EXPERT EVIDENCE: DEFINING NEW APPROACH TO THE ADVERSARIAL METHOD IN THE COMMON LAW SYSTEM

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Abstract

This paper is based on library research on the use of expert evidence in the common law system which is conducted at the Law School, the University of Melbourne, Australia. Related to fragility of expert witnesses in an adversarial system, this paper examines whether the use of expert evidence in the common law system promotes objectivity and impartiality.

The research shows that the method used in the common law system creates opportunities for the expert to be an advocate for the party. Moreover, the system allows lawyers to have excessive control over the expert. In order to overcome these weaknesses, this paper offers substantial modification by transplanting a civil law approach to expert evidence into the common law. This is in order to better deal with the problems, which may arise in common law expert evidence.

Keywords: Expert evidence, the Common Law System, the Civil Law System

A. Introduction

The recognition of science in the court is crucial. This is because scientific knowledge can be used as a tool to determine the existence of certain facts. The use of fingerprints and the use of DNA evidence in solving serious crimes are little examples of the use of expert evidence in court proceedings. This condition has resulted, more or less, in the courts depending on the scientific matters. By using scientific method, the judge, jurors and lawyers may have a clearer description regarding the facts of the disputes.

As a result, litigation experiences a trend in which complexity becomes part of its daily routine. This has led to significant influence in the court system. One of the examples is the use of expert evidence. Experts introduce to a court a subject that is considered a specialisation or beyond the knowledge of ordinary people. There is cooperation between the court and experts which is very beneficial to assess certain facts. Courts, as a result, rely heavily on the experts.

In this era, where the necessity of scientific proof exists, it must be considered

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that the availability of experts to give evidence must be in accordance with the need for objectivity and impartiality. This is the duty owed by the experts to the courts. This means that experts are prohibited to offer “dishonest falsification of test results, of exhibit tampering and of the offering of opinions which are biased, spurious or scientifically dishonest.” This is because partial or dishonest expert evidence endangers the outcome of the litigation process. Due to the important role the expert may have, there are some requirements which must be achieved by the expert.

Even though expert evidence is very useful in helping the court find clearer facts, the use of expert evidence in the common law system has received many criticisms. The reason is that expert evidence has created some defects, such as partiality and bias. Such defects may lead to erroneous decisions by the court and erroneous verdicts by juries, since the court and the juries use the expert evidence as one of the basis to obtain the decision. Therefore, it is undeniable that scientific evidence is fragile in the common law legal system.

Why has the matter of expert evidence become so problematic? In the author’s view, this is because the expert, in giving evidence, is permitted to offer opinions to the court. The expert is allowed to draw conclusions from the available facts, and the conclusions must be based on a “reasonable probability” in an area in which the experts is a master. This differs to laypersons who can give evidence only when they saw or heard the actual event. It means that expert witnesses are allowed to give evidence in much broader circumstances than that of lay witnesses.

Moreover, the adversarial system of litigation may also contribute to the fragility of expert evidence. The reality is that experts, in common law system, are hired by the parties to help them in order to win the case. For that reason, each party chooses its own expert on the basis that the expert opinion will advance the party’s case. As a result, the process of selection of the expert witnesses is “not generated by a dispassionate quest for truth.”

Another consequence of the adversarial system regarding the use of expert witnesses in the court room is the possibility of a “battle of experts”. The method of cross examination, which is currently employed, allows the lawyers to confront the expert witness with another witness from the opposing party. In this confrontation, the experts are likely to criticize each other’s opinions and methods. As a result, what seems likely to happen is that the experts tend to resolve any disagreement in the court room.

Regarding the role of juries, the use of expert evidence in court proceeding often provides additional directions on how to evaluate and weigh expert testimony. These directions concern on how the legal system expects jurors to deal with the expert testimony. For example, the juries should not be influenced by the impressiveness of the expert because the matter of impressiveness can mislead the jury in reaching their verdict. The jurors can experience difficult positions since they must determine which of the expert evidence is true. Jurors will find it hard to choose between two opposed witnesses but have “impressive-sounding expert opinions on matters beyond the factfinder’s comprehension.”

This is because jurors are lay people therefore the jurors are not able to give weight to different kinds of evidence presented to them. It seems that error in giving weight to certain expert evidence may lead to an erroneous verdict.

From the lawyer’s side, the use of expert witness has an impact. Lawyers should pay particular attention to them, since “the ethical duty of lawyers becomes more complex” when the case is involving expert testimony. An example of this duty is in relation to the preparation of the expert witness. In my view, the preparation should be conducted in a different manner to that of lay witness. This is important to help the expert give reliable testimony. Reliability of expert testimony is the focus of the common law system, rather than the ways in which expert witnesses express their opinion. Determining the reliability of expert testimony depends on whether or not the facts and assumptions, on which the expert relied on to reach conclusions, are accurate. Therefore lawyers should give the experts the independence to conduct their own work without any attempts to shape their opinion.

From the judges, there are some additional concerns with dealing with expert witnesses. This is because the expert testimony may sometimes confuse the judge, as Justice Peter Heerey has observed:

Sometimes, as a witness leaves the box, the judge feels that he is perhaps not really on top of the evidence, but does not know to express what it is he does not know. But the witness is gone forever. While writing the judgement, the judge cannot ring up the expert and put some new idea to him or her or ask for the explanation of some conundrum.

Therefore, judges need to play a more active role in the matter of expert evidence, to determine whether or not an expert testimony will be admitted in the court proceeding. Due to the fragility of expert evidence,
many judges in the common law court try to apply stricter criteria, before admitting an expert give testimony in court. This is in order to reduce the possibility of the use of unreliable scientific evidence. It is done by applying stricter evaluation of expert evidence before trial.

Related to fragility of expert witnesses in an adversarial system, this paper addresses the effectiveness of an inquisitorial approach to issue relating to expert. From a comparative perspective, this paper offers substantial modification by transplanting a civil law approach to expert evidence into the common law. This is in order to better deal with the problems, which may arise in common law expert evidence. Part I looks at some aspects of expert evidence in the common law, which have proven to be problematic, namely: party-appointed expert; preparation of expert evidence before trial; the use of oral testimony; and the conduct of cross-examination by lawyers toward the experts. Part II concerns the matter of how common law lawyers perceive expert evidence. This part also discusses how the Federal Court expert witness guidelines influence the field of expert evidence. Part III addresses reforms to overcome problems in common law expert evidence. It offers some recommendations for the modification of the current common law system of expert evidence. The reforms proposed are: the use of mandatory court-appointed experts; the principle of open procedure in preparing the experts; the use of new method of cross-examination; and the use of peer review.

B. Aspects of expert evidence in adversary procedure

There are four significant aspects of the delivery of expert witnesses in the common law adversarial method, which differ significantly from the civil law inquisitorial method. These four aspects, which will be discussed in this section, are in my view the main sources of the problems with expert evidence in the common law adversarial system.

1. Party-appointed Expert Witnesses

Unlike its counterpart, civil law courts possess an authority to appoint expert witnesses, whereas common law courts do not usually possess such an authority. Even though, in some common law jurisdictions, judges are given the power to appoint expert witness, it seems that the judges hesitate to use the power. In Australia, Federal Courts and tribunals have the authority to “manage, control and obtain expert evidence”, but rarely do they use the authority. This is why a party-appointed expert still widely used in Australia.

From the common law lawyer’s perspective, using a party appointed expert has several advantages over using a court appointed expert. By having their own appointed expert, it is easier to develop communication with the expert. This is because, lawyers usually choose the expert with whom they have already had experience with. This enables the lawyers to have better understanding over the expert, since the lawyers already had a description about the expert’s previous work. In this regard, lawyers know exactly the capacity and competency of the expert they appointed.

The disadvantage of using a party-appointed expert is that it leads to partisan testimony. The danger of this is that the testimony given by the expert is far from objective, since the parties are not likely to look for the best expert in a certain field, but the best witness who will support their cases. This is because the experts will try to satisfy the party who hires them. In doing so, the experts may “distort their views to suit the interests of their clients, perhaps even lie outright.”

As a result, the expert testimony is biased. This can happen when the parties are the government or individual persons. When the government is a party, such as in crime cases, the government’s expert may also bias.

An Australian case: R. v. Chamberlain can be used as an example of where government experts allegedly interpret their result in accordance with the prosecution need to prove that the defendant is guilty. In this case, the prosecutor claimed that Mrs. Chamberlain had cut her baby’s throat and took the body from the car and buried it in sand. The prosecutor also stated that Mrs. Chamberlain or her husband had cut the baby’s clothes to give the impressions that they had been chewed by a dingo. Then, he or she removed the clothing and placed it in a pile. Both Mrs. Chamberlain and the prosecutor presented expert evidence to determine the issue of the origins of the cuts on the baby’s clothes, the ability of a dingo to carry the baby and the blood which was found in the baby’s clothes and in Mrs. Chamberlain’s car. Based on the scientific evidence presented before them, the jury reached verdict that they convicted Mrs. Chamberlain.

However, there was an allegation about the possible misuse of the prosecutor’s expert evidence. As a result, some Australian scientists presented new evidence which convinced the court the baby’s clothes was really chewed by a dingo’s teeth. In addition, the scientists also “cast doubt on the blood evidence”. Finally, a Royal Commission was established to evaluate the use of expert evidence in Chamberlain. As a result, a report was published and “acting on the advice of the Commission, the Northern Territory Court of Appeal ordered that Mrs. Chamberlain be freed.

Such kind of condition may danger the outcome of the case. This is demonstrated by a study conducted by Freckleton. The study
shows that nearly nine out of ten judges have experience with partisan expert testimony, and nearly half of the judges interviewed stated that such kind of testimony influences the quality of fact finding in trial proceedings.\(^\text{23}\)

Moreover, the nature of an adversarial system opens an opportunity for expert witnesses to be engaged professionally. An expert may make determined effort in order to be able to give testimony again in the future, since there is greater possibility for lawyers to use experts, with whom they have won the case.\(^\text{24}\) The fact that experts get paid to give testimony, and that they can also be hired repeatedly to testify in the similar issue on other occasions, has led to some experts actively promoting their services.\(^\text{25}\) In this circumstance, there is an inevitable temptation for the experts to be advocates for the party using them, and to adapt their evidence according the needs of the party. The experts will found psychologically difficult to be neutral, as they have been called for a party to support the party's case.\(^\text{26}\)

A further risk from the party-appointed experts is the possibility of a battle of the experts.\(^\text{27}\) This method enhances the possibility of disagreements between the experts, of disputes being overwhelming, and the possibility of consensus among them being ignored. As a result, judges or juries are more likely to be confused or misled by the two different expert opinions, instead of being helped by them.\(^\text{28}\)

From my point of view, the above mentioned problems in the expert testimony in the Common Law System are due to the party-appointed method creating psychological dependence on the experts for the parties hire them. This leads to the view that their main duty is to help the parties win the case, rather than helping the court to reach a just decision. By having such a view, the expert will do anything to convince the judge and the jury that his or her opinion is superior to that of the opposing expert.

2. Oral Testimony

The ways expert witnesses give their testimony in the common law system is mostly by oral testimony rather than written testimony.\(^\text{29}\) As a result, the trial seems to be a confrontation. It often happens that the lawyer confronts another party's expert with his or her own expert. Therefore it can be said that, in the matter of fact gathering process, adversarial system creates a high level of conflict between expert witnesses from opposing parties.\(^\text{30}\)

The conflict between expert witnesses may confuse the jurors. This happened in Chamberlain. The situation became worse when the judge, then gave a misleading instructions to the jury, about how to deal with a confusing expert testimony. In Chamberlain case, the court gave instructions that if the jurors could not fully understand the scientific evidence presented before them, they could decide the case based on their common knowledge, and the way the expert convinces them. It means that an impressiveness of the expert plays an important role in convincing the jurors. Indeed, it can lead to erroneous verdict. In this case, the jury then convicted Mrs. Chamberlain based on the impressiveness of the expert, and in the end it was decided that Mrs. Chamberlain was not guilty.

The Chamberlain case provides a clear example of how oral testimony creates the possibility to abuse an expert's testimony. This is from the perspective that the more impressive the experts, the higher value they will have. Such a misguided perspective leads to unfairness of proceeding. This is because there is likely to be an advantage for who are persuasive, regardless of whether or not their testimonies are true.\(^\text{31}\) The party who has strong financial ability has more opportunity to choose such kind of expert, who usually charges a lot of money. On the other hand, a party who cannot afford the fee for such an expert, this party may not be able to have such an impressive testimony from the expert hired, since the expert does not perform very well in the court, even if the expert has given a valid and reliable testimony.

The most crucial thing about an expert testimony is that the expert evidence presented in the court is trustworthy.\(^\text{32}\) In this regard, the validity of the evidence must be determined. This is whether or not the evidence presented on trial is as a result of thorough and thoughtful work from the expert, which has been proven to be true in their field of expertise. Such a misguided about impressiveness must be eliminated. If there is an abuse in scientific evidence in trial proceedings, then the society will no longer believe that the judicial system is trustworthy.

3. Preparing Expert a Witness

Preparing witness before giving testimony in trial is allowed in the common law system. From the lawyer's perspective, the form of witness preparation might be beneficial, in order to improve the accuracy and effectiveness of the expert testimony.\(^\text{33}\) One of the reasons for this is because in the common law system expert witnesses usually give testimony orally rather than written. This means the expert witness is subject to cross-examination by the opposing lawyer. For this reason the expert might forget the information due to panic. Moreover, the presentation may ramble and become incoherent, inadmissible evidence will be inadvertently presented.\(^\text{34}\) From the lawyer's

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\(^\text{25}\) Ibid p 1132.


\(^\text{28}\) Special Committee of the Association of the Bar of the City of New York on the Medical Expert Testimony Project, 1956, Impartial Medical Testimony, p. 6.


\(^\text{31}\) Ibid


\(^\text{34}\) Ibid, p. 1138.
The dependence of the experts puts the expert in a difficult position between their responsibility toward their profession, and toward the party calling them. There is a real dilemma between “autonomy and internal integrity on one hand and the demands of the trial process on the other hand.” Confidential witness preparation opens the possibility for lawyers to dictate to the expert what sort of information they want to have before the court. The experts often have sufficient information and views that “could be critical to the determination of issues by court but which never come before court.” This is because the lawyers do not want the information and views to be disclosed before court as evidence. As a result, the experts “cannot bring the court’s attention” to the significant information or facts.

This situation requires urgent attention because, in the current method, the expert testimony may not be the best evidence the expert can give. In this regard, the courts will not get the scientific assistance as they deserve.

4. Cross-examination

Cross examination in the common law system is believed to be a method to overcome any bias and partial evidence. Since cross examination is carried out to find out “alternative interpretations of data or information”. Lawyers argue that judges and juries may not be able to identify any errors and inconsistencies in the expert witnesses by themselves. There is a possibility of misimpression experienced by the trier, due to the impressiveness of the expert and the practical difficulties of the information presented. Therefore, the lawyers think it is inevitable for them to discover the true value of the expert opinion, in order to help the judge and juries give weight to the evidence. The way they do this is by cross-examining the expert.

However, critics have arisen in light of the way cross examination is delivered by lawyers. The cross-examination is said to be off-track from its original purpose. In addition, the cross-examination is not likely “demonstrate that new material has been insinuated into the witness’s recollections.” This occurs since lawyers sometimes misunderstand this concept. It seems that cross examination is carried out to find out only some aspects of truth that may help the party to win the case. Therefore, in the cross-examination process lawyers try to find out facts that will make their position stronger. The danger is that the expert can be manipulated into “presenting a distorted account of the evidence that, given an opportunity, he would wish to have before the tribunal of fact.”

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38 Ibid.
43 Ibid.
It often happens that the lawyers contradict the expert witness by using another expert from the opposing party. The expert will be confronted and queried about their training, their observations, their opinions and the bases for those opinions.48 In this stage, the expert witnesses from both parties attack each other. If cross-examination becomes an arena of attack between the experts, then the goal of cross-examination can no longer be achieved. Cross examination of an expert by a non-expert, in this regard by a lawyer, is believed to have a "detrimental effect on the reliability of such evidence."49 This is because the matter of opinion that the expert presented is usually very technical and complicated, so the lawyer cannot be fully aware of what the expert presented. Examining the expert by using such an adversarial manner is not appropriate way to reach the truth. As Frecktonel stated:

The courtroom is not the proper forum to determine the reliability or validity of a scientific technique, nor is it the right venue to assess whether controversy within the scientific community has subsided sufficiently for the technique or theory to be accounted as receiving general or even substantial acceptance within that community.50

Furthermore, lawyers usually mislead the court, in using cross-examination as a way to humiliate the experts, and to impeach them.51 In light of the possibility of impeachment, from the expert point of view cross-examining an expert witness may become "ego-threatening" when the opposing lawyers contradict the experts in an accusing manner.52 This method may create "dangers of distortion of the expert's real opinions and the possible discrediting on what objectively viewed may have been "worthwhile testimony."53 Therefore the current method of cross examination is believed to undermine the reliability of the expert's evidence.54 This is contrary to the goal of cross examination, which is to show the superiority of the expert toward opposing experts by providing the most reliable data and thorough work to support their opinions.55

In my view, the problems in the common law cross-examination are in the method that is being used to cross-examine. It seems that the method applied give to much power to the cross-examiner. This is evident since the lawyer who cross examine the experts may impeach the expert who in their opinion is unreliable.

C. Common Law Lawyers and Expert Evidence

The characteristic of an adversarial system is that it depends on the judge and jury, as a passive and neutral party, to determine the outcome of the disputes. In doing so, they base their decision on the information provided by the parties during the court proceedings.56 This condition brings an implication that the judge and jurors tend to give priority to resolve the disputes, rather than searching for the "material truth."57 As a consequence, it is sometimes said that the adversarial system aims at "defending individual's legal rights."58 In order to best defend the individual's right, it is believed that a lawyer is chosen will further the client's interest.59

Regarding evidence, a common law lawyer must be able to recognise what evidence is likely to be needed, what steps shall be taken on the evidence that already available, and how to gather other material that the parties lack.60 This includes whether or not they need an expert to give testimony, and if one is needed then who will it be. The role of the lawyer is a crucial one, in this regard.

However, the lawyer's misconceptions mentioned above in the previous part has made the role of the expert witness in the common law system become more problematic. In order to minimize the problems, not only does the mechanism need to be improved, but also some of the erroneous perception at the lawyers should be changed. The following section of this paper will discuss the possible reforms of the mechanism that the author proposed, along with discussion from the common law lawyer's perspective, regarding their role in the expert evidence.

D. Reforms

It is of critical concern to find out what the courts, in Australia or in other common law countries, should do to overcome a lack of objectivity or manipulation of evidence. In order to achieve this, attempts should be made by introducing a civil law approach towards expert evidence. This would lead to some relaxation or modification of traditional common law rules.

In order to overcome the defects that arises from the current method in dealing with expert witnesses, this paper suggest some reforms. The suggestions are the use of court-appointed expert rather than party-appointed experts, the use of written report rather than oral testimony, the openness of witness preparation and lastly the changes from the current method of cross-examination.

1. Court-appointed experts

In my view, the process of gathering information should be controlled by judges. This is because parties are likely to give

55 Ibid.
57 Ibid.
58 Ibid.
59 WAN Wells, 1988, Evidence and Advocacy, p. 42.
only information which they think help to win their case. This means that relevant information may be ignored if the information is not beneficial for them. This sort of presentation may undermine the accuracy of the final decision since either judge or juries cannot have a full picture regarding the facts of the case.

The use of single court-appointed expert provides an answer to overcome the problem of expert-partisanship in the party-appointed expert. The court-appointed experts have some advantages compared to party-appointed expert. The clearest advantages are that they are less possibility for bias than partisan expert. It is evident because the experts do not have relationship with the litigant since they availability in the court proceeding is the court initiative. Therefore, the expert do not have psychological burden towards the party.

However, from the common law lawyer's perspective, a court appointed expert also has several disadvantages. According to them, court-appointed experts reduce the effectiveness of the trial since they may make presentation which is not sufficiently important to the subject matter of the disputes. This is because, the experts themselves do not have a commitment to either party. As a result, they will probably be "reluctant to compromise his or her neutrality by working too closely with either side." The lawyers cannot know what the expert is going to say since they do not have the opportunity to prepare the expert before trial. If the experts do not comply with the subject matter, then their attendance is not useful and only a kind of waste time and money.

In addition, a court-appointed expert may be attacked by both lawyers, without receiving any support. Since a court appointed expert is not the responsibility of either party, when the expert is attacked by one side another side will do nothing. In this respect, the role of expert witnesses is very unattractive for the expert himself. This is dangerous since it may undermine the quality of the expert evidence.

In this paper, the author will not recommend the use of a court appointed expert, as recognized in the civil law system as such. Rather, I will suggest the modification of the system that is currently available in the common law system with some aspects that exist in the civil law system. Therefore, the author suggests a synergy between the two systems in order to create the best advantage of expert witnesses in the common law court proceedings. All of these reforms aim to achieve a higher quality of expert evidence in the development of both law and science itself.

My first recommendation is to make court appointment mandatory for all expert witnesses, as it is in civil law system. However, both of the parties should be given an opportunity to nominate who is the expert the court should appoint. This mechanism seems alien to the common law system, but it is the most effective solutions to overcome the problem of partisan expert witnesses.

In order to achieve the most ultimate benefit, this reform must be accompanied by another improvement regarding the procedure of the delivery of expert testimony.

Supporters a party-appointed expert may think that by appointing an expert, the judge is determining the case. This method does not intend to place the absolute responsibility of the appointment of the expert on the judge. Rather, both of the parties should be given opportunity to nominate the expert with whom they want to work with. If there is an agreement on who the expert is, the court should appoint the expert designated by both parties. However, if such an agreement cannot be obtained, then it should be court's authority to decide which expert should be appointed. This is crucial to establish good cooperation between the expert and the lawyers. In addition, the judge will not be the one who determines the outcome of the case, since the expert appointed by him or her is the result of compromise between the judge and both parties.

The court should provide opportunities for both parties to communicate with the experts prior to trial. In this communication, both lawyers would be given the same opportunity to work with appointed experts to assist the expert and to prepare the testimony. This is so, any disagreements or questions may be raised in this stage in order to make the trial process run faster and more effective.

The use of a court appointed expert only, cannot properly address the problem if the court only serves as a passive participant. It is important to ensure that the court has more power as a facilitator in dealing with the expert evidence. This is important to minimize disagreements which may lead to the delay of trial proceeding, so the trial proceeding becomes more effective.

Not only should the court monitor the communication but it also should take an active role. This method also serves as a way to “screen the scientific evidence” before trial. This is very important to decrease the possibility of the misuse of scientific evidence and also to prevent the use of unreliable scientific evidence. By empowering the court to have more active roles, the possibility of ineffectiveness of the use of court appointed expert can be reduced.

2. The use of written reports

The common law is dominated by the use of oral evidence rather than documentary evidence. In general, it cannot be simply determined which method is better, since different circumstances will dictate what the best form of evidence is in each case.

However, in my view, in light of expert evidence, it will be better to use written testimony rather than oral testimony. The reason is...
for this is the use of written report is simpler than oral testimony. This is because it does not necessitate direct cross examination, since any questions and answers can be directed in writing.

From the expert’s point of view, written testimony also provide advantages. This is because this method provides the expert with the opportunity to respond to questions thoughtfully, since they have more time to find out reliable answer. This means that the use of a written report can improve the standing of the expert. Furthermore, a written report would help the jurors to follow the arguments of the expert, so jury confusion can be minimized. As a result, the possibility of the jury being misled will be reduced.

The expert should be required to submit a written report, to the court which will be distributed to both parties. The report should consist of expert’s qualifications, research procedure, materials reviewed, analyses and conclusions. This would be very beneficial for the court, to evaluate the validity and reliability of the report. In this regard, the court should have great discretion in determining the weight of the testimony, since the court may reject any part of the testimony which is unreliable and invalid.

By proposing written report, the author does not wish to say that there should be no more oral testimony. Lawyers would still have the opportunity to ask the expert to testify in person, in order to clarify the written report or to bring up a matter which is not covered by the written report. Oral discussion is especially important when difficult questions of fact or law have arisen.

However, the proposed written report is not without limitation. Written reports are hearsay and therefore, would not be admissible under exceptions to the hearsay rule. In order to make such a written report admissible, new legislation creating an admissibility exception for expert witnesses’ written report should be enacted.

3. The openness of witness preparation

The partisanship of witnesses in the common law system, in my opinion, is not merely because they are appointed by the parties, but rather because of the mechanism in which the lawyers can prepare the expert before trial, which it is a confidential process. Support for this argument can be seen from the mechanism in choosing arbitrators. Arbitrators are also party appointed, but they do not become partisans. This is because there is no confidential preparation conducted between lawyers and arbitrators before the proceedings. Therefore, in my view, the manner of expert preparation should be changed entirely.

The preparation should be conducted openly, both parties should have same access to the expert. This is because the expert witnesses have to maintain their objectivity and independence. The experts should, therefore, disclose the information on which their opinions rely. Disclosure should also be made for any communication between the expert and the parties, so any kind of information from one party to the expert must also be available for opposing party. It must be held openly in front judge and juries. This is important as a safeguard to afford fair process.

Why is it important to avoid confidentiality? This is because confidentiality means both parties do not have the same access of information from the expert. In addition, confidentiality also discourages the expert to become dependence on the lawyer. This is since the lawyer may dictate what information the expert shall provide to the court.

A further risk is that they may be some information that is important to the case, but is not revealed to the court, since one party may prohibit the expert from doing so. In this regard, the judge and juries do not have thorough information from the expert, in deciding the outcome of the case. If judge and juries are unable to gain complete information regarding the case, then the outcome of the court proceeding will not be a just and right decision.

The need for independence and objectivity, however, does not prohibit the experts from working together with the lawyers. Such kind of cooperation is still possible, especially when the lawyers have important information or suggestions, that will facilitate the expert’s work. The judge also needs to work closely with the expert. The judge should state the necessity for the expertise and what issues need to be investigated. In doing so, the judge may limit or expand the investigation. The expert, is required to comply with the judge’s directions. If this method is done properly, it will be beneficial, since there is an intellectual exchange between the expert, lawyers and judge.

4. The method of cross examination

From the common law lawyer’s perspective, cross-examination is a powerful tool to discover any defects in the testimony, such as if the witnesses have made a mistake in their testimony, or have contradicted themselves. The author argues that cross examination is a useful mechanism to find out the truth of the testimony. However, the author suggests that cross examination of expert witnesses is conducted with certain limitations. This is because expert evidence is difficult to rebut by usual cross-examination due to its complexity and highly technical nature.

For this reason, it is important to find out how to minimise the dangers of current cross examination method toward expert witness. This paper would like to suggest structuring the cross examination in such as to avoid confrontation.

The first step should be taken is to change lawyer’s attitudes in conducting cross examination. It must be noted that the cross

76 Australian Law Reform Commission, ALRC 89, 2000, Managing Justice: A review of the federal civil justice system, 6.82.
examination should be an arena to demonstrate that the expert's theory is not to be based on relevant facts, or that the expert has not done sufficient work and therefore, the opinion he or she gave is unreliable. After cross examining the expert, lawyers should give sufficient evidence that the opposing expert opinion is illogical or it has not supported by sufficient data. So, the judges and the juries become more aware of the erroneous nature of the expert testimony.

Based on this concept, lawyers should not use cross examination to attack the expert's credibility. Rather, the cross examination should be conducted to establish the accountability of the expert testimony. The most important thing in expert testimony is whether or not the experts' testimony is reasonable and accepted in their field of expertise. Therefore, this matter should be the main focus to be explored in the cross examination. In this regard, the lawyer's options in asking questions in the cross-examination would be limited, questions which are not related to the content of the testimony should be prohibited.

The current methods of cross examination give more focus to the issue of credibility. The lawyers hope to lead the jury to a negative response to the expert's answer. In doing so, the lawyer will question the expert's impartiality, by asking about such matters as, how much the witness is being paid to testify; whether the witness has worked for the party and or lawyers before; and other indicators of bias. An attack on an expert's credibility is unhelpful in improving the accountability of the expert's testimony.

The lawyers may ask the experts about the bases for their opinion, or whether they conduct sufficient research on the subject matter. They should also be asked about something that they have neglected such as a test they did not conduct, or data they did not review. They should show that certain expert's testimony is not to be considered truth. The lawyers should also make an attempt to show that the evidence is unreliable or inappropriately relied on insufficient data. Such kind of questions are fair and appropriate, in order for the expert to be able to reconsider their opinion. This is because these questions aim to make sure that the expert's positions is thorough and valid. The lawyers should suggest ways in which the opinion could be strengthened or supported, since that may help the expert formulate a better testimony.

To eliminate the possibility of wrong expert testimony to be used in the proceeding, the author proposes another mechanism as an alternative for cross-examination which is by having the testimony reviewed by other experts. The idea of peer review is somewhat similar to that of the cross-examination, which is an effort to find out the reliability of the testimony. Therefore, reducing the opportunity for the lawyer to cross examine the expert, in my opinion, will improve the reliability of expert testimony.

5. Peer Review

The reform that the author proposes enables the court to have a more active role in dealing with expert evidence. This is not an easy task for the judges, since the matter of expert evidence is very technical in a certain field of expertise. When the expert introduces novel scientific evidence in the testimony, peer review is more necessary. Novel scientific discovery needs to be assured in the light of its quality. To help the judges and the juries value the evidence presented by the expert, peer reviews are needed. In this regard, the expert testimony should be tested by other experts in the same field of expertise.

Judges often struggle to determine the admissibility standard of expert testimony. This is because judges, as lay persons in that field of expertise, do not possess sufficient knowledge to decide whether or not the testimony is reliable in the field. It is, therefore admissible as evidence. Peer reviews help the judges where the judges remain uncertain about the validity of the evidence being presented by the experts. When the expert's report has been reviewed and accepted by the scientific community, it can be said that the report has significant probative value, and is therefore admissible. It seems that there is a delegation of judge's power to determine the admissibility of the testimony. In this regard, scientists from the same field of expertise can investigate a scientific question in the way they see appropriate.

It is important to note that the peer review evaluations are only necessary to determine whether or not the evidence is based on valid data and methodology in the field of expertise, and is therefore admissible. Thus, it is not to be used as a tool to determine whether or not the expert evidence is relevant, and peer review itself should not be admissible into evidence. The matter of whether or not an expert is qualified to express an opinion is a question of law and, therefore, is in the authority of the judge to decide.

Why is peer review so important to determine the question of admissibility? This is because peer review enables the task of

91 Lawrence S. Pinsky, "The Use of Scientific Peer Review and Colloquia to Assist Judges in the Admissibility Gatekeeping Mandated by Daubert" 34 Houston Law Review 544, 1997.
evaluating the expert claims made in the testimony. This is done by other experts who are more competent than the judge to assess the validity of the methodology and the data on which the expert witness relies. Therefore, peer review has the potential to prevent the expert witnesses from making claims that are not supported by reliable data. The positive impact of this peer review mechanism would be to minimize the possibility of bias, since the expert knows that their work will be analysed by other experts. If the expert testimony is impartial, then public trust of the accountability of expert evidence in court can be preserved.

The peer review approach has been implemented in an American case Daubert v Merrel Dow Pharmaceuticals. In this case, two babies were born with birth defects that reduced the size of their limbs. During the pregnancy, the mother had consumed a morning sickness drug called Bendectin. The parents alleged that the defects had been caused by that drug. An expert witness from Merrel Dow Pharmaceuticals testified that, based on epidemiological studies, Bendectin does not cause limb reductions on fetuses. However, the plaintiff's expert, gave an opposing point of view. This expert stated that, based on the epidemiological studies they had conducted, it could be concluded that Bendectin does cause birth defects. It was then discovered that plaintiff's expert had not had verification by other experts in the field, since the expert had not submitted their analyses to peer review, or published the findings in a scientific journal. As a consequence, the findings would not be accepted in that field of expertise. If the approach taken in that case was consistently applied in the common law jurisdiction, it would maintain the accountability of expert testimony.

This paper proposes that review should be conducted outside the court proceedings, in order to avoid changes in the procedural rules. The proposed written report is very suitable with the idea of peer review. The testimony in the written form should be forwarded to peer review. This would relieve the court from the task of determining the admissibility issues, until the review had been returned. After the review had been finished, it would be given to the parties. If the review stated that such a testimony is reliable, and therefore, admissible to be used as an evidence, the judge would then proceed with that expert’s testimony.

The peer review mechanism would be crucial if the courts were given a more active role in dealing with expert evidence. This is because the courts need to develop a standard to guarantee that the expert testimony is reliable and valid in the field of expertise. The standards are designed to improve the quality and the manner of presentation of expert evidence. In this regard, peer review could serve as a tool to eliminate the possibility that the expert can manipulate the testimony. The aim of this mechanism would be to ensure that the expert witnesses are "behaving the same in the courtroom as they would if they were in professional their environments."98

E. Conclusion

The role of expert witnesses in an adversarial system has not yet reached its ultimate benefit. Besides providing many opportunities for the expert to be an advocate for the party, the system allows the lawyers to have excessive control over the expert. It may negatively impact on the integrity of the court proceedings, since the current practice of expert evidence can undermine the essential characteristic of trial, namely justice. In jury trials, the situation is even worse, as the jury may become confused, and be misled by the expert witness’s testimony.

Problems surrounding the use of expert witnesses in the common law system are important to be addressed. This should be done by integrating some aspects that exist in the civil law system. The best method would be by obtaining a balance between non-adversarial and adversarial values in the matter of use of expert witnesses.99 This method would utilize some aspects of the inquisitorial system, on the need bases.

The key point in this proposal is giving the court a more active role in fact gathering process. It should be done by requiring court-appointed expert witnesses rather than party-appointed expert witnesses. The modification from the civil law method take place as the parties would still have the opportunity to advise judges to choose the expert who they believe will testify effectively. However, the final decision would be made by the judge. Under this proposal, the expert would be employed by the court, and all parties would have equal and open access to them.

The proposed method encourages lawyers to work together with the expert. However, the parties and their lawyers should not dictate to the expert what information the expert should disclose. In order to make this method work properly, the preparation of expert witnesses before trial should be conducted openly. Therefore, both parties and the judges could have thorough information from the experts. Thus, objective and impartial expert testimony would no longer an illusion.

Moreover, because of the complex and technical nature of the expert testimony, it would be beneficial to the court to have a peer review, in order to help it to determine the admissibility of the testimony. In doing so, the expert would be required to submit written reports, which would be reviewed by other experts from the same field. In light of this proposal, significant changes on the hearsay rule would be needed, since such a report is currently considered hearsay.

From the reform that the author suggests, the common law lawyers would see

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other things that have significant value in the process of obtaining just decision, namely honesty and reliability. The work produced by the proposed method of the expert evidence may result in more honest expert testimony, since the experts are doing their job in the name of justice rather than in the name of party who appointed them. It is also more reliable since by having the expert's work examined by their peer, it means that the work is qualified. If this proposed method run properly, the lawyers as well as the society would like to see that the delivery of scientific evidence in the court proceedings is satisfy to help the court obtain right and just decision.

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