *Lord Abinger v Ashton* (1873) LR 17 Eq 358 at 374.

6 *Miller Steamship Co Pty Ltd v Overseas Tankship (UK) Ltd* [1963] SR (NSW) 948 at 963.

7 *Re Dyce Sombre* (1849) 1 Mac & G 116 at 128 [41 ER 1207 at 1212].

8 *Thorn v Worthing Skating Rink Co* (1876) reported as a note to *Plimpton v Spiller* (1877) 6 Ch D 412 at 416.

9 *British Celanese Ltd v Courtaulds Ltd* (1935) 152 LT 537 at 543.

10 *Review of the Criminal Courts of England and Wales: Report*, (2001) at 574 [133].

11 *Chaulk v Volkswagen of America Inc* 808 F 2d 639 at 644 (7th Cir 1986). The quotation is from *Keegan v Minneapolis & St Louis RR* 78 NW 965 at 966 (Minn 1899).

> hardly anything, not palpably absurd on its face, that cannot now be proved by some so-called "experts.""

In 1994 he said[12]:

> "Many experts are willing for a generous (and sometimes for a modest) fee to bend their science in the direction from which their fee is coming. The constraints that the market in consultant services for lawyers places on this sort of behaviour are weak … The judicial constraints on tendentious expert testimony are inherently weak because judges (and even more so juries …) lack training or experience in the relevant fields of expert knowledge."

Then there is the delay and expense caused by the disproportionate volume of expert evidence….

6. What are the solutions and what, if anything, can be learned from the approach in other jurisdictions?

7. As will be seen, there are a range of substantive and procedural devices used both here and overseas. Broadly, they represent techniques designed to ensure that expert evidence will be effective. However there is no one solution, whether across jurisdictions, or within jurisdictions, across different types of litigation.

8. The available solutions include: (1) early, clear directions or rulings by judges, (2) modifications to, or flexibility in the application of, Rules of Court or "codes of conduct", (3) new ways of selecting experts, or taking the evidence of experts, and (4) greater emphasis on the disclosure and production of the materials made available to, used by, or produced by experts, including by the forced abrogation of the litigation or advice privilege that might ordinarily otherwise apply.

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[12] *Indianapolis Colts Inc v Metropolitan Baltimore Football Club Limited Partnership* 34 F 3d 410 at 415 (7th Cir 1994).

AUSTRALIA

The Test

9. An 'expert' exception to the opinion rule exists in most jurisdictions.

10. Under the *Uniform Evidence Act*, evidence of an opinion is inadmissible if the opinion is intended to prove the existence of a fact.[13] There is an exception to this rule for opinion evidence the subject of an expertise. If an individual has '*specialised knowledge based on a person's training, study or experience*', the opinion rule is inapplicable to the extent that the person's opinion is based '*wholly or substantially'* on that specialised knowledge.[14] Furthermore, an expert is required to demonstrate how his or her field and '*training, study or experience'* applies to a fact in issue and gives rise to the opinion proffered.[15]

11. At common law a witness is not usually permitted to express any opinion. This rule does not apply to experts as was explained by Dixon CJ in *Clarke v Ryan* (1916) 103 CLR 486 at 491:

> The opinion of witnesses possessing peculiar skill is admissible whenever the subject matter of enquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without assistance. … but [expert witnesses] … cannot be permitted to attempt to point out to the jury matters which the jury could determine for themselves or to formulate their empirical knowledge as a universal law.

12. Likewise in *R v Bonythyon* (1984) 38 SASR 45 at 46, King CJ explained:

> The general rule is that a witness may give evidence only as to matters observed by him. His opinions are not admissible. One of the recognised exceptions to this rule is that which relates to the opinions of an expert. This is confined to subjects which are not, or are not wholly, within the knowledge and experience of ordinary persons. …On such subjects a witness may be allowed to express opinions if the witness is shown to possess sufficient knowledge or experience in relation to the subject upon which the opinion is sought to render his opinion of assistance to the Court. ...When it is established that the witness is an expert in the relevant field of knowledge, he will be permitted to express his opinion. …The weight to be attached to his opinion is a question for the jury.

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[13] *Evidence Act 1995* (Cth) s 76.
[14] *Evidence Act 1995* (Cth) s 79(1).
[15] *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, 744 per Heydon JA.

13. In determining whether a witness is an expert and therefore entitled to express an opinion, the trial judge must decide two questions:[16]

    13.1. First, whether the subject matter of the opinion forms part of the body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the Court.

    13.2. The second question is whether the witness has acquired by study or experience sufficient knowledge of that subject to render his opinion of value in resolving the issues before the Court.

14. Moreover, expert opinion is not usually admissible unless the constituent facts on which it is based are properly proved by admissible evidence.[17]

The Issues

Nobody Likes to Disappoint a Patron

15. The issues arising out of party-appointed experts in litigation have been well-documented and thoroughly explored. The most commonly posed problem is the tension between the adversarial system and the duty of an expert to behave objectively, effectively as an advisor to the Court.

16. The notion of the 'biased expert' is not new or novel: phrases such as 'hired guns'[18] and 'paid agents'[19] have been commonplace for some time. In the United States, judges have referred to experts as 'jukeboxes' who will play any song for any person, for so long as they are being paid.[20] To an extent, this is a natural human reaction. Experts agreeing to

[16] *R v Bonython* (1984) 38 SASR 45, 46-47 per King CJ and *Casley-Smith v FS Evans (No 1)* (1998) 49 SASR 314, 320.
[17] See generally the decisions of Heydon J in *Makita v Sprowles* (2001) 52 NSWLR 705 and *Dasreef v Hawchar* (2011) 243 CLR 588, and also *TPC v Arnott's Ltd (No 5)* (1990) 92 ALR 527, *Arnott's Ltd v TPC* (1990) 97 ALR 555 at 589-598 and *R v Fowler* (1985) 39 SASR 440 at 443 per King CJ.
[18] H K Woolf, *Access to Justice* (Final Report to the Lord Chancellor, HMSO, London, 1996).
[19] H K Woolf, *Access to Justice* (Final Report to the Lord Chancellor, HMSO, London, 1996).
[20] David Paciocco "*Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts"* (2009) 34 *Queen's Law Journal* 565, 566.

give evidence for a particular party for a fee may find it difficult, even subconsciously, to ignore the pressure to 'join the team'.[21]

17. In Australia the Freckleton Report into 'Judicial Perspectives on Expert Evidence' in 1999 found that over a quarter of judges encountered bias often and two thirds had encountered it on occasion.[22]

18. 'Adversarial bias' is the term given for an expert who exhibits bias either consciously or unconsciously towards the retaining party.[23]

19. 'Selection bias' involves 'shopping around' for the expert whose opinion best supports the case at hand.[24] This has the potential to dilute the true role of the expert, undermining any assistance given to the trier of fact. The integrity of the evidence delivered may be compromised,[25] which, in turn, has repercussions for the resulting judgment.

The 'Gravy Train'?

20. How experts are paid is thought by some to influence an expert's bias. Lord Woolf in his Access to Justice Report commented that expert evidence as a '*large litigation support industry'* has expanded amongst a variety of professions '*generating a multi-million fee income'*.[26] The need to opine in a manner helpful to the retaining party can be irresistible.

21. In American jurisdictions, the right of a party to cross-examine an expert on the annual income received from acting as an expert witness was recognised as early as 1988; in Illinois, the Supreme Court allowed counsel to cross-examine the plaintiff's medical expert on the frequency for which he testified for plaintiffs in malpractice suits as a means of adducing bias.[27]

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[21] The Hon. Justice Davies 'The Reality of Civil Justice Reform: Why We Must Abandon the Essential Elements of our System' (speech presented at the Australasian Institute of Judicial Administration, Brisbane, 12 July 2002).
[22] Dr Ian Freckleton, Dr Prasuna Reddy and Hugh Selby 'Australian Judicial Perspectives on Expert Evidence: An Empirical Study' (Research Report No 54, The Australian Institute of Judicial Administration, 1999) 25.
[23] New South Wales Law Reform Commission, *Expert Witnesses* Report No 109 (2005) 72.
[24] New South Wales Law Reform Commission, *Expert Witnesses* Report No 109 (2005) 73.
[25] The Hon. Justice Preston SC 'Specialized Court Procedures for Expert Evidence' (speech presented at the Japan Federation of Bar Associations, Tokyo, 24 October 2014).
[26] HK Woolf *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wakes* (London: HMSO, 1996) Chapter 13.
[27] *Trower v Jones* 520 N.E.2d 297 (1988).

22. Experts who testify may do so for a fees higher than they can command in the ordinary practice wage. Monetary incentive may persuade an expert to lend greater support to 'their' party's case in the hope that they will be retained in the future. This incentive escalates where a contingency arrangement is organised. Finally, whilst it is unlikely to be put so explicitly, experts who does not unwaveringly support the 'party line' know that they are unlikely to be retained again.[28]

Solutions

The 'Expert Code'

23. Australian jurisdictions take various measures to counter partisanship. The primary strategy has been to amend the Rules of Court. Typically, an expert is required to read, acknowledge and sign a code of conduct prior to giving evidence. Although the wording varies across jurisdictions, the overall effect is an acknowledgment by the expert that the expert is not an advocate for either party and has an overriding duty to the Court.[29]

24. In South Australia, for example, experts are required to insert a declaration into their reports that they have made all appropriate inquiries and no matters of significance have been withheld from the Court.[30] This is clearly intended to curtail a party from directing an expert to deliberately withhold relevant material within the expert's knowledge.

25. The 'expert code' must now be viewed as only an elementary step in curbing partisanship. This is because a failure to comply with the relevant Practice Note or Code of Conduct has limited consequences. It may not render the expert evidence inadmissible.[31] Rather, evidence can only be excluded under the general provisions of the *Uniform Evidence Act* if an expert is considered to be in '*grave breach*' of the relevant provision.[32] The recent Federal Court case of *Ananda Marga* illustrates the hesitance of the Australian jurisdictions to interfere with a biased expert witness despite the expert's awareness and

[28] The Hon. Justice Davies 'The Reality of Civil Justice Reform: Why We Must Abandon the Essential Elements of our System' (speech presented at the Australasian Institute of Judicial Administration, Brisbane, 12 July 2002).
[29] *Uniform Civil Procedure Rules 2005* (NSW) r 31.23; *Supreme Court (General Civil Procedure) Rules 2005* (Vic) Form 44A; *Court Procedures Rules 2006* (ACT) Schedule 1; *Federal Court Rules 2011* (Cth) Practice Direction CM 7; *Supreme Court Civil Supplementary Rules 2014* (SA) r156; *Uniform Civil Procedure Rules 1999* (Qld) r 249.
[30] *Supreme Court Civil Supplementary Rules 2014* (SA) r156.
[31] See *Wood v R* [2012] NSWCCA 21.
[32] *Wood v R* [2012] NSWCCA 21, 729; *Uniform Evidence Act (Cth) ss 135-137.*

disregard of his or her duty to the court. In that case the defendants sought to exclude the evidence of two experts on the basis of a clear indication that neither was independent. The judge acknowledged the desirability of independent evidence and the effect of the relevant expert code, [33] but ruled "*that such qualities are not preconditions of competence.*" Declining to exclude the evidence, the judge merely alluded to the risk that it would fail to persuade him.[34] A lack of independence was therefore held to affect evidentiary weight, but not compel exclusion.[35]

26. Whilst an expert code may create the perception of reducing adversarial bias, it cannot eliminate selection bias. A party is not deprived of the right to seek an expert who may genuinely, however tenuously, support that party's case. As was observed in the New South Wales Law Reform Report, this kind of bias is difficult to address without subjugating the traditional right of a party to choose his or her own witnesses.[36] This has been addressed in part by reform in the United Kingdom.

Comprehensive Rules: New South Wales

27. The 'expert code' in each State and Territory differs. As may be expected, some have preferred more comprehensive rules, whereas others prefer minimal interference.

28. Reform in New South Wales has been particularly robust, arising out of the 2005 Law Reform Commission report into expert evidence. This closely followed the trend in civil procedure in the United Kingdom. The report's recommendations resulted in an interventionist set of rules, very different to the previous rules. Comprehensive divisions detail the procedures for court-appointed experts and 'single experts'. [37] Non-exhaustively, some rules regulating expert evidence in New South Wales are:

    28.1. any party seeking to adduce expert evidence at trial must seek directions from the Court;[38]

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[33] *Federal Court Rules 2011* (Cth) Practice Direction CM 7.
[34] *Ananda Marga v Tomar (No 4)* (2012) 291 ALR 292 at [35] per Dodds-Streeton J.
[35] *Fonterra Brands (Australia) Pty Ltd v Viropoulos (No 2)* [2015] FCA 974 at [17] per Robertson J.
[36] New South Wales Law Reform Commission, *Expert Witnesses,* Report no 109, (2005) pg 74.
[37] *Uniform Civil Procedure Rules 2005* (NSW) Part 31, Division 2, Subdivision 4 & 5.
[38] *Uniform Civil Procedure Rules 2005* (NSW) r 31.19: see rule 31.20 for further directions the Court is permitted to make.

28.2. the Court can make an order limiting the number of experts who may be called on any one issue;[39]

28.3. in personal injury matters, the General Case Management List Practice Note advises that the Court will limit the number of experts to one per medical specialty;[40]

28.4. the Court can direct expert witnesses to confer on certain issues and 'endeavour to reach agreement', before presenting their findings in a joint report.[41]

29. New South Wales may have the most detailed regime, and has been looked on by other jurisdictions considering similar reform.[42]

30. Another example of a rule that is now commonly used is one requiring the disclosure of any contingency arrangement between the expert and the hiring party. This practice has been enforced because it is a simple way to expose any ulterior motive an expert may have in the outcome.[43] However, where an expert has failed to disclose a contingency arrangement, courts have had difficulty deciding what consequence follows.[44]

Concurrent evidence

31. Australia is the most experienced jurisdiction in the practice of using 'concurrent evidence' or 'hot-tubbing'.[45] The practice probably first developed in the Federal Court and enables experts to congregate on a single panel and give evidence at the same time: concurrently. Experts are sworn in together and give evidence together. It may be that prior to convening this panel, the presiding judge or member directs the experts to confer in a private conference to identify the common ground in their opinions.[46] In this forum, each expert is open to directly question or answer each other expert, under the control of

[39] *Uniform Civil Procedure Rules 2005* (NSW) r 31.20 (2)(e).
[40] Victorian Law Reform Commission *Civil Justice Review Report* Report No 14, (2008) pg 489.
[41] *Uniform Civil Procedure Rules 2005* (NSW) r 31.24(1)(b)-(c).
[42] Victorian Law Reform Commission *Civil Justice Review Report* Report no 14, (2008) Chapter 7.
[43] See *Uniform Civil Procedure Rules 2005* (NSW) r 31.22(1).
[44] see *Fuller-Lyons v State of New South Wales (No 2)* [2013] NSWSC 445, [8]-[10] per Beech-Jones J.
[45] The Hon. Justice Rares 'Using the 'Hot Tub'- How Concurrent Expert Evidence Aids Understanding Issues' (speech presented at the Judicial Conference of Australia Colloquium, 12 October 2013).
[46] The Hon. Justice Duncan Kerr *Use of Concurrent Evidence in the AAT* (30 June 2015) Administrative Appeals tribunal< http://www.aat.gov.au/AAT/media/AAT/Files/Directions%20and%20guides/Guideline-Use-of-Concurrent-Evidence-in-the-AAT.pdf>

the judge. Experts endeavor to identify agreed facts and distil the areas of dispute 'without the constraints of the adversarial process.'[47]

32. The concurrent expert evidence model can be applied to any issue, particularly where there are serious and complicated issues and experts in disagreement.[48] Whether the judge permits counsel to question the experts, and the extent of it, varies, often depending on the practice of the particular court. For example, in the Family Court, counsel still conducts questioning.

33. Some advantages are immediately apparent. The judge no longer has to rely solely on counsel to ask questions during examination in chief and cross-examination. The prospect of misunderstanding an expert's views, especially an expert who is is verbose and technical, are significantly reduced. As one Federal Court judge commented, "*each expert knows his or her colleague can expose an inappropriate answer immediately, and can also reinforce an appropriate one*."[49] The process may sometimes become a type of peer review where no expert can hope to evade an answer by using complex language, given the risk of immediate exposure by another of the colleagues giving concurrent evidence.

34. Most importantly, concurrent evidence is thought to facilitate the process of acting as an independent adviser.[50] Removing an expert from the influence of a party, or the party's lawyers, and placing the expert into the witness box alongside peers in the same field can be enough to expunge partisanship.[51] Additionally there are potential cost and time savings.[52] The process is no longer controversial in Australia and is regularly used. The same cannot be said for other jurisdictions, such as Canada and the United States, who are still experimenting, and who look to Australia for guidance.[53] Comparatively, in the

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[47] Hon. Justice McClellan CJ 'New Method With Experts - Concurrent Evidence' (2010) 3.1 *Journal of Court Innovation* 259, 264.

[48] The Hon. Justice Rares 'Using the 'Hot Tub'- How Concurrent Expert Evidence Aids Understanding Issues' (speech presented at the Judicial Conference of Australia Colloquium, 12 October 2013).

[49] The Hon. Justice Rares 'Using the 'Hot Tub'- How Concurrent Expert Evidence Aids Understanding Issues' (speech presented at the Judicial Conference of Australia Colloquium, 12 October 2013).

[50] The Hon. Justice Garry Downes AM 'Concurrent Evidence in the AAT: The New South Wales Experience' (speech delivered at the Australasian Conference of Planning and Environment Courts and Tribunals, Hobart 27 February 2004).

[51] The Hon. Justice Peter Heerey '*Recent Australian Developments'* (2004) 23 Civil Justice Quarterly 386, 391.

[52] Administrative Appeals Tribunal *'An Evaluation of the Use of Concurrent Evidence in the Administrative Appeals Tribunal'* (2005) 4.

[53] See Freya Kristjanson "Hot-Tubs" and Concurrent Evidence: Improving Administrative Proceedings (2012) 25 *Canadian Journal of Administrative Law and Practice* 79; David Sonenshein and Charles

United Kingdom the Civil Procedure Rules allow for 'discussions' where experts are ordered to confer and prepare a joint statement of the issues on which they agree and disagree.[54]

Single and Court-Appointed Experts

35. Single experts are more commonly used in particular Courts where the range of issues is narrower.

36. In the New South Wales Land and Environment Court, single experts are now routinely appointed. The Court has the power to order that the parties to a dispute jointly engage a single expert, with or without directions from the Court.[55] Remuneration is also agreed as a joint cost, or in the event of a failure to agree, by direction from the Court.[56] Once a single expert has been appointed, a party cannot adduce additional expert evidence without the leave of the Court. However, upon receiving the report of the joint expert, the parties retain the right to examine a witness on request.[57]

37. Likewise, in the Family Court the parties are routinely encouraged to select and instruct a single expert. The Court may also appoint its own expert, depending on a consideration of various relevant factors.[58] Parties who choose to appoint a single expert are not required to seek the leave of the Court to tender the report.[59] Partly this is aimed at addressing bias. There are also strong policy reasons for ensuring that parties with sparse financial resources do not suffer at the hands of a more prosperous litigant.[60]

38. Additionally, the expectation is that a Court routinely handling sensitive family matters, often regarding children, should have the means to control the proceedings more strictly. Therefore the rise of the single-expert has been met with less hostility in the Family Court than in courts of general jurisdictions.

Fitzpatrick "The Problem of Partisan Experts and the Potential for Reform Through Concurrent Evidence" (2013) 32(1) *The Review of Litigation* 1, 55.

[54] *Civil Procedure Rules 1998* (UK) SI 1998/3132, r 35.12.

[55] *Uniform Civil Procedure Rules 2005* (NSW) r 31.37(2).

[56] *Uniform Civil Procedure Rules 2005* (NSW) r 31.37(2).

[57] *Uniform Civil Procedure Rules 2005* (NSW) r 31.43.

[58] *Family Law Rules 2004* (Cth) r 15.45(2).

[59] *Family Law Rules 2004* (Cth) r 15.44(2).

[60] '*The Changing Face of the Expert Witness'* (Discussion Paper, The Family Court of Australia, 1 January 2002) 15.

39. This came under particular focus in a decision of the Full Court of the Family Court where a child psychiatrist was accused of bias. In that case, Dr. W had formed an incriminating opinion of the father in the proceedings. He gave evidence that the father had sexually abused his children. His opinion was arrived at without having observed or assessed the children or either of the parties in person. On giving evidence he made what were described as '*extraordinary assertions*'[61] that were '*well beyond the position of an expert commenting on facts.*'[62] Nicholson CJ and O'Ryan J commented on the selection bias of experts: '*in the context of normal adversarial litigation this is a well recognized and perhaps acceptable approach'*.[63] However, they considered this could not be tolerated in a jurisdiction bound to act in the best interests of the child.[64]

40. The reasons for adopting single or court expert evidence in the Family Court are compelling. However the same considerations do not necessarily translate to other courts. Commonly, the grievance with use of single expert evidence is that it stifles genuine debate by the provision of only one opinion.[65] The use of court-appointed experts in particular has polarised many members of the legal profession.

41. A former president of the Administrative Appeals Tribunal has argued that the attraction of single expert evidence lay in the fallacy that there was only one answer to every issue. To this, he put, how often do the wise persons in Canberra arrive at the same answer and for the same reason? He further commented that it was wrong to assume that differences in opinion between experts inevitably demonstrated partisanship.[66] His experience was that the concurrent evidence model was a far more effective way of addressing any adversarial bias in evidence. [67]

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[61] *W and W, Re; Abuse Allegations; Expert Evidence* (2001) 28 Fam LR 45, [180].
[62] *W and W, Re; Abuse Allegations; Expert Evidence* (2001) 28 Fam LR 45, [179].
[63] *W and W, Re; Abuse Allegations; Expert Evidence* (2001) 28 Fam LR 45, [154] per Nicholson CJ and O'Ryan J.
[64] *W and W, Re; Abuse Allegations; Expert Evidence* (2001) 28 Fam LR 45, [154].
[65] *Judge ME Rackemann* 'Expert Evidence Reforms- How Are They Working?' (2011) 1 *National Environmental Law Review* 40, 42.
[66] The Hon. Justice Garry Downes AM 'Concurrent Evidence in the AAT: The New South Wales Experience' (speech delivered at the Australasian Conference of Planning and Environment Courts and Tribunals, Hobart 27 February 2004).
[67] The Hon. Justice Garry Downes AM ' the Value of Single or Court-Appointed Experts' (speech delivered at the Australian Institute of Judicial Administration, Melbourne 11 November 2005).

42. However, the former Chief Judge of the Land and Environment Court has stated that the fear that only one view was being presented was misplaced. He commented that, in the event more than one viewpoint is relevant, an expert can be found to express it.[68]

43. A former Justice of the Supreme Court of Victoria has appealed against the use of single experts, in particular, court-appointed experts. Arguing that these experts are often selected from a pool of 'established and conservative' members of the profession, he stated that these experts would take a traditionalist approach, which may suppress more progressive views.[69] However, and by contrast, a former Justice of Appeal in Queensland has contended that the use of party-appointed experts in our adversarial system was the 'worst way' to resolve any question. The presiding judge, presumably with little to no expertise in the field, cannot be expected to accurately choose between two diametrically opposed expressions of opinion. He urged that this, as well as adversarial bias, can only be addressed by having all experts court-appointed.[70]

44. However, aside from specialist courts where the field of expertise is narrower, there is no obvious trend towards single expert appointment.

45. It may be that Australia hasn't quite yet refined the art of single expert appointment, whether selected by the parties or by the Court. Both the advantages and disadvantages posed are legitimate. However, and as will be seen, countries with similar problems have found other means to satisfactorily address them.

The Common Law Jurisdictions

46. Predictably, other common law jurisdictions have encountered problems with expert evidence, and much earlier.

47. In 1873, Sir George Jessel M.R. in *Lord Abinger v Ashton* remarked on the '*natural bias*' of a remunerated witness to be '*serviceable*' to the party retaining the witness to the point that they are simply '*paid agents*'.[71] Problems of bias, a lucrative litigation support

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[68] Justice PD McClellan 'Expert Evidence- Aces Up Your Sleeve?' [2006] 15 *New South Wales Judicial Scholarship* 6.
[69] The Hon. Justice Hampel "A Case Against Single Experts" (2013) 119 *Precedent* 15.
[70] The Hon. Justice Davies "Court Appointed Experts" (2005) 5(1) *Queensland University of Technology Law and Justice* 89.
[71] *Lord Abinger v Ashton* (1873) 17 LR Eq 358, 373 per Jessel M.R.

industry, and convoluted evidence are prevalent in these countries and emulate Australia's own problems. The manner in which these countries choose to address these issues differs. In most instances it will be seen that a more assertive direction has been taken. Additionally, techniques similar to Australia's have been further nuanced.

ENGLAND

The Test

48. England relies on a combination of case law, statute and court rules to determine admissibility of expert evidence. The starting point is the *Civil Evidence Act 1972* which provides:[72]

> Subject to any rules of Court made in pursuance of this Act, where a person is called as a witness in any civil proceedings, his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence…
>
> (3) In this section "relevant matter" includes an issue in the proceedings in question.

Solutions

Rules as a starting point

49. Lord Woolf's 1998 Report '*Access to Justice'* was the genesis for reform in the United Kingdom, beginning with the introduction of the *Civil Procedures Rules* 1998. Whilst his report covered a great many dilemmas in the civil justice system, he delivered a damning chapter on the role of the expert witness. Like other common law jurisdictions, the tension between the adversarial or 'party' system and the duty of an expert to be bipartisan was a cornerstone issue.

50. The statutory answer to Woolf's critique on expert evidence was Part 35 of the *Civil Procedure Rules*. Outweighing any of our Australian Supreme Court Rules in comprehensiveness, Part 35 contains 15 individual rules relating to expert evidence. Most

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[72] *Civil Evidence Act 1972* (UK) c. 30, s 3.

contemporary among them are the Court's power to restrict expert evidence to what is '*reasonably required to resolve proceedings*'[73], the requirement of obtaining the Court's permission to tender expert evidence, or even call an expert witness at all.[74] If both parties submit evidence on a particular issue, an order can be made that a single joint expert give evidence on the matter.[75] Contrary to Australian approach, expert evidence can be excluded entirely at the discretion of the judge if independence and impartiality are threatened.[76]

Cracking the whip-lash

51. Reform is usually born of crisis. In the United Kingdom, that crisis was the cost of skyrocketing insurance premiums resulting from a huge volume of motor vehicle whiplash claims. The United Kingdom self-deprecatingly proclaimed itself as the 'whiplash capital of the world' and in conference with insurers proposed a reform. The result was the Ministry of Justice's Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents (**The Protocol**). The Protocol applies to soft tissue personal injury claims resulting from a vehicle accident that do not exceed 25,000 pounds in value.[77]

52. Under the Protocol, a claimant who has suffered a soft tissue injury resulting from a motor accident must obtain a fixed cost medical report from an accredited medical expert.[78] However the medical expert chosen to provide the report is randomly generated via a portal run by "Medco". Medco is a not-for-profit organisation that works concomitantly with the Protocol to establish rigorous accreditation requirements for experts who deliver reports through the portal. Importantly, the portal '*breaks the financial links*'[79] between solicitors and medical experts, making it difficult for exaggerated or fraudulent claims to advance. The risks of association or selection bias are eliminated. Furthermore, as it is '*expected'* that only one expert report will be required, a second report will only be

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[73] *Civil Procedure Rules 1998* (UK) SI 1998/3132, r 35.1.
[74] *Civil Procedure Rules 1998* (UK) SI 1998/3132, r 35.4. The parties must also provide an estimate of costs upon applying for permission.
[75] *Civil Procedure Rules 1998* (UK) SI 1998/3132, r 35.7.
[76] *Kennedy v Cordia (Services) LLP* [2016] UKSC 6 per Lords Reed and Hodge at [51] citing with approval *Toth v Jarman* [2006] 4 All ER 1276.
[77] *Civil Procedure Rules 1998 (Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents from 31 July 2013)* (UK) SI 1998/3132, 1.2(1)(a).
[78] *Civil Procedure Rules 1998 (Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents from 31 July 2013)* (UK) SI 1998/3132, 7.8A.
[79] Lord Faulks 'Civil Justice-The Way Ahead' (speech at Association of Personal Injury Lawyers Conference, England 4 May 2016).

authorised if the initial expert recommends it.[80] The explicit aims of the Protocol are to ensure that:[81]

52.1. the use and cost of medical reports is controlled;

52.2. in most cases only one medical report is obtained;

52.3. the medical expert is normally independent of any medical treatment; and

52.4. offers are made only after a fixed cost medical report has been obtained and disclosed.

53. Currently, 40,000 medical reports a month are generated through this portal. However, Medco type reforms are not a panacea for all areas of the law. The model has partly been successful because the volume of claims and the expert reports needed is high, yet the field of expertise is relatively narrow. As a result, there is little concern that accredited experts within the Medco database may be unqualified to report on a particular injury.

Something Wicked This Way Comes?

54. Another development is the United Kingdom Supreme Court's recent abolition of the expert's immunity that had previously applied to evidence given orally as well as in writing or in reports given by the expert.[82]

55. Dismissing the potential '*chilling effect'* this may have on the willingness of experts to give evidence, Lord Collins had stated that most professionals take out insurance coverage or limit their liability by contract.[83] This is tantamount to a backdoor strategy of ensuring that expert witnesses give careful consideration to their reports and the duty owed to the court. An expert who is aware that he or she no longer gives evidence under the protection of an immunity is thought to be more likely to be more conscientious in delivering an objective and thorough report. Lord Phillips envisaged it would lead to a *'sharpened*

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[80] *Civil Procedure Rules 1998 (Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents from 31 July 2013)* (UK) SI 1998/3132, 7.8A.
[81] *Civil Procedure Rules 1998 (Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents from 31 July 2013)* (UK) SI 1998/3132, 3.2.
[82] Jones v Kaney [2011] UKSC 13, over-ruling *Stanton v Callaghan* [2000] QB 75
[83] *Stanton v Callaghan* [2000] QB 75, 81 per Lord Collins.

awareness of the risks of pitching their initial views of the merits of their client's case too high or too inflexibly…'.[84] It is no doubt hoped that the UK Courts will be rewarded with a more flexible class of experts, unwilling to compromise themselves professionally by presenting their opinion in a bullish or obstinate manner so as to advance the interests of the party retaining them.

56. In Australia, the immunity of the expert is a derivative of the general immunity provided to all witnesses '*for what is said and done in Court'*.[85] Whilst the High Court has not had occasion to specifically consider the status of expert immunity, it has very recently made clear that an abolition of the general immunity is an '*alteration…best left to the legislature*'.[86] Whilst it is unlikely that this trend will be adopted from the United Kingdom, it will be interesting to see the effects of the Supreme Court's decision unfold, particularly in relation to expert evidence.

The 'Gate Keeper' Jurisdictions: Canada and the United States

CANADA

The Test

57. In Canada, the admissibility of expert evidence is based on common law principles, outlined in the leading case of *R v Mohan. Mohan* is regarded as having 'tightened' the admissibility of expert evidence from what was described previously as a 'laissez-faire' approach. The criteria to which the court must have regard include:[87]

    57.1. relevance;

    57.2. necessity in assisting the trier of fact;

    57.3. the absence of any exclusionary rule;

    57.4. a properly qualified expert.

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[84] *Stanton v Callaghan* [2000] QB 7, 67 per Lord Phillips.
[85] *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, [40] and *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 90 ALJR 572; [2016] HCA 16
[86] *Attwells v Jackson Lalic Lawyers Pty Limited* [2016] HCA 16, 28.
[87] *R v Mohen* [1994] 2 S.C.R 9

Additional Issues

58. The greatest concern of Canadian courts is apparently the tendency of expert evidence to 'distort the fact finding process',[88] and take over the adjudication process.

59. Special scrutiny is also given to novel techniques, theories or processes. In *Mohan,* Sopinka J has expressed concern about the admissibility of 'junk science' where opinion evidence, cloaked in technical and verbose language, was '*apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves'*. [89]

Solutions

The Best Defence is a Good Offence

60. In *Mohan,* the four criteria were developed as preconditions to admissibility: the evidence must be relevant, it must be necessary to assist the judge, there must be no rule excluding it, and the expert must be qualified. It is relevant to ask: is the probative value outweighed by any prejudicial effect? Is it likely to be misleading in the sense that the effect of it is likely to be greater than its reliability or use?[90]

61. Satisfaction of these criteria does not guarantee admissibility. In *R v Abbey,* the Court of Appeal for Ontario found that the trial judge has a discretionary power to exclude expert evidence that meets the *Mohan* criteria: if the judge is of the opinion that the evidence is not sufficiently beneficial in comparison to the potential harm to the trial process that may be caused by its admission, it may be excluded. This bears some resemblance to the *Christie* discretion or s 137 of the Uniform Evidence Act which provides that, in criminal proceedings, a court may refuse to admit evidence if its probative value is outweighed by the prejudice it causes to the defendant. In Canada this discretion extends to civil proceedings.

62. However, the *Mohan* test has been criticised by academics as failing to address the issue of expert bias. [91] Although the function of the 'judicial gatekeeper' leaves the final

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[88] *R v Mohan* [1994] 2 S.C.R 9, 10 per Sopinka J.
[89] *R v Mohan* [1994] 2 S.C.R 9, 21 per Sopinka J.
[90] *R v Mohan* [1994] 2 S.C.R 9, 21 per Sopinka J.
[91] David Paciocco "*Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts"* (2009) 34 *Queen's Law Journal* 565, 571.

question of admissibility to the judge, it has been suggested that the discretion to exclude evidence on the grounds of bias should be approached with greater candour. This criticism was addressed in the recent case of *White Burgess* where the Supreme Court of Canada unanimously held that trial judges should exclude expert testimony where an expert has breached the duty to provide objective and non-partisan evidence. However this is a discretionary matter for the judge to decide. He or she may choose not to exclude expert evidence in light of particular circumstances: however, it is implicit that the right exists.[92] As was said in *R v J.-J.L*: [93]

> The admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility.

63. The Canadian approach is clearly different from the approach in Australia where it has been made clear that lack of partiality will usually only affect the weight to be given to the evidence. Canada probably represents the most judicially interventionist common law jurisdiction on expert evidence, rivalled only by England.

Rules and Assessors

64. Rule 282.1 of the Canadian Federal Court Civil Procedure Rules allows the Court to order expert witnesses to testify as a panel. The Court retains a discretion to conduct the panel by directing the experts to comment on the views of other panel members and draw conclusions. This is one version of the concurrent evidence model.

65. Similarly to Australia, a Canadian expert must acknowledge that he or she has read the Code of Conduct for Expert Witnesses in an affidavit or statement as a pre-condition to admission.[94] The Rules also provide that a party wishing to call more than 5 expert witnesses must seek the leave of the Court.[95] Judges may order experts to meet and confer with each other prior to the hearing and *'endeavour to clarify the….points on which they agree and points on which their views differ*'.[96]

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[92] See *United City Properties Ltd. v. Tong* [2010] BCSC 11.
[93] *R v J.-J.L* [2000] 2 SCR 600[28] per Binnie J.
[94] *Federal Court Civil Procedure Rules* SOR 98-106, r 52.2.
[95] *Federal Court Civil Procedure Rules* SOR 98-106, r 52.4
[96] *Federal Court Civil Procedure Rules* SOR 98-106, Schedule 'Code of Conduct of Expert Witnesses'

66. Canada has declined to follow the route of the court-appointed expert. The Civil Procedure Rules make no provision for the court to call its own expert. However, the Court may appoint an assessor. The duty of an assessor is to assist the Court in understanding technical evidence or to provide a written opinion on a proceeding.[97] Parties cannot question an assessor but they may provide submissions to the Court on matters that they believe the Court should question the assessor about.[98] Therefore the assessor cannot be scrutinised or cross-examined as is done in the traditional adversary process. However, the appointment of an assessor does not negate the right of a party to appoint its own expert witness.[99]

67. Additionally, if the Court requests an assessor to produce a written report, the parties can make submissions on the scope and content of the report. The role of an assessor is more of an adviser to the Court rather than a conventional witness. As such, the appointment of an assessor may be of use when a judge is trying a complex matter and is having difficulty understanding expert evidence or other technical issues.

68. Similar provisions for the appointment of assessors exist in England and America, but the responsibilities of assessors, and the frequency of their use, vary.[100]

THE UNITED STATES

The Test

Away from General Acceptance

69. Prior to 1993, the test for admitting expert evidence could be found in the decision of *Frye,* which considered that the correct approach turned on whether there was 'general acceptance' of a particular skill or expertise. The 'general acceptance' test, although widely adopted, was criticised in Australia for shifting from the judge to the relevant

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[97] *Federal Court Civil Procedure Rules* SOR 98-106, r 52(1).
[98] *Federal Court Civil Procedure Rules* SOR 98-106, r 52(4).
[99] *Federal Court Civil Procedure Rules* SOR 98-106, r 52.1.
[100] In England see *Senior Courts Act 1981* s 70; American rules often refer to a 'technical adviser'.

professional community the question whether evidence on a matter in a particular field of knowledge is admissible.[101]

70. *Frye* came under attack when the Federal Rules of Evidence were enacted in 1975 and there was genuine confusion as to the correct application of the test. Three Supreme Court judgments since 1993 have moulded the way expert evidence is admitted in the United States. The first and most often cited is *Daubert v Merrell Dow Pharmaceuticals Inc.*

Reliability, Relevance and a Gatekeeper

71. In 1993 the United States Supreme Court in *Daubert v Merrell Dow Pharmaceuticals Inc,* effectively overturned *Frye* in rejecting the proposition that the common law test had been incorporated into the Federal Rules of Evidence. The Court held that the Rules had superseded the *Frye* test, in the same way that any statute would. Specifically, the Court referred to Rule 702, which provides:[102]

> If scientific, technical, or other specialised knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

72. Properly construed, the Court decided that the requirement for 'scientific, technical or specialised knowledge' in Rule 702 was contingent upon the *reliability* of the methodology or reasoning used. Factors that go to the reliability of the method used are standard: has the method has been subjected to peer review, is there any known or potential rate of error and, what is the degree of acceptance in the community? Likewise, the requirement that the evidence 'assist the trier of fact' essentially turns on relevance.

73. *Daubert* then turned to the relationship between Rule 702 and the judge. Importantly, Rule 702 was interpreted as assigning a 'gatekeeper' responsibility to the judge to ensure '*that an expert's testimony both rests on a reliable foundation and is relevant to the task at*

[101] 'Admissibility of Expert Evidence Under the Uniform Evidence Act' Justice Peter McClellan Judicial College of Victoria 'Emerging Issues in Expert Evidence Workshop' 2 October 2009 p 7 http://www.austlii.edu.au/au/journals/NSWJSchol/2009/13.pdf
[102] FED. R. EVID 702.

hand.'[103] The judgement formulated a list of indicia to consider, but it was stressed that these had the character of '*general observations'* rather than a confined test.[104]

74. Following *Daubert* was *Kuhmo Tyre,* which emphasised that the interpretation of Rule 702 in *Daubert* was '*flexible*' and that the indicia were meant to be '*helpful, not definitive'*.[105]

75. Therefore the test for admitting expert evidence involves consideration of the applicable case law, as well as Rule 702. The established 'gatekeeper' role for the judge is perhaps the most noteworthy aspect of the United States test. It confers a role that gives considerable latitude to the judge when assessing both the reliability and the relevance of expert evidence.

76. This has been, to an extent, replicated in other countries, but Australia has declined to adopt it. However, aspects of the *Daubert* judgment have been cited with approval in many jurisdictions, including in the High Court of Australia, particularly the connection between scientific knowledge and reliability.[106]

Solutions

Court Appointed Experts

77. Rule 706 of the Federal Rules of Evidence allows for the court to appoint its own expert with or without a request from a party. There is little authority on Rule 706, as it is rarely applied, however, one judge in Michigan expressed concern that:[107]

> *…the presence of a court-sponsored witness, who would certainly create a strong, if not overwhelming impression of impartiality and objectivity, could potentially transform a trial by jury into a trial by witness.*

78. In 1986 a study was conducted to determine why judges declined to appoint experts. Unsurprisingly, most judges viewed appointment of a court expert as 'an extraordinary

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[103] *Daubert v Merrell Dow Pharmaceuticals Inc* (1993) 509 U.S 579,597.
[104] *Daubert v Merrell Dow Pharmaceuticals Inc* (1993) 509 U.S 579,593.
[105] *Kuhmo Tyre Co. v Carmichael* (1999) 526 U.S 137.
[106] *Honeysett v The Queen* (2014) 253 CLR 122, 123.
[107] *Kian v Mirro Aluminium Co* 88 FRD 351, 356 (Mich 1980).

action'[108] to be taken only in the face of utter failure of the adversarial system.[109] As one judge commented: '*We're conditioned to respect the adversary process. If a lawyer fails to explain the basis for a case, that's his problem'.*

79. However, where parties have exercised their right to call their own witnesses and the evidence proffered by them is of no assistance, judges may then use Rule 706. For example, a judge appointed an expert under Rule 706 in a toxic contamination case where the plaintiff's attorney had failed to secure an expert to show the connection between the contamination and the injury to the plaintiff. Rather than enter summary judgment, the judge appointed an expert to preserve a degree of equity between the parties.[110]

80. This in itself is an indication of a problem grounded in culture more than in legal principle.

81. In Australia, aside from specialist courts and tribunals, the same sentiment as is found in the United States exists. The majority of judges prefer not to interfere with the traditional rights of parties to appoint their own expert witnesses unless circumstances are exceptional. Although the culture of the adversary system is not easily changed, other grievances by judges can, and have been, addressed. Dilemmas about where to find a 'neutral' expert, the selection process, and their remuneration, have been considered and addressed by an initiative known as C.A.S.E.

C.A.S.E: A forum for court appointed experts

82. 'Court Appointed Scientific Experts' or C.A.S.E. is an independent initiative launched in 2001. The American Association for the Advancement of Science (**AAAS**) administers C.A.S.E as an international not-for-profit scientific organisation. The sole purpose is to provide a platform for connecting judges with independent experts in science and technology who are dedicated to providing an accurate and bipartisan opinion.[111] The limitation is that the program only provides scientists, engineers and health care experts.

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[108] Thomas E. Willging 'Court-Appointed Experts' (Federal Judicial Centre, 1986)18.
[109] Thomas E. Willging 'Court-Appointed Experts' (Federal Judicial Centre, 1986) 20.
[110] Thomas E. Willging 'Court-Appointed Experts' (Federal Judicial Centre, 1986) 20.
[111] Court Appointed Scientific Experts, *Handbook for Judges* (6 February 2002) American Association for the Advancement of Science:
<https://www.aaas.org/sites/default/files/migrate/uploads/handbookjudges4.pdf>

83. As Rule 706 does not specify selection criteria for appointment, judges are free to source an expert from wherever they choose. Rather than having a specific list of qualified experts from which to choose, C.A.S.E. involves a panel actively seeking out an expert who fits the request made by the judge. This resolves the tension of finding and deciding on a neutral expert, a task that falls to the Judge under an ordinary Rule 706 appointment.

84. Judges have shown a propensity to appoint experts whom they have had prior personal or professional relationships.[112] Likely, this has had an affect on perceived bias and undermined the beneficial role a court appointed expert could otherwise play. C.A.S.E. therefore provides the means for truly independent advice by outsourcing the selection process.

85. Often the experts chosen will have little or no experience in court proceedings. However they are given with an information handbook containing 'necessary' information. An impartial committee ensures conflicts of interest are handled professionally. Judges who have taken advantage of the initiative have responded positively and indicated they found the expert helpful. However, given the vast number of matters and varying experience across State jurisdictions in the United States, it is as yet impossible to tell whether there is an emerging trend.

86. The complaints against court appointed scientific experts are not dissimilar from those made in Australia. There is a strong argument that the search for the 'neutral' expert is futile. Every expert, notwithstanding the field of expertise, can be influenced. Expertise is subjective, and contingent on or aligned to various factors, whether they be professional, institutional, financial or merely personal.[113]

Technical Advisers

87. An alternative to court appointed experts is the appointment of a technical adviser. The role of the adviser has been described as akin to a chambers legal clerk.[114] The power to appoint a technical adviser does not originate in Court rules or any other official instrument. Rather, it is derived from an inherent power that each Court reserves to itself,

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[112] Si-Hung Choy 'Judicial Education After *Markman v Westview Instruments, Inc:* The Use of Court-Appointed Experts' (2000) 40 *U.C.L.A Law Review* 1423, 1427.
[113] Gary Edmond 'Merton and the Hot-Tub: Scientific Conventions and Expert Evidence in Australian Civil Procedure' (2009) 72 *Law and Contemporary Problems* 159, 173.
[114] *Reilly v United States of America* 682 F. Supp 150, 417 (D.R.I 1988).

a power to be exercised carefully and with discretion.[115] It is an attractive option for a judge facing complicated issues where self-education on the topic is inadequate. Appointment of a technical adviser has been used successfully in patent and antitrust cases in the United States,[116] which are may involve complex and obscure issues.

88. An adviser who is able to have frank and informal discussions outside of court proceedings may aid the judge in understanding the evidence of the experts. In this sense, the adviser is not a formal witness, unlike the court appointed expert of Rule 706. He or she cannot be deposed or cross-examined. Broad scope is given to the adviser to become familiar with the proceedings, whether by attending Court or conducting individual research and experiments.[117]

89. However in one case, the Federal Circuit Court accepted an undertaking from the appointed adviser that no independent investigation of the underlying litigation would occur.[118] Presumably this was done to meet the parties' concerns that the adviser would tread into the realm of giving an opinion on the present litigation rather than the scientific issues. For this reason, Judges have been wary of appointing a technical adviser, despite the role being confined to one of assistance rather than opinion. Upon appointment, it is stressed that the task is not one of delegating a Judge's decision making, and Judges are expected to exclude any potential for this to occur.[119]

Lessons

'O just but severe law!'

90. One lesson from Canada and the United Kingdom is the observation that similar jurisdictions are enacting stricter procedural rules and conferring greater judicial discretion to meet the perceived threat posed by expert evidence that is neither expert nor impartial.

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[115] *Ex parte Peterson,* 253 U.S 300 (1920).
[116] See *United Shoe Machinery Corp. v United States* 347 U.S 521 (1954); Si-Hung Choy '*Judicial Education After Markman v Westview Instruments Inc: The Use of Court Appointed Experts'* (2000) 47 *Ucla Law Review* 1423,1439.
[117] *Reilly v United States of America* 682 F. Supp 150, 417 (D.R.I 1988).
[118] *Techsearch Llc v. Intel Corporation* 286 F.3d 1360, 93 (Fed Cir 2002).
[119] *Techsearch Llc v. Intel Corporation* 286 F.3d 1360, 92 (Fed Cir 2002).

91. There seems to be little concern that this offends traditional adversarial trial principles. By moving in this direction, Canada and the United Kingdom make it clear that they prioritise the timely resolution of disputes and the need for impartiality over the conventional rights of a party to adversarial litigation. Whilst this development may be anathema to most litigants and their lawyers, it is regarded as going some way toward meeting the desired results.

92. In comparison to Canada and the United Kingdom, Australian expert codes that are limited in their effect seem feeble. It might be thought that, as a result, this does not send a strong message to expert witnesses that the legal system takes issues such as bias seriously.

93. On the other hand, if parties are aware that there is a risk that their expert's evidence may be excluded, they may become more diligent in facilitating bipartisanship.

94. However, little can be garnered from the United States experience. Although C.A.S.E. is indeed innovative, its success is contingent on judges deigning to use Rule 706. This in itself is a cultural issue of the adversarial system. In the United States rulings have often been made, just as in Australia, that bias will only go to weight.[120]

Assessors and advisers

95. The power of a Court to appoint an assessor or a technical adviser is also an option worth considering.

96. At one level, incorporating an assessor may simply allow the Australian Judge to resolve convoluted technical issues. An independent assessor may be in a position to identify areas where a party's expert is trespassing beyond the scope of their specialised knowledge. Importantly, the introduction of an assessor may answer the criticisms of court appointed or single experts. Parties do not have their right to call an expert witness supplanted, and any genuine dispute between the experts can still be aired.

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[120] See *Rodriguez v. Pacificare of Texas, Inc.*, 980 F.2d 1014 (5th Cir. 1993).

97. The concept of an assessor is not foreign in the Australian jurisdictions: the Family Court of Australia has the power to appoint assessors who are not witnesses at law.[121] However, appointment is rare.[122] It may be that appointment of an assessor should be encouraged in the Family Law Court and offered as an example for reform in other courts. Certainly, it appears compatible with our system, and far less contentious than a court appointed expert. This would be a step towards the Canadian system, where court appointed experts are not provided for, but assessors are regularly used. Properly used, a Judge might then be better placed to resolve complicated issues in a timely manner and be better equipped to identify bias cloaked in technical language.

The Flipside: Germany

98. In Germany the civil system is in many respects adversarial. Litigants address a judge in a courtroom and submit arguments to advance the interests of their party. The crucial difference is that under the inquisitorial system the parties' right to call expert evidence is extremely limited.[123]

99. The right to collect and adduce information and evidence to support a case is a judicial, not a party, function. Therefore no 'test' exists for the admission of expert evidence, as the court selects the expert and determines how many are to be used.[124] Likewise, the Judge determines the scope of the issue that the expert must report on, albeit this is disclosed fully to the parties.[125]

100. A public list exists for the selection of particular experts, and it is from this that a Judge must select.[126] However, if no public list is compiled a Judge will ordinarily have prepared his or her own list which will then be used. Once an expert is selected and a report produced, the final product is given to the parties, who are permitted to make written submissions on its findings.[127]

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[121] *Family Court Act 1975* (Cth) s 102B, and Family Court Rules 2004 (Cth) r 15.38-15.39.
[122] '*The Changing Face of the Expert Witness'* (Discussion Paper, The Family Court of Australia, 1 January 2002) 30.
[123] John H. Langein, *'The German Advantage in Civil Procedure'* (1985) 52(4) *University of Chicago Law Review* 823, 824.
[124] [124] *Zoeller Zivilprozessordung* [The German Civil Procedure Code] (Germany) (*'ZPO'*) s 404 (1).
[125] *ZPO* s 404A.
[126] *ZPO* s 404 (2).
[127] John H. Langein, *'The German Advantage in Civil Procedure'* (1985) 52(4) *University of Chicago Law Review* 823, 839.

101. The losing party bears all costs of the procedure, including any experts. An expert is always court-appointed and the *Judicial Remuneration and Compensation Act* determines the expert's salary.[128]

102. Curiously, parties in Germany are permitted to seek and hire their own expert witness, however there is no procedural rule that confers this right. Generally, German courts are reluctant to accept the evidence of an expert hired by a party and give little weight to a party expert in comparison to the court's expert.[129] Unlike Australia, an expert hired by a party is not considered to be giving evidence. Rather, they merely advise a party or make assertions in the case that they have been hired to support.[130] However, if a party expert presents a compelling case in rebuttal to the court-appointed expert, the court may appoint another court expert to give a report on the contested issue.[131] Therefore a party expert's opinion rarely factors into a judge's decision-making process.

103. The difference between the German system and the Australian is not so disparate that nothing can be taken from it. Whilst it is not suggested that the fact-finding and adducing process should be taken from the litigants and given to Judges, the German method of the court appointed expert is not entirely dissimilar from the procedure surrounding the appointment of an assessor in Canada.

104. A salient feature of the system is the difference between the party expert and the court expert.

105. The weight and opportunity given to both may be worth considering. If courts choose to appoint their own expert, they may consider making it clear that the weight of their expert's evidence will outweigh the evidence given by a potentially biased party expert. This is at least consistent with Australian practice of declining to exclude expert evidence, but giving it minimal weight.

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[128] *ZPO* s 413.
[129] Sven Timmberbeil '*The Role of Expert Witnesses in German and U.S Civil Litigation'* (2003) 9(1) *Annual Survey of International and Comparitive Law* 163, 177.
[130] Sven Timmberbeil '*The Role of Expert Witnesses in German and U.S Civil Litigation'* (2003) 9(1) *Annual Survey of International and Comparitive Law* 163, 178.
[131] John H. Langein, *'The German Advantage in Civil Procedure'* (1985) 52(4) *University of Chicago Law Review* 823, 840.

France

106. France, like Germany, has a civil procedure system that centres on judicial intervention. In many respects, the German and French procedural rules governing experts are similar. As in Germany, parties are not deprived of their right to adduce an expert report, but the judge is free to give it as little weight as he or she sees fit. Far more common is a judge's appointment of an expert.

107. The most interesting aspect of the French expert model is the gathering of qualified experts into lists by the courts.

108. Judges in France, in theory, are permitted to select an expert from wherever they wish. However, practically, French Judges prefer to select an expert from an official list. There is a national list compiled by France's highest court, the *Court de Cassation* and a list of experts drawn up by each Court of Appeal. Both are subject to systematic review as well as formal annual review. The lists differ in comprehensiveness depending on the size of the jurisdiction. For example, the list of experts in Paris is over 400 pages long, whereas in smaller cities the list is a handful of pages.[132]

109. Larger courts have a separate department that specifically handles the expert list. Experts are required to apply to the court and the department to be endorsed and placed on the official list. They must submit their qualifications as well as explain why they should be regarded as a specialist in their field.[133] The court considers complaints about improper conduct and has on occasion struck an expert off the list.[134]

110. Each court list quite thoroughly covers even the most obscure fields of expertise, from hydraulic agriculture to crystalware.[135] Accordingly, all contemplated areas that may be the subject of expertise may be considered. Each expert is publically listed with details of relevant qualifications, and contact details.

111. Court reviewed expert lists in the Australian jurisdiction would likely be regarded sceptically. In France where judicial appointment of an expert is commonplace, it is

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[132] Cour D'Appel De Paris *Liste Des Experts Judiciaires Annee 2016* <https://www.courdecassation.fr/IMG///liste_experts_CA_Paris_201601.pdf>
[133] Cour D'Appel De Basta *Judicial Experts* (31 March 2016) Cour D'Appel De Basta <www.ca-bastia.justice.fr/index.php?rubrique=11668&ssrubrique=11750>
[134] Peter Herzgog, Martha Weser *Civil Procedure in France* (Columbia University 1st ed, 1967) 351.
[135] Cour D'Appel De Paris *Liste Des Experts Judiciaires Annee 2016* <https://www.courdecassation.fr/IMG///liste_experts_CA_Paris_201601.pdf>

simply a practical way to facilitate the Judge's task. The process is also highly regulated and the lists evolve. This provides a means to exclude experts who have been out of practice for too long. Court appointment of experts in Australia has not evolved sufficiently to justify the resources required to compile and review such comprehensive lists. However, it is a step worth evaluating.

Conclusion

112. As Lord Woolf commented, a uniform solution for all cases does not exist.[136] Problems with expert evidence are reappear across most common law jurisdictions. There are interesting developments that warrant consideration.

113. In Australia, greater use of concurrent evidence has been a major advancement, but there is scope to develop and refine other techniques. In particular, court appointed and single experts are worth considering in specialist tribunals where similar issues regularly arise. Indeed, Australian courts could consider introducing the technical adviser or assessor and look to Canada or the United States for guidance.

114. Consideration should also be given to the United Kingdom's Medco portal, and the US C.A.S.E. system.

115. Finally, there is an expectation that, over time, the use by Judges and parties of procedural rules and expert codes will become more nuanced and better able to handle the issues of bias and cost in an adversarial system.

M.C. Livesey

6 July 2017

[136] H K Woolf, *Access to Justice* (Final Report to the Lord Chancellor, HMSO, London, 1996) ch 13, 12.