Fire the hired gun: Eliminating expert bias in the accusatorial-adversarial civil justice system

by

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II. LIST OF ACRONYMS

ABAJ:	American Bar Association Journal.
ABSA:	Amalgamated Bank of South Africa.
AMA:	American Medical Association.
C&B:	Corbett & Buchanan.
Cl & F:	Clark & Finnelly.
CILSA:	Comparative and International Journal of Southern Africa.
CIR:	Commissioner for Inland Revenue.
CRAVA:	Compensation for Road Accident Victims Act.
DR:	Disciplinary Rule.
EFF:	Economic Freedom Fighters.
HPCSA:	Health Professions Council of South Africa.
LR:	Law Review.
LRC:	Law Reform Commission.
NDPP:	National Director of Public Prosecutions.
NSWLRC:	New South Wales Law Reform Commission.
PWC:	Price Waterhouse Cooper.
RAF:	Road Accident Fund.
SABC:	South African Broadcasting Commission.
SACJ:	South African Journal of Criminal Justice.
SAJHR:	South African Journal of Human Rights.
SALJ:	South African Law Journal.
SALRC:	South African Law Reform Commission.
SAR&H:	South African Railway and Harbours.

THRHR:	Tydskrif vir die Hedendaagse Romeins Hollandse Reg.
TSAR:	Tydskrif vir die Suid Afrikaanse Reg.
UC Davis:	University of California, Davis School of Law.
UCLA:	University of California, Los Angeles.
WLR:	Weekly Law Reports.
WPI:	Whole Person Impairment.

CHAPTER 1

1. INTRODUCTION

1.1 Rationale for the study

In 1954, an expert witness, Dr Unsworth, testifying for the defendant, exculpatorily opined that the plaintiff was a malingerer, but had he testified for the plaintiff instead, his opinion would be that the plaintiff's condition was post-traumatic at the hands of the defendant.[1] This statement captures the essence of the adversarial expert bias problem.

As early as 1843, selection expert bias (adversarial bias) was observed in Anglo-American jurisdictions.[2] From a cursory search of South African case law, more fully set out in section 4.8, it is evident that expert bias is a legitimate and significant problem.[3] This work considers the problematic manifestation of expert bias in South Africa and possible responses thereto in the context of a predominantly adversarial procedural system, but the problem is in no way confined to the adversarial legal systems

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[1] *Ladner v Higgins* (1954) 71 50 2d 242; Editor 'Developments in the law: Confronting the new challenges of scientific evidence' (1995) 108(7) *Harvard Law Review* 1481 at 1481. For an article defending partisanship see FRC Goodall 'The expert witness: Partisan with a conscience' (1990) 56(3) *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 159-161; *Cala Homes v Alfred McApline Homes* [1995] EWHC 7 (Ch).

[2] *Tracy Peerage Case* (1843) 10 Cl & F 191; *Lord Arbinger v Ashton* (1873) 17 LR Eq 358 at 374; T Golan *Laws of Men and Nature: The History of Scientific Expert Testimony in England and America* (2004) at 51; *Winans v New York & Erie Railroad* 62 US 88 101 (1858); *Baxter v Chicago Railway Co* 80 NW 644 653 (1899); WL Foster 'Expert testimony- Prevalent complaints and proposed remedies' (1897) 11 *Harvard Law Review* 169 at 171; JP Taylor *Treatise on the Law of Evidence* (1858) §§ at 45-50; E Washburn 'Testimony of experts' (1866) 1 *American Law Review* 45 at 48-49; *Rutherford v Morris* (1875) 77 111 397 at 405; *Persons v State* (1891) 16 Tenn SW 726 at 727; FF Wharton *A Commentary on the Law of Evidence in Civil Issues* (1888) at § 454; *Lowder v Standard Auto Parts* (1939) 287 NW Neb 211 at 215; *Keegan v Minneapolis & St Louis Railroad Company* (1899) 76 Minn 90 at 95; *Chaulk v Volkswagen of America* (1986) P11 CCH Prod Liab Rep 248 at para 18; TW Shelton 'Greater efficacy of the trail of civil cases' (1928) 32 *Law Notes* 45 at 48.

[3] *Twine v Naidoo* [2018] 1 All SA 297 (GJ) at para 16; *MV Banglar Mookh v Transnet* 2012 (4) SA 300 (SCA) at 314; *William Grant v Cape Wine & Distillers* 1990 (3) SA 897 (C) at 912; *Menday v Protea Assurance* 1976 (1) SA 565 (E) at 569D; *PWC v National Potato* [2015] 2 All SA 403 (SCA) at paras 98 & 113; *Stacey v Kent* 1992 (4) SA 495 (C) 497 at 497; *Slavin's Packaging v Anglo African Shipping* 1989 (1) SA 337 (W) at 345; *Stock v Stock* 1981 (3) SA 1280 (A) at 1296E; *P v P* 2007 (5) SA 94 (SCA) at paras 18 & 21; *Fulton v RAF* 2012 (3) SA 255 (GSJ) at para 45; *Schneider v Aspeling* 2010 (5) SA 203 (WCC) at 211J-212B; *Nonyane v RAF* (3126/2016) [2017] ZAGPPHC 706 (10 November 2017) at para 14.

1.2 The problem of expert bias

The role that experts play may be an inevitable consequence of the procedural system in which they testify. The South African law of evidence is based on the accusatorial system that exists in English law, a common law system which follows strict rules of evidence and is premised on an oppositional system.[4] By way of contrast, an inquisitorial system is based on a free evidence system in which judges inquire in a search for the truth.[5] Most judicial systems contain both accusatorial and inquisitorial elements.[6] In South Africa an adversarial/accusatorial fact-finding approach predominates and because litigants are pitted against each other and are exclusively responsible for soliciting expert evidence it is hardly surprising there is party identification and propriety.[7]

Expert bias manifests when legal practitioners, under instruction from litigants, act in secret, and from a large array they select experts (whose opinions conform to their clients' case) to act as witnesses, during which they may become sympathetic and associative as a result of spending a great deal of time with the litigant and the legal team and who are well paid for their evidence.[8] Also, experts may be hired pre-emptively so as to prevent them testifying for the opponent in a situation where their honest opinion may aid the opponent.[9] There is potentially a danger that in pursuing their financial interest by ensuring they are given more work by legal practitioners, expert witnesses will depart from the duty they owe the court and grant their allegiance to the litigant paying them.[10] In adversarial systems legal practitioners may restrict the information which they provide to the experts and limit the issues on which the experts are mandated to testify, thereby manipulating the ultimate findings of the expert.[11]

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[4] PJ Schwikkard & SE Van der Merwe *Principles of Evidence* 4ed (2016) at 8.

[5] Schwikkard & Van der Merwe op cit n4 at 8.

[6] SE Van der Merwe 'Accusatorial and inquisitorial procedures and restricted and free systems of evidence' in AJGN Sanders (ed) *South African in Need of Law Reform* (1981) at 141.

[7] L Meintjes-van der Walt *Expert Evidence in the Criminal Justice Process: A Comparative Perspective* (2001) at 134. Also see fn 3 supra, for South African case law complaining about adversarial expert bias.

[8] ED Bernstein 'Expert witnesses, adversarial bias and the (partial) failure of the Daubert revolution' (2008) 93(2) *Iowa Law Review* 451 at 453-454; Meintjes-van der Walt op cit n7 at 135.

[9] J Vuille 'Admissibility and appraisal of scientific evidence in continental European criminal justice system: Past, present and future' (2013) 45(4) *Australian Journal of Forensic Sciences* 389 at 389.

[10] RS Gross 'Expert evidence' (1991) *Wisconsin Law Review* 1113 at 1125.

[11] Gross op cit n10 at 1125.

Expert bias becomes especially problematic and untenable given that courts are ill-equipped to assess and to comprehend expert evidence.

In general, expert evidence falls outside the scope of the court's general knowledge, which results in the court being unable to comprehend sometimes confusing and incomprehensible evidence and making it difficult for the court to identify bias.[12] Meintjes-van der Walt labels this dilemma as a paradox, because the expert is called to testify on matters beyond the comprehension of the court, yet the court must adjudicate the trial on, inter alia, the expert evidence, which paradox is exacerbated by the adversarial system because, additionally, the court often must decide between conflicting expert evidence.[13]

It is argued that the fact-finding adversarial system in which expert witnesses are employed[14] is flawed.[15] Expert evidence differs from other evidence and ought not be forced into a pre-existing mould that by its very nature was designed for fact finding in respect of lay witnesses, because this practice leads to unintended results[16] such as bias. Superimposing expert evidence onto the pre-existing mould designed for lay witnesses also is problematic because the conventional means of evaluating expert evidence is ineffective and fails to meet the challenges raised by biased expert evidence.[17]

Although South African courts often complain about biased experts, elevating expert bias to real and significant levels,[18] there seem to be no empirical research done from the South African vantage point. The extent of the problem of adversarial bias however has been reflected in various international studies. An empirical study in the United States of America (USA) revealed that 77% of experts agreed that lawyers manipulate them into weakening unfavourable testimony and vice versa and 57% agreed that lawyers urge them to be less tentative.[19] Of judges, 79% felt that they could not rely on expert opinion to be impartial, 63% thought experts

[12] Meintjes-van der Walt op cit n7 at 65.

[13] Meintjes-van der Walt op cit n7 at 5.

[14] EM Frankel 'The search for the truth: An imperial view' (1975) 123(5) *University of Pennsylvania Law Review* 1031 at 1039.

[15] Gross op cit n10 at 1125.

[16] Gross op cit n10 at 1126.

[17] Meintjes-van der Walt op cit n7 at 6.

[18] Supra n3.

[19] DW Shuman, E Whitaker & A Champagne 'An empirical examination of the use of expert witnesses in the courts- Part II: A three city study' (1994) 34(2) *Jurimetrics Journal* 193 at 201.

were usually noticeably biased to favour the litigant instructing them, 68% thought the most distressing characteristic of experts is that they are not to be depended upon to be impartial, 57% thought of experts as hired guns and 68% thought that the fees paid to experts were enough to provide a financial interest in the outcome of the case.[20] Other studies in the United States of America reveal similar results.[21] Courts in adversarial systems generally approach expert evidence cautiously as such evidence is assembled for the purpose of litigation where parties are concerned with gaining victory and not to achieve the abstract truth.[22] The next section considers the research questions.

1.3 The research questions

This work considers the following questions in relation to adversarial expert bias:

1.3.1 Why are expert witnesses susceptible to bias and what are the characteristics of adversarial bias?

1.3.2 What steps have been taken in response to adversarial bias in South Africa and elsewhere, what are the advantages and disadvantages resulting from these steps and are they effective and adaptable to the South African social, political, legal and economic context?

1.3.3 Is the current regulation of expert witnesses and legal practitioners effective and should trial experts and legal practitioners employing them be regulated separately from existing professional regulatory bodies?

1.3.4 How best to reform the law to eradicate expert bias?[23]

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[20] Shuman et al op cit n19 at 202-203.

[21] C Krafka, MA Dunn, MT Johnson & JS Cecil 'Judge and attorney experiences, practices and concerns regarding expert testimony in federal civil trials' (2002) 8(3) *Psychology, Public Polity and Law* 309 at 328, stating the problem is that of experts losing their objectivity and becoming advocates. In the United States of America, over 30% of jurors reported perceived bias in J Harrison 'Reconceptualizing the expert witness: Social costs, current controls, and proposed responses' (2001) 18 *Yale Journal on Regulation* 253 at 255.

[22] L Meintjes-van der Walt 'Expert odyssey: Thoughts on the presentation and evaluation of scientific evidence' (2003) 120(2) *SALJ* 352 at 366; *Daubert v Merrell Dow Pharmaceuticals* 43 F3d 1311 (9th Cir 1995) 1316; *Whitehouse v Jordan* (1981) WLR 246. Cf G Edmond 'Judicial representations of scientific evidence' (2000) 63 *Modern Law Review* 216 at 224-225. In the context of South African courts, see supra n3.

[23] Gross op cit n10 at 1116.

1.4 The structure

Chapters two to four cover introductory material identifying the root causes of adversarial bias as the foundation to this research. In tracing the history of the expert witness, chapter two explains how the role of the expert witness was superimposed on the 'mould' of the lay witness and facilitates expert bias.

Chapter three encapsulates an exposition of expert bias and considers how it relates to and manifests in adversarial and inquisitorial civil legal systems. Because ill-equipped courts rely on expert evidence in technical matters, chapter three further considers whether a legally qualified, but otherwise lay court, is competent to assess the expert evidence and examines strategies employed by the courts to assesses expert evidence in order to establish whether such strategies can be successfully employed.

Chapter four sets out the relevant provisions of the South African law pertaining to expert opinion evidence.

Chapters five to eight deal with the various potential responses to adversarial expert bias. Chapter five focuses on the way in which expert evidence is introduced and employed in the legal system. Chapter six considers the identity of the trier of fact. Chapter seven examines pre-trial and trial expert collaboration. In chapter eight, regulation of the expert and legal profession is discussed.

Chapter nine concludes with a proposal for law reform.

1.5 The scope of the study

This work is confined to civil proceedings.[24] The study focuses on expert evidence presented in the High Court[25] but, mutatis mutandis, the research applies to magistrates' courts.[26] It is accepted that South Africa's legal system remains fundamentally adversarial in nature.

Criminal proceedings differ materially from civil proceedings. There are no concrete or uniform rules regarding the discovery of expert evidence in criminal law.[27] In civil matters the

[24] For a compendium on expert evidence in the criminal justice system see Meintjes-van der Walt op cit n7.

[25] Superior Courts Act 10 of 2013, s6(1)(*a*)-(*i*).

[26] Magistrates Court's Act 32 of 1944.

[27] *Shabalala v Attorney-General Transvaal* 1995 (2) SACR 761 (CC) at para 72.

Supreme Court of Appeal (SCA)[28] has incorporated the English case *Jones*[29] into the civil adversarial system, holding that a court may not conduct an investigation or examination of the case on behalf of the society at large.[30] In both English and South African civil proceedings the court is barred from calling a witness (including expert witnesses) whom the court thinks may shed light on the facts save with the consent of the parties.[31] In the more inquisitorial criminal law,[32] however, the judge must uncover the truth and ensure that justice is done in line with the law and controls the proceedings.[33] The Criminal Procedure Act[34] (CPA) provides that at any stage of the proceedings the court 'may' subpoena any person as a witness and a court 'shall' subpoena a witness where the evidence of such a witness is essential to a just decision.[35]

The modalities applicable in this section are discretionary ('may') and pre-emptory ('shall').[36] The criminal court may also examine any person who has been subpoenaed or who is in attendance at the criminal trial and may recall and re-examine any person already examined and shall do so where it is a just decision and is essential to the case.[37] However, the court must take care not to take on the role of the prosecutor.[38] Given these vast differences, this work deals exclusively with civil proceedings.

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[28] *City of Johannesburg Metropolitan Council v Ngobeni* (314/11) [2012] ZASCA 55 (30 March 2012) at para 30.

[29] *Jones v National Coal Board* [1957] 2 All ER 155 (CA) at 159A-B; *Yuill v Yuill* [1945] 1 All ER 183 at 189.

[30] *Jones* supra n29 at 159; *Ngobeni* supra n28 at para 30; *S v Roberts* 1999 (4) SA 915 (SCA) at 923.

[31] *Ngobeni* supra n28 at para 37; *S v Rall* 1982 (1) SA 828 (A) at 831-832; *S v Mafu* 2008 (2) SACR 653 (W) at 671.

[32] *S v Masooa* 2016 (2) SACR 224 (GJ) at para 18.

[33] *S v Rall* supra n31 at 831. In *R v Hepworth* 1928 AD 265 at 277, it was held that a judge must ensure that justice is done and is seen to be done and must conduct the trial open-mindedly, impartially and fairly.

[34] 51 of 1977, s186. Also see *S v Le Grange* 2009 (1) SACR 125 (SCA) at para 14.

[35] Section 186 of the Criminal Procedure Act 51 of 1977. Also see *S v Karolia* 2006 (2) SACR 75 (SCA) at para 9; *S v Gerbers* 1997 (2) SACR 601 (SCA) at 606; *S v Kwinika* 1989 (1) SA 896 (W) at 899. The court does not need permission from the parties to call a witness, see *S v Gabaatlholwe* 2003 (1) SACR 313 (SCA) at para 6.

[36] *R v D* 1951 (4) SA 450 (A) at 460; *DPP Transvaal v Mtshweni* 2007 (2) SACR 217 (SCA) at para 24. To be able to balance the role of deciding the case and administering justice, calls for sound judicial discernment and a decision as to how far a court will go to mend the carelessness of a litigant in order to create the perception of an even-handed-trial will depend on common sense, see *Hepworth* supra n33 at 277. The court has a wide discretion, see *R v Gani* 1958 (1) SA 102 (A) at 107-108. The power to call witnesses should be exercised sparingly, see *R v Grafton* [1993] QB 101 107 (CA).

[37] Criminal Procedure Act 51 of 1977, s167.

[38] *Masooa* supra n32 at para 19; Meintjes-van der Walt op cit n7 at 133-134.

1.6 Methodology

This work is a desktop study and a product of theoretical research that is reform orientated and which follows a critical conceptual analysis of existing resources such as the Constitution, legislation, case law, law reform reports and local and international academic research which mark the parameters of the law. This work considers the conceptual basis of the law, evaluates inadequacies and then considers practical reforms where the existing law is found wanting.

This work does not include a chapter dedicated to comparative study. Chapters five to eight draw on foreign jurisdictions such as the USA, Canada, Australia, New Zealand, Israel, France, Ireland, Wales, Scotland and England where most of these jurisdictions share a common law heritage with South Africa. These chapters highlight common law problems indicated also in international jurisdictions and shed light on the effectiveness of implementing the recommended responses.

1.7 Conclusion

Adversarial expert bias is a real and significant problem in South African civil procedure,[39] owing to the role which expert witnesses play in the procedural system, the method of their appointment and their incentives to assist the litigant instructing them. The research questions set out in this chapter will be explored in line with the structure set out.

The next chapter considers the legal history of expert evidence and how the position which experts witnesses take in adversarial proceedings came about.

[39] Supra n3.

CHAPTER 2

2. THE HISTORY OF EXPERT EVIDENCE

2.1 Introduction

In order to pronounce on a litigant's rights and responsibilities a court first must establish facts before applying the law. To arrive at the former, the law of evidence provides the technical rules for selecting the evidence to be furnished to the court for judicial adjudication.[1] The South African law of evidence prescribes these procedural rules that largely originate in the English common law.[2] In establishing the material facts, a court will draw inferences from proven facts.[3] When facts fall outside the knowledge and experience of the court,[4] the court is unable to draw sound inferences and must then draw on the knowledge and experience of an expert.[5]

This chapter considers the legal history pertaining to expert opinion evidence. A consideration of the history of the admission of expert testimony is necessary in order to understand the current legal framework[6] and to inform appropriate law reform[7] in the context of

[1] L Rosenthal 'The development of the use of expert testimony' (1935) 2(4) *Law & Contemporary Problems* 403 at 403.

[2] See s 42 of the Civil Procedure Evidence Act 25 of 1965; A Esmein *A History of Continental Criminal Procedure with Special Reference to France: The Continental Legal History Series* (1913) at Vol V 617-619; G Joubert 'S v Mjoli 1981 3 SA 1233 (A)' (1982) 3 *Journal of South African Law* 261 at 262. The Anglo-American law of evidence belongs to a broader evidence family and was born out of the English law and is influenced by the jury system, see SE Van der Merwe 'Die evolusie van die mondelinge karakter en uitsluitingreëls van die Engelse gemene bewysreg' (1991) 2(3) *Stellenbosh Law Review* 281 at 281. The English law has had a significant influence on South African procedural law, but it is the Roman-Dutch law that has had a significant influence on the principles of substantive law.

[3] Rosenthal op cit n1 at 403; *S v Thomo* 1969 (1) SA 385 (A) at 394.

[4] WJ Travis 'Impartial expert testimony under the Federal Rules of Evidence: A French perspective' (1974) 8 *International Lawyer* 492 at 493.

[5] L Hand 'Historical and practical considerations regarding expert testimony' (1901) 15 *Harvard Law Review* 40 at 40 & 50-52; *Mayor v Pentz* 24 Wend 668 (NY 1840); *Ferguson v Hubbell* 97 NY 507 513 (1884).

[6] D Kleyn & F Viljoen *Beginners Guide for Law Students* 3 ed (2002) at 20.

[7] NSWLRC Project 109 *Expert Witnesses* (2005) at 8.

society's needs and changing values.[8] How did it come to be that the expert witness take up a similar role to that of a lay witness?

2.2 Early experts

For two millennia the law has employed skilled and knowledgeable people to resolve technical issues.[9] From far in the past,[10] and as early as 3000BC, experts were employed to assist rulers and other decision makers on technical issues;[11] a role that has expanded in substance and complexity over time.[12]

Prior to the codification of the Roman law[13] a reliance on expert evidence can be traced back to biblical Israel during the Talmudic period in the fourth century where it was common practice for rabbis to enrich their religious knowledge from legal and natural science studies.[14]

In the Roman era, imperial tribunals[15] relied on experts to settle technical disputes, however it is not known if such experts were called at the behest of the court mero motu[16] or at the liberty

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[8] Kleyn & Viljoen op cit n6 at 20; PHJ Thomas, CG Van der Merwe & BC Stoop *Historiese Grondslae van die Suid Afrikaanse Privaatreg* (2000) at 17.

[9] RF Taylor 'A comparative study of expert testimony in France and the United States: Philosophical underpinnings, history, practice and procedure' (1996) 31 *Texas International Law Journal* 181 at 181.

[10] L Meintjes-van der Walt *Expert Evidence in the Criminal Justice Process: A Comparative Study* (2001) at 13.

[11] In 3000 BC, Grand Vizier Imhotep was the chief justice and physician to King Zoser and is one of the earliest known examples of an expert, see AR Brownlie 'Expert evidence in light of Preece v H.M Advocate' (1982) 22(4) *Medicine, Science and the Law* 237 at 237; RBH Gradwohl *Legal Medicine* (1954) at 3. Imhotep was an expert in medicine, architecture, religion and astronomy, see M Swanepoel 'The development of the interface between law, medicine and psychiatry: Medico-legal perspectives in history' (2009) 12 *Potchefstroomse Elektroniese Regsblad* at fn 47. The Holy Bible describes occasions of legal reliance on experts without medico-legal skills. The wise Daniel (620-538 BC) interpreted the vision that King Belshazzar had of a hand which wrote a text in a foreign language on a wall, see Book of Daniel, Chapter 5.

[12] D Dwyer 'Expert evidence in the English civil courts, 1550-1800' (2007) 28 *Journal of Legal History* 93 at 101.

[13] Codex 12,36,6.

[14] ML Aydalot *L'Expertise Comptable Judiciaire* 4 ed (1981) at 14.

[15] DJ Gee 'The English medical witness-Why so late' (1993) 33 *Medicine, Science and the Law* 11 at 17.

[16] Enactments by Justinian implied expert-bias-fear in handwriting experts, giving credence to the notion that the court called upon experts, see MC Ferguson 'A day in court in Justinian's Rome: Some problems of evidence, proof and justice in Roman law' (1961) 46 *Iowa Law Review* 732 at 757.

of the parties.[17] In Roman law, the fact finder could not reject the expert's conclusions.[18] Historians reference the recourse to experts in medieval times when expert witnesses were employed in Italian cities and in other parts of Europe.[19] Earlier, the codes of Theodosius (438 AD) and Justinian (533 AD) refer to medical information in matters of insanity, premature birth,[20] and impotence where midwives were used to give evidence.[21] The Enactments of Justinian refer to handwriting experts, as well, they reference the earliest fears of expert bias as shown by the repeated requirement that such experts must have been 'sworn'.[22] From the sixth to the tenth century there appear traces of medical evidence in the Alemanni, Lombards and Salian Franks laws.[23] The first known reference of oral evidence by sworn experts dates back to 1511 when Phillip the Handsome spoke of 'well beloved surgeons, sworn experts to the courts of Paris'.[24]

After the fall of the Roman Empire the use of experts employed by the court and other highly developed systems suffered a decline; during this period Roman institutions of fact finding were superseded by ancient modes of proof premised on the intervention of the Deity.[25]

[17] Aydalot op cit n14 at 15.

[18] Aydalot op cit n14 at 123-188.

[19] Brownlie op cit n11 at 237.

[20] Ferguson op cit n16 at 735.

[21] Gee op cit n15 at 17.

[22] SP Scott (ed) *The Civil Law Including the Twelve Tables: The Institutes of Gaius, the Rules of Ulpian, the Opinions of Paulus, the Enactments of Justinian, and the Constitutions of Leo* 49th Constitution, Title IV, Chap 2, First Collection Vol 7 (2001) at 219.

[23] Gee op cit n15 at 17.

[24] EE Ackerknecht 'History of legal medicine' in CR Burns (ed) *Legacies in Law and Medicine* (1977) at 250.

[25] PR Hyams 'The key to proof in the early common law' in MS Arnold et al (eds) *On the Law* (1981) at 90 states that the earliest English case comprising a trial of ordeals dates from 1198.

2.3 Early development of the English law of evidence

2.3.1 The Primitive phase: The period up to 1200 AD[26]

2.3.1.1 Trial by Ordeal

Employing ancient modes of proof was not confined to the Continent[27] and was popular also in England.[28] It was adopted into English law by the Anglo-Saxons in England and derived from the practices among the 'barbarian' tribes on the Continent, including the Franks and the Lombards.[29]

In the early stages of English legal history a trial entailed a mechanical procedure of proof where information and facts were largely irrelevant.[30] There was no role for a witness, let alone an expert witness.[31] During this primitive and religious phase in the early history and development of the English law[32] of evidence,,[33] it was generally accepted that a person did not judge another[34] but there was a belief in divine intervention because God knew best what were the relevant facts.[35] A trial was an appeal to God to adjudicate a factual dispute;[36] in modern societies, this practice is deemed irrational[37] and ridiculous,[38] but at the time was considered an appropriate method in the

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[26] Meintjes-van der Walt op cit n10 at 30.

[27] AS Diamond *Primitive Law Past and Present* (1971) at 47; JH Langbein *Torture and the Law of Proof* (1977) at 6; ES Hartland *Primitive Law* (1924) at 191.

[28] GD Nokes *An Introduction to Evidence* 4 ed (1967) at 18; JB Thayer *A Preliminary Treatise on Evidence at the Common Law* (1898) at 24-36; GR Elton (ed) *The Law Courts of Medieval England* (1972) at 25; TFT Plucknett *A Concise History of the Common Law* (1956) at 113-118; FG Kempin *Historical Introduction to Anglo American Law* (1973) at 54-57; P Devlin *Trial by Jury* (1978) at 6-7; AA Wakeling *Corroboration in Canadian Law* (1977) at 8-9; LW Levy *Origins of the Fifth Amendment: The Right against Self Incrimination* (1968) at 5-7.

[29] Gee op cit n15 at 13.

[30] J Stone & W Wells *Evidence its History and Policies* (1991) at 16-19.

[31] Rosenthal op cit n1 at 406.

[32] Nokes op cit n28 at 18.

[33] Joubert op cit n2 at 261.

[34] PJ Schwikkard & SE Van der Merwe *Principles of Evidence* 4 ed (2016) at 4.

[35] PG Stein *Legal Institutions: The Development of Dispute Settlements* (1984) at 25.

[36] Nokes op cit n28 at 18. Cf PJ Schwikkard *Presumption of Innocence* (1999) at 2.

[37] M Damaska 'Evidentiary barriers to conviction and two models of criminal procedure' (1973) 121 *University of Pennsylvania Law Review* 506 at 556 fn110.

[38] JH Wigmore *A Treatise on the Anglo-American System of Evidence in Trial at Common Law* (1940) at Vol 7 para 8.

search for the truth, in which the role of the court was to establish which of the parties was to submit to a selected form of proof and to ensure that one of the forms was observed.[39] The court would rule whether the litigants were to prove their case by way of the ordeal, oath or duel.[40]

The earliest English records that deal with ordeals date back to 1198.[41] This procedure remained applicable for 600 years, long after the Norman Conquest.[42] The ordeal as a legal device eclipsed all other methods of dispute settlement from the fifth century and during the high Middle Ages and the cultural Renaissance. [43]

2.3.1.2 Trial by battle/duel

The invading Normans in 1066 AD found a legal system in England not very different to the one that applied on the Continent. William I retained the ordeal procedures, but added battle to the ordeal.[44] This Norman innovation entailed not only physical force but Providence's intervention in favour of the side that was in the right.[45] In battle, the parties were represented in civil actions by champions, who formed a professional band.[46] In a battle trial, the court arranged a battle date and important and frequent litigators, such as churchmen, appointed permanent champions.[47] Modern authors believe that this practice gave birth to the accusatorial system that we know today[48] in which physical confrontation has been replaced by oral confrontation.[49]

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[39] I Holdsworth *History of English Law* (1926) at 133-139. GW Paton & DP Derham in *A Text-Book of Jurisprudence* (1972) at 597 suggest that the trial by ordeal was not absurd, because the physiological response of a fearful and guilty person causes a dry mouth, which leads to choking- the beginnings of observing the accused's behaviour and conduct as a factor in establishing his credibility.

[40] F Pollock & FW Maitland *The History of English Law* (1968) at 602.

[41] Hyams op cit n25 at 101.

[42] Gee op cit n15 at 13.

[43] Hyams op cit n25 at 91.

[44] Gee op cit n15 at 14.

[45] Holdsworth op cit n39 at 308.

[46] Gee op cit n15 at 14.

[47] Gee op cit n15 at 14.

[48] L Re 'Oral v written evidence: The myth of the impressive witness' (1983) 57 *Australian Law Journal* 679 at 679.

[49] Van der Merwe op cit n2 at 288.

2.3.2 The formal phase: Period up to 1300AD

2.3.2.1 Trial by oath

In this phase, the claimant was required to present witnesses, called secta, to support the sincerity of his/her allegations.[50] If the accused denied the allegations levelled against him/her by using a certain formal and prescribed oath,[51] he/she was required to present a number of oath helpers (or compurgators) to confirm his/her innocence under oath.[52] In the earlier stages, such helpers were relatives of the accused, later they were witnesses called by the court or the opposing side to attest to the character and reputation of the accused, but not to the facts.[53] The court, which questioned the witnesses in the thirteenth century, adjudicated disputes based on the number of witnesses presented and the consistency of the accounts submitted.[54]

The trial by compurgators was a formal process and the court was not required to weigh the evidence.[55] This trial method was inspired by the notion that the oath was considered to have a powerful hold on the conscience of a person,[56] a notion that is believed to this day.[57] It was accepted that the compurgators made a valuable contribution and, later, no longer were they called only to express their belief in the credibility of a party, but they were asked to make decisions based on their personal knowledge of the event that had transpired.[58] At a later date it was recognised that the oath helpers could play a more active role in reaching a decision, mostly

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[50] Holdsworth op cit n39 at 300.

[51] W Forsyth in *History of Trial by Jury* (1878) at 63.

[52] Pollock & Maitland op cit n40 at 600.

[53] Pollock & Maitland op cit n40 at 600.

[54] Holdsworth op cit n39 at 300 & 303.

[55] Schwikkard & Van der Merwe op cit n34 at 6.

[56] W Best *Treatise on the Principles of Evidence and Practice as to Proofs in Court of Common Law* (1849) at para 55.

[57] *S v Munn* 1973 (3) SA 734 (NK) at 736H; *S v Bothma* 1971 (1) SA 332 (C) at 332; *S v Ndlela* 1984 (1) SA 223 (N) at 223-224. See ss 39-41 of the Civil Proceedings Evidence Act 25 of 1965. Schwikkard is however critical of the oath, in PJ Schwikkard 'The oath: ritual and rationality' (2019) 32 *SACJ* at 357-376.

[58] Schwikkard & Van der Merwe op cit n34 at 6.

because of their personal knowledge of events. Despite their personal knowledge, this development is viewed as an unsophisticated version of a jury.[59]

2.3.3 The rational phase

2.3.3.1 1200AD to 1500AD

Gradually, as people's understanding of reason changed, from the twelfth century[60] societies across Europe[61] rejected these now 'irrational' trial methods and the limitations of the older systems were replaced by more reliable scientific techniques.[62] In 1215 the Fourth Lateran Council[63] proclaimed that the Catholic Church officially barred clergy from participating in a trial by ordeal, which spelled the end of a system premised on divine judgement and exemplified by the involvement of priests.[64] The result was trial by ordeal was abolished.[65] God was replaced as the fact finder by humans who henceforth were to decide on guilt and innocence.[66] At the same time, proof by oath became unpopular, although only formally abolished in 1833.[67]

The abolition of these central adjudication procedures in England and on the Continent left a lacuna which called for a substitute.[68] In England, one was readily at hand; the Petty Jury.[69] In the time of trial by ordeal,[70] Henry II of England gradually increased the use of a jury and petty juries were born, by which it was possible to replace a trial by battle with a petty jury or inquest

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[59] Schwikkard & Van der Merwe op cit n34 at 6; Gee op cit n15 at 15 notes that another reason for jury development was the involvement of lawyers. In Saxon and early Norman times, no lawyers acted for litigants, but from the thirteenth century a narrator or 'counter' was allowed to represent and speak for a party.

[60] S Kuttner & JJ Ryan (eds) *Proceedings of the Second International Congress of Medieval Cannon Law* Series C (1965) Vol 1at 304.

[61] Hyams op cit n25 at 101.

[62] Hyams op cit n25 at 91.

[63] Specifically, Pope Innocentius III, see Schwikkard & Van der Merwe op cit n34 at 6.

[64] Gee op cit n15 at 15.

[65] Meintjes-van der Walt op cit n10 at 31.

[66] Langbein op cit n27 at 6.

[67] Pollock & Maitland op cit n40 at 598 note that this method was used in 1708, 1799 and 1824.

[68] Gee op cit n15 at 15.

[69] Gee op cit n15 at 15.

[70] The jury trial existed in the time of the ordeal but would become popular only after the ordeal was abolished, see JH Baker *An Introduction to English Legal History* (2002) at 600.

of jurors.[71] The jury trial gradually replaced the older forms of adjudication after they had been abandoned by the courts.[72]

By the sixteenth century, trial by jury became wide-ranging in its use.[73] The jury was called upon, on oath, to truthfully answer questions.[74] In its primitive stage, the jury was regarded as a group of witnesses[75] who gave the court their preconceived opinion on the issues in dispute, as opposed to evaluating the evidence adduced before it, and 'partook in the character of witnesses as much as judges'.[76] The jury adjourned on a regular basis to consult the community to make additional inquiries.[77] The law did not concern itself with how the jury came to the evidence which was not secured by way of giving oral evidence.[78] From the sixteenth century, the procedures changed, from the matter being decided based on the personal knowledge of the jury, to witnesses being called before the jury to prove facts.[79] Because the jury had been required to make findings of fact premised on their personal knowledge,[80] a need was born for specialized knowledge to be accessed by courts.[81] As the population grew and day to day activities became more complicated, the knowledge of neighbours decreased in value, necessitating the need to call factual witnesses and eventually the jury laid aside its previous character; a jury member was now required not to have any knowledge of the dispute (ironically, a notion which had qualified a person to be a jury

[71] Holdsworth op cit n39 at 312.

[72] Taylor op cit n9 at 185.

[73] Rosenthal supra n1 at 406.

[74] Pollock & Maitland op cit n40 at 117.

[75] Esmein op cit n2 at 324.

[76] Rosenthal op cit n1 at 406.

[77] W Blackstone *Commentaries on the Laws of England* 17 ed (1922) Vol 4 at Chapter 25; JER Stephens 'The growth of trial by jury in England' (1896-1897) 10 *Harvard Law Review* 150 at 150-151.

[78] Rosenthal op cit n1 at 406.

[79] Holdsworth op cit n39 at 334.

[80] MD Forkosch 'The nature of legal evidence' (1971) 59 *California Law Review* 1356 at fn 35.

[81] T Hodgkinson *Expert Evidence: Law and Practice* (1990) at 6; JH Langbein 'The historical foundations of the law of evidence: A view from the Ryder sources' (1996) *Columbia Law Review* 1168 at 1170; A Biedermann & KN Kotsoglou 'Decisional Dimensions in expert witness testimony- A structural analysis' (2018) 9 Article 2073 *Frontiers in Psychology* 1 at 4.

member in earlier days).[82] During this time, legislation was enacted to make provision for witnesses to be compelled to give evidence.[83] The law of evidence began to take shape.[84]

Special juries were empanelled in the fourteenth century; the members were summoned based on their expertise as tradesmen, craftsmen and so on, to decide, inter alia, whether wine was bogus or a surgeon was guilty of malpractice; the need for expert knowledge was now established.[85] Holdsworth suggests these members are the ancestors of the modern expert witness.[86] Over the centuries the law developed two procedures to deploy expert knowledge where the court lacks specialized skills, training and knowledge:[87] The first procedure was the expert jury and the second the expert witness[88] called either by the court or the parties.[89]

2.3.3.2 The expert jury: 1400AD to 1700AD

From the fourteenth century onwards, in cases where jurors with specialize knowledge were a requirement, a jury consisting partially or completely of expert jurors was constituted.[90] The exact origin of the special/expert jury is not known.[91] Where expert juries were employed, the court delegated instructions to the jury, who ultimately decided the case;[92] the court either followed the

[82] RH White 'Origin and development of the trial by jury' (1961) 29 *Tennessee Law Review* 8 at 15.

[83] Perjury Statute of 1562-1563 (Statute of Elizabeth) 9.

[84] Rosenthal op cit n1 at 411.

[85] Rosenthal op cit n1 at 407.

[86] Holdsworth op cit n39 at 333.

[87] JH Beuscher 'The use of experts by the courts' (1941) 54 *Harvard Law Review* 1105 at 1108-1110.

[88] Rosenthal op cit n1 at 407.

[89] Rosenthal op cit n1 at 411.

[90] A Dickey 'The jury and trial by one's peers' (1941) 11 *University of Western Australia Law Review* 205 at 217; C Jones *Expert Witnesses: Science, Medicine and the Practice of Law* (1994) 25-29; Note 'The case for special juries in complex civil litigation' (1980) 89 *Yale Law Journal* 1155 at 1155; J Oldham 'The origins of the special jury' (1983) 50 *University of Chicago Law Review* 137 at 214; H Menin & GC Leedes 'The present status of the impartial medical expert in civil litigation' (1961) 34 *Temple Law Quarterly* 476 at 476; H Clemmens 'Services of experts in the conduct of judicial enquiries' (1887) 21 *American Law Review* 571 at 573.

[91] N Howlin 'Special Juries: A solution to the expert witness' (2004) 12 *Irish Student Law Review* 19 at 33.

[92] As in *Grant v Vaughan* (1764) 96 ER 281.

jury's conclusion or was guided[93] by the jury as an element in reaching a conclusion.[94] In the thirteenth century, Bracton[95] records the earliest known English document, the 'writ de ventre inspiciendo', codifying the use of expert evidence.[96]

By the eighteenth century, the special jury was well embedded in the law and well understood.[97] Under the influence of Lord Mansfield, the Chief Justice of the Court of King's Bench, merchant juries became a practice because merchants understood questions of trade better than anyone else present,[98] thereby developing the common law in respect of commercial matters.[99] In the case of merchant juries, over time, the use of expert witnesses superseded the employment of the expert jury, leading to the earliest known distinction between factual and expert witnesses.[100] The courts became passive adjudicators leaving the employment and calling of expert witnesses and the gathering of evidence to the litigants, and by the latter part of 1700s experts took up their place as mere witnesses.[101]

By the late eighteenth century, the adversarial system had developed into one very similar to the common law system as we know it today.[102] The use of expert juries became completely redundant, resulting in virtual disuse in the latter half of the nineteenth century and early twentieth century, as civil trial by jury declined and the use of expert evidence increased.[103] The practice of

[93] As in *Pickering v Barkley* (1648) 82 ER 587.

[94] Rosenthal op cit n1 at 407.

[95] Hand op cit n5 at 40 fn 2.

[96] Hand op cit n5 at 40-41.

[97] Hand op cit n5 at 42 notes that by the fourteenth century this practice was established.

[98] *Lewis v Rucker* [1761] 97 ER 769 770. However, as early as 1645 a jury of merchants was used in the King's Bench, see Thayer op cit n28 at 94.

[99] E Heward *Lord Mansfield* (1979) at Ch 16; FD MacKinnon 'Origins of commercial law' (1936) 52 *Law Quarterly Review* 30 at 30-31.

[100] Hand op cit n5 at 40.

[101] Wigmore op cit n38 at vol 7 para 1917.

[102] T Golan 'The history of scientific expert testimony in the English courtroom' (1999) 12 *Science in Context* 7 at 7.

[103] RM Jackson 'The incidence of jury trial during the past century' (1937) 1 *Modern law Review* 132 at 133.

the court summonsing experts to court had gradually given way[104] over the preceding centuries to a practice whereby the litigants themselves called experts.[105]

2.3.3.3 The expert witness

In the second method of securing knowledge, courts summoned skilled persons to appear before it.[106] Motivated in part by Privy Council and Chancery cases, non-jury witnesses began to give evidence in the common law courts.[107]

The earliest known case where an expert witness was summoned by the court to give evidence dates back to the fourteenth century and similar cases are reported in the sixteenth and seventeenth centuries.[108] The information which experts provided most likely was given directly to the court as opposed to the jury and the court subsequently instructed the jury accordingly.[109] In the sixteenth century, the distinction between juries and witnesses was clarified,[110] at which time witnesses increasingly were used and the emphasis shifted to the probative value of the witness's testimony and not on the number of witnesses called.[111] As far back as 1553, Judge Saunders noted that when matters arise in law which concern sciences or faculties, reliance on such sciences is 'commendable and honourable'.[112]

Although court-appointed experts date back to the end of the fifteenth century,[113] the first known example of party-appointed experts in civil matters in the common law courts was in 1619, albeit as a factual witness[114] and there is no further report until the 1750s.[115] In contrast, in criminal

[104] The court appointed experts in *Buller v Crisp* 6 Mod Rep 30 (1705).

[105] NSWLRC op cit n7 at 15. In *R v Green* 7 How St Tr 159 (1967), two surgeons testify about the cause of death.

[106] Rosenthal op cit n1 at 407; *Willoughby's Case* (1597) Cro Eliz 566.

[107] JD Jackson 'Theories of truth finding in criminal procedure: An evolutionary approach' (1998) 10 *Cardozo Law Review* 475 at 488.

[108] CT Moodie 'Expert testimony- Its past and its future' (1937) 11 *Australian Law Journal* 210 at 211.

[109] J Beames & R de Glanvilla *A Translation of Glanville* (1900) at 44-46.

[110] Holdsworth op cit n39 at 31

[111] Jackson op cit n107 at 488-489.

[112] In *Buckley v Rice* I Powd 125 (1554), grammarians testified about Latin.

[113] *Buckley v Rice* supra n112, refer to language masters, testifying to the meaning of the word 'fine'.

[114] *Alsop v Bowtrell* 79 ER 464.

[115] In *Fearon v Bowers* (1753) 126 ER 214 both parties called merchants.

courts, we find one of the earliest known cases where experts were called on both sides in 1678.[116] Very few rules governed expert witnesses; expert testimony could be presented formally or informally.[117]

In these early stages in the development of the English law, there seems to be a degree of experimentation, but by the middle seventeenth century the role of the jury and the witness became clear. [118] During a transitional stage, there are known cases where experts testified before the court and jury, although it remains uncertain at whose liberty these experts were called to testify;[119]by the court sua sponte[120] or at the behest of the parties.[121] A shift to where the courtroom was split into the embedded territories of the litigant, jury and judge called for evidentiary rules in general and by the latter half of the eighteenth century it was a rule that witnesses must have personal knowledge of the stated facts, which is known as the rule against opinion evidence.[122] The rationale behind the rule was that a witness will provide facts and the trier of fact then competently can make inferences or frame an opinion.[123] This rule was more about avoiding superfluous testimony and less about usurping the function of the jury.[124]

Pursuant to the rule against opinion evidence,[125] by the late eighteenth century (or early nineteenth century), a contention had arisen, not about the fact that a litigant called the expert directly, as one would anticipate, but how an expert rationally could give an opinion whereas witnesses were barred from expressing an opinion, despite it being a long-standing practice that

[116] *R v Pembroke* 6 How St Tr 1310 (1678); *R v Cowper* 13 How St Tr 1106 (1699).

[117] Dwyer op cit n12 at 98.

[118] Beames & Glanvilla op cit n109.

[119] Rosenthal op cit n1 at 409.

[120] Aydalot op cit n14 at 15.

[121] Dwyer op cit n12 at 98. The first known case of party-appointed experts in civil matters is *Foubert v De Cresseron* (1698) 1 ER 130 in 1698. The first known party-appointed expert, in criminal matters, dates to 1678 in *R v Pembroke* supra n116 and *R v Green* supra n105.

[122] Golan op cit n102 at 7.

[123] Wigmore op cit n38 at para 1918.

[124] Wigmore op cit n38 at para 1918.

[125] *Adams v Canon* (1622) 73 ER 117.

experts had been sought to give opinion evidence.[126] This bone of contention was put to bed by Lord Mansfield in *Folkes v Chadd*[127] where it was held that expert evidence is an exception to the exclusionary rule.[128] The objection to opinion evidence in *Folkes* at the time would not have been routine.[129]

It can be concluded that the jury system probably has had the most profound impact on the development of the law of evidence.[130] For example, courts were required to determine the admissibility of certain categories of evidence notorious for their unreliability, such as hearsay and character evidence. Because admissibility was said to be a question of law and not one of fact, the jury had to be protected from attaching too much weight to such evidence.[131] These rules developed slowly, by the first half of the seventeenth century, the common law books were mute on examination of witnesses[132] and up to the 1700s thoughts on the subject of opinion evidence were negligible in value.[133]

The accusatorial trial system, the best evidence rule, the importance of oral evidence and stare dececis created a complicated system for facilitating the proof of facts in courts.[134] Some evidentiary rules can be comprehended only when they are considered in the context of the jury system.[135]

[126] NSWLRC op cit n7 at 16.

[127] (1782) 99 ER 58.

[128] Hand op cit n5 at 40.

[129] Expert opinion evidence has been received in civil and criminal matters, without objection, for several centuries by 1782, see Dwyer op cit n12 at 110.

[130] Schwikkard & Van der Merwe op cit n34 at 8.

[131] Nokes op cit n28 at 35.

[132] Holdsworth op cit n39 at 180.

[133] Wigmore op cit n38 at §1917.

[134] Schwikkard & Van der Merwe op cit n34 at 8.

[135] Schwikkard & Van der Merwe op cit n34 at 7.

2.3.3.4 The expert assessor

A third method of securing expert assistance was to employ expert assessors, as was the case in the admiralty courts, where experts served by virtue of an office;[136] the Trinity House.[137] In the seventeenth century, collision cases could be deferred by the court to external experts for arbitration.[138] It is unclear whether the Trinity masters were experts employed in the same capacity as they were known to be in Continental courts,[139] as a type of special jury or expert assessors, however comparison with and similarity to recently known expert assessors is clear. [140]

2.4 1700AD to 1790AD

The changes in the court's use of expert testimony between 1550 and 1800 reflected society's increasing reliance on specialists because of the growth in specialist occupations and coupled with a belief that certain matters could be determined competently only by such specialists.[141]

Over time, the questions to be considered by experts would increase in substance and complexity,[142] and by 1730 experts were expected to apply their knowledge to facts as opposed to merely describing the general state of affairs.[143] After the 1760s, there was a reluctance to receive certain types of evidence from lay witnesses, such as the question of insanity, that could be answered only by a physician, who viewed the allegedly 'insane' party.[144] However, experts did

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[136] The Trinity House was established by Henry VIII, via a royal charter, to be a guild for mariners, see A Ruddock 'The trinity house at Deptford in the sixteenth century' (1950) 65 *English Historical Review* (1950) 458-476; *R v Clarke* (1787) 99 ER 1317.

[137] Dwyer op cit n12 at 106 notes that the origin of this practice is unknown.

[138] GF Steckley 'Collisions, prohibitions and the admiralty court in the seventeenth century London' (2003) 21 *Law and History Review* 41-68.

[139] Dwyer op cit n12 at 109.

[140] Dwyer op cit n12 at 109.

[141] Dwyer op cit n12 at 114.

[142] Dwyer op cit n12 at 101.

[143] Dwyer op cit n12 at 101.

[144] *Coate's Case* (1772) 98 ER 542. Up to 1760, it was common for lay witnesses to give opinion evidence, because of the absence of expert evidence in the seventeenth century, see Dwyer op cit n12 at 115. During 1640-1660, there had been a reaction to the progression of learned professionals; it was perceived that experts made the laity believe that they possessed expertise and authority beyond the reach of ordinary citizens, see R O'Day *The Professions in Early Modern Day England* 1450-1800 (2000) at 15.

not make past or future estimations on causation.[145] By 1760, the majority of the experts were called at the behest of the litigants.[146] The practice of the court summonsing experts gradually had given way over the preceding centuries to a practice whereby the litigants themselves called experts[147] and by the late eighteenth century, the adversarial revolution led to a system that is very similar to the common law system that we know today.[148] The courts became passive adjudicators, leaving the calling of expert witnesses and the gathering of evidence to the litigants and by the latter part of 1700 experts took their place as mere witnesses.[149]

2.5 The significance of Folkes v Chadd

Thayer submits that the significance of *Folkes v Chadd* is the introduction of experts testifying to a jury,[150] in which the court approved the adversarial apparatus entailing contending experts, hypothetical questions and consideration by the jury.[151] Wigmore adds that *Folkes* allowed experts to submit opinions, despite their lack of personal knowledge about the circumstances of the case.[152] Golan adds that the court allowed party-presented experts, departing from the existing practice of court-appointed experts, because the court lacked an appreciation of how party experts would differ from court experts.[153] Dwyer notes that *Folkes* was the first civil[154] matter in which party-instructed experts gave opinion evidence to a common law jury on issues where the expert drew

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[145] Dwyer op cit n12 at 102.

[146] Dwyer op cit n12 at 102.

[147] NSWLRC op cit n7 at 15. In *Rex v Green* supra n105, surgeons testified about the cause of death.

[148] Golan op cit n102 at 7.

[149] Wigmore op cit n38 at para 1917.

[150] Thayer op cit n28 at 666.

[151] S Landsman 'Of witches, madmen and product liability: An historical survey of the use of expert testimony' (1995) 13 *Behavioral Sciences and the Law* 131 at 141.

[152] Wigmore op cit n38 at 105.

[153] Golan op cit n102 at 14. The lack of anxiety regarding biased experts is more remarkable if one considers the court's dismay at lay-hired witnesses, see G Gilbert *The Law on Evidence* 4 ed (1795) at 93-135.

[154] In criminal matters, experts testified in respect of causation in causes of death, a practice followed much later in civil matters, because medical questions on causation were not deemed opinion evidence at the time. Alternatively, prior to *Folkes*, evidence was objected to, premised on its poor probative value, as not admissible, see Dwyer op cit n12 at 113. With the rise of an adversarial system, evidentiary objections grew in strength and sophistication, see WM Best op cit 56 at 133.

inferences that went beyond describing the state of affairs and where a special skill was a prerequisite to reach such an inference.[155] *Folkes* rejected the requirement that a witness must testify to what was seen or heard and could now express an opinion on causation.[156] *Folkes* abolished two well-embedded principles:[157]

i. That witnesses can testify only to facts and juries are to form opinions on the facts.[158]
ii. Court decisions could be premised only on facts.[159]

2.6 The role of the expert witness superimposed on the lay witness

There are questions as to why the model in relation to expert witnesses was superimposed on the model of lay witnesses and why, from all the variables, did party-appointed experts reign supreme over other methods of introducing expert knowledge in the legal system.

English procedure did not have a system of judicial bureaucracy, such as in France, where experts were office bearers, so the courts had no effective mechanism or resources to appoint experts.[160] In a civil matter, the judge could ask an acquaintance for advice and in a scenario where parties omitted to appoint experts, courts, at best, could ask experts from the public gallery for advice.[161] The demise of the court advisor thus probably was related to the litigant's growing role, as their agency increased, so did their control over the evidence tendered,[162] whereas judges became all the more reluctant to interfere with the selection of evidence.[163] Perhaps judges were not concerned about allowing party-appointed experts because experts were fellow gentleman,[164]

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[155] Dwyer op cit n12 at 111.

[156] Dwyer op cit n12 at 111.

[157] Dwyer op cit n12 at 111.

[158] A principle depicted in the *Bushell Case* (1671) Vaug 135.

[159] *Adams v Canon* supra n125. In *Folkes*, the court held that if experts' evidence is barred because it usurps the role of the jury, the alternative is that a jury is required to make a finding on causation based on insufficient evidence, see Dwyer op cit n12 at 112.

[160] Dwyer op cit n12 at 117.

[161] Dwyer op cit n12 at 117.

[162] JM Mitnick 'From neighbour-witness to judge of proof: The transformation from the English Civil Juror' (1988) 32 *American Journal of Legal History* 201-209.

[163] Golan op cit n102 at 9.

[164] At the time there existed great gender and class bias, hence the reference only to the male gender.

and could be counted on to give objective evidence;[165] or the dominant thought in the eighteenth-century courtroom could not fathom the system in any other way.[166] The growing deployment of experts in society at large seems to be part of the reason court-appointed experts survived.[167] Experts were useful in the heightened industrialized and urbanized eighteenth century and judges were not going to give them up for legal peculiarities such as creating an environment vulnerable to the risk of partisan experts.[168] It remains unclear why authoritative royal judges failed to mould a new procedure to remove experts from the adversarial fire.[169]

These developments raise a question of how to ensure reliable expert guidance.[170] There are historical reasons why party experts survived beyond the expert jury and expert aid, but survival does not justify ongoing utility,[171] especially considering what is said in chapter three, that the existing method of party introduction under the adversarial system is a main cause of the biased expert.

2.7 Recent developments in South Africa

In the twentieth century, major statutory reform took place in South Africa,[172] aimed largely at relaxing the strict evidence rules that were incorporated for jury trials.[173] The residual clause in the Civil Proceedings Evidence Act provides that where the Act or any other law does not provide for an evidence rule, the law which was in force on the 30 May 1961 shall apply;[174] this is the common law of England.[175]

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[165] S Shapin *A Social History of Truth* (1994) at 65 et seq.

[166] Golan op cit n102 at 14.

[167] Golan op cit n102 at 14.

[168] Golan op cit n102 at 14.

[169] Golan op cit n102 at 14.

[170] Golan op cit n102 at 10.

[171] Hand op cit n5 at 40.

[172] Law of Evidence Amendment Act 45 of 1988; Civil Proceedings Evidence Act 25 of 1965.

[173] Schwikkard & Van der Merwe op cit n34 at 7.

[174] Section 42 of Act 25 of 1965.

[175] Schwikkard & Van der Merwe op cit n34 at 26.

In contemporary South African law of evidence, many rules exist that were designed for a jury trial,[176] despite its abolition in South Africa.[177] The majority of our exclusion rules that determine the admissibility of evidence and competency of witnesses can be ascribed to a jury system that was designed to keep the lay jury from being misled by evidence presented and to confine consideration to the issues pleaded by litigants.[178] Schwikkard & Van der Merwe argue that abolishing the jury system, theoretically opened the door for a more liberal and robust approach to the admissibility of evidence.[179]

2.8 Conclusion

This chapter considered the historical backdrop of expert evidence, divided into historical benchmarks. The chapter dealt with early experts, expert in the primitive phase, formal phase and rational phase, the expert jury and ultimately the expert witness. It sets out how it came about that the expert witness takes up a role coressponding to that of a lay witness, which is deemed to be one of the main reasons for the manifestation of adversarial expert bias.

When expert evidence became prevalent, there was little foresight regarding adversarial bias; confidence in the objectivity of an expert's integrity derived from the notion that gentleman gave such evidence to assist the court.[180] This belief rested on a notion that experts were gentleman and their discourse discouraged disagreement,[181]and was supported by the fact that courts appointed experts or constituted special juries.[182] For most of the eighteenth century, expert evidence was divorced from any animosity and expert bias.[183] The sixteenth to the eighteenth centuries are considered a golden age for expert evidence; free of the contentions that were to come.[184] Opposing party-appointed experts had ample opportunity to find common ground when

[176] Schwikkard & Van der Merwe op cit n34 at 7.

[177] In civil matters in 1927. See s3 of the Administration of Justice [Further Amendment] Act 11 of 1927. For criminal matters in 1969, see the Abolition of Juries Act 34 of 1969.

[178] Rosenthal op cit n1 at 411.

[179] Schwikkard & Van der Merwe op cit n34 at 8.

[180] Golan op cit n102 at 14.

[181] Landsman op cit n151 at 486-489.

[182] Dwyer op cit n12 at 118.

[183] Jones op cit n90 at 4-6.

[184] Dwyer op cit n12 at 118.

they disagreed.[185] This ideal state was short-lived; during the eighteenth century experts increasingly were willing to disagree publicly and in court[186] and by the mid-nineteenth century it was commonly accepted among lawyers that expert evidence was often unreliable by virtue of its partisan nature[187] and the judiciary and public raised their feeling of discontent with persistent partisan experts as being a thorn in the flesh of the common law.[188] Experts could be solicited to adduce any evidence, no matter how absurd.[189] Against this backdrop, reform of the law applicable to expert evidence must be considered; prioritizing accuracy in fact finding over simplicity, expedition, comfort[190] or even custom. The problem is complex and persistent.[191]

Before the potential responses to adversarial expert bias are considered, the next chapter first considers the characteristics and causes of expert bias against the backdrop of the adversarial and inquisitorial systems. It is exactly the role that experts take that is similar to lay witnesses, which is deemed one of the main reasons for the existance of adversarial expert bias.

[185] Dwyer op cit n12 at 118.

[186] Dwyer op cit n12 at 118.

[187] Dwyer op cit n12 at 118.

[188] *Severn v Imperial Insurance* (1820) as quoted by Dwyer op cit n12 at 118; *Dyce Sombre* (1849) 41 ER 1207. By 1820, judges expressed a serious concern that experts were being employed as a weapon, as opposed to an information source.

[189] Jones op cit n90 at 98.

[190] G Mueller & F LePoole-Griffiths *Comparative Criminal Procedure* (1969) at 50.

[191] MR Damaska *Evidence Law Adrift* (1997) at 144-147.

CHAPTER 3

3. THE MANIFESTATION OF ADVERSARIAL BIAS

3.1 Introduction

By now it is established that adversarial bias is a problem in South Africa. To better understand the manifestation of adversarial expert bias, this chapter explores three main themes, which collectively explain the manifestation of bias in the South African legal system. First, this chapter considers numerous root causes of adversarial expert bias. Secondly, it considers the role that the expert witness takes in the adversarial system. Thirdly, the contention is that fact finders are ill suited to comprehend complex evidence. The concluding part of this chapter considers strategies employed by adversarial courts to compensate for their inability to assess complex expert evidence epistemically.

3.2 Adversarial expert bias as a distinct form of bias

Some forms of bias,[1] known colloquially under the heading of cognitive bias, owing to the intrinsic fallibility of the human mind,[2] can lead to erroneous interpretations and opinions,[3] especially among forensic experts because these forms affect the expert's memory, reasoning and decision-making.[4] Cognitive bias includes expectation bias,[5] anchoring effects,[6]

[1] IE Dror 'Human expert performance in forensic decision making: Seven different sources of bias' (2017) 49(5) *Australian Journal of Forensic Sciences* 541-547.

[2] IE Dror & G Hampikian 'Subjectivity and bias in forensic DNA mixture interpretation' (2011) 51 *Science & Justice* 204-208.

[3] L Meintjes-van der Walt & A Oalaborede 'Cognitive bias affecting forensic expert opinion' (2019) 32 *SACJ* 324 at 327.

[4] GS Cooper & V Meterko 'Cognitive bias research in forensic science: A systematic review' (2019) 297 *Forensic Science International* 35-46.

[5] Pre-expected outcomes that influence opinion, see MD Risinger et al 'The Daubert/Kumho implications of observer effects in forensic science: Hidden problems of expectation and suggestion' (2002) 90 *California Law Review* 1 at 3 & 6–8.

[6] A cognitive bias, where an opinion is formed using preliminary information on a topic, as the primary reference point and not applying objectivity to the question, see Z Maniadis, F Tufano & JA List 'One swallow doesn't make a summer: New evidence in anchoring effects' (2014) 104(1) *American Economic Review* 277-290.

motivational bias,[7] role effects,[8] reconstructive effects,[9] confirmation bias,[10] disconfirmation bias,[11] contextual bias[12] and tunnel vision.[13]

This work deals with a different manifestation of bias, namely adversarial partisan or selection bias, which is closely linked to the other forms of bias. In paragraph 1.1, it was established that the South African courts often complain about the manifestation of expert bias, which elevate bias to a significant problem in South Africa. This manifestation of bias,[14] whether intentional/conscious or unintentional/unconscious,[15] is not premised on error but on

[7] An expert favours the instructing party because he wants the party to win, see PC Giannelli 'Independent crime laboratories: The problem of motivational and cognitive bias' (2010) 2 *Utah Law Review* 247 at 251.

[8] Also called subconscious motivational bias, where an expert's perception of his/her role as part of a litigation team influences their opinion, more so in ambiguous cases, see Giannelli op cit n7 at 252.

[9] An expert's reliance on memory, to fill in gaps, but memories can be inaccurate (scheme-guided) and may be socially influenced, such as by conforming to the affect of the receiver of the information (audience-tuning), see HL Roediger & KA DeSoto 'The psychology of reconstructive memory' (2015) 2 *International Encyclopedia of the Social and Behavioral Sciences* 50-55.

[10] Evidence is interpreted to conform or align with the expert's own existing beliefs, expectations or hypotheses, see RS Nickerson 'Confirmation bias: A ubiquitous phenomenon in many guises' (1998) 2(2) *Review of General Psychology* 175-220.

[11] The expert's inability to disregard pre-existing beliefs, when counter-arguing or the discounting of information with which the expert disagrees, see CS Taber, D Cann & S Kucsova 'The motivated processing of political arguments' (2009) 31(2) *Political Behaviour* 137-155.

[12] Experts exposed to influential extraneous information that is irrelevant to the issue at hand can reach erroneous conclusions, see EJ Reese 'Techniques for mitigating cognitive biases in fingerprint identification' (2012) 59 *UCLA Law Review* 1252-1290.

[13] An expert reaches an early conclusion, premised on what the expert expects to find (oversimplification) and then ignores relevant counter evidence, often owing to pressure to achieve an outcome, see D Martin 'Lessons about justice from the "laboratory" of wrongful convictions: Tunnel vision, the construction of guilt and informer evidence' (2002) 70 *University of Missouri-Kansas City Law Review* 847 at 848.

[14] Bias relates primarily to the actual reporting and presentation of expert evidence and amounts to an active distortion of the actual opinions held by experts, see M Malsch & I Freckleton 'Expert bias and partisanship: A comparison between Australia and the Netherlands' (2005) 11(1) *Psychology, Public Policy and the Law* 42 at 47.

[15] It is not intended and occurs merely because of the expert's position as an adversary witness, see N Vidmar & NM Laird 'Adversary social roles: Their effects on witnesses' communication of evidence and the assessments of adjudicators' (1983) 44(5) *Journal of Personality and Social Psychology* 888 at 890.

the distortion of the expert's opinion to favour a party's standpoint.[16] Adversarial selection bias, as is found in written and oral expert evidence,[17] results in challenges regarding the expert's objectivity,[18] due to experts being influenced by their own interests to express dishonest and partial opinions.[19] Adversarial bias is exacerbated by the experts' perception that they blithely may say what they please and are immune to sanctions for perjury, malpractice or unethical conduct and fly under the radar of fraud detection.[20]

The method of soliciting expert opinion evidence itself may give rise to bias. Experts, who do not per se have reason to suspect fraud or deceit, are instructed by a litigant that a certain condition of things exists, premised on a particular hypothesis as to the cause, and on this basis the expert is instructed to employ special skill to verify rather than discredit this condition of things.[21]

It is in this context that the multi-faceted, inherently complex and dynamic manifestation of adversarial bias must be considered. Once the root causes of adversarial expert bias are better understood, a better response to adversarial bias can be constructed. One or more of the following root causes may contribute to the manifestation of adversarial selection expert bias.

3.3 Root causes of adversarial bias

3.3.1 Party introduction of experts

Some experts are more competent than others,[22] which is a reason a litigant has the right to appoint an expert of their choice. In South Africa, legal practitioners unilaterally elect and

[16] L Meintjes-van der Walt *Expert Evidence in the Criminal Justice Process: A comparative perspective* (2001) at 123.

[17] Meintjes-van der Walt op cit n16 at 123.

[18] P Roberts 'Science in the criminal justice process' (1994) 14 *Oxford Journal of Legal Studies* 469 at 501; C Krafka et al 'Judge and attorney experiences, practices and concerns regarding expert testimony in Federal civil trials' (2002) 8 *Psychology, Public Policy and Law* 309 at 314; EK Cheng 'Same old, same old: Scientific evidence past and present' (2005) 104 *Michigan Law Review* 1387 at 1392.

[19] E Washburn 'Testimony of experts' (1866) 1 *American Law Review* 45 at 57.

[20] LT Perrin 'Expert witness testimony: Back to the future' (1995) 29(5) *Univ of Richmond LR* (1995) 1389 at 1469.

[21] Washburn op cit n19 at 53.

[22] BE Becker & SS Luthar 'Social-emotional factors affecting achieving outcomes among disadvantaged students: Closing the achievement gap' (2002) 37(4) *Educational Psychology* 197 at 198.

employ experts,[23] and seek experts who may enhance[24] or support the litigant's case.[25] The affiliation between experts and litigants is complex, because litigants must employ all reasonably available means to adduce the best evidence to advance their case,[26] even if this means seeking a contra-mainstream expert, but whose views conform with that of the litigant.[27] Litigants must produce their own evidence, which may very well be partial, intelligent and cunning: It follows that the system cannot require litigants to produce their own evidence and then cripple their ability to do so by placing restrictions on evidence.[28] One must still be mindful of the legal practitioners ethical duties which are discussed in more detail in section 8.3. Lawyers in producing evidence can do almost anything short of buying the witness, suborning perjury[29] or committing a crime.[30]

Holding an opinion which differs from the mainstream-view does not make the expert a biased person or untoward in their thinking.[31] There is nothing wrong with relying on professionalism,[32] but the line is crossed when the expert advocates[33] for the instructing

[23] For the South African procedure, see section 4.7. Also see SR Gross 'Expert evidence' (1991) 1 *Wisconsin Law Review* 1113 at 1125.

[24] JD Jackson 'The role of the expert in UK criminal procedure' in JF Nijboer et al (eds) *Forensic Expertise and the Law of Evidence* (1993) at 22.

[25] New South Wales Law Reform Commission, Report 109 *Expert Witnesses* (2005) at 73.

[26] Gross op cit n23 at 1125 & 1130; L Meintjes-van der Walt 'Experts testifying in matters of child abuse: The need for a code of ethics' (2002) 3(2) *Child Abuse & Research in South Africa* 24 at 24.

[27] Malsch & Freckleton op cit n14 at 48.

[28] Gross op cit n23 at 1137.

[29] Gross op cit n23 at 1137. For an insightful article on the relationship between the expert and advocate see O Rogers 'Argument and opinion: Advocate and expert' (2019) April *Advocate* 56-64.

[30] FHH Kehrhahn 'MT v RAF; HM v RAF [2021] 1 All SA 285 (GJ): Adverse findings against experts and legal practitioners without evidence or a hearing' (2021) 54(1) *De Jure* 265 at 273.

[31] Malsch & Freckleton op cit n14 at 48; RA Yerion 'Expert medical testimony in compensation proceedings' (1935) 2 *Law and Contemporary Problems* 476 at 477; M Kirby 'The judicial review of expert evidence: Causation, proof and presentation' available at https://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kir byj_expert.htm, accessed 15 March 2022 at 2.

[32] Gross op cit n23 at 1132; WL Foster 'Expert testimony- Prevalent complaints and proposed remedies' (1897) 11(3) *Harvard Law Review* 169 at 171.

[33] Paid to speak for the instructing litigant, see RG Beran 'The role of the expert witness in the adversarial legal system' (2009) 17 *Journal of Law and Medicine* 133 at 134.

litigant.[34] On the other hand, some experts are prepared to tailor their opinion according to expectations,[35] and may omit[36] or downplay material but adverse facts[37] and so solidify their bias.[38] Such obvious delinquency is less frequently seen and is not deemed to be a major problem[39] because the practice would lower the reputation of experts among peers and the court[40] and makes it counterproductive in the long run.[41] This consequence moves the litigant rather to appoint helpful experts whose opinions are more readily accepted.[42]

The adversarial system is designed for litigants to solicit evidence which aids their case as opposed to assisting the court in arriving at the truth.[43] Party selection leads to polarization among experts[44] and offends the notion that experts are independent.[45] Polarization is exacerbated by the practice of litigants frequently calling upon the same experts,[46] who are known for their inclination to favour the case of the litigant notwithstanding their duty to the court.[47]

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[34] I Freckleton & H Selby *Expert Evidence: Law, Practice and Procedure* (2005) at 11-20; R Eggleston *Evidence, Proof and Probability* (1983) at chapter 9.

[35] See generally MA Hagen *Whores of Court: The Fraud of Psychiatric Testimony and the Rape of American Justice* (1997) at 1-5; I Freckleton, P Reddy & H Selby *Australian Judicial Perspectives on Expert Evidence: An Empirical Study* (1999) at 2-3.

[36] For examples see, *MS v DPP* High Court 5 December 1997; *The People (DPP) v Allen* [2003] 4 IR 295; *R v Clark (Sally)* [2003] EWCA Crim 1020; *Fitzpatrick v DPP* High Court 5 December 1997. This view was approved in *JL v DPP* [2000] 3 IR 122; *AW v DPP* High Court 23 November 2001; *JOC v DPP* [2000] IESC 58; *RB v DPP* High Court 21 December 2004.

[37] MJ Saks 'Expert witnesses in Europe and America' in PJ Van Koppen & SD Penrod (eds) *Adversarial versus Inquisitorial Justice: Psychological Perspectives on Criminal Justice Systems* (2002) at 235-244.

[38] Gross op cit n23 at 1133.

[39] Gross op cit n23 at 1132.

[40] Family Courts of Australia *The Changing Face of Expert Witness: A Discussion Papers* (2002) at 58.

[41] Malsch & Freckleton op cit n14 at 48.

[42] Gross op cit n23 at 1132.

[43] G Lundberg 'Expert witness for whom?' (1984) 252(2) *Journal of the American Medical Association* 251 at 253.

[44] G Davies 'Expert evidence: Court appointed experts' (2004) 23 *Civil Justice Quarterly* 367 at 368-369.

[45] Vidmar & Laird op cit n15 at 890.

[46] MS Guttmacher *The Role of Psychiatry in Law* (1968) at 87-91.

[47] Malsch & Freckleton op cit n14 at 45.

Experts are chosen by litigants among competing experts for their courtroom skill, personality and forensic skills, as much as for their professional ability.[48] Other traits include[49] their persuasiveness,[50] rhetorical strength,[51] a list of publications,[52] confidence, an ability to create empathy and a sense of sincerity and conviction,[53] a fighting spirit,[54] the ability to command a presence and respect from the counter expert,[55] appearance of objectivity[56] and 'battlefield experience',[57] all general qualities which give a good impression and add a ring of truth.[58]

However, there is general disdain for the professional trial expert who possesses these skills, who may be perceived as an unethical participant, who helps to win a case by manipulating the facts to match a purpose and by disparaging the 'ethical' expert.[59] The ethical expert may be inexperienced and their performance falls short of that of the career-expert.[60]

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[48] HS Williams 'Medical experts and homicide' (1897) 164 *North American Review* 160 at 161; MM Belli 'Forensic medical experts, obligations and responsibilities' (1968) 8 *Medicine, Science and the Law* 15 at 19; P Rosenthal 'Nature of jury response to the expert witness' (1983) 28(2) *Journal of Forensic Science* 528 at 529; AD Austin *Complex Litigation Confronts the Jury System: A Case Study* (1984) at 82.

[49] M Angell *Science on Trial: The Clash of Medical Evidence and the Law in the Breast Implant Case* (1996) at 118.

[50] TV Harris 'A practitioner's guide to the management and use of expert witnesses in Washington civil litigation' (1979) 3 *University of Puget Sound Law Review* 159 at 161; J Harrison 'Reconceptualizing the expert witness: Social costs, current controls and proposed responses' (2001) 18 *Yale Journal on Regulation* 253 at 255.

[51] HA Hammelmann 'Expert evidence' (1947) 387 *SALR* 387 at 389.

[52] EE Miller & CM Kolb 'The penologist as expert witness' (1982) Summer *Litigation* 30 at 31.

[53] SE Nagin 'Economic experts in antitrust cases' (1982) 8 Winter *Litigation* 36 at 37.

[54] R Crane 'What difference does an expert make?' (1981) Dec *Michigan Bar Journal* 966 at 967.

[55] G Adshead 'Evidence-based medicine and medicine-based evidence: The expert witness in cases of factitious disorder by proxy' (2005) 33(1) *Journal of the American Academy on Psychiatry and the Law* 99 at 102-103.

[56] HD Sperling 'Expert Evidence: The problems of bias', available at https://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Assorted%20%20L%20to%20Z/sperling_speeches.pdf, accessed on 15 March 2022 at 3.

[57] JL Mills & D Alexander 'Teratogens and "Litogens"' (1986) 315 *New England Journal of Medicine* 1234 at 1235.

[58] A Momjian 'Preserving your witness's stellar testimony: How to qualify your expert to the court' (1983) 6(1) *Family Advocate* 8 at 8.

[59] E Mock 'Medical testimony' (1938) 1 *American Journal of Medical Jurisprudence* 119 at 119.

[60] Mock op cit n59.

3.3.2 Lawyers' fees, pressure and threats[61]

Legal practitioners, in various ways, play a part in the manifestation of adversarial bias. Legal practitioners may pressurise experts[62] and try to persuade the expert to give their client the benefit of the doubt.[63] They may embark on an effort at seduction to be partisan, by dropping direct or indirect hints of future work and even,directly or indirectly, may threaten and coerce expert witnesses into providing a favourable opinion.[64] Legal practitioners hide the work they have done to woo the experts and to prepare and shape their evidence, so that the expert opinion comes across as legitimate.[65]

Bias is caused by short term (large fees) and long term (securing future work) economic incentives.[66] Experts must satisfy the evidence-buying customer or they risk not being hired.[67] Some experts make all or the majority of their income from being trial-experts[68] and it follows, notwithstanding their being honest, that the expert invariably favours the litigant employing the expert.[69] When experts yield to unethical practices, motivated by a financial incentive, their conscience becomes less acute and their decisions and opinions are influenced by quirks and traits of thought based on the desire for gain or personal advancement.[70] New and aspirant experts, who wish to enter the lucrative expert-witness profession, may bend over backwards to favour the attorney of the instructing litigant and so boost their reputation among lawyers.[71]

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[61] The problem is not that they are paid, but that they are paid by the instructing litigant, see JL Mnookin 'Expert evidence, partisanship and epistemic competence' (2008) 73 *Brooklyn Law Review* 1009 at 1011.

[62] TG Gutheil, M Commons & PM Miller 'Withholding, seducing and threatening: A pilot study of further attorney pressures on expert witnesses' (2001) 29(3) *Journal of the American Academy and the Law* 336 at 338.

[63] Mock op cit n59 at 120.

[64] S Feola & RA Alcorn 'Expert witness advocacy: Changing its culture' (2009) 45(7) *Arizona Attorney* 24 at 25; MJ Saks 'Accuracy v advocacy: Expert testimony before the bench' (1987) 90 *Technology Review* 42 at 43-44.

[65] Gross op cit n23 at 1165.

[66] Feola & Alcorn op cit n64.

[67] Gross op cit n23 at 1132.

[68] *Motswai v RAF* 2013 (3) SA 8 (GSJ) at para 1; KR Kreiling 'Scientific evidence: Towards providing the lay trier of fact with comprehensive and reliable expert evidence necessary to meet the goals of the rules of evidence' (1990) 32(4) *Arizona Law Review* 915 at 938 fn 134.

[69] *Abinger v Ashton* (1873) 17 LR Eq 358.

[70] Mock op cit n59 at 119.

[71] D Dwyer 'The causes and manifestations of bias in civil expert evidence' (2007) 26 *Civil Justice Quarterly* 425 at 430.

3.3.3 Expert-parking

Lawyers may brief experts purely to compromise their objectivity, so as to make the expert, who may be helpful, unavailable to their opponents. This practice offends public policy[72] and undermines the notion that an expert witness does not 'belong' to a particular party, but assists the court.[73]

3.3.4 Delinquency hidden behind 'the freedom of opinion'

Reputational damage seems to be the only negative consequence attaching to delinquent experts.[74] Experts have a broad latitude in respect of their discretion and they may easily rationalize their partisan views without it necessarily harming their image in terms of their intellect.[75] Despite the fact that propagating an intellectual agenda (consciously or subconsciously, such as being a proponent of a contra-mainstream theory) may be a cause of expert bias, the practice continues to be acceptable, owing to justification in the form of professionalism and sincerity.[76] This self-serving rationalization is more difficult to sustain when bolder breaches of the moral conventions are involved.[77]

Because an expert's credibility is seriously questioned if the expert allows the legal practitioner to exaggerate a true (and more conservative) position,[78] over time they have learned to manipulate the impact of their testimony separately from its value.[79]

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[72] *Harmony Shipping v Davis* [1979] 3 All ER 177 at 181; J Vuille 'Admissibility and appraisal of scientific evidence in continental European criminal justice system: Past, present and future' (2013) 45(4) *Australian Journal of Forensic Sciences* 389 at 389.

[73] *Harmony Shipping v Saudi Europe* [1979] 1 WLR 1380, applied in Australia in *Kimbers v Harley* (1998) BC9807400 Unreported at 7-8; W*immera Industrial Minerals v Iluka Midwest* [2002] FCA 653 at paras 44-46; Rule 48 of the Western Australia Bar Association Conduct Rules (2006).

[74] Meintjes-van der Walt op cit n26 at 27.

[75] O Perez 'Judicial strategies for reviewing confliction expert evidence: Biases, heuristics and higher-order evidence' (2016) 64 *American Journal of Comparative Law* 75 at 86.

[76] Dwyer op cit n71 at 434 states that experts use their role in litigation to enhance their careers and fail to consider other viable theories. Also see *Petursson v Hitchison 3G UK* [2005] EWHC 920 (TCC).

[77] Perez op cit n75 at 86.

[78] L Meintjes-van der Walt 'Ethics and the expert: Some suggestions for South Africa' (2003) 4(2) *Child Abuse Research South Africa* 42 at 47.

[79] Gross op cit n23 at 1148.

3.3.5 Battle of the experts

Party selection of experts results in a 'battle-of-the-experts'.[80] This battle often is confined to the litigation and, in practice, the opposing trial experts are ad idem on the science.[81] In litigation, disagreements are inevitable and are magnified, whereas areas of agreement are obscured, ignored or underemphasized.[82] This battle is characterised by all the predictable problems of evaluating the evidence associated with the adversarial system[83] that will be discussed under 3.5 below.

3.3.6 Withholding facts from the expert and clipping the expert's 'wings'

Experts view lawyers as unprincipled manipulators of the law,[84] and do so for good reason. During the pre-trial stages, lawyers may withhold key information from the expert,[85] which limits the expert's ability to factor in adverse facts in their opinions.[86] Litigants also instruct the expert on confined or limited aspects to benefit their case.[87]

During the trial stage, experts are asked limited questions in examination in chief (and cross examination),[88] depriving the expert of the opportunity to furnish the full extent of their expertise to the court and inevitably concealing the whole truth.[89] The corollary of this situation is the difference between 'testifying' and giving a deliberate and carefully-formed opinion.[90]

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[80] MR Damaska *Evidence Law Adrift* (1997) at 145; DR Richmond 'Regulating expert testimony' (1997) 62(3) *Missouri Law Review* 485 at 486.

[81] Such as in *Wells v Ortho Pharmaceutical Corporation* 615F Supp 262 (ND Ga 1985) where the court had to decide if a spermicide could be the cause of a birth defect, whereas, in reality, the facts were known to the scientific community.

[82] Gross op cit n23 at 1175.

[83] Gross op cit n23 at 1175.

[84] Gross op cit n23 at 1115.

[85] Feola & Alcorn op cit n64 at 25.

[86] Gross op cit n23 at 1181.

[87] A Wolmarans *Die Sielkundige as Deskundige Getuie in Strafsake* (Unpublished masters thesis in Clinical Psychology, University of Johannesburg, 1986) at 62.

[88] A cardinal rule of cross examining is never to ask the expert to explain, see T Mauet *Fundamentals of Trial Techniques* (1980) at 243.

[89] DJ Gee 'The expert witness in the criminal trial' (1987) *Criminal Law Review* 307 at 308-309; A Kenny 'The expert in court' (1983) 99 *Law Quarterly Review* 197 at 208; L Ellison 'The protection of vulnerable witnesses in court: An Anglo-Dutch comparison' (1999) 3 *The International Journal of Evidence and Proof* 29 at 36.

[90] C Herschel 'Services of experts in the conduct of judicial inquiries' (1887) 21 *American Law Review* 571 at 572.

Experts have expressed the view that as learned, honest[91] and conscientious experts, they do not have an opportunity to present the truth accurately, owing to the skillful manner they are asked questions.[92] Under cross-examination, experts are more concerned to bolster their evidence in chief rather than reveal the actual true situation.[93] Furthermore, to give evidence which differs from what is said in a preceding written report elicits harsh cross examination which may affect negatively the expert's credibility.

3.3.7 The incentive to inflate claims

The Contingency Fees Act[94] was promulgated, inter alia,[95] to counter the high costs of litigation and to promote access to justice.[96] This Act allows legal practitioners, who agree to work on a 'no-win-no-fee' basis, to charge double their normal fee or 25% of the capital awarded, whichever is less.[97] The higher the amount awarded, the higher the potential fee for the legal practitioner.[98] This decision may motivate lawyers to inflate claims by resorting to hired-gun experts. In practice many lawyers spend a great deal of time and money garnering expert evidence.[99]

[91] An honest expert can be biased, see Meintjes-van der Walt op cit n16 at 136.

[92] HS Williams 'Medical experts and homicide' (1897) 164 *North American Review* 160 at 160.

[93] For an in-depth discussion see JD Jackson 'Law's truth, lay truth and lawyers' truth: The presentation of evidence in adversary trials' (1992) 3(1) *Law and Critique* 29-49.

[94] Act 66 of 1997.

[95] *Motsepe v Commissioner of Inland Revenue Service* 1997 (2) SA 898 (CC) at para 30. The CCMA and the small claims court, in terms of The Small Claims Court Act 61 of 1984, assist the public free of charge.

[96] I Currie & J De Waal *The Bill of Rights Handbook* 6ed (2005) at 709; FE Elliot & R Spillman 'Medical testimony in personal injury cases' (1935) 2 *Law and Contemporary Problems* 466 at 471.

[97] Section 2(2) of the Contingency Fees Act 66 of 1997.

[98] *MT v Road Accident Fund; HM v Road Accident Fund* [2021] 1 ALL SA 285 (GJ) at para 31.

[99] Gross op cit n23 at 1147.

3.3.8 Experts act in solidarity with client and attorney

Expert witnesses may identify[100] or be perceived[101] to identify with a particular party[102] (known as countertransference)[103] and be sympathetic to the position of that party and will shape their opinions and reporting accordingly,[104] in disregard of the objective truth.[105] This view is the result of experts identifying with the cause of the instructing litigant.[106] Professional rapport and solidarity[107] with lawyers and litigants further contribute to the sympathetic relations among experts.[108]

Generally, such an affiliation is stronger in adversarial systems, because litigants select and pay experts directly[109] and have close contact with experts in the pre-trial and trial phase.[110] This affiliation is compounded by the experts' dependance on attorneys for pre-trial

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[100] C Walker & R Stockdale 'Forensic science and miscarriages of justice' (1995) 54 *Cambridge Law Journal* 69 at 77; R Stockdale 'Running with the hounds' (1991) 141 *New Law Journal* 772 at 772.

[101] P Roberts 'Science in the criminal process' (1994) 14(4) *Oxford Journal of Legal Studies* 469 at 501 fn 93; CAG Jones *Expert Witnesses* (1994) at 212-222; A Samuels 'Forensic science and miscarriages of justice' (1994) 34 *Medicine, Science and the Law* 148 at 150; P Roberts & C Willmore *The Role of Forensic Science Evidence in Criminal Proceedings* (1993) at 139.

[102] Meintjes-van der Walt op cit n16 at 125.

[103] Gutheil et al op cit n62 at 338.

[104] See DC Murrie, MT Boccaccini, LA Guarnera & KA Rufino 'Are forensic experts biased by the side that retained them?' (2013) 24(10) *Psychological Science* 1889-1897, for an imperical study on adversarial allegiance.

[105] A Allan & L Meintjes-van der Walt 'Expert evidence' in S Kaliski (ed) *Psycho-Legal Assessment in South Africa* (2006) at 353; A Memon, A Vrij & R Bull *Psychology and Law –Truthfulness, Accuracy and Credibility* (2003) at 178; B MacFarlane 'Convicting the innocent: A triple failure of the justice system' (2006) 31 *Manitoba Law Journal* 403 at 454; TV Lee 'Court-appointed experts and judicial reluctance: A proposal to amend rule 706 of the Federal Rules of Evidence' (1988) 6 *Yale Law & Policy Review* 480 at 488; WR Alford III 'The biased expert witness in Louisiana tort law: Existing mechanism of control and proposals for change' (2000) 61 *Louisiana Law Review* 181 at 213; D Sonenshein & C Fitzpatrick 'The problem of partisan experts and the potential for reform through concurrent evidence' (2013) 32 *The Review of Litigation* 1 at 36-45.

[106] A Samuels 'Expert forensic evidence' (1974) 14 *Medicine, Science and the Law* 17 at 24.

[107] T Gutheil, DH Schetky & IR Simon 'Pejorative testimony about opposing experts and colleagues 'fouling one's own nest'' (2006) 34(1) *The Journal of American Academy of Psychiatry and the Law* 26 at 27-28.

[108] MC Bednar 'Medical expert witness bias due to commonality of insurance' (2002) 23 *Journal of Legal Medicine* 403 at 408 & 414.

[109] Meintjes-van der Walt op cit n16 at 6.

[110] T Broeders 'The role of forensic experts in an inquisitorial system' in PJ Koppen & SD Penrod (eds) *Adversarial versus Inquisitorial Justice: Psychological Perspectives on Criminal Justice Systems* (2002) at 246-254.

preparation, which has a bearing on their 'success' as an expert witness and which ensures protection from hostile cross examination.[111] These dynamics leading up to the trial may incline experts subtly to lean toward the position of the litigant who pays them.[112]

Experts generally are confused with regard to whether their duty lies with the court or the litigant who pays them; the latter view carries considerable weight.[113] It has been confirmed by an empirical study in the United States of America that where experts see their role as aligned with that of the a litigant, they develop a psychological bond with the instructing litigant, which has a bearing on the expert's decision making, selection of details, memory and retrieval thresholds.[114] Sanders aptly warn not to superimpose study-findings of lay witnesses on experts, however, such studies have revealed that weak role manipulations produce bias even when a subject has no psychological or economic interest in the outcome of the case.[115]

An expert becomes an increasingly valued asset, because the expert presents the litigant's case as the truth.[116] This development is known as the 'accommodation of the expert' phenomenon.[117] Regular reporting on one side in a specific type of case (creating terms such as 'Plaintiff- or Defendant' experts),[118] over time, may lead to an inclination to advance facts which favour the particular party.[119] Repeated writing of expert-reports for litigation purposes

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[111] Gross op cit n23 at 1139.

[112] Malsch & Freckleton op cit n14 at 48.

[113] Australian Council of Professions *Dealing with Risk: Managing Expectations* (1996) at 24.

[114] BH Sheppard & N Vidmar 'Adversary pretrial procedures and testimonial evidence: Effects of lawyer's role and Machiavellianism' (1980) 39(2) *Journal of Personality & Social Psychology* 320-332; MH Bazerman, G Lowenstein & DA Moore 'Why good accountants do bad audits' (2002) 80 *Harvard Business Review* 97 at 98-99; LA Ponemon 'The objectivity of accountants' litigation support judgments' (1995) 70 *The Accounting Review* 467 at 484.

[115] J Sanders, in 'Science, law and the expert witness' (2009) 72(1) *Law and Contemporary Problems* 63 at 76 reports on an empirical study in respect of accounting, in which the identity of those instructing professional auditors was manipulated and led to biased effects.

[116] Gross op cit n23 at 1133.

[117] S Jasanoff *Science at the Bar* (1995) at 45.

[118] LM Friedman 'Expert testimony, its abuse and reformation' (1910) 19 *Yale Law Journal* 247 at 253; LW Myers 'The battle of the experts: A new approach to an old problem in medical testimony' (1965) 44 *Nebraska Law Review* 539 at 552-554.

[119] D Bernstein 'Expert witnesses, adversarial bias and the (partial) failure of the Daubert Revolution' (2008) 93 *Iowa Law Review* 451 at 457.

makes the expert's inclination known and therefore partisan selection is easy.[120] The next section considers bias from the vantage point of the expert witness.

3.4 Expert disdain for existing legal process

Deliberate and fraudulent misrepresentation by experts plays but a part in adversarial bias and many of the causes are incidental (and, inevitably, owing) to the method in which experts are employed in the adversarial system. Kubie argues that the adversarial system makes a mockery of honest and competent specialists;[121] in agreeing to give evidence, experts stand to have their expertise and credibility challenged.[122]

Experts are not necessarily intruders who disrupt the judicial search for the truth.[123] They are not self-invited; they are approached by a litigant's legal representative,[124] to assist in giving evidence, only to be attacked, criticized, suspected, disregarded, ridiculed and their evidence disputed in cross examination.[125] The vilification experts endure is not compatible with the serious attention experts pay to evidence.[126] Experts do not like being challenged by professionals outside their discipline.[127] Experts fear aggressive cross-examination and animadversion which does them an injustice.[128] This situation makes experts reluctant to testify,[129] and to have disdain for lawyers,[130] and is why some of the best experts, who have honourable instincts and high scientific standards, often look upon the witness box as a Golgotha.[131] They regard their expert-witness colleagues who engage in court work, as

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[120] Gross op cit n23 at 1132.

[121] LS Kubie 'The Ruby case: Who or what was on trial?' (1973) 1 *Journal of Psychiatry and Law* 475 at 477.

[122] C O'Boyle 'Leave it to the experts' (1998) 92(9) *Law Society of Ireland Gazette* 20 at 22; H O'Flaherty 'The expert witness and the courts' (1997) 3 *Medico-Legal Journal of Ireland* 3 at 6.

[123] Gross op cit n23 at 1114.

[124] Gross op cit n23 at 1115.

[125] K Menninoer *The Crime of Punishment* (1968) at 140.

[126] Gross op cit n23 at 1135.

[127] Malsch & Freckleton op cit n14 at 58.

[128] Washburn op cit n19 at 48.

[129] M Ruse 'Commentary: The academic as expert witness' (1986) Spring *Science, Technology and Human Values* 68 at 69.

[130] Gross op cit n23 at 1135.

[131] JH Wigmore *Evidence in Trials at Common Law* (1979) at § 563; ES Turner *Call the Doctor: A Social History of Medical Men* (1958) at 205; MS Guttmacher 'Problems faced by the impartial expert in court: The American view' (1961) 34(4) *Temple Law Quarterly* 369 at 369-370; CL Compere 'Unbiased medical evaluation' (1967)

financially hard pressed.[132] Testifying in court generally interferes with their work, wastes valuable time and subjects them to indignities.[133]

Experts dispute the condemnation of bias, arguing instead that the method of introducing expert opinion,[134] in legal fact-finding, should be condemned.[135] They ask apposite questions: How can the genuineness of opinion be maintained amid conscious gain or unconscious partisanship,[136] amid marketing and the need for pandering to potential clients?[137] How can experts inspire respect for honest opinion if such an opinion is formed after considering only one side of the case, pursuant on a private consultation with counsel and the litigant?[138] This critical view of party-introduced experts, in the adversarial system, is considered next.

3.5 Expert bias in adversarial and inquisitorial legal systems[139]

3.5.1 Adversarial system

Because expert bias is manifested mostly, but not exclusively, in an adversarial system,[140] it is important to understand the reasons. In an adversarial system, two equal and autonomous

National Medicolegal Symposium Proceedings 14 at 15; WJ Curran 'Uncertainty in prognosis of violent conduct: The Supreme Court lays down the law' (1984) 310 *Medical Intelligence* 1651 at 1652.

[132] SR Gerber 'Expert medical testimony and the medical expert' in O Schroeder (ed) *Physician in the Courtroom* (1957) at 65 & 72.

[133] H Moss 'The practicing physician in court' (1929) 15 *American Bar Association Journal* 497-502.

[134] Herschel op cit n90 at 572.

[135] T Broeders 'The role of forensic experts in an inquisitorial system' in PJ Koppen & SD Penrod (eds) *Adversarial versus Inquisitorial Justice: Psychological Perspectives on Criminal Justice Systems* (2002) at 246.

[136] EEH Griffith 'Personal narrative and an African-American perspective on medical ethics' (2005) 33(3) *Journal of the American Academy of Psychiatry and the Law* 371 at 380.

[137] EEH Griffith & M Baranoski 'Oral performance, identity and representation in forensic psychiatry' (2011) 39(3) *Journal of the American Academy of Psychiatry and the Law* 352 at 360-361.

[138] Herschel op cit n90 at 573-574.

[139] For an in-depth discussion of the differences between the two systems see GC Hazard Jr 'Discovery and the role of the judge in civil law jurisdictions' (1997) 73 *Notre Dame Law Review* 1017 at 1017-1020; J Dainow 'The civil law and the common law: Some points of comparison' (1966) 15 *American Journal of Comparative Law* 419 at 431-432; R Verkerk 'Comparative aspects of expert evidence in civil litigation' (2009) 13 *International Journal of Evidence & Proof* 167-197.

[140] G Edmond, JM Tangen, RA Searston & IE Dror 'Contextual bias and cross contamination in the forensic sciences: The corrosive implications for investigations, pleas, bargain trials and appeals' (2015) 14(1) *Law,*

adversaries resolve a dispute before a passive court.[141] A feature that strongly distinguishes adversarial from inquisitorial systems[142] is that litigants have control over the soliciting, investigating and gathering of evidence[143] (including expert evidence)[144] because litigants are deemed to have the greatest incentive to elicit evidence thoroughly.[145] In theory, the maximum available relevant evidence will be placed before the passive court.[146]

The axiomatic notion that the truth always emerges from a clash of opinions in the adversarial system is not grounded in empirical or heuristic research.[147] Litigants employ competent lawyers who remain in control and select the evidence to be used and discard the rest and litigants define the scope of issues[148] and neglect common cause or neutral data.[149] The passive court makes do with evidence as presented, the rest remains unknown to the court.[150] The adversarial system has drawbacks; evidence is duplicated, the system depends largely on the competence of attorneys and is dependent on the resources of litigants.[151] The system can be misused to cloud the truth by making evidence less accessible by distorting the evidence or making proof of facts impossible.[152]

Probability and Risk 1 at fn 103; JM Chin, M Lutsky & IE Dror 'The biases of experts: An empirical analysis of expert witness challenges' (2019) 42(4) *Manitoba Law Journal* 21 at 24-25 & 34.

[141] JF Nijboer 'Common law tradition in evidence scholarship observed from a continental perspective' (1993) 41(2) *American Journal of Comparative Law* 299 at 308.

[142] M Damaska 'Presentation of evidence and factfinding' (1975) 123 *University of Pennsylvania Law Review* 1083 at 1088.

[143] Gross op cit n23 at 1126.

[144] Malsch & Freckleton op cit n14 at 42.

[145] Gross op cit n23 at 1126.

[146] S Landsman *The Adversary System: A Description and Defense* (1984) at 45; SR Gross 'The American advantage: The value of inefficient litigation' (1987) 85 *Michigan Law Review* 734 at 742-743.

[147] Malsch & Freckleton op cit n14 at 57.

[148] Gross op cit n23 at 1126.

[149] Damaska op cit n80.

[150] ME Frankel *Partisan Justice* (1980) at 43. For a general discussion see, H Kötz 'The role of the judge in the court-room: The common law and civil law compared' (1987) 1 *TSAR* 35-43; G Edmond 'Bacon's chickens? Re-thinking law and science (and incriminating expert opinion evidence) in response to empirical evidence and legal principle' in JT Gleeson & RCA Higgins (eds) *Constituting Law: Legal Argument and Social Values* (2011) at 137.

[151] Gross op cit n23 at 1126.

[152] Kubie op cit n121 at 477.

Appazov alludes to the dichotomous nature of the adversarial trial; courts apply the same evidentiary rules to experts and to lay witnesses, despite expert evidence being exponentially in a different category to lay evidence.[153] The idea that a trial judge is well placed to detect expert bias is a fallacy.[154] Fact finders, trained in the adversarial system, inadvertently turn to entrenched methods in the adversarial system to evaluate the evidence that are based on the expert's demeanour, personality and rhetorical skills, to test the expert's credibility[155] and consider the probabilities of the evidence presented.[156]

It is unlikely that adversarial systems will discard these 'forensic-tools', especially for as long as experts are party introduced.[157] Although the tools have a place in lay witness's fact finding,[158] they are not as effective in assessing expert evidence. The more complex a question, the less the court can assess the evidence (using these conventional means) in an epistemic and sound fashion, a situation exacerbated by mutually destructive versions.[159] Section 2.7 considers the court's strategies in assessing and adjudicating matters involving complex expert evidence. Some of the conventional 'forensic-tools' in assessing expert evidence are scrutinised next, in the context of assessing expert evidence.

[153] A Appazov *Expert Evidence and International Criminal Justice* (2016) at 63.

[154] *Joyce v Yeomans* [1981] 1 WLR 549.

[155] Meintjes-van der Walt op cit n26 at 27. There is little profit in a demeanour which is vague, misleading and indefinable, see *S v Kelly* 1980 (3) SA 301 (A) at 308; *R v Lekota* 1947 (4) SA 258 (O) at 263; *Jackson v Jackson* 2002 (2) SA 303 (SCA) at 324; G Wellborn 'Demeanour' (1991) 76 *Cornell Law Review* 1075 at 1104; WH Gravett 'Spotting the liar in the witness box -How valuable is demeanour evidence really' (2018) 81 *Journal of Contemporary Roman-Dutch Law* 563 at 565.

[156] Hammelmann op cit n51 at 389.

[157] L Meintjes-van der Walt 'The proof of the pudding: The presentation and proof of expert evidence in South Africa' (2003) 47(1) *Journal of African Law* 88 at 101.

[158] Gross op cit n23 at 1134.

[159] K Shaw 'Comment: Expert evidence reliability- Time to grasp the nettle' (2011) 75(5) *The Journal of Criminal Law* 368 at 371; G Edmund & L Meintjes-van der Walt 'Blind justice, forensic science and the use of closed circuit television images as identification evidence in South Africa' (2014) 131 *SALJ* 109 at 141.

3.5.1.1 Cross examination

The centrepiece of the adversarial system is the viva voce trial.[160] Cross-examination in common law systems,[161] has strong symbolic and historical roots.[162] Great faith is placed in its capacity to expose mistaken, dishonest and unreliable evidence and to uncover inconsistencies and inaccuracy.[163] In South Africa, the right to cross-examine is considered the greatest legal engine in pursuit of the truth and the most important aspect of the right to confront;[164] a right protected by the Uniform Rules of court.[165] Although biased expert-witnesses, who may have made inconsistent averments in previous reports and articles, are vulnerable to cross examination[166] and may be exposed as hired-guns,[167] it is doubtful whether cross-examination provides sufficient safeguards in relation to expert evidence.[168]

Career experts are highly resistant to cross examination[169] aimed at ad hominem and collateral attacks on them.[170] Expert witnesses are experienced enough to be comfortable as witnesses and over time have perfected their performance.[171] Their position of authority is used

[160] P Delvin *The Judge* (1979) at 54; RH Mildred *The Expert Witness* (1982) at 122; EW Cleary (ed) *McCommick on Evidence* (1984) at para 19.

[161] RG Singer 'Forensic misconduct by federal prosecutors- and how it grew' (1968) 20 *Alabama Law Review* 227 268.

[162] SE Van der Merwe 'Regterlike inkorting van kruisondervraging: 'n Gemeenregterlike, statutêre en grondwetlike perspektief" (1997) 8 *Stellenbosch Law Review* 348 at 348; RH Underwood 'The limits of cross-examination' (1997) 21 *American Journal of Trial Advocacy* 113 at 113-118.

[163] *Daubert v Merrell Dow Pharmaceuticals* 509 US 579 (1993) at 596.

[164] JH Wigmore *A Treatise on the Anglo-American Systems of Evidence in Trials at Common Law* (1940) at 32; WM Best & SL Phipson *Best on Evidence: The Principles of the Law of Evidence with Elementary Rules for Conducting the Examination and Cross-Examination of Witnesses* (1922) at para 100; J Epstein 'The great engine that couldn't: Science, mistaken identifications, and the limits of cross-examination' (2007) 36 *Stetson Law Review* 727 at 727; FE Vandervort 'A search for the truth or trial by ordeal: When prosecutors cross-examine adolescents how should courts respond?' (2010) 16 *Widener Law Review* 335 at 335; *California v Green* 399 US (1970) 149 at 158.

[165] Uniform Rule 39(8).

[166] Gross op cit n23 at 1168.

[167] Gross op cit n23 at 1161.

[168] Law Commission of England and Wales *Expert Evidence in Criminal Proceedings in England and Wales* (2011) at paras 1.20 & 1.24.

[169] *R v DD* 2000 SCC 43 at para 54.

[170] Richmond op cit n80 at 487.

[171] Gross op cit n23 at 1187.

for its maximum effect and they are hard to discredit, because they may see the presentation of evidence as a game.[172] Their demeanour, personality and communication skill may outweigh their expert-discipline skill, knowledge or experience.[173] Cross examination can turn even an impartial expert into one that is partisan, as a defence or in response to vigorous cross examination.[174]

The adversarial system is not effective in conveying the accepted beliefs that reasonably pass for scientific truth because cross examination causes scepticism to prevail over consensus and distorts the scientific reality which the expert presents, thereby creating the impression of conflict where none exists. [175] In litigation, comparative discipline experts often are set up to be on opposing sides, creating an erroneous impression of a divided scientific community at large.[176] Although an expert witness may hold a view supported by only one percent of his peers, in court the minority view enjoys 50% support owing to the reduced expert sample.

Cross examination, by its very design, uses leading questions to lead the expert into a direction of providing specific responses, which assert more than the cross examiner asked and, unbeknown to the expert witness, are closely related to the questioner's hypothesis, rather than to the truth and which ultimately leads to the distortion of evidence.[177]

An empirical study based on practice in Israel, where a hybrid system applies, but which predominantly is adversarial, shows that cross examination of a court appointed expert had little effect on the court's willingness or unwillingness to accept the court's expert's opinion;[178]

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[172] Gross op cit n23 at 1175.

[173] *Abada v Gray* (1997) 40 BMLR 116.

[174] Hammelmann op cit n51 at 389 fn4.

[175] S Jasanoff 'What judges should know about the sociology of science' (1992) 32 *Jurimetrics Journal* 345 at 353.

[176] J Sanders 'From science to evidence: The testimony on causation in the Bendectin Cases' (1993) 46 *Stanford Law Review* 36 at 39-41.

[177] L Ellison 'The protection of vulnerable witnesses in court: An Anglo-Dutch comparison' (1999) 3 *International Journal of Evidence and Proof* 29 at 36; JD Lieberman, CA Carrell, TD Miethe & DA Krauss 'Gold versus platinum: Do jurors recognize the superiority and limitations of DNA evidence compared to other types of forensic evidence?' (2008) 14 *Psychology, Public Policy and the Law* 27 at 50.

[178] Perez op cit n75 at 100.

a finding that is in stark contrast to the belief that in an adversarial paradigm cross examination has an epistemic impact.[179]

3.5.1.2 Witness demeanour

The suggestion that the demeanour of a witness (even lay witnesses) is useful is not supported by evidence.[180] This notion, that demeanour is equal to credibility, offends the notion that the merits of a claim lie in its ability to be independently assessed free of personal attributes.[181] The risk of misinterpretation simply is too high in relying on demeanour,[182] which may distort the truth, rather than enhance judgements about credibility.[183] Despite these concerns, there is an ongoing reliance on witness demeanour in assessing evidence.[184] Relying on an expert witness's demeanour to establish credibility is unreliable,[185] not useful[186] but dangerous,[187] because it has more to do with the authority exerted by the expert, rhetorical skill and personality[188] and less with respect to the court's ability to appreciate critically the expert's conclusions.[189]

The emphasis on demeanour allows unscientific attributes to be factored into decisions on the probative value of expert evidence.[190] Perceived qualities such as verbal fluency, ease of manner and humility and stellar credentials in the abstract may hold true but only when

[179] Perez op cit n75 at 102.

[180] Wellborn op cit n155 at 1104.

[181] RK Merton 'The normative structure of science' in NW Storer (ed) *The Sociology of Science* (1973) at 267-278.

[182] M Stone 'Instant lie detection? Demeanour and credibility in criminal trials' (1991) *Criminal Law Review* 827 at 827.

[183] Wellborn op cit n155 at 1104.

[184] T Ward 'Psychiatric evidence and judicial fact finding' (1999) 3 *International Journal of Evidence & Proof* 180 at 181.

[185] *State v Cressey* 628 A2d 696 700-701 (NH 1993).

[186] UK Law Commission, Consultation Paper 138 *Evidence in Criminal Proceedings, Hearsay and Related Topics, Consultation* (1995) at para 6.24.

[187] DH Kaye, DE Bernstein & J Mnookin *The New Wigmore: A Treatise on Evidence* (2005) at 329-346; Note 'The doctor in court: Impartial medical testimony' (1967) 40 *Southern California Law Review* 728 at 728-729.

[188] M Selvin & L Picus *The Debate Over Jury Performance: Observations From a Recent Asbestos Case* (1987) at 27-28.

[189] M Redmayne *Expert Evidence and Criminal Justice* (2001) at 109.

[190] Such as withstanding cross examination, see Meintjes-van der Walt op cit n16 at 191.

experts are selected randomly and are free from bias, however, whatever small value is encapsulated in demeanour, it is neutralised by party selection.[191]

3.5.2 Inquisitorial system

An inquisitorial system,[192] a free evidence system,[193] is based on the free appreciation of evidence,[194] where judges have wide-ranging and active[195] managerial power in soliciting and evaluating evidence,[196] to inquire and search for the truth.[197] An inquisitorial trial is relieved of having intricate admissibility rules,[198] it is more a trial of inquiry and less one of strength.[199] The adversarial system focuses on self-interest, the inquisitorial on public interest and aims to seek the truth and find exculpatory evidence.[200]

In inquisitorial courts, there is faith in the integrity of the state, which is deemed best equipped with the capacity to conduct an objective investigation into the truth, unprompted by partisan pressure from those with an interest to conceal the truth, individual self-interests and untrammelled by equality of arms.[201] In inquisitorial systems, courts place substantial trust in 'their' experts.[202] Unlike the adversarial system, which focuses on admissibility rules and on

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[191] Gross op cit n23 at 1134.

[192] South African Law Commission Report (Project 73) *A More Inquisitorial Approach to Criminal Procedure* (2002).

[193] JD Jackson 'Analysing the new evidence scholarship' (1996) 16 *Oxford Journal of Legal Studies* 309 at 324; M Damaska 'Free proof and its detractors' (1995) 43 *American Journal of Comparative Law* 343 at 348-352.

[194] W Kralik *Introduction to the Continental Judicial Organization and Civil Procedure* (1963) at 6-7.

[195] Australian Law Reform Commission, Report 89 *Managing Justice: A Review of the Federal Civil Justice System* (1999) at para 1.120; M Damaska *The Faces of Justice and State Authority: A Comparative Approach to Legal Process* (1986) at 3.

[196] Verkerk op cit n139 at 169.

[197] PJ Schwikkard & SE Van der Merwe *Principles of Evidence* 4 ed (2016) at 8.

[198] L Meintjes-van der Walt 'A few plain rules? A comparative perspective on exclusionary rules of expert evidence in South Africa' (2001) 64(2) *THRHR* 236 at 237.

[199] Delvin op cit n160 at 54.

[200] N Jörg, S Field & C Brants 'Are inquisitorial and adversarial systems converging?' in HC Fennell et al (eds) *Criminal Justice in Europe: A Comparative Study* (1995) at 49.

[201] The concept was explained by the European Court of Human Rights in *Steel and Morris v United Kingdom* (15 February 2005). A litigant should have the same opportunity to present a case as his/her opponent, see B Swart 'The European Convention as an invigorator of domestic law in the Netherlands' (1999) 1 *Journal of Law and Society* 38 at 43.

[202] JS Cecil & TE Willing *Court-Appointed Experts: Defining the Role of Experts Appointed Under the Federal 706* (1993) at 13.

resolving the dispute before the court on the evidence presented by the parties, the inquisitorial system mainly is concerned with the search for the truth.[203]

Civil law courts, such as in the Netherlands,[204] use experts as advisors to the court and not as witnesses.[205] The judge is not a referee but investigates the merits of a case, with legal representatives taking the role of assistants rather than opponents.[206] Little emphasis is placed on viva voce evidence as this is viewed as an attempt to tailor evidence,[207] or to corner a witness, and where even a truthful witness can have the evidence twisted to contradict themselves.[208] A pronounced emphasis is placed on documentary expert evidence,[209] that is based on its primacy.[210] The characteristics of the inquisitorial system make it less conducive to demonstrate traits of adversarial bias.

3.5.3 South African hybrid system

There is a danger in labeling justice systems adversarial or inquisitorial.[211] Most judicial systems contain both accusatorial and inquisitorial elements.[212] In both systems, the judge plays a pivotal role in the management of the evidentiary process.[213] More recently, there is a shift in both systems, towards the imposition of stronger control by courts over civil litigation

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[203] H Mannheim 'Trial by jury in modem continental criminal law' (1937) 53 *Law Quarterly Review* 388 at 389.

[204] The Dutch Code of Civil Procedure, art 194(2).

[205] JH Langbein 'The German advantage in civil procedure' (1985) 52 *University of Chicago Law Review* 823 at 835-841; M Ploscowe 'The expert witness in criminal cases in France, Germany and Italy' (1935) 2 *Law & Contemporary Problems* 504 at 504-505.

[206] Swart op cit n201 at 51.

[207] L Meintjes-van der Walt 'The presentation of expert evidence at trials in South Africa, the Netherlands and England and Wales' (2001) 12(2) *Stellenbosch Law Review* 283 at 286.

[208] Meintjes-van der Walt op cit n16 at 42.

[209] Meintjes-van der Walt op cit n207 at 286.

[210] T Honoré 'The primacy of oral evidence' in CF Tapper (ed) *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (1981) at 172.

[211] AS Goldstein 'Reflections on two models: Inquisitorial themes in American criminal procedure' (1974) 26(5) *Stanford Law Review* 1009 at 1019; U Mattei 'Three patterns of law: Taxonomy and change in the world's legal systems' (1997) 45 *The American Journal of Comparative Law* 5 at 38.

[212] SE Van der Merwe 'Accusatorial and inquisitorial procedures and restricted and free systems of evidence' in AJGN Sanders (ed) *South African in Need of Law Reform* (1981) at 141; B Markesinis 'Learning from Europe and learning in Europe' in B Markesinis (ed) *The Gradual Convergence: Foreign Ideas, Foreign Influences, and English Law on the Eve of the 21st Century* (1994) at 30; J Jolowicz 'The Woolf report and the adversary system' (1996) 15 *Civil Justice Quarterly* 198 at 200.

[213] Perez op cit n75 at 76.

process.[214] South Africa, as is the case in most systems,[215] employs a hybrid legal system.[216] Despite having a few weak inquisitorial features, the South African legal system displays adversarial bias, even if South African judges are legally qualified.[217]

3.6 Adversarial versus inquisitorial: The search for the truth

Twining describes the adversarial trial as a forensic lottery or a sporting contest.[218] Jackson expresses it as offering a 'lawyerised' version of the truth.[219] Gross says the adversarial system opens up an unparalleled opportunity for manipulation and bias.[220] The adversarial system seems to be incompatible with the view that the chief function of the court is to seek the truth and is not merely to decide which party produced the best evidence and should succeed on a balance of probabilities.[221] The pursuit of truth is (or ought to be) indispensable for the law to function in inquisitorial and adversarial legal systems.[222] To achieve this end, courts turn to experts to help them establish facts truthfully.[223]

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[214] A Zuckerman 'Justice in crisis: Comparative dimensions of civil procedure' in A Zuckerman (ed) *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (1999) at Ch 1.

[215] Van der Merwe op cit n212 at 141.

[216] HQR Hahlo & E Kahn *The South African Legal System and its Background* (1968) at 578-596; AJGM Sanders 'The characteristic features of South African law' (1981) 14(3) *The Comparative and International Law Journal of Southern Africa* 328 at 328-329; B Beinart 'The English legal contribution in South Africa: The interaction of civil and common law' (1981) 7 *Acta Juridica* 7 at 8-9.

[217] Meintjes-van der Walt op cit n157 at 89. Also see section 1.1, for South African case law dealing with expert bias.

[218] W Twining 'Some scepticism about some scepticisms' (1984) 11(2) *Journal of Law & Society* 137 at 138.

[219] Jackson op cit n193.

[220] Gross op cit n23 at 1117.

[221] W Zeidler 'Evaluation of the adversary system: A comparison, some remarks of the investigatory system of procedure' (1981) 55 *Australian Law Journal* 390 at 395.

[222] AC Spigelman 'The truth and the law- The Sir Maurice Byers address' (2011) Winter *Bar News* 99 at 100; HM Freedman 'Judge Frankel's search for truth' (1975) 123 *University of Pennsylvania Law Review* 1060 at 1065; C Menkel-Meadow 'The trouble with the adversary system in a postmodern, multicultural world' (1996) 38 *William & Mary Law Review* 5 at 13-14; ME Frankel 'The search for truth: An umpireal view' (1975) 123(5) *University of Pennsylvania Law Review* 1031 at 1035; JA Jolowicz 'Adversarial and inquisitorial models of civil procedure' (2003) 52 *International & Comparative Law Quarterly* 281 at 291.

[223] Verkerk op cit n139 at 169.

Truth has intrinsic values that are connected to ideals commonly associated with law (such as justice, objectivity and the absence of arbitrariness)[224] and instrumental values.[225] Instrumental truth refers to the factual truth that is necessary for the law to achieve efficient results.[226] Making findings on an incorrect factual basis is inconsistent with the notion of corrective justice.[227]

But 'truth' in adversarial and inquisitorial systems has different meanings: the adversarial judge searches for the formal truth and the inquisitorial judge for the material truth.[228] This distinction has been widely criticised.[229] The adversarial trial cannot be seen as a pure fact-finding endeavour as the trial does not concern itself with the truth of all facts but only those placed in dispute by the parties.[230]The next section considers strategies employed by courts to help them assess complex expert evidence to find the 'truth'.

3.7 Assessing expert opinion: Epistemology, heuristics and higher order evidence?

The law exhibits an ambivalence.[231] On one hand, the law yearns for a fact finder who can provide definitive answers to complex issues, on the other hand, legal practitioners in the adversarial system cling to control.[232] Expert witnesses with special skill, training and experience are relied on when an issue falls outside the court's knowledge,[233] but the court is not bound by the expert's opinion and remains the ultimate fact finder.[234] It is precisely because the court lacks knowledge, experience and skill that the court is in a compromised position to

[224] S Haack in 'Of truth, in science and in law' (2008) 73 *Brooklyn Law Review* 563 at 564 says: 'Truth is surely relevant to legal proceedings, for we want, not simply resolutions, but just resolutions; and substantial justice requires factual truth'. Also see HL Ho *A Philosophy of Evidence Law: Justice in the Search for Truth* (2008) at 51.

[225] Perez op cit n75 at 82.

[226] Perez op cit n75 at 83.

[227] EJ Weinrib 'Aristotle's forms of justice' (1989) 2(3) *Ratio Juris* 211 218.

[228] CR Snyman 'The accusatorial and inquisitorial approaches to criminal procedure: Some points of comparison between South African and Continental systems' (1975) 8(1) *Comparative and International Law of Southern Africa* 100 at 103.

[229] Snyman op cit n228 at 108.

[230] D Derham 'Truth and the common law' (1963) 5 U*niversity of Malaya Law Review* 338 at 339-340; D Napley 'Lawyers and statisticians' (1982) 145(4) *Journal of the Royal Statistical Society* 422 at 422.

[231] A shotgun marriage, see CAJ Coady *Testimony: A Philosophical Study* (1977) at 277.

[232] P Allridge 'Forensic science and expert evidence' (1994) *Journal of Law and Society* 136 at 138-139.

[233] *Menday v Protea Assurance* 1976 (1) SA 565 (E) at 569.

[234] *S v M* 1991 (1) SACR 91 (T) at 99.

evaluate and comprehend the intricacies of the expert's opinion.[235] Hand says the fact finder 'will do no better with the so-called testimony of experts than without, except where it is unanimous'.[236] As discussed in section 3.5, conventional (and mostly adversarial) means, such as cross examination of expert witnesses and demeanour in the witness box, as ways to assess expert opinion, are not really helpful in assessing complex expert opinion.[237] This section considers how courts go about making complex decisions, invoking expert evidence and whether these methods are competent to meet contemporary requirements.

3.7.1 Methods to resolve conflicting expert opinion: Epistemology or heuristics

In general, the ways of reaching decisions rely on applying statistics, logic or heuristics, mental tools which are not deemed of equal value.[238] Courts can resolve conflicting opinion in one of two ways which have inherently different foundations.[239] The first-order strategy (the gatekeeping or epistemological strategy), is a systematic assessment of the epistemological merits of the testimony and requires the court to analyse the quality of the expert's reasoning itself, whereas the second-order strategy (the fact-finding or heuristics strategy), draws on a second-order heuristics,[240] or pragmatic rule-of-thumb mechanisms, which do not consider the quality of the expert's reasoning itself.[241] Perez uses a basketball analogy, specifically conflicting referee decisions, to explain the difference. One way to resolve the referee dispute is for the referees to look at what factually occurred in the game, which will inform the refereeing decision (an epistemologically correct decision).[242] In a medical malpractice dispute, this strategy would call on the court to review closely the experts' opinion, the epistemic value

[235] DL Faigman, E Porter & MJ Saks 'Check your crystal ball at the courthouse door, please. Exploring the past, understanding the present and worrying about the future of scientific evidence' (1994) 15 *Cardozo Law Review* 1799 at 1801.

[236] L Hand 'Historical and practical considerations regarding expert testimony' (1901) 15 *Harvard Law Review* 40 at 56.

[237] Meintjes-van der Walt op cit n16 at 6.

[238] G Gigerenzer & W Gaissmaier 'Heuristic decision making' (2011) 62 *Annual Review of Psychology* 451 at 452.

[239] Perez op cit n75 at 78.

[240] A conscious or unconscious cognitive process, that is efficient, but which disregards part of the information as a strategy in making decisions faster, frugally and more accurately than other complex methods, see Gigerenzer & Gaissmaier op cit n238 at 454.

[241] Perez op cit n75 at 78.

[242] Perez op cit n75 at 78.

and the medical literature on which they rely (along with possible biases) and the existing accepted medical practice in order to adjudicate the dispute.[243] But this rationality-approach requires a court to be cognizant of all relevant scientific variables, their associated consequences or implications and the probabilities in a predictable world without surprises.[244] Because courts lack these scarce attributes, the first order epistemological approach is not regularly invoked.

The second and more pragmatic way to solve the basketball-referee-conflict, is a jump ball between two teams (a second-order indicator).[245] A practical example of a jump-ball strategy is referring an expert dispute to a third party or a meta-expert (expert's expert) to make the decision, but this requires the judge to select the right meta-expert.[246]

3.7.2 Following the heuristics model

Due to cognitive capacity limitations courts may be prevented from employing epistemological approaches to decision making and mostly resort to heuristics.[247] Although not necessarily so,[248] it is generally accepted that heuristics allow for less effort at the cost of accuracy.[249] The second order strategy of employing heuristics, to assess opposing expert opinion, is divided into two further options:

i. A heuristic strategy that invokes higher order evidence[250] or evidence about the existence, merits or the significance of a body of evidence which indirectly relates to the epistemic questions of the expert opinion.[251] The court may resolve the dispute

[243] Perez op cit n75 at 78.

[244] HA Simon 'Rational decision making in business organization' (1979) 69 *American Economics Review* 493 at 500; A Tversky & D Kahneman 'Judgement under uncertainty: Heuristics and biases' (1974) 185 *Science* 1124 at 1974.

[245] Perez op cit n75 at 78.

[246] Perez op cit n75 at 79.

[247] There is a belief that courts have an ability to assess expert evidence epistemically, see Sonenshein & Fitzpatrick op cit n105 at 36-45.

[248] Gigerenzer & Gaissmaier op cit n238 at 452-453 & 457.

[249] JW Payne, JR Bettman & EJ Johnson *The Adaptive Decision Maker* (1993) at 21; AK Shah & DM Oppenheimer 'Heuristics made easy: An effort-reduction framework' (2008) 137 *Psychological Bulletin* 207 at 207.

[250] R Feldman 'Evidentialism, higher-order evidence and disagreement' (2009) 6 *Episteme* 294 at 304.

[251] Perez op cit n75 at 79.

using indicators, such as the opposing experts' comparative reputations,[252] which are dependent on the experts' ability to form strong arguments.[253]

ii. A pure jump ball strategy.[254] The court resorts to second order indicators to choose one expert's opinion over the next, such as race, age, gender, attractiveness and rhetorical skills with no link to the epistemological value.[255]

Courts often turn to irrelevant proxies for the truth,[256] and rely on pure jump-ball strategies such as measuring the reliability and the validity of experts' opinion by considering attributes such as the expert's demeanour, which generally are not useful[257] and are not supported by evidence,[258] where the risk of misinterpretation is high.[259]

Despite heuristics not being epistemically robust, courts resort to them for numerous reasons:[260]

i. To economize on cognitive costs which are required for an in-depth evaluation of the expert opinion.

ii. Courts face institutional pressures such as high caseloads which make shortcuts attractive. The courts' reliance on heuristics is a reaction to individual constraints and does not necessarily heed what is optimal in law or dispute adjudication or what is expected of a judge from a normative perspective.[261] An

[252] MB Kovera & BD McAuliff 'The effects of peer review and evidence quality on judge evaluations of psychological science: Are judges effective gatekeepers?' (2000) 85 *Journal of Applied Psychology* 574 at 575.

[253] Perez op cit n75 at 79.

[254] Which can relate to how the court chooses between mutually exclusive opposing experts or how to evaluate the court-appointed expert opinion, see Perez op cit n75 at fn 141.

[255] CT Robertson 'Blind expertise' (2010) 85 *New York University Law Review* 174 at 192; G Enosh & T Bayer-Topilsky 'Reasoning and bias: Heuristics in safety assessment and placement decisions for children at risk' (2015) 46(6) *The British Journal of Social Work* 1771 at 1773-1775.

[256] N Vidmar *Medical Malpractice and the American Jury* (1997) at 172-173.

[257] Meintjes-van der Walt op cit n157 at 89; Law Commission England & Wales, Consultation Paper 138 *Evidence in Criminal Proceedings, Hearsay and Related Topics* (1995) at para 6.24.

[258] Non-verbal behaviour is questionable to determine veracity, see OG Wellborn 'Demeanor' (1991) 76 *Cornell Law Review* 1075 at 1104.

[259] Stone op cit n182 at 827.

[260] Perez op cit n75 at 104.

[261] Perez op cit n75 at 79-80.

example, in the United States of America, judges of appeal are reluctant to interfere with matters of fact.[262]

iii. When courts follow the mainstream approach they are less exposed to critique by higher courts.

iv. Heuristics may be a court's response to the strategic dynamics of litigation and are employed by courts owing to their knowledge that experts are influenced by their instructing litigant, which causes the courts to lose faith in their abilities.[263]

Heuristics creates a self-supporting dynamic for the court.[264] When courts are confronted with mutually opposing party-introduced experts, [265] and resort to the heuristic in the form of court-appointed experts,[266] the court generally adopts the opinion of the court-appointed expert.[267] This is a rule-of-thumb or an institutional mechanism, employed by the court as an alternative to resorting to epistemic evaluation of the evidence.[268] Another heuristic, in personal injury matters, is for the court to resort to the average quantification of damages between the parties' experts.[269]

It has to be decided whether a first order epistemological approach should be followed by the court when confronted with mutually opposing expert opinion or the easier and readily ascertainable fact-finding second order which draws on higher order evidence.[270] To answer

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[262] The United States of American federal judicial system, see SM Bainbridge & GM Gulati 'How do judges maximize? (The same way everybody else does-boundedly): Rules of thumb in securities fraud opinions' (2002) 51 *Emory Law Journal* 83 at 85-86; WM Richman & WL Reynolds *Injustice on Appeal: The United States Courts of Appeals in Crisis* (2013) at 3. In South Africa, the appeal court, only in exceptional cases, will interfere with the trial court's factual findings, see *S v Francis* 1991 (1) SACR 198 (A) at 204c-e; *R v Dhlumayo* 1948 (2) SA 677 (A) at 705-706; *S v Hadebe* 1998 (1) SACR 422 (SCA) at 426a-c.

[263] Perez op cit n75 at 105.

[264] Perez op cit n75 at 105.

[265] The courts appointed experts, in a significantly higher number of delictual cases, where the controversy was high (85% of these cases), compared to 31% where the controversy was low. A great disparity in expert opinion encourages courts to appoint experts, see JS Cecil & TE Willging 'Court-appointed experts' in Federal Judicial Centre (ed) *Reference Manual on Scientific Evidence* (1994) at 542.

[266] Perez op cit n75 at 102.

[267] Which an Israeli court can do, see Regulation 127 of the Civil Procedure Regulations 1984.

[268] Perez op cit n75 at 94.

[269] Which occurred in 48% of all relevant matters, (where the court did not appoint experts). In another 42%, the court's order was less than 56% of the average between the Plaintiff and Defendant, see Perez op cit n75 at 98.

[270] Perez op cit n75 at 79.

this first question one must ask another: To what extend can a second order approach, drawing on higher order techniques, produce conclusions which are the truth?[271]

3.7.3 Can a heuristic approach produce the truth?

Perez hypothesizes that court's generally resort to a variety of rule-of-thumb heuristics drawing on higher-order evidence and jump-ball heuristics in resolving disputes, which either supplement or replace in-depth assessment of the evidence.[272] But the question which begs an answer is how reliable are heuristics when employed by courts to facilitate decision making, amid information overload or when considering the court's inherent inability to resolve complex problems falling outside the expertise of the court?[273]

Heuristics, as a decision-making aid, has value and in some circumstances can outperform calculations and optimize reasoning,[274] as Gigerenzer demonstrates through the ability of a business using a computer to predict if a customer will return to a store.[275]

The value of heuristics in this context lies in the fast and frugal heuristics which enable fact finders to solve complex decisions, with little computation and little information, because the single most valid cue which discriminates between opposing views only is considered and all others are ignored.[276] But in the context of judicial decision making the first problem that plagues the ability of heuristics to produce the truth is that the fast and frugal heuristics may not provide a model that is universally applicable as a decision-making strategy.[277]

A central characteristic of heuristics, as a decision-making aid, is a dependence on an ecological fit between the heuristic and the environment (either physically or socially), in which it will be involved.[278] Perez alludes to a further problem with Gigerenzer's 'environmental fit' model; that it does not address the question of how the heuristics that best

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[271] Perez op cit n75 at 79.

[272] Perez op cit n75 at 80.

[273] Perez op cit n75 at 89.

[274] G Gigerenzer 'Why heuristics work*'* (2008) 3 *Perspective on Psychological Science* 20 at 21-23; H Brighton & G Gigerenzer 'Homo heuristicus: Less-is-more effects in adaptive cognition' (2012) 19(4) *Malays Journal of Medical Science* 6 at 6; JN Marewski & G Gigerenzer 'Heuristic decision making in medicine' (2012) 14(1) *Dialogues Clinical Neuroscience* 77 at 78.

[275] Gigerenzer & Gaissmaier op cit n238 at 452-455.

[276] Perez op cit n75 at 89.

[277] Gigerenzer & Gaissmaier op cit n238.

[278] Perez op cit n75 at 89.

fit the environment, is selected. Perez submits that a tempting solution is to answer this question with the employment of heuristics,[279] but this may lead to an infinite regress,[280] which can only be prevented by supplementing Gigerenzer's doctrine with meta-cognitive[281] principles.[282]

Perez notes that whatever the court's motives in relying on heuristics, it does not enhance the goals of law if the chosen heuristic is not epistemologically robust.[283] There is no point in delivering expeditious outcomes in matters, if justice is not served and which may lead to an aggregated deterrence when cases are associated with a higher error rate.[284] People may lose faith in the judicial system where justice is not done and is not seen to be done.[285]

Perez, in an empirical study looking at a few heuristics which courts do rely on, found that it is doubtful whether heuristics are optimal in resolving legal disputes such as personal injury disputes.[286] Two heuristics are considered; resorting to court experts and averaging opinions. Resorting to court experts as a heuristic has the following problems:

i. The integrity of the court's expert is not beyond question owing to the expert's continuous work for litigants beyond court appointments and his/her opinion can be distorted by future hiring considerations.[287]

[279] Perez op cit n75 at 90.

[280] RP Cooper 'Simple heuristics could make us smart: But which heuristics do we apply when?' (2000) 23(5) *Behavioural and Brain Science* 746 at 746-747. A regress formula is 'recursive when it can be applied to a starting point to get a certain result, and then re-applied to that result to get a further result, and so on', see C Granton 'What is an infinite regress argument' (1997) 18 *Informal Logic* 203 at 207.

[281] Cognitive strategies regarding the awareness of a person's knowledge, allowing a person to use prior knowledge to comprehend and to manipulate cognitive processes and to comprehend when and where to employ a strategy for problem solving, and how and why such a strategy is to be employed, and subsequently to reflect on and evaluate existing results and to modify one's approach as required by the circumstances, see JH Flavell 'Metacognitive aspects of problem solving' in LB Resnick (ed) *The Nature of Intelligence* (1976) at 231-236.

[282] A Feeney 'Simple heuristics: From one infinite regress to another?' (2000) 23 *Behavioural and Brain Science* 749 at 750; J Sobel 'Can we trust social capital?' (2002) 40 *Journal of Economic Literature* 139 at 146.

[283] Perez op cit n75 at 104.

[284] Perez op cit n75 at 105.

[285] D Meyerson 'Why should justice be seen to be done?' (2015) 34(1) *Criminal Justice Ethics* 64 at 72.

[286] Perez op cit n75 at 103.

[287] Perez op cit n75 at 103.

ii. The expert will be selected based on the expert's social connections and court bureaucracies and not on professional criteria, which may drastically decrease the justification for deferring to a court expert.[288]

iii. The court expert is not free from motivated reasoning bias,[289] for example, an expert with a social justice inclination may have a different opinion from one with a liberal-capitalist viewpoint.[290]

Because of these contentions, resorting to court experts is not epistemically justified unless one can guarantee the expert's professional credentials and integrity.[291]

Averaging the opinions as a heuristic similarly is plagued by complications. Truth approximating is only viable if the court can assume expert opinions are determined by independent discretion and are an honest opinion.[292] Even if one accepts that expert opinions are honest, not subordinated or compelled to align with the strategic needs of those instructing them, averaging makes sense only if the experts are equally informed and have similar expertise.[293] When experts have disparate reputations, it is less obvious how to treat their opinions (if commission bias is discounted) and it may make sense to resort to a pro rata weight attachment based on comparative reputations and academic credentials.[294]

Courts are usually oblivious to the intricacies of expert averaging, but as a strategy, averaging makes sense to the court and the court resorts to this strategy on the basis that the

[288] Perez op cit n75 at 103.

[289] Perez op cit n75 at 103.

[290] AL College, B Hunter, LD Bunkall & EB Holmes 'Impairment rating ambiguity in the United States: The Utah Impairment Guides for calculating workers' compensation impairments' (2009) 24 *Journal of Korean Medical Science* at S232-S233.

[291] Perez op cit n75 at 103.

[292] Perez op cit n75 at 104. This is the common expectation in most legal systems, see *Meadow v General Medical Council* [2007] 1 All ER 1; J Sanders 'Expert witness ethics' (2007) 76 *Fordham Law Review* 1539 at 1557-1561; Civil Justice Council 'Protocol for the instruction of experts to give evidence in civil claims' (2005) 11 *Clinical Risk* 232 at 233.

[293] Perez op cit n75 at 104. For a critical analysis of the split-the-difference approach see T Kelly 'Peer disagreement and higher order evidence' in R Feldman & T Warfield (eds) *Disagreement* (2010) at 14.

[294] Perez op cit n75 at 104.

expert's opinion does not limit the court's discretion and on the basis that the strategy is a competent one in law.[295]

It seems unlikely that the existing method of employing experts in the adversarial system can achieve the truth as contemplated by the discussion in section 3.6. It is the 'whole truth' which is important not only for adjudicating disputes but for the right to a fair trial, especially for the indigent.

3.8 Conclusion

This chapter considered three main strands which explain the manifestation of adversarial bias. They are: (i) The generally accepted root causes of bias dealt with in section 3.3, (ii) the role that the expert takes in the adversarial legal system that corresponds to that of a lay witness and (iii) the court's inherent inability to assess complex evidence. If it is accepted that courts are in a weak position to assess expert opinion and that the existing method of adversarial party introduction of expert witnesses leads to expert bias and other contentious issues, such as a failure to produce the material truth, then law reform is apposite and in the interest of justice. The final chapter in the thesis proposes law reform. Any reform ought to address all three main strands set out in this chapter if it is to be effective.

Some opinion in the Western world deem, politically and ideologically, the adversarial system as superior to the inquisitorial.[296] Kubie notes that opposition to a more inquisitorial approach is premised and grows partly out of habituation and partly out of fear of losing social and judicial gains, but sight must not be lost of the desire to protect one's own economic interest, whether it is driven by idealistic forces or by self-centred motives, and notwithstanding the social gain that may go with such a change.[297]

Damaska doubts whether the adversarial system is competent, in the ongoing climatic developments, to facilitate decision making in an increasingly complex scientific milieu.[298] It may not be helpful to seek solutions that conform to adversarial or inquisitorial notions,

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[295] Averaging may be more of a reasonable truth-approximating method if one considers the aggregate of cases as opposed to a singular matter; this possibility, however, offends the notion that a court must do justice to the parties, see Perez op cit n75 at 104 & fn 122.

[296] Swart op cit n201 at 53.

[297] Kubie op cit n121 at 478.

[298] Damaska op cit n80 at 145.

countries rather should consider solutions which conform to its social, legal, economic and political milieu.[299]

The next chapter considers modern-day law that governs expert opinion evidence and the vexed issue of biased experts. The existing rules and procedure must be considered comprehensively so that the foundation of the problem of expert bias can be fully understood and only then can viable solutions to the expert-bias problem be considered, against the backdrop of the South African milieu.

[299] Australian Law Reform Commission op cit n195 at para 1.112: '…an adversarial-non adversarial construct was too elusive a basis on which to analyse problems or to formulate change to the system'.

CHAPTER 4

THE SOUTH AFRICAN LAW ON EXPERT OPINION EVIDENCE

4.1 Introduction

Once, expert witnesses were infrequent visitors to court but now appear daily.[1] Litigation has grown unprecedently over the last seven decades because the natural, physical, social and commercial sciences and technical knowledge have increased exponentially[2] and in complexity.[3] An entire industry of experts now sell their skills, knowledge and experience to litigants.[4]

The growth in expert witnesses in an adversarial-accusatorial system creates problems, including partisan experts,[5] as a result of litigants' and experts' failure to observe the basic principles regarding the role, relevance and value of expert evidence.[6] These problems impact negatively on the duties and functions of the courts and are exacerbated by the courts' failure to consistently apply the basic principles underlying the admission of party-appointed experts.[7] This chapter deals with the current law of expert opinion evidence in the context of adversarial expert bias.

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[1] *Twine v Naidoo* [2018] 1 All SA 297 (GJ) at para 18.

[2] The 'scientific sea' is deep and very wide, see DL Faigman 'Mapping the labyrinth of scientific evidence' (1994-1995) 46 *Hastings Law Journal* 555 at 579.

[3] L Meintjes-van der Walt 'Decision-maker's dilemma: Evaluating expert evidence' (2000) 13(3) *SACJ* 319 at 321. Scientific data relies on statistical reasoning, which is counter intuitive and difficult to comprehend by non-scientists, see K Foster & P Huber J*udging Science* (1997) at 250. Certain kinds of evidence pose problems for lay courts because of their exceptional complexity, see I Freckleton, P Reddy & H Selby *Australian Judicial Perspectives in Expert Evidence: An Empirical Study* (1999) at 38.

[4] Especially in personal injury law, see *Ndlovu v RAF* 2014 (1) SA 415 (GSJ) at 438.

[5] L Meintjes-van der Walt *Expert Evidence in the Criminal Justice Process: A Comparative Perspective* (2001) at 134.

[6] *Twine* supra n1 at para 18.

[7] *Twine* supra n1 at para 18.

4.2 Admissibility of expert opinion evidence

4.2.1 Irrelevant and inadmissible expert opinion evidence

Witnesses generally may not inform the court of inferences that they draw from perceived facts.[8] It is the court's duty to draw inferences (which is different from conjecture and speculation) from the established facts.[9] Any issue that the court can decide without opinion evidence, generally makes a witness's opinion,[10] in relation to that issue, irrelevant,[11] superfluous,[12] unhelpful,[13] supererogatory,[14] confusing[15] and improper.[16] Courts must remain mindful of their own

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[8] *Holtzhauzen v Roodt* 1997 (4) SA 766 (W) at 771; DT Zeffertt in '*Opinion evidence: Recent case*' (1976) 93 *SALJ* 275 at 277.

[9] *Gentiruco AG v Firestone SA* 1972 (1) SA (A) at 616-618; *S v Rethemeyer* 1971 (2) SA 567 (SWA) at 569; *S v Harris* 1965 (2) SA 340 (A) at 365; *S v September* 1996 (1) SACR 325 (A) at 328.

[10] C Theophilopoulos et al *Fundamental Principles of Civil Procedure* (2006) at 283; PJ Schwikkard & SE Van der Merwe *Principles of Evidence* 4ed (2016) at 92 notes that it is not easy to differentiate between fact and opinion. B Thayer in *A Preliminary Treatise on Evidence at the Common Law* (1898) at 524 submits: 'in a sense all testimony to matter of fact is opinion evidence; ie, it is a conclusion formed from phenomena and mental impressions'. Also see P Murphy *A Practical Approach to Evidence* 10ed (2008) at 386; Z Cowen & PB Carter *Essays on the Law of Evidence* (1956) at 166; *Herbst v R* 1925 77 (SWA) at 80; RJ Allen & JS Miller 'The common-law theory of experts: deference or education' in JF Nijboer et al (eds) *Forensic Expertise and the Law of Evidence* (1993) at 11; T Hodgkinson *Expert Evidence: Law and Practice* (1990) at 18.

[11] *S v H* 1981 (2) SA 586 (SWA) at 591. This evidence has no probative value, it can extend the trial and open an evidential Pandora's box, see *S v Nel* 1990 (2) 1990 (2) SACR 136 (C) at 143; *Nomandela v S* [2007] 1 All SA 506 (EC) at 507.

[12] *Twine* supra n1 at 18c.

[13] *Glenister v President of the RSA* 2013 (11) BCLR 1246 (CC) at para 7; *R v Turner* 1975 1 All ER 70 at 74d-e. In *Reckitt & Coleman v SC Johnson* 1993 (2) SA 307 (A) at 315E, psychologists disguised their opinion as a statement of scientific principle or fact, thereby subtly attempting to displace the court's valued judgement.

[14] *R v Makiep* 1948 (1) SA 947 (A) at 953; *S v Nkosiyani* 1970 (2) PH H170 (T); *R v Van Schalkwyk* 1948 (2) SA 1000 (O) at 1002.

[15] *Ruto Flour Mills v Adelson* (1) 1958 (4) SA 235 (T) at 237; *Association of Amusement and Novelty Machines Operators v Minister of Justice* 1980 (2) SA 636 (A) at 644; *International Business Machines v Commissioner for Customs and Excise* 1985 (4) SA 852 (A) at 874; JH Wigmore *A Treatise on the Anglo-American System of Evidence in Trial at Common Law* (1940) at paras 1917-2028, repudiates the term 'usurp the court's function'. The rule serves to save time and avoid confusion.

[16] *R v Herholdt* 1956 (2) SA 714 (W) at 716.

capabilities and responsibilities.[17] Where courts are competent to employ their own experience and insight into human behavior, they must draw inferences from objective facts.[18] Whether the court is so competent is a relative test that depends on the specific subject.[19]

Everyday evidence, at times, is disguised by scientific jargon and may be construed by the courts and legal representatives as dependent on expert evidence.[20] Because it amounts to irrelevant evidence, expert witnesses may not express an opinion on the law[21] or the general merits of the case.[22] Expert evidence is received on foreign law,[23] unless it readily can be ascertained with sufficient certainty, in which case the courts can take judicial notice thereof.[24]

Irrelevant evidence is inadmissible in common law, because evidence must be confined to proving facts necessary to establish the probabilities of the facts in issue and supernumerary facts will not assist the court but, to the contrary, may prejudice the court against a litigant despite having

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[17] *Holtzhauzen* supra n8 at 772.

[18] *S v Kalagoropoulos* 1993 (1) SACR 12 (A) at 22; *S v Mkhabela* 1984 (1) SA 556 (A) at 563.

[19] This is so even where an expert witness on the topic has an impressive career history, scientific qualifications and a body of knowledge, such as language experts, testifying about the meaning and status of words in a statute, see *Kommissaris van Doeane en Aksyns v Mincer Motors* 1959 (1) SA 114 (A) at 121; *Crown Chickens v Minister of Finance* 1996 (4) SA 389 (E) at 395; LH Hoffmann & DT Zeffertt *South African Law of Evidence* (2003) at 85. A Price in 'Dealing with differences: Admitting expert evidence to stretch judicial thinking beyond personal experience, intuition and common sense' (2006) 19(2) *SACJ* 141 at 144 is critical of *S v Ferreira* 2004 (2) SACR 454 (SCA) where, at para 60, it was held that courts always have the common sense, intuition, logic and skill sufficiently to understand the minds of others.

[20] *R v Turner* supra n13 at 74.

[21] *Metro Transport v National Transport Commission* 1981 (3) SA 114 (W) at 120; *IBM SA v CIR* 1985 (4) SA 852 (A) at 874.

[22] *S v Haasbroek* 1969 (2) SA 624 (A) at 631.

[23] *Atlantic Harvesters of Namibia v Unterweser Reederei GMBH of Bremen* 1986 (4) SA 865 (C) at 874; *Levy v Levy* (1904) 18 ECD 164.

[24] In *South Atlantic Island v Buchan* 1971 (1) SA 234 (C) at 238, expert evidence was inadmissible on foreign law. Also see *Holtz v Harksen* 1995 (3) SA 521 (C) at 522; *Harnischfeger Corporation v Appleton* 1993 (4) SA 479 (W) at 485. The Law of Evidence Amendment Act 45 of 1988, s 1(1), permits a court to take judicial notice of foreign law, if it readily can be ascertained with sufficient certainty. Foreign law is a fact to be proven, see *Standard Bank v Ocean* 1983 (1) SA 276 (A) at 294; BSC Martin 'Judicial notice of foreign law' (1998) 31(1) *CILSA* 61-77.

no probative value.[25] Schwikkard & Van der Merwe[26] add the following reasons for its inadmissibility: it may cause delay, wasted costs, inconvenience and confusion,[27] the undesirability that courts are asked to make a determination on issues that do not relate to the disputes at hand, the risks that the real issues are displaced to the background, the fact that it may be difficult to prosecute one's case where irrelevant evidence is being presented and it may infringe the right to a fair trial.[28]

The Civil Proceedings Evidence Act[29] codified the common law rule that irrelevant evidence is inadmissible.[30] Relevance of evidence, although defined in some foreign jurisdictions,[31] to date has not been defined by the legislature,[32] but this lacuna has caused few problems in practice.[33] Despite this, courts and commentators have attempted to define 'relevance' in the context of evidence.[34] The relevance of evidence does not depend on the abstract legal theory

[25] Murphy op cit n10 at 25.

[26] Op cit n10 48.

[27] With reference to AAS Zuckermann *The Principles of Criminal Evidence* (1989) at 49.

[28] Op cit n10 at 48.

[29] Act 25 of 1965.

[30] Section 2. For a similar provision in criminal law, see the Criminal Procedure Act 51 of 1977, s 210. Also see *R v Trupedo* 1920 AD 58 at 62; *S v Gokool* 1965 (3) SA 461 (N) at 475.

[31] Rule 401 of the US Federal Rules of Evidence provides that evidence is relevant if it has: '(a) tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action'.

[32] The SALRC, Discussion Paper 113 (Project 126) *Review of the Law of Evidence (Hearsay and Relevance)* (2008) at para 3.31, recommended the following definition: 'Relevant evidence, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding'.

[33] Relevance is identified, in its logical tendency, to show the material fact for which evidence is offered. See E Du Toit et al *Commentary on the Criminal Procedure Act* (1997) at §24-12. The fate of evidence must past the muster of relevance. For the nature and purpose of the evidence and trial, see J McEwan *Evidence and the Adversarial Process* (1992) at 31.

[34] Irrelevant evidence means it is totally irrelevant or is too remote to be admissible, see LH Hoffmann and DT Zeffertt *The South African Law of Evidence* (1988) at 23. In *Holtzhauzen*, supra n8 at 776, the definition by JF Stephen in *Digest of the Law of Evidence* 12ed (1885) art 1, was found to be too limited, yet it was approved in *R v Katz* 1946 AD 781. Stephen formulated the following definition: 'The word 'relevant' means that any two facts to which it is applied are so related to each other that, according to the common course of events, one, either taken by itself or in connection with other facts, proves or renders probable the past, present, or future existence or non-existence of the

but instead on the circumstances of each case[35] and is a determination as to the degree[36] to which evidence increases or diminishes, the probabilities and that is derived, more often than not, from common sense and experience.[37] Despite its relevance, expert evidence may be excluded by other evidentiary rules, such as the rule against hearsay evidence.[38]

4.2.2 Relevant and admissible opinion expert evidence[39]

It is preferable not to consider the reception of expert evidence as an exception to the rule against opinion[40] evidence, and rather must be viewed as admissible based on its relevance.[41] Conversely, the opinion rule should be regarded merely as a specialised expression of the general rule requiring relevance as a pre-requisite for admissibility. Expert evidence is relevant and admissible where,

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other'. AJ Van Wyk 'Juridiese relevantheid en toelaatbaarheid' (1978) 41 *THRHR* 175 at 175 submits that evidence is relevant when it comprises the ability, independently or in conjunction with other evidence, to make the existence of a fact in dispute to be more or be less probable, directly or indirectly. In *DPP v Kilbourne* 1973 AC 729 at 756 the court held that relevant evidence is '…logically probative or disapprobative evidence, is evidence which makes the matter which requires proof more or less probable'.

[35] In *S v Zuma* 2006 (2) SACR 191 (W) at 199 it was held that relevance cannot be divorced from the facts. In *Lloyd v Powell Duffryn Steam Coal Co Ltd* 1914 AC 733 at 738 it was held that the issues in dispute are substantially important in this context. Also see *R v Guney* 1998 2 Cr App Rep 242 at 246. The expert opinion must be relevant to the question which the court is adjudicating, see *Daubert v Merrell Dow Pharmaceuticals* [1993] USSC 99 where the US Supreme Court interpreted Rule 702 of the Federal Rules of Evidence.

[36] LH Hoffmann 'Those dogs again: Notes and comments' (1974) 91 *SALJ* 237 at 238.

[37] *R v Randall* [2004] 1 All ER 467 at para 20. In *R v Matthews* 1960 (1) SA 752 (A), at 758, the court held that relevance is based on a blend of logic and experience, distant from the legal arena.

[38] Schwikkard & Van der Merwe op cit n10 at 49 & 89; *R v Schaube-Kuffler* 1969 (2) SA 40 (RA) at 46; A Faurie *The Admissibility and Evaluation of Scientific Evidence in Court* (unpublished LLM thesis, Unisa, 2000) 7. The law of evidence does not give unhindered access to all relevant evidence, see SJ Van Niekerk et al *Privileges in die Bewysreg* (1984) at 4; In *Katz* supra n34, at 78, relevant evidence was excluded, due to the meagre probative value it carries or the possibility to cause prejudice. Also see *Gosschalk v Rossouw* 1966 (2) SA 476 (A) at 485.

[39] Admission of expert evidence is open to abuse and should be guarded, see *Kozak v Funk* 1995 CanLII 5847 (SK QB). *Menday v Protea Assurance* 1976 (1) SA 565 (E) at 569 list the dangers as: The court's inability to verify the opinion and partisan experts, where experts are overready to corroborate their theories from innocent facts.

[40] That an opinion is held by a person, including an expert, may be proved like any other relevant fact, see CWH Schmidt & H Rademeyer *Bewysreg* 4ed (2006) at 457; WA Joubert (founding ed) *LAWSA* 3ed vol 18 (2000) at 121.

[41] Du Toit et al op cit n33 at §24-12.

by virtue of the nature of the dispute, [42] experts are better positioned than the court, which lacks special skill, experience or knowledge, to draw competent and reasoned inferences from the facts.[43] To be admitted, the evidence presented by the expert must be sufficiently[44] relevant[45] and reliable[46] to assist the court in understanding a scientific issue[47] or directly or indirectly establishing a fact which can be solicited only by possessing a special skill, [48] failing which the expert evidence is superfluous and inadmissible.[49]

In *Holtzhauzen v Roodt*[50] the court allowed an opinion by an expert, called by the defendant, who, contrary to custom, did not consult with the defendant, to assist the court with

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[42] *Goliath v Fedgen Insurance* 1994 (2) PH F31 (E) at 83; *Barrie v R* 1959 1 PH H22 (O).

[43] *Coopers v Deutsche Gesellschaft Für Schädingsbekämpfung* 1976 (3) SA 353 (A) at 370; *S v Engelbrecht* 2005 (2) SACR 41 (W) at para 26; *AM v MEC for Health, Western Cape* 2021 (3) SA 337 (SCA) at para 17.

[44] Sufficiently relevant is a criterion, see Du Toit et al op cit n33 at §24-12. Whether this criterion is met will depend on the nature of the trial, see McEwan op cit n33 at 31.

[45] It is the relevance and not the competency that is at the forefront of considering the admissibility of expert evidence, see *Ruto Flour* supra n15 at 236. In *Jacobs v Department of Land Affairs* (LCC3/98) [2016] ZALCC 14 (13 June 2016) at para 8, the court held it jealously must guard its fact-finding obligations, but that is not the main consideration behind the exclusion of expert testimony *per se*, and instead expert evidence is excluded because it makes no probative contribution to the resolution of the disputes. The question of relevance is one of fact, see *R v Vilbro* 1957 (3) SA 223 (A) at 228; *R v David* 1962 (3) SA 305 SR at 306; *S v Nagutuuala* 1974 (2) SA (SWA) at 167; *Hollington v F Hewthom* 1943 KB 587 (CA) at 589. Evidence that is logically relevant may be excluded on the basis that it is not sufficiently relevant, there is a threshold of relevance, see Hoffmann & Zeffertt op cit n19 at 23.

[46] I Knoetze 'Expert evidence v science- nature, purpose and admissibility with reference to SA and US Authority' (2008) 481 *De Rebus* 26 at 28.

[47] Or to interpret facts that are not readily susceptible to interpretation, in the absence of a special skill, see *Thomas v BD Sarens* (2007/6636) [2012] ZAGPJHC 161 (12 September 2012) at para 8. In *AM* supra n43 at para 17, the court held that the expert provides the court with general knowledge regarding the relevant discipline and accepted practice, which is factual evidence.

[48] *Thomas* supra n47 at para 8.

[49] *S v Van As* 1991 (2) SACR 74 (W) at 86-87. Du Toit et al op cit n33, at 24-16A, submit that words such as 'relevance' and 'irrelevance' amount to empty catchphrases, blurring the parameters of the rule and diminishing its core function to exclude supererogatory evidence.

[50] Supra n8 at 778. Also see DT Zeffertt 'Law of Evidence' (1997) *Annual Survey of the South African Law* 718 at 737 and L Meintjes-van der Walt 'Law of evidence' (2012) 25(1) *SAJCJ* 139 at 141, discussing *S v S* [2011] ZASCA 214 (29 November 2011).

inferential reasoning. Where the court engages in the process of inferential reasoning, the court may have regard to certain hypotheses, for the court fully to comprehend what is not in the court's personal knowledge, such as the chain of events of emotion and experience of rape victims.[51] The court held it would be unwise to draw an inference from facts established in evidence on issues of which the court has no knowledge, experience or skill, without welcoming the opportunity to learn and solicit guidance from an expert.[52] In *Stewarts & Lloyds of SA v Croydon Engineering and Mining Supplies*,[53] the court declined an opportunity to qualify itself in a scientific branch of handwriting. The court held it is undesirable for a court to educate itself on handwriting, where the court lack skills to establish handwriting comparisons from mere observations of handwriting, and lacked the knowledge to know if an inference reliably can be drawn therefrom.[54] Zeffertt correctly confirms that a court cannot always verify a conclusion from its own observations, however the court can accept the opinion as accurate, when the court is satisfied that the opinion is reliable.[55]

Where the court can, of its own accord, make such inferences itself, an expert can nevertheless be of appreciable help,[56] great assistance[57] or of material assistance.[58] In these circumstances the expert's opinion is relevant and admissible.[59]

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[51] At 776-777. An expert may testify to a general body of knowledge in a discipline and is not confined to his/her own perceptions and reasoning, see Meintjes-van der Walt op cit n5 at 70. Cf *S v O* 2003 (2) SACR 147 (C) at 163.

[52] At 777-778. Also see *Maritime & General v Sky Unit Engineering*1989 (1) SA 867 (T) at 876.

[53] 1979 (1) SA 1018 (W).

[54] Para 1019. Cf *S v Boesak* 2000 (1) SACR 633 (SCA), at para 57, where the court held it may draw inferences from its own observations. Also see *R v Kruger* 1941 OPD 33; *S v Boesak* 2001 (1) SACR 1 (CC) at para 13.

[55] Zeffertt op cit n50 at 737.

[56] *S v Vause* 1997 (2) SACR 395 (N) at 397; *S v Ngomane* 2007 (2) SACR 535 (W) at 537; *Mkhize v Lourens* 2003 (3) SA 292 (T) at 299; FE Raitt 'A new criterion for the admissibility of scientific evidence: The metamorphosis of helpfulness' in H Reece (ed) *Law and Science: Current Legal Issues* (1998) at 153.

[57] *William Grant v Cape Wine & Distillers* 1990 (3) SA 897 (C) at 912.

[58] B Pithey et al (1999) *The Legal Aspects of Rape* (1999) at 106.

[59] In *S v Skeal* 1990 (1) SACR 162 (ZS), at 165, expert evidence on a state of intoxication was beneficial but not necessary.

4.3 What qualifies a witness to be an expert?

Before a witness is allowed to testify as an expert, a foundation must be laid to prove the expertise of the witness,[60] failing which the evidence is of no value.[61] In the past, if experts came from a widely-accepted discipline of expertise, such an enquiry was superfluous.[62] However, due to the rapid development of science and technology, new and novel techniques are ever developing and the area between acknowledged and accepted disciplines and cutting edge experimentation is now called the 'twilight zone' of expertise. [63] It is for a court to decide if novel experiments have developed sufficiently to become demonstrable and accepted theories on which the court can rely.

It is for the court to establish if the expert is a qualified expert,[64] which concept is elastic.[65] The party presenting the expert evidence has the onus to prove the expertise,[66] which procedurally is achieved by placing in evidence the credentials of the expert witness, before an expert's opinion can be presented.[67] The failure of a litigant to challenge the qualification of an expert witness does not compensate for the lack of the expert's competence nor does it cure intrinsic defects in the evidence.[68]

The court must establish if the witness has specialised knowledge,[69] this requires the expert to have undergone a course of study or have experience or a skill that will qualify him/her as an

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[60] *S v Nangutuuala* 1974 (2) SA 165 (SWA) at 167; *S v Shiini* 1997 (1) SACR 212 (Nm) at 214; *Landsdowne v Wajar* 1973 (4) SA 329 (T) at 332.

[61] *Havenga v Parker* 1993 (3) SA 724 (T) at 726.

[62] L Meintjes-van der Walt 'The proof of the pudding: The presentation and proof of expert evidence in South Africa' (2003) 47(1) *Journal of African Law* 88 at 94.

[63] *Frye v United States* 54 App D C 46 (1923) at 47.

[64] *Mohamed v Shaik* 1978 (4) SA 523 (N) at 523-524.

[65] Joubert op cit n40 at 124. If the court accepts the witness is an expert, no reasons are necessary, see *S v Williams* 1985 (1) SA 750 (C) at 753; *S v Adams* 1983 (2) SA 577 (A) at 586; *S v January* 1980 (2) SA 598 (C) at 600; *S v Ramgobin* 1986 (4) SA 117 (N) at 146. Reasons must be given to the weight attached, see *S v Nyathe* 1988 (2) SA 211 (O) at 216.

[66] Faurie op cit n38 at 10.

[67] *Menday* supra n39 at 569B-C.

[68] *Pitout v North Cape Livestock* 1977 (4) SA 842 (AD) at 854-855.

[69] Expert evidence must be based on specialized knowledge, see *Holtzhauzen* supra n8 at 772.

expert.[70] A lack of formal qualifications does not disqualify an expert witness,[71] however qualifications without experience may lead to the rejection of the expert's evidence.[72] The skill of an expert need not have been acquired professionally.[73] It is not a sine qua non that the expert has theoretical training, practical experience or the highest qualifications to be deemed qualified and, as a realistic test, the court must measure the qualifications and experience of the proposed expert against the nature of the evidence the expert proposes to give along with general practical considerations.[74]

Where an expert is unqualified to draw inferences from facts, his/her opinion lacks probative value and is irrelevant and inadmissible.[75] Irrespective of how renowned an expert is in a discipline, he/she is not expert in a discipline, unless by study or experience, he/she is qualified to tender an opinion.[76]

Procedurally, an expert may refer to his/her own report and original notes to refresh his/her memory while giving evidence provided the report was prepared when the content of the report was fresh in the expert's memory.[77] It is irregular for a court to use its personally gained expert-

[70] *PWC v National Potato Co-op* [2015] 2 All SA 403 (SCA) at para 100; *Van Heerden v SA Pulp and Paper Industries* 1945 (2) PH J14 at 31-32; *IO Tech Manufacturing v Gallagher Group* [2014] 2 All SA 134 (SCA) at para 12; *R v Nksatlala* 1960 (3) SA 543 (A) at 546; *R v Kolisi* 1960 (2) SA 374 (EC) at 375.

[71] *Van Graan v Naude* 1966 PH J12 (O); *Sentrachem v Prinsloo* 1997 (2) SA 1 (SCA) at 17; *S v Mlimo* 2008 (2) SACR 48 (SCA) at 52-53.

[72] *Van Heerden v SA Pulp* supra n70.

[73] In *R v Silverlock* 1894 (2) QB 766, a solicitor's opinion on handwriting was accepted.

[74] CWH Schmidt *Bewysreg* 2ed (1998) at 333; *S v Kimimbi* 1963 (3) SA 250 (C) at 252; *S v Bertrand* 1975 (4) SA 142 (C) at 149; *Bristow v Sequeville* (1850) 155 ER at 118; *United States Shipping Board v The Ship St Albans* 1931 AC 632.

[75] *S v Mjakuca* 1967 (3) SA 352 (C) at 354; *Starke v Schreiber* [2001] All SA 167 (C) at 174.

[76] *Engelbrecht* supra n43 at para 26.

[77] *S v Heller* 1964 (1) SA 520 (W) at 521.

or special knowledge in reaching a conclusion,[78] as the judge cannot be cross-examined by the parties.[79]

4.3.1 Experts relying on the expertise of others

An expert must either personally have the knowledge or experience in a field or rely on the experience and knowledge of others ,who are known to be acceptable experts in the field,[80] even if such an expert is called by an opposing litigant.[81] It is easier for the court to make a ruling where the expert opinion is based on actual experiments, as opposed to relying on acknowledged authors or authority, even though it also is an accepted method.[82] An expert may refer to the writing/opinion of others in support of his/her own opinion or for purposes of refreshing his/her memory, provided that the expert has sufficient personal knowledge in relation to the subject to express an opinion.[83] Experts, relying on facts known to them only by their reliance on the authority of others, such as textbooks, technically give hearsay evidence, where the author of the book is not called as a witness.[84] To reject an expert's opinion on this basis would set impossible standards, because it practically is unrealistic and repudiates accepted methods of professionalism.[85] Experts can competently rely on textbooks if it is established that the expert relying on the textbook:

i. Can, by virtue of his/her own training, at least in principle, affirm the correctness and trustworthiness of the content of the passage;

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[78] *R v Fourie* 1947 (2) SA 972 (E) at 974.

[79] *R v Radebe* 1960 (4) SA 131 (T) at 134; *S v Seboko* 1975 (3) SA 343 (O) at 344; *S v Letimela* 1979 (2) SA 332 (B) at 334. A police officer may identify dagga and liquor, see *R v Modesa* 1948 (1) SA 1157 (T) at 1159. Cf *S v Malefane* 1974 (4) SA 613 (O) at 616; *R v Ntholeng* 1952 (3) SA 396 (O) at 397; *R v Mgotywa* 1958 (1) SA 99 (E) at 101. In *S v Rousseau* 1979 (3) SA 895 (T) at 898, it was irregular for the court to obtain an opinion by an outside expert. Also see J Visser 'Independent judicial research for forensic evidence in criminal trials- A South African perspective' 2021 (3) *SACJ* 415-441.

[80] *Menday* supra n39 at 569.

[81] *PWC* supra n70 at para 113.

[82] *S v Van As* supra n49 at 86.

[83] *Van Heerden* supra n70.

[84] Schwikkard & Van der Merwe op cit n10 at 108.

[85] *S v Kimimbi* supra n74 at 251.

ii. By personal observation is competent to affirm that the referenced text is plausible, probable, sound and/or reliable and has been written by a reputable and experienced person in the relevant discipline;[86] and

iii. It is impossible to secure the data otherwise.[87]

It is unlawful for the court to rely on publications (or part thereof), if the expert did not approve or refer to them.[88] Where an expert refers to what has been written, the referenced material becomes part of his/her opinion and not the other portions of the material, unless such material was the subject of cross examination.[89]

4.4 Probative value of expert opinion

The standard of proof in a civil case is the balance of probabilities.[90] A court in determining whether this standard has been met must, inter alia, decide what weight to attach to expert evidence. Scientific evidence is subject to the court's procedures in the context of a legal system and is one piece in the entire puzzle, as opposed to a conclusive answer to a question.[91] A court should not blindly accept and act on an expert opinion. It is important for the court to scrutinize closely the expert evidence to eliminate the risk of error and it must decide if the opinion can safely be accepted[92] because if a witness is found to be an expert and that he/she gave credible evidence,

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[86] In *S v Collop* 1981 (1) SA 150 (A), at 167B-C, the actual textbook did not become evidence. An expert may refer to data garnered from other experts, provided that the expert has the prerequisite qualifications to analyse the data or find reliable sources, see *S v Kimimbi* supra n74 at 252; *The Sussex Peerage* 8 ER 1034 at 1046.

[87] *S v Kimimbi* supra n74 at 251.

[88] *S v Jones* 2004 (1) SACR 420 (C) at 425.

[89] *S v De Leeuw* 1990 (2) SACR 165 (NC) at 174c-d; *R v Mofokeng* 1928 AD 132 at 136; *R v Basson* 1946 CPD 479 at 479; *R v Phillips* 1949 (2) SA 671 (O) at 676; *S v Henning* 1972 1 PH H42 (N).

[90] In *Miller v Minister of Pensions* [1947] 2 All ER 372, at 374, it was held that it must carry a reasonable degree of probability, but not as high as is required in a criminal case. Also see *Ocean Accident and Guarantee v Koch* 1963 (4) SA 147 (A) at 159; *Peregrine Group v Peregrine* 2001 (3) 1268 (SCA) at para 10.

[91] G Edmond 'Science, law and narrative helping the 'facts' to speak for themselves' (1998-1999) 23 *Southern Illinois University Law Journal* 555 at 581.

[92] *R v Nksatlala* supra n70 at 546.

the court will accept, as prima facie proof the evidence and the onus of rebuttal is shifted to the opposing litigant.[93]

The probative value of an expert's opinion is considered in the same fashion as that of a lay witness.[94] It depends on the skill, experience and qualifications of the expert, along with the court's ability to assess the evidence.[95] In evaluating expert opinion, courts must determine whether such opinions are based on logical and cogent[96] reasoning, which entails the expert considering comparative and alternative scenarios, in reaching a defensible conclusion.[97] The reliability and, subsequently, the probative value of expert evidence will be undermined if the expert failed to keep abreast of developments in his/her profession and has no or little practical experience or if the expert fails to lay a factual basis and/or is unresponsive and fails to deal with questions of substance when examined.[98] There are no hard-and-fast rules as much depends on the nature of the dispute and whether the expert opinion is attacked in court.[99] A proper evaluation depends on the process of reasoning which led to the final opinion and the grounds on which the opinion is premised,[100] being disclosed by the expert.[101] Also, if the expert's opinion is reasonable,

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[93] *Seyisi v S* (117/12) [2012] ZASCA 144 (28 September 2012) at para 12.

[94] *Widdrington Wightman* 2011 QCCS 1788 (CanLII), at para 329, as quoted with approval in *PWC*, supra n70 at para 99.

[95] P Carstens & D Pearmain *Foundational Principles of South African Medical Law* (2007) at 861.

[96] *Bee v RAF* 2018 (4) SA 366 (SCA) at para 22. The appeal court can test the expert's reasoning, as good as the trial court, see *Jackson v Jackson* 2002 (2) SA 303 (SCA) at 311; *Stock v Stock* 1981 (3) SA 1280 (A) at 1296.

[97] *Michael v Linksfield Park Clinic* 2001 (3) SA 1188 (SCA) at paras 36-38; *Bolitho v City and Hackney Health Authority* [1998] AC 232.

[98] *PWC* supra n70 at paras 100-113. Note that in the United States of America, the Supreme Court held that Federal Rule 702 requires the court to ensure that scientific evidence not only is relevant but also reliable to be admissible, elevating the court to a gatekeeper. In Canada, the court in *R v Mohan* [1994] 2 SCR 9 89 CCC (3d) 402 (SCC) 411, added an admissibility criterion of 'reliability' to novel evidence. In English law, if an expert cannot be independently reviewed by any given criteria, the court may declare it inadmissible, see *R v Gilfoyle* [2001] 2 Cr App R 5; *R v Dallagher* [2002] EWCA Crim 1903; *R v Luttrell* [2004] 2 Cr App R 520.

[99] *S v Mthimkulu* 1975 (4) SA 759 (A) at 762-763; *S v Claassen* 1976 (2) SA 281 (O) at 284; *Nelson v Marich* 1952 (3) SA 140 (D) at 149; *S v Mkhize* 1998 (2) SACR 478 (W) at 482; *Pezzutto v Dreyer* 1992 (3) SA 379 (A) at 391.

[100] *R v Jacobs* 1940 TPD 142 at 147; *S v Nala* 1965 (4) SA 360 (A) at 362; *S v Blom* 1992 (1) SA 649 (EC) at 655; *S v Mkhize* 1999 (1) SACR 256 (W) at 263-264.

[101] *Coopers* supra n43 at 371.

considering the prima facie facts on which it is based.[102] Failing these requirements, the opinion is not helpful,[103] is inadmissible[104] or lacks reasonableness, but rarely will it be held that a genuinely-held view by a competent expert is unreasonable.[105] The non-motivation of an opinion goes to the question of weight rather than admissibility,[106] but there must be at least some probative value in the expert opinion, otherwise the expert opinion will be deemed irrelevant and thus inadmissible as set out in paragraph 4.2.[107]

Unless not controversial, the bare ipse dixit of an expert is not of assistance or helpful,[108] no matter how renowned the expert is, and will carry little weight if it cannot be tested in cross examination or be appraised independently.[109] Whether a theory or technique of a scientific nature can assist the court will depend on whether it can be tested.[110] It is the expert's duty to submit the scientific criteria employed for testing the accuracy of his/her findings as this submission will enable the court to form an independent judgement on the application of the facts to the expert's criteria.[111]

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[102] *MV Pasquale Della Gatta MV Filippo Lembo Imperial Marine v Deiulemar Compagnia Di Navigazione SPA* 2012 (1) SA 58 (SCA) at para 26.

[103] *Jacobs v Transnet ltd t/a Metrorail* 2015 (1) SA 139 (SCA) at para 15.

[104] *Massstores v Pick 'n Pay* 2016 (2) SA 586 (SCA) at para 15.

[105] *S v Venter* 1996 (1) SACR 664 (A) at 666.

[106] *R v Mbongwe* 1954 (3) SA 1016 (T) at 1018.

[107] Joubert op cit n40 at 127.

[108] *S v Gouws* 1967 (4) SA 527 (E) at 528; *S v Mokgiba* 1999 (1) SACR 534 (O) at 547; *R v Sene* 1965 (2) SA 144 (SRA) at 145; *R v Barry* 1940 NPD 130 at 132; *S v Mhetoa* 1968 (2) SA 773 (O) at 775; *S v Eadie* 2002 (1) SACR 663 (SCA) at 692.

[109] *Davie v Magistrates of Edinburg* [1953] SC 34 40; *S v Mkhize* supra n99 at 482.

[110] *Daubert* supra n35 where the court held: 'Scientific methodology is what distinguishes science from other fields of human enquiry' and 'The criterion of the scientific status of a theory it its falseability or refutability, or testability'. *Daubert* was criticized in S Orofino 'Daubert v Merrell Dow Pharmaceuticals Inc: The battle over the admissibility standards for scientific evidence in court' (1996) 3 *Journal of Undergraduate Sciences* 109-111 and G Edmond 'Judicial Representations of scientific evidence' (2000) 63(2) *The Modem Law Review* 216-251. The main criticism levelled at *Daubert* is the endorsement of a single school of thought, that of Karl Popper, in the field of epistemology (the theories of knowledge). Other methods also can lead to the truth and confining the test to one method may hinder the search for the truth or may not be in the interests of justice.

[111] *Davie* supra n109 at 40.

Experts have various duties and only when these duties are observed is a court in a position to test and weigh the value of the opinion and form a proper judgement.[112] Because expert evidence generally carries more weight, higher standards of accuracy and of objectivity are required.[113]

Judicial officers tend to use a story-based approach to organize and interpret evidence[114] and although narrative-coherent fact-finding has an important place in evaluating evidence,[115] facts and opinions by experts do not speak for themselves.[116] Meintjes-van der Walt contends that the fact finder must consider the four criteria identified in the well-known dicta of *Daubert v Mertell Dow*[117] when called on to evaluate specialist expert evidence. They are: [118]

i. Was the theory tested?
ii. Has the theory or technique used, gained general acceptance in the scientific community?
iii. Was the theory subjected to peer review and publication? and
iv. Consider the known potential error rate and the existence and maintenance of standards controlling the technique applied.

[112] *R v Jacobs* supra n100 at 147.

[113] *S v Kotze* 1994 (2) SACR 214 (O) at 225.

[114] Fact finders may see causal connections that really are coincidental relations, see N Pennington & R Hastie 'A theory of explanation-based decision making' in G Klein & J Orasanu (eds) *Decision-making in Complex Worlds* (1991); SD Jackson & S Doran *Judge without Jury* (1995) at 217-219.

[115] N MacCormick *Legal Reasoning and Legal Theory* (1978) at 86-91; W Twining *Rethinking Evidence* (1994) at chapter 7; BS Jackson *Law, Fact and Narrative Coherence* (1988) see chapter 2.

[116] Meintjes-van der Walt op cit n3 at 337.

[117] Supra n35. Authors have been critical of the success with which these rules have been applied, see DM Godden & D Walton 'Argument from expert opinion as legal evidence: Critical questions and admissibility criteria of expert testimony in the American legal system' (2006) 19 *Ratio Juris* 261 at 271; SI Gatowski et al 'Asking the gatekeepers: A national survey of judges on judging expert evidence in a post-Daubert world' (2001) 25 *Law & Human Behaviour* 433 at 451-455.

[118] Meintjes-van der Walt op cit n3 at 327.

4.4.1 Expert opinion less relevant where lay witness exists

The expert's opinion of the factual circumstances generally must give way to the evidence of a credible and direct eyewitness,[119] even where it contradicts the probabilities held by an expert.[120] The court in *Stacey v Kent* held that it is too general to make a bold statement that direct evidence is to be preferred over expert evidence and each case must be determined on its own merits, by considering the nature of the expert evidence and the reliability of facts on which the opinion is premised.[121] Procedurally, the court ought first to establish if a factual eye witness's evidence is acceptable,[122] and make a provisional finding on the version of the eye witness and subsequently determine if the expert's evidence displaces it.[123] Where the evidence of an eyewitness is improbable and therefore not credible, the expert can persuade the court of his/her opinion on the transpired fact.[124] An accident reconstruction expert's opinion is notoriously premised on facts derived, inter alia, from imperfect human observation, often the very same eyewitness account by the lay witness, and the court should be cautious in determining its probative value.[125] Although eye witness accounts are preferred, an expert may still assist the court with other aspects in the

[119] *Stacey v Kent* 1992 (4) SA 495 (C) at 497; *Nock v RAF* [2000] All SA 436 (W) at 437; *Biddelcombe v RAF* [2011] ZASCA 225 at para 10; *Roux v Hattingh* 2012 (4) SA 300 (SCA) at para 50-53. Considering that eyewitness accounts are notoriously unreliable, the courts may reconsider this precedent in the future, see J Cutshall & JC Yuille 'Field studies of eyewitness memory of actual crimes' in DC Raskin (ed) *Psychological Methods in Criminal Investigation and Evidence* (1989) at 97-124; M McCloskey 'Expert testimony about eyewitness behavior: Is it safe and effective?' in GL Wells & EF Loftus (eds) *Eyewitness Testimony: Psychological Perspectives* (1984) at 283-303; RK Bothwell, KA Deffenbacher & JC Brigham 'Correlation of eyewitness accuracy and confidence: Optimality hypothesis revisited' (1987) 72 *Journal of Applied Psychology* 691-695.

[120] *Mapota v Santam* 1977 (4) SA 515 (A) at 527; *Abdo v Senator* 1983 (4) SA 721 (E) at 727.

[121] *Stacey v Kent* supra n119 at 497.

[122] *Putzier v Union and South West Africa* 1973 ECD quoted in *Abdo* supra n120 at 725.

[123] *Vergoedingskommissaris v Multilaterale Motorvoertuigongelukkefonds* [1998] 3 All SA 155 (O) at 155.

[124] *Madumise v Motor Voertuig Assuransie Fonds* 1983 (4) SA 207 (O) at 209.

[125] *Biddlecombe v RAF* [2011] ZASCA 225 (30 November 2011) at para 10; *MV Banglar Mookh v Transnet* 2012 (4) SA 300 (SCA) at 319.

matter, such as stopping distance,[126] where the mass of a vehicle and braking efficiency play a role.[127]

4.5 Duties of an expert witness

4.5.1 Do not usurp the court's function[128]

This rule originates in justice systems with jury trials[129] and entails that experts should not unduly influence the jury, thereby usurping the court's role.[130] Juries are not schooled in law and consequently it is believed that they need to be protected from certain types of evidence.[131] The ultimate-issue doctrine was abolished in civil matters in England on 1 January 1973.[132] In South Africa, the question of whether an expert can opine on the ultimate issue on which the court is to decide, hangs in the balance.[133] There are two schools of thought. First, some case law and authors suggest that there is no ultimate-issue-rule and evidence is admissible provided it is relevant.[134] In the second school of thought expert witnesses may not usurp the court's functions;[135] instead their overriding duty is towards the court,[136] to guide it to a rational decision on questions which fall within the expert's expertise.[137] In some South African cases it has been held that an expert opinion

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[126] *Seti v Multilateral Motor Vehicle Accident Fund* 1999 (1) SA 1035 (SE) at 1040.

[127] *Intercape Ferreira v Pro-Haul Transport Africa* (44350/2012) [2016] ZAGPJHC 134 (3 June 2016) at para 15.

[128] Also see section 4.2.

[129] GP Stevens & EC Lubaale in 'Revisiting the historical context surrounding the development of the ultimate-issue rule to inform its future in South African law of evidence' (2016) 22(1) *Fundamina* 94 at 94.

[130] L Meintjes-van der Walt 'Evaluation of divergent expert opinions' (2011) 24(2) *South African Journal of Criminal Justice* 213 at 215; L Meintjes-van der Walt 'A few plain rules: A comparative perspective on exclusionary rules of expert evidence in South Africa' (2001) 64 *THRHR* 236 at 236-256; R May *Criminal Evidence* 3ed (1995) at 134.

[131] Stevens & Lubaale op cit n129 at 94.

[132] Section 3(1) of the Civil Evidence Act 1972.

[133] The uncertainty regarding the doctrine negatively impacts on the advancement of expert evidence, see Stevens & Lubaale op cit n129 at 94.

[134] Joubert op cit n40 at 123. Cf *Publication Control Board v Williams Heinemann* 1965 (4) SA 137 (A) at 147.

[135] *R v Louw* 1930 CPD 368; *R v Van Tonder* 1929 TPD 365; *R v Ndhlovu* 1954 (4) SA 482 (N) at 483; *S v Govender* 1968 (3) SA 14 (N) at 20.

[136] *Meadow v General Med Council* [2007] 1 All ER 1 (CA) at para 21 cited with approval in *Twine* supra n1 at18. Also see *S v Huma* 1995 (1) SACR 407 (W) at 410.

[137] *Malan v Oranje-Vrystaatse Ongedierte Bestrydings- & Wildbewarings* 1976 (1) SA 830 (O) at 846.

should not displace the findings of the tribunal[138] and when expert evidence goes to the very (ultimate) issue[139] that a court must decide, such expert evidence becomes inadmissible.[140] The second school asserts that expert evidence should be scrutinized,[141] to ensure compliance with the rule that experts are not to usurp the court's function, because, in testing if a hypothesis has been proven, at a time when the court rules on whether a litigant has discharged its onus, a court may innocently be seduced into applying to the evidence a scientific measure of proof which is acceptable in the expert's profession and not the balance-of-probabilities test, as the court should.[142]

The problem lies in deciding which school is applicable in the South African legal dispensation. The ultimate issue debate has received abundant attention from modern authors. Meintjes-van der Walt warns that this doctrine, known as the rule against the ultimate issue, must not be accepted and applied uncritically, as this may result in expert evidence which has the potential to contribute to the court's understanding being excluded.[143] Schwikkard & Van der Merwe submit that the appropriate question is whether the evidence is superfluous.[144] Schmidt & Rademeyer however maintain the end issue doctrine should not be rejected out of hand because of the administrative law principle that the trier of fact must have regard to and is seized with the matter before it.[145] Stevens and Lubaale argue that this rule in South Africa's non-jury system is

[138] *S v Du Preez* 1972 (2) SA 519 (SWA) at 522.

[139] *R v Cele* 1943 AD 123; PB Carter *Cases and Statutes on Evidence* (1981) at 503; *DPP v A & BC Chewing Gum* 1968 AC 159 at 164; P Huxley & M O'Connell *Blackstone's Statutes on Evidence* (1991) at 142-143.

[140] *Commercial Union v Wallace: In re Santam v Africa Addressing* 2004 (1) SA 326 (SCA) at para 74. Note that the court's findings were ambiguous.

[141] *R v Nksatlala* supra n70 at 546.

[142] *Dingley v The Chief Constable, Strathclyde Police* 200 SC (HL) 77 at 89; *Guardian National Insurance v Springgold Investments* [2010] 1 All SA 301 (SCA) at para 30. The disparity in law and science fact finding is justified by law's response to the normative and social order, see Meintjes-van der Walt op cit n3 at 319.

[143] Meintjes-van der Walt op cit n130 at 249. In *Murphy v Queen* (1988-1989) 167 CLR 94, at 110, the court noted a difficulty with the presumption that ordinary folk comprehend human behaviour.

[144] Op cit n10 at 96.

[145] Schmidt & Rademeyer op cit n40 at 17-8.

unsound,[146] and Meintjes-van der Walt notes that the rule disregards the fact that, at times, an expert will struggle to give an opinion without referring to the ultimate issue.[147] Zeffertt submits that it is a pity that judge Satchwell in the most instructive case law on this point, *Holzhauzen v Roodt*,[148] used the pernicious expression 'usurp the court's function' which expression was described by Wigmore as empty rhetoric that obfuscates the fact that the court's consideration on the admission of expert evidence is a flexible and practical concept founded in relevance.[149] Wigmore notes this rule is premised on moral impropriety or the notion of tactical unfairness, and it must be repudiated; no expert could usurp the court's function even if they so desired.[150] This maxim, essentially, is designed to avoid supererogatory and superfluous evidence, a confusion of issues that encumber proceedings.[151] A court can reject the opinion on the ultimate issue and self-decide the issue.[152] The court ultimately must decide whether inferential evidence on the ultimate issue is acceptable. [153] Many foreign law reform commissions have recommended that the ultimate issue rule be abolished.[154]

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[146] D Carson 'Beyond the ultimate issue' in F Lösel, D Bender and T Bliesener (eds) *Psychology and Law: International Perspectives* (1992), at 447, submit in cases where experts testify to an ultimate issue, courts must test the reliability, quality and accountability of evidence. Also see JD Jackson 'The ultimate issue rule: One rule too many' (1984) *Criminal Law Review* 75 at 80. IR Freckleton in *The Trial of the Expert: A study of Expert Evidence and Forensic Experts* (1987) at 75, described the rule as obsolescent, redundant and forcing experts to express opinions in indirect and elusive terms, rather than using the terminology that they customarily employ.

[147] Meintjes-van der Walt op cit n 130 250.

[148] 1997 (4) SA 766 (W).

[149] Zeffertt op cit n50 737.

[150] *R v Sole* 2004 (2) SACR 599 (Les) at 631; *Visagie v Gerryts* 2000 (3) SA 670 (C) at 681; *ZS-SVN Syndicate v 43 Air School* 2007 (6) SA 386 (E) at para 18; *S v Swanepoel* 1983 (1) SA 434 (A) at 455.

[151] Wigmore op cit n15 at § 1918.

[152] *R v Vilbro* supra n45 at 228.

[153] Joubert op cit n40 at 123.

[154] Australian Law Reform Commission, Interim Report 26 *Evidence* (June 1984) at para 359; Ontario Law Reform Commission *Report on the Law of Evidence* (1976) at 153-158, Scottish Law Commission, Memorandum No 46 *Law of Evidence* (1983) at Part 1 C16; Uniform Law Conference of Canada, *Federal/Provincial Task Force on Uniform Rules of Evidence Report* (1982) at paras 8-10; New Zealand Law Commission, Preliminary Paper No 18, *Evidence Law: Expert Evidence and Opinion Evidence* (1991) at para 40.

Zeffertt states that if one accepts that opinion evidence is admissible if relevant, the notion that an expert's opinion on the ultimate issue is inadmissible falls by the way side, provided the opinion is relevant.[155] The less a court can independently assess the evidence, the more relevant an opinion on the ultimate issue becomes.[156] Thus, there are subjects on which the court is incapable of forming any kind of opinion (predominantly a question of science or skill, where an expert may competently be asked to express an opinion on that which a court must ultimately decide),[157] whereas on other subjects, courts can competently come to an independent opinion, but expert opinion nevertheless is useful,[158] such as in respect of drunkenness or handwriting.[159] In the former case, where the court does not have the training to act on its own opinion, the courts resort to determining whether the expert opinion can safely be accepted.[160]

4.5.2 Give an opinion within his/her discipline of expertise

An expert may not go beyond the logic which underwrites the scientific knowledge of the expert's discipline,[161] as this will detract from the value of such evidence.[162] To illustrate this contention by an example: In a personal injury case, an industrial psychologist may not give an opinion on the prognosis of an orthopaedic injury. An expert must highlight the fact that a question falls outside his/her expertise.[163]

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[155] Joubert op cit n40 at 123.

[156] *Ruto Flour* supra n15 at 237; *R v Thomas Mason* (1911) 7 CAR 67; *Ireland v Taylor* 1949 1 KB 300 (CA) at 312; *R v Holmes* [1953] 2 All ER 324 (CCA).

[157] *Ruto Flour* supra n15 at 237.

[158] *Coopers* supra n43 at 370.

[159] Schwikkard & Van der Merwe op cit n10 at 99.

[160] *R v Morela* 1947 (3) SA 147 (AD) at 151; *R v Smit* 1952 (3) SA 447 (AD); *R v Harvey* 1969 (2) SA 193 (RA) at 194.

[161] *Schneider v Aspeling* 2010 (5) SA 203 (WCC) at 211.

[162] *Nicholson v RAF* (07/11453) [2012] ZAGPJHC 137 (30 March 2012) at para 17.

[163] *National Justice Compania Naviera SA v Prudential Assurance ('The Ikarian Reefer')* 1993 (2) Lloyds Reports 68 at 81 applied in *National Justice Cia Naviera SA v Prudential Assurance* [1995] 1 Lloyd's Rep 455 at 496.

4.5.3 Qualify a provisional opinion and do not omit facts

When an expert cannot assert the correctness of his/her opinion without a qualification, such as where insufficient research or data are available to reach a conclusion, the expert must indicate that the opinion is provisional.[164]

An expert must draw the court's attention to anomalies and obtain sufficient clarity before formulating an opinion.[165] In *Ndhlovu v RAF*,[166] the plaintiff alluded to a brain injury not supported by the hospital records.[167] The court held that where the ipse dixit of a litigant (subjective data) differ from other objective evidence, the expert has a duty to highlight this discrepancy in order to maintain a distinction between receivable opinion evidence, where an expert can verify and diagnose a brain injury, from inadmissible opinion evidence on the part of the litigant (the litigant tenders symptoms of a brain injury that are not consistent with other objective data such as the hospital records). If the expert fails to highlight such discrepancies, it can be said the expert relies on inadmissible opinion evidence (that of the injured victim regarding symptoms of a brain injury).[168]

Experts, especially but not limited to the neurological, psychological and psychiatric disciplines, receive collateral input from the litigant, on which the expert relies to form an opinion, that is inextricably linked to the credibility of the collateral input, and if such input is discredited, the expert's evidence is of no value.[169] An expert's opinion, where the subject does not testify and

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[164] The *Ikarian Reefer* supra n163 at 81; *Schneider* supra n161 at 211; LJ Staughton 'Derby & Co Ltd v Weldon' Times, 9 November 1990.

[165] *Ndhlovu* supra n4 at 437-438.

[166] Supra n4.

[167] At 418-419.

[168] Para 115. Also see *P v P* 2007 (5) SA 94 (SCA) at 98.

[169] *S v Mthethwa* (CC03/2014) [2017] ZAWCHC 28 at para 98; *R v Möhr* 1944 TPD 105 at 108; *S v Shivute* 1991 (1) SACR 656 (NM) at 661H; *S v Mngomezulu* 1972 (1) SA 797 (A) at 798; *S v Loubser* 1979 (3) SA 47 (A) at 57 & 60; *S v Malinga* 2002 (1) SACR 615 (N) at 618; *R v Abbey* [1982] 2 SCR 24 at 43-45; *Singh v Parkfield* (1996) PIQR Q 110; AM Colman & RD Mackay 'Legal issues surrounding the admissibility of expert psychological and psychiatric testimony' (1993) 20 *Issues in Criminological and Legal Psychology* 46 at 47; RD Mackay & AM Colman 'Equivocal rulings on expert psychological and psychiatric evidence: Turning a muddle into a nonsense' (1996) *Criminal Law Review* 88 at 92; *S v Kleynhans* 2005 (2) SACR 582 (W) at 586.

the collateral information relied on is not placed before the court, lacks relevance and weight, and what remains is an abstract theory.[170] Experts must draw a clear line between matters of fact and matters of opinion (inferences that they draw), failing which they can be seen to act like judges and their evidence will have no probative value.[171]

In as much as experts must avoid obfuscation and vagueness,[172] an expert may not merely be a conduit of data which they accept uncritically on the say-so of others.[173] An expert is not at liberty to consider (or omit) material facts that would detract from his/her opinion.[174] The court in *Nonyane v RAF* held that experts are readily amenable (often to favour their instructing litigant) to pronounce on opinions without logical foundation, which amounts to an abuse of the powers of the court.[175]

4.5.4 Lay a factual basis

Experts must give clear and cogent reasoning[176] for their opinion, which must be premised on a relevant and reliable factual basis,[177] to allow a court to assess the cogency of the expert's reasoning.[178] The expert must tell the court of the premise on which an opinion is based,[179] whether facts or assumptions/inferences.[180] Expert may make assumptions based on proven admissible

[170] *S v Shivute* supra n169 at 661.

[171] *Potgieter v Potgieter* 2007 (5) SA 94 (SCA) at para 17.

[172] *Twine* supra n1 at para 18.

[173] *Ntombela v RAF* 2018 (4) SA 486 (GJ) at para 48.

[174] *Schneider* supra n161 at 211-212; *Vernon v Bosley* (No 1) [997] 1 All ER 577 at 601.

[175] *Nonyane v RAF* (3126/2016) [2017] ZAGPPHC 706 (10 November 2017) at para 14.

[176] *Hing v RAF* 2014 (3) SA 350 (WCC) at 363.

[177] *Moloi v S* 1995 BLR 439 (CA); *Caswell v Powell Duffryn* [1939] 3 All ER 722 (HL) at 733; *Motor Vehcile Assurance Fund v Dubuzane* 1984 (1) AS 700 (A) at 706; *Great River Shipping v Sunnyface Marine* 1994 (1) SA 65 (C) at 75.

[178] *R v Sibanda* 1963 (4) SA 182 (SR) at 190; *R v Nyamayaro* 1967 (4) SA 263 (RA) at 264; RL Carlson 'Experts, judges and commentators: The underlying debate about an expert's underlying data' (1995-1996) 47(2) *Mercer Law Review* 481 at 491.

[179] *R v Theunissen* 1948 (4) SA 43 (C) at 46; *R v Dembo* 1952 (2) SA 244 (T) at 249E.

[180] *Twine* supra n1 at para 18h.

objective facts and must avoid basing their opinions on conjecture or speculation,[181] or they run the risk of their evidence being disallowed.[182] A hypothesis, which is different from either inference or speculation, is a theory advanced in explanation of the facts in evidence as a basis for an inference.[183] For a hypothesis to be logically sound, it must be consistent with all the proven facts and must not postulate unproven facts.[184] Where the subject is technical, a hypothesis may be advanced by an expert witness.[185] Reasoning by inference includes consideration of various hypotheses which are conceivable on the evidence.[186] In civil cases, the hypothesis to be selected should be the most natural and plausible one in the sense of it being acceptable, credible or suitable and reached by balancing probabilities.[187]

The opinion must be presented in a fashion that allows the court to make its own observations[188] and to consider if the expert's conclusions are sound.[189]

[181] In *Caswell v Powell Duffryn Associated Collieries* (1939) 3 All ER 722, at 733, it was held that there can be no inference, in the absence of objective facts. In the absence of positive proved facts, speculation or conjecture remains.

[182] *S v Mtsweni* 1985 (1) SA 590 (A) at 593; *S v Essack and Another* 1974 (1) SA 1 (A) at 16; *AA Onderlinge Assuransie v De Beer* 1982 (2) SA 603 (A) at 620; *R v Dhlumayo* 1948 (2) SA 677 (A) at 678.

[183] *Bates & Lloyd Aviation v Aviation Insurance* 1985 (3) SA 916 (A) at 939-940.

[184] Ibid.

[185] Ibid.

[186] Ibid.

[187] *Koch* supra n90.

[188] *Powernet Services (1988) v Govt of RSA* 1998 (2) SA 8 (SCA) at 19.

[189] *S v Armstrong* 1998 (1) SACR 698 (SE) at 703.

Generally,[190] experts, in the same way as a lay witness, may not give hearsay evidence[191] or base their opinion on the statements of others who are not called as witnesses,[192] unless it amounts to an exception in terms of the Law of Evidence Amendment Act.[193] Facts which an expert relies on must:[194]

i. Be in the expert's personal knowledge; or
ii. Amount to the expert's opinion based on his/her expertise and/or other facts available to the expert, which are either admitted or yet to proven by the litigant at trial; and
iii. Must then be established in evidence by a factual witnesses.

In *PWC*,[195] the SCA quoted with approval the ratio dicidendi in *Widdrington*:[196] Before a court can attach weight to an expert opinion, the facts on which it is based must be proven (which facts can be observed by the expert witness personally), failing which it is of no value to the court. The court must consider first if the underlying facts are prima facie established and not based on

[190] Valuators of property, who express opinions about the value of immovable property, are an exception, see *Southern Transvaal Buildings v Johannesburg City Council* 1979 (1) SA 949 (W) at 959; *Lornadawn Investments v Minister van Landbou* 1977 (3) SA 618 (T) at 626. The expert's evidence will not be proof of the truth of the hearsay evidence, see *Davey v Minister of Agriculture* 1979 (1) SA 466 (N) at 475-477. D Zeffertt in 'Law of Evidence' (2000) *Annual Survey of South African Law* 795 at 802, remarks that since these expressions are in line with the common law, the General Law Amendment Act 45 of 1988 renders hearsay evidence inadmissible, yet courts rely on outdated case law.

[191] Defined by section 3(4) of the Law of Evidence Amendment Act 45 of 1988, as evidence in 'oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence'. Hearsay evidence is generally inadmissible. See s 3(1). Hearsay evidence may be admissible if it is in the interest of justice, based on a variety of factors to be considered, see s 3(1)(*c*); *Mathebula v RAF* (05967/05) [2006] ZAGPHC 261 (8 November 2006) at para 13.

[192] Schwikkard & Van der Merwe op cit n10 at 107.

[193] 45 of 1988, s 3(1)(*a*)-(*c*). Schuller submits that hearsay evidence, by an expert, may carry persuasive weight, see RA Schuller 'Expert evidence and hearsay: The influence of 'second-hand' information on jurors' decision' (1995) 19(4) *Law and Human Behavior* 345 at 357.

[194] *Holtzhauzen* supra n8 at 772.

[195] Supra n70 at para 99.

[196] Supra n94 at paras 326-330.

arbitrary guesswork,[197] failing which an expert opinion is worthless, purely hypothetical,[198] to be disregarded[199] or of little value[200] where no competent inference can be drawn by the court as only speculation remains.[201]

Proven facts must be compatible with other evidence and objective facts,[202] including the reliability of witnesses,[203] and must be proved by admissible evidence.[204] When an expert opinion is based on correct facts and presented in a satisfactory fashion, the opinion and reasons for the opinion ought not to be lightly rejected.[205] If an expert opinion is based on some (partially) proven facts, it cannot be ignored, but the less it relies on proven facts, the more its weight will be diminished.[206]

The inclusion of hearsay evidence in the expert's report is permissible, purely based on convenience and practicality, but this does not amount to proof of such hearsay averments.[207] Ultimately, the court is confined to the four corners of the proven facts and may not speculate if other facts exist.[208] Courts may not take judicial notice of facts which are not immediately and accurately determinable, and parties must lead evidence, even where the court has specialized knowledge in the area.[209]

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[197] *Flemington v Transvaal Carpet* 1972 (1) SA 249 (T) at 250.

[198] *S v Mkohle* 1990 (1) SACR 95 (A) at 100; *S v Mponda* 2007 (2) SACR 245 (C) at para 49; *S v Boyce* 1990 (1) SACR 13 (T) at 18.

[199] *MV Pasquale* supra n102 at para 26.

[200] *Ndlovu v RAF* supra n4 at 437; *Prinsloo v RAF* 2009 (5) SA 406 (SE) at para 19.

[201] *De Wet v President Versekeringsmaatskappy* 1978 (3) SA 495 (C) at 500. S v *Williams*, supra n65, at 753, incorrectly held that once an expert has the necessary knowledge and experience, and subsequently reaches a conclusion based on tests, it amounts to prima facie evidence, notwithstanding the absence of reasoning.

[202] *Louwrens v Oldwage* 2006 (2) SA 161 (SCA) at para 27.

[203] *S v Harris* supra n9 at 365.

[204] *Holtzhauzen* supra n8 at 772.

[205] *S v M* 1991 (1) SACR 74 (W) at 99-100.

[206] *Widdrington* supra n94 at paras 326-330.

[207] In *Godi v S* (A683/09) [2011] ZAWCHC 247 (31 May 2011) at para 20; *National Bank of Commerce of New Bedford v City of New Bedford* 175 Mass 257.

[208] *S v Ndlovu* 1987 1 PH H37 (A) at 68.

[209] *S v Steenberg* 1979 (3) SA 513 (B) at 515.

4.5.5 Make material available

Any material which the expert relied on, must be made available to the opposing litigants, such as photographs and measurements.[210]

4.5.6 Opinion must be reasonable

An opinion must be reasonable.[211] Carstens opines that it is problematic to equate logic and reasonableness as was done in the case of *Michael v Linksfield*: He argues that although logic can be an integral part of reasonableness, one can conceive of a situation where a logical medical expert opinion is not reasonable:[212] Carstens says logic refers to a process of rationality, premised on scientific cause and effect, and an inference is either rational or not, but reasonableness is a value judgement, premised on an accepted norm or standard.

4.5.7 Opinion should be independent

An expert is not to advocate for a specific litigant;[213] he or she is not a hired gun who dispenses his/her expertise specifically to advance a particular case.[214] An expert witness, not only must be, but also must be seen to be independent and the content of the opinion must not be influenced either in form or content by the demands that the adversarial litigation process places on the expert.[215] Experts should steer clear of professional bias as this may detract from an independent,[216] neutral,[217] objective[218] and scientific reasoning.[219] An opinion of a partisan expert,

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[210] *Twine* supra n1 at para 18l.

[211] See section 4.4 above. Also see *Maloney v RAF* (468/2018) [2022] ZAWCHC 51 (14 April 2022) at paras 101-103.

[212] PA Carstens 'Setting the boundaries for expert evidence in support or defence of medical negligence: Michael v Linksfield Park Clinic (Pty) Ltd 2001 (3) SA 1188 (SCA)' (2002) 65(3) *THRHR* 430 at 434-435.

[213] *Geldenhuys v Minister of Safety and Security* 2002 (4) SA719 (C) at 732.

[214] *Schneider* supra n161 at 211.

[215] *The Ikarian Reefer* supra n163 at 81.

[216] *Whitehouse v Jordan* (1981) WLR 246 at 276 cited with approval in *Twine* supra n1 at para 18n.

[217] *Stock* supra n96 at 129.

[218] *S v Kotze* supra n113 at 225; *Polivite Ltd v Commercial Union Assurance Co Plc* [1987] 1 Lloyd's Rep 379 at 386; *Re J* [1991] FCR 193.

[219] *Fulton v RAF* 2012 (3) SA 255 (GSJ) at para 45.

that asserts the cause of a litigant, is of little value and is to be discarded.[220] To the extent that the opinion is not independent, it is incorrect and self-defeating.[221]

Despite the notion that expert evidence may not be tailored to suit a litigant's case,[222] the SCA held[223] that however objective experts may endeavor to be it and other jurisdictions have generally experienced that invariably and perhaps subconsciously experts have a natural tendency to favor the case of the litigant calling him/her.[224] For this reason, courts must weigh their evidence carefully against apparently reliable direct evidence.[225]

Generally, no trust or reliance can be placed on an expert opinion ,where a legal practitioner has put his/her own interpretation to the expert: The court held in *S v Zwane* that then it is the counsel who gives evidence and not the expert.[226] Zeffertt, however, submits that reliance can be placed on the evidence if counsel's interpretation can be accepted by the court or the witnesses or both.[227]

The credibility and objectivity of an expert may competently be called into question when the expert:[228]

i. Accepts to perform a mandate in a restricted manner.
ii. Presents a report which is influenced, as to form or content, by the exigencies of litigation.
iii. Lacks independence or shows bias.
iv. The expert has an interest in the outcome because of his/her relationship with the litigant who instructed him/her.

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[220] *Transnet* supra n103 at 148.

[221] *Whitehouse* supra n216 at 276b cited with approval in *Twine* supra n1 at para 18n.

[222] *MV Banglar* supra n125 at 314.

[223] *PWC* supra n70 at paras 98 & 113.

[224] *Slavin's Packaging v Anglo African Shipping* 1989 (1) SA 337 (W) at 345; P Roberts 'Science in the criminal justice process' (1994) 14(4) *Oxford Journal of Legal Studies* 469 at 501.

[225] *Stacey v Kent* supra n119 at 497.

[226] *S v Zwane* (3) 1989 (3) SA 253 (W) at 278; *S v Baleka* 1986 (4) SA 1005 (T) at 1021.

[227] DT Zeffertt 'Law of Evidence' (1989) *Annual Survey of the South African Law* 409 at 420-421.

[228] *Widdrington* supra n94 at para 330; *PWC* supra n70 at para 99.

v. Acts as an advocate.

vi. Selectively examines and reports only evidence which supports his/her findings.

Much will ride on how an expert relies on objective originating data against the litigant's say-so or on unsubstantiated hearsay evidence[229] and the expert's willingness to make reasonable concessions, which adversely impact the instructing litigant, where there are good reasons to do so.[230]

4.6 The weight attached to expert opinion[231]

4.6.1 General rule

Courts generally are not bound by an expert's opinion.[232] A court must give reasons when it rejects an expert opinion, failing which its decision 'will usually be a grave lapse of duty, a breach of litigants' rights, and an impediment to the appeal process'.[233] Courts may have high regard for expert opinion, particularly where the opinion is intelligible, convincing and tested, but the court must consider the cogency of the expert opinion in the contextual matrix of the case and all evidence and circumstances presented to decide if the expert opinion is correct and reliable[234] and cannot blindly accept an expert opinion.[235]

4.6.2 Where opposing experts agree

What facts have been proved is for the court to decide, with a single exception, that is, where the parties reach an agreement on the facts.[236] The court cannot generally interrogate or go beyond such an admission of facts, even if skeptical about their validity.[237] Experts are not an agent of the

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[229] *Ndlovu v RAF* supra n4 at 439.

[230] *Jackson* supra n96 at 329.

[231] Usurping of the court's function is discussed at section 4.4 above.

[232] *S v Lewis* 1986 (2) PH 1196 (A); *Road Accident Tribunal v Gouws* [2018] All SA 701 (SCA) at para 33; *Van Wyk v Lewis* 1924 AD 438 at 447-448; *Leadbitter v Kitchin* (1890) 7 RPC 235 at 247-248 quoted with approval in *De Beers Industrial Diamond Division v Ishizuka* 1980 (2) SA 191 (T) at 199.

[233] *Strategic Liquor Services v Mvumbi* 2010 (2) SA 92 (CC) at para 15.

[234] *S v Apadile* 2011 1 BLR HC; *Van Wyk* supra n232 at 447; *Transkei Blueline Bus Company v Minister of Police* 1983 ECD (unreported) as referred to in *Abdo* supra n120 at 726.

[235] *S v Legote* 2001 (2) SACR 179 (SCA) at 182.

[236] *Thomas* supra n47 at para 9.

[237] *Thomas* supra n47 at para 9.

litigant, this fact places an agreement between experts on a different footing to agreements reached by legal practitioners.[238] Where opposing experts reach consensus on an issue, such as the injuries sustained by a victim as a direct result of being bitten by a dog, a party may litigate with the acceptance that such an agreement duly limits the issues and need not lead further evidence on the injuries sustained.[239] A litigant who wishes to dispute such a joint agreement (based perhaps on fraudulent collusion or gross misconduct by the experts), must clearly and timeously repudiate the joint expert minute. [240] This repudiation should not be for tactical reasons as litigation is not considered a game and private funds and court time should be expended only on triable issues.[241] Fair notice to the adversary is essential because a repudiation during the trial may lead to a postponement, to allow facts which were deemed admitted to be presented by way of evidence and further witnesses must then be called.[242] Where an expert wishes to renege on a joint minute the same fair play rule is required and a supplementary report must be filed.[243] Where the court rejects the joint expert opinion, the court has a duty to alert the litigants, so that they can adduce the necessary further evidence.[244] Joint expert agreements can bind the parties and the court only on the agreed facts and opinions and not on issues of law.[245]

4.6.3 Where there is no agreement between opposing experts

In the case of two mutually destructive versions, a litigant can succeed only if she/he can satisfy the court, on a balance of probabilities, that her/his own version is true and accurate and thus acceptable and that the other version is false or mistaken.[246]

Where two experts present irreconcilable opinions in an adversarial system, the court must decide which of those expert opinions is preferable. Hoffmann and Zeffertt[247] submit that peculiar

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[238] *Bee* supra n96 at para 66.

[239] *Bee* supra n96 at para 66.

[240] *Thomas* supra n47 at para 11.

[241] *Bee* supra n96 at paras 66-67.

[242] *Bee* supra n96 at para 69.

[243] *Bee* supra n96 at para 68.

[244] *Bee* supra n96 at para 71.

[245] Ibid.

[246] *National Employers Mutual General v Jagers* 1984 (4) SA 437 (E) at 440.

[247] LH Hoffmann & DT Zeffertt *The South African Law of Evidence* (1988) at 86.

difficulties present themselves in assessing the probative value of expert evidence, because the court does not have the means to verify the witnesses' conclusions and, in the case of a conflict, the court may turn to doubtful factors such as rival witnesses reputations and experience.[248] This difficulty is overcome in inquisitorial systems where experts must, inter partes, solve their disagreements in a joint report.[249] In *Geldenhuys,*[250] the court held that when opposing experts differ, the court must turn to the credibility of the experts,[251] but this decision is not in line with the SCA's decision in *Linksfield*.[252] To resolve two mutually destructive lay versions, courts turn to credibility, reliability and probability.[253] The credibility of experts inextricably is linked to probabilities, which probabilities[254] are to be considered in a case of conflicting expert opinions,[255] however, as a rule when adjudicating conflicting expert opinions, the court must turn, not to

[248] As quoted in *S v Malindi* 1983 (4) SA 99 (T) at 104-105.

[249] In the Netherlands two flies are caught simultaneously, experts are perceived to be impartial and it expedites the process, see PTC Van Kampen & JF Nijboer 'Daubert in the Lowlands' (1997) 30 *UC Davis Law Review* 951 at 985.

[250] *Geldenhuys v Minister of Safety and Security* 2002 (4) SA719 (C) at 732.

[251] At 732.

[252] *Linksfield* supra n97 paras 36-38. Credibility and the demeanour of witness are inadequate to fathom the reliability and validity of forensic evidence, see L Meintjes-van der Walt 'Decision-maker's dilemma: Evaluating expert evidence' (2000) 13(3) *SAJCJ* 319 at 321.

[253] *Stellenbosch Winery Group v Martell* 2003 (1) SA 11 (SCA) at para 5; *African Eagle Life Assurance Co Ltd v Cainer* 1980 (2) SA 234 (W) at 237D-H; *National Employers General v Jagers* 1984 (4) SA 437 (E) at 440D.

[254] See *Body Corporate of Dumbarton Oaks v Faiga* 1999 (1) SA 975 (SCA) at 979C and *MV Banglar Mookh* supra n125 at para 38, on the risks relying inherently on demeanour as opposed to probabilities.

[255] *Visagie v Transsun (Pty) Ltd* [1996] 4 All SA 702 (Tk); W Twining 'Debating probabilities' (1980) 2 *The Liverpool Law Review* 51 sets out four different theories of probabilities. Also see *Medi-Clinic Ltd v Vermeulen* 2015 (1) SA 241 (SCA) at para 5.

credibility but to analysis and reasoning[256] and the cogency of such reasoning.[257] In doing so, the court must measure the cogency of the expert evidence using the legal standard of a balance of probabilities and not scientific standards,[258] where the net result need not exclude all reasonable doubt.[259] The court should select the conclusion which is more natural and plausible from any number of conceivable conclusions, even where other conclusions may be reasonable.[260] 'Plausible' in this context means credible, acceptable or suitable.[261] The court must accept the most readily apparent and acceptable inference.[262] The scientific theory, on which the expert based an opinion, must exhibit consistency and logical reasoning, where both the theory and the observations and data must result in conclusions reached through logically valid reasoning.[263] It would be wrong of a court to make a decision on preference, where there are mutually destructive opinions, both supported by logical reasoning.[264] The trial court must determine whether and to

[256] *Abdo* supra n120 726; *GS Fouche Vervoer v Intercape Bus Service* [2006] 1 All SA 24 (C) at paras 25 & 44; *Linksfield* supra n97 at para 34; *Webb v Isaac* 1915 ECD 273 at 273; *Coppen v Impey* 1916 CPD 309 at 309; *Pringle v Administrator Transvaal* 1990 (2) SA 379 (W) at 379; *Castell v De Greef* 1994 (4) SA 408 (C) at 409; TB Barlow 'Medical negligence resulting in death' (1948) 11(3) *THRHR* 173-190; PA Carstens 'Nalatigheid en verskillende gedagterigtings binne die mediese praktyk: Pringle v Administrator Transvaal 1990 (2) SA 379 (W)' (1991) 54(4) *THRHR* 673-676; SA Strauss *Doctor, Patient and the Law* (1991) at 122; NJB Claassen & T Verschoor *Medical Negligence in South Africa* (1992) at 26; FFW Van Oosten & SA Strauss 'Medical Law-South Africa' in R Blanpain (ed) *International Encyclopedia of Laws* (1996) at paras 79 & 89.

[257] *Buthelezi v Ndaba* 2013 (5) SA 437 (SCA) at 442. For a useful approach to conflicting evidence, see B Robertson & GA Vignaux 'Expert evidence, law, practice and probability' (1992) 12(3) *Oxford Journal of Legal Studies* 392 at 402.

[258] *S v RAF* [2016] All SA 637 (GP) at paras 47-48.

[259] *Govan v Skidmore* 1952 (1) SA 732 (N) at 734A.

[260] *AA Onderlinge Assuransie-Assosiasie v De Beer* 1982 (2) SA 603 (A) 614-615; *Goliath v MEC for Health* 2015 (2) 97 (SCA) at 107.

[261] *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A) at 159.

[262] *Goliath* supra n260 at 107.

[263] In *S v RAF* supra n258 at para 52, the court agreed with L Meintjes-van der Walt 'Expert Odyssey: Thoughts on the Presentation and Evaluation of Scientific Evidence' (2003) 120 *SALJ* 352. *Mutual and Federal Insurance v SMD Telecommunications* 2011 (1) SA 94 (SCA) at 99-100. This approach was first employed in *Bolam v Friern Hospital Management Committee* I [1957] 2 All ER 118 (QB) at 122 and approved by the House of Lords in *Bolitho v City and Hackney Health Authority* [1998] AC 232.

[264] *Linksfield* supra n97 at para 39; *Oppelt v Department of Health 2016* (1) SA 325 (CC) at 339.

what ends the conflicting opinions are premised on logical reasoning and how the opposing evidence stands in relation to each other in light of the probabilities.[265]

Where appropriate, the court can reject both conflicting and mutually destructive expert opinions.[266] Where the court is unable to prefer one version above the next, absolution from the instance must follow.[267]

4.7 Procedural aspects

In civil trials, opinion evidence is given viva voce.[268] An exception is to be found in the Constitutional Court Rules that provides that litigants are entitled to file documents, to canvass factual material relevant to the question before the court that does not appear from the record, provided such facts are common cause or incontrovertible or of an official, scientific, technical or statistical nature[269] and capable of easy verification.[270] Judicial notice can then be taken of facts of

[265] *Louwrens v Oldwage* 2006 (2) SA 161 (SCA) at para 27. The limitation in logical reasoning is that logic does not necessarily indicate what is true and what is not, see PA Carstens 'Setting the boundaries for expert evidence in support or defence of medical negligence: Michael v Linksfield Park Clinic (Pty) Ltd 2001 (3) SA 1188 (SCA)' (2002) 65(3) *THRHR* 430 at 434-435. Logic speaks to arguments which are justifiable, but it is devoid of things that one should believe in at the first instance as a point of departure, see L Meintjies van der Walt 'Evaluation of divergent expert opinions' (2011) 24(2) *South African Journal of Criminal Justice* 213 at 215; *Mutual and Federal Insurance v SMD Telecommunications CC* 2011 (1) SA 94 (SCA) at 99-100

[266] *Twine* supra n1 at para 18s.

[267] *GS Fouche* supra n256 at paras 25 & 44.

[268] *Ex parte Smith* 1970 (4) SA 122 (O) at 125. The opinion potentially may be accepted in writing, if the conditions of s34 of the Civil Proceedings Evidence Act 25 of 1965 are met.

[269] Constitutional Court, Rule 31. Also see *S v Ntuli* 1996 (1) SACR 94 (CC) at para 27; *Ferreira v Levin; Vryenhoek v Powel* 1996 (1) SA 984 (CC) at para 4; *S v Makwanyane* 1995 (2) SACR 1 (CC) at para 24; *Shabalala v Attorney-General of Transvaal* 1995 (2) SACR 761 (CC) at para 18.

[270] The Constitutional Court can develop the law and may act legislatively, in doing so it may need to consider the law or policy which is known to it via legislative facts aimed to assist the court is exercising its discretion and judgement, see KC Davis 'An approach to problems of evidence in administrative process' (1942) 55(3) *Harvard Law Review* 364 at 402.

a social, economic, political and scientific nature.[271] Hogg justifies evidence in the absence of proof at trial, on two grounds: [272]

i. It is practical to inform the court of the full range of opinion on a particular point. No single expert or group of experts can adduce the entire range of professional opinion and it would be time consuming and expensive.
ii. Principally, the nature of judicial review does not make it a requirement to prove legislative facts (or facts which inform the court's legislative judgement) as only adjudicative facts (or facts concerning the immediate parties to the litigation) are relevant to dispose of litigation, but in a constitutional court review, the court need not be that definite because such facts are general and do not concern the litigants directly and in many cases need not, regularly are not and at times cannot be supported by evidence.

The Rules Board[273] recently changed the superior court's time periods for a litigant's pre-trial notice on expert evidence from late to early in the litigation process.[274] Save with leave from the court or the opposing parties, a litigant may not call an expert witness unless notice[275] of the intention to call the expert witness is given (no more than thirty days for plaintiff or sixty days for the defendant after the close of pleadings) and unless a summary[276] of the expert's opinion and with reasons, is delivered (not more than ninety days for the plaintiff or one-hundred-and-twenty days for the defendant after close of pleadings).

Uniform Rule 36 was promulgated to ensure than no litigant is taken by surprise at trial in relation to matters which a litigant in the normal course of events will be unable effectively to

[271] E Cleary (ed) *McCormick on Evidence* 3ed (1984) at para 328; Schwikkard & Van der Merwe op cit n10 at 530-531.

[272] PW Hogg 'Proof of facts in Constitutional cases' (1976) 26(4) *University of Toronto Law Journal* 386 at 396; KC Davis 'Judicial notice' (1955) 55(7) *Columbia Law Review* 945 at 952.

[273] Section 6 of the Rules Boards for Court of Law Act 107 of 1985.

[274] Amendment of the Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa, published in the GG No 42497 of 31 May 2019, commencing on 1 July 2019.

[275] In terms of Uniform Rule 36(9)(*a*).

[276] In terms of Uniform Rule 36(9)(*b*).

prepare for in the absence of Rules.[277] Two main requirements are necessary for Rule 36(9)(*a*) to apply:

i. The nature of the evidence must be that of an opinion; and
ii. The opinion must be given by an expert.[278]

Courts should guard against allowing Rule 36 to be evaded by litigants styling expert evidence as non-expert or vice versa.[279] The phrase 'reasons therefor' in Rule 36(9)(*b*) means that the opinion must at least include the facts and data relied on, which facts can be personally known or solicited by general scientific knowledge, experiments and investigations or ascertained by others, all of which factors the expert has been informed of to assist in the formulation of an opinion.[280] An expert report must be 'intelligible without oversimplification, comprehensive without irrelevance and succinct without material omission'.[281] The report must educate decision makers on their field of expertise.[282]

The notice of an intention to call an expert witness and the summary of the opinion with reasons must be delivered before the first judicial case management meeting[283] or must be delivered as directed by a case management judge.[284]

If a plaintiff claims damages or compensation arising out of the bodily injuries or the death of another person,[285] and the plaintiff's state of health is relevant to quantify the damages, the

[277] *Durban City Council v Mndovu* 1966 (2) SA 319 (D) at 324; DE Van Loggerenberg & I Farlam *Superior Court Practice* (2012) at B1-265-B1-269.

[278] *Uni-Erections v Continental Engineering* 1981 (1) SA 240 (W) at 250; *Snyman v Alert Drive* 1981 BP 198 (CP) at 213.

[279] *Stewarts & Lloyds of SA Ltd v Croydon Engineering and Mining* 1979 (1) SA 1018 (W) at 1020.

[280] In *AM* supra n43 at para 18, the court held that the reasoned conclusions must be based on the data/facts.

[281] P Roberts 'Science in the criminal process' (1994) 14(4) *Oxford Journal of Legal Studies* 469 at 484.

[282] EJ Imwinkelried 'The next step in conceptualizing the presentation of expert evidence as education: The case for didactic trial procedures' (1997) 1(2) *The Internal Journal of Evidence and Proof* 128 at 129.

[283] As contemplated in Uniform Rule 37A (6)-(7).

[284] Uniform Rule 36(9).

[285] Uniform Rule 36(5A).

defendant at their cost[286] has the right to submit the plaintiff to a medical examination,[287] by notice setting out logistical details.[288] This right constitutes a drastic invasion of a litigant's liberty[289] and rights,[290] therefore the Rule must be complied with strictly.[291] The person to be examined should be subjected to the least possible inconvenience.[292] The plaintiff may, in writing, object within five days of service of the Rule 36(1) notice, setting out the nature and grounds for the objection,[293] failing which it is deemed that the plaintiff consents to the examination on the grounds as set out in the notice.[294]

If the medical examination reveals that a further medical examination is necessary or desirable by another person, to disclose full information relevant to the claim, either party may require a second and final medical examination to be conducted in line with Rule 36.[295] The defendant must ensure that the expert submit a full report on the examination, containing his/her opinion pursuant to the examination, within two months of the examination or within a date

[286] Uniform Rule 36(8)(*c*).

[287] Uniform Rule 36(1).

[288] Uniform Rule 36(2)(*i*) -(*iv*) requires setting out: (i) The nature of the examination. (ii) Specifying the person who makes the examination. (iii) The date, time and place, being at least 15 days after the notice. In terms of Uniform Rule 36(2)(*b*)(*i*)-(*ii*) the notice must further set out: (i) That the Plaintiff may have his/her own medical adviser present and (ii) Be accompanied by a remittance for the reasonable expenses to attend the examination.

[289] *Goldberg v Union and SWA Insurance* 1980 (1) SA 160 (E) at 164D; *Lane v Willis* [1972] 1 All ER 430 (CA) at 435.

[290] *Durban City Council* supra n257 324; *Starr v National Coal Board* [1977] 1 All ER 243 (CA).

[291] Van Loggerenberg & Farlam op cit n277 at B1-266. A litigant may rely on privacy rights, to avoid being medically examined by the rival experts, but in the Irish case of *McGrory v ESB* [2003] IESC 45, the court held that a claimant, suing for damages, by implication waives the right to privacy and he may not unreasonably and unfairly impede the trial preparation of the defence, see *Brady v Judge Haughton* [2005] IESC 54; *Re Haughey* [1971] IR 217; *Maguire v Ardagh* [2002] 1 IR 385; *McGrory v ESB* [2003] IESC 45.

[292] *Mgudlwa v AA Mutual* 1967 (4) SA 721 (E) at 723.

[293] Uniform Rule 36(3). The objection, in terms of Rule 36(3)(*a*)-(*d*), may relate to the nature of the examination, the person conducting it, the date, time and place and the expenses tendered. If the defendant deems the objection to be unsound, a judge must determine the conditions of the examination by way of an application in terms of Uniform Rule 36(3)(*ii*).

[294] Uniform Rule 36(3)(*ii*).

[295] Uniform Rule 36(5).

directed by the case-management-judge, as contemplated by Rule 37(8) or 37A.[296] Within five days of receipt of the expert's report, the defendant[297] must notify all other litigants in writing that the report exists and immediately make it available on request.

To ensure effective case management and probably not to curb adversarial expert bias, the Uniform Rules of court enjoins the litigants to endeavor to appoint a single joint expert,[298] alternatively to file a joint expert minute/report, relating to the same discipline of expertise, within twenty days of the last filing of an expert report.[299] This ruling may save time and litigation costs.[300] In *Ntombela v RAF*[301] the court gives directions on how experts must prepare joint reports:

i. Experts are not to treat joint minutes merely as a clerical task, which amounts to a dereliction of duties in terms of the court directives.
ii. Experts should take the task of seeking common ground seriously.
iii. The intellectual input of the experts is an important endeavour to settle differences by engaging the counterpart expert and interrogating his/her views.
iv. Even the attorney's fees may be disallowed based on negligence or a lackadaisical attitude in non-compliance with the directives by the expert, placing a duty on an attorney to ensure that the expert complies.[302]

The Rules of court do not require a party to make any pre-trial disclosures regarding expert witnesses consulted. The Rules Board, in making a recent amendment,[303] missed an opportunity and did not heed the call of contemporary authors, who have suggested law reform, to compel the declaration and discovery of all ascertained expert evidence, even where it does not favour a

[296] Uniform Rule 36(8)(*a*).

[297] Uniform Rule 36(8).

[298] Uniform Rule 36(9A)(*a*).

[299] Uniform Rule 36(9A)(*b*).

[300] *Klue v Provincial Administration Cape* 1966 (2) SA 561 (E) at 261-262; *Doyle v Sentraboer* 1993 (3) SA 176 (SE) at 181; *Hall v Multilateral Motor Vehicle Accident Fund* 1998 (4) SA 195 (C) at 200.

[301] 2018 (4) SA 486 (GJ) at paras 46-47.

[302] Legal practitioners must ensure that experts comply with duties towards the court, see *Twine* supra n1 at para 18q.

[303] Op cit n274.

litigant.[304] A litigant, unbeknown to his/her opponent or the court, can secure an expert opinion without giving notice of such an expert in terms of Uniform Rule 36.[305] A litigant may choose to do this because, once notice is given, a party may be bound by the expert's evidence.[306] If a litigant does not give notice, they can pick which evidence is useful and discard the remainder, a notion which is untenable if it is accepted that experts are there to assist the court.[307]

Against an adversarial background, Uniform Rule 36 makes inroads upon a fundamental right of a litigant, that of being able to call a witness and to require the opposing party to intimate in advance what the expert will be testifying about and for this reason the rule should be strictly construed and adhered to.[308] Strict adherence would mean that proper and cogent reasons are presented, even in a summary format, that need not deal fully with the allegations in the pleadings. The rule cannot be employed to solicit information from a litigant by attacking the summary provided.[309]

Before the amendment of the Uniform Rules of court,[310] there was a contention against Uniform Rule 36(9)(*a*) & (*b*). This contention entailed that the Rules impose the same timeframes for all the parties to the litigation, fifteen days for the notice of intention to utilize expert evidence and ten days before trial to deliver a summary and reason for the expert evidence. In the Superior Courts, a plaintiff, in terms of the pre-amendment rules, could deliver a notice to file experts some fifteen days before trial, leaving his/her opponent disadvantaged and unable to secure counter/rebuttal expert evidence well in time of the limitation. The court held that Uniform Rule

[304] RS Gross 'Expert evidence' (1991) 6 *Wisconsin Law Review* 1113 at 1212; L Meintjes-van der Walt 'Pre-trial disclosure of expert evidence: Lessons from abroad' (2000) 13(2) *South African Journal of Criminal Justice* 145-159.

[305] Uniform Rule 36(9)(*a*) and 36(1).

[306] Section 4.6 above.

[307] *S v Huma* supra n136 at 410.

[308] *Boland Construction v Lewin* 1977 (2) SA 506 (C) at 508. In *City of Cape Town v Kotze* 2017 (1) SA 593 (WCC) at paras 25 & 33, the court held Rule 36 is invasive and limits a party's constitutional right to bodily integrity, privacy and dignity, but reasonably and justifiably so. Rule 36 is necessary for public policy and for the administration of justice. There must be as little interference with the claimant's rights as possible, see *Goldberg* supra n289.

[309] *Boland Construction* supra n308 508.

[310] Per Government Gazette 42497.

36 was not designed strictly to cover evidence in answer to an opposing expert.[311] This lacuna in Rule 36[312] was rectified by the amended Uniform Rules of court, however the Rules Board unfortunately missed an opportunity to also rectify this lacuna in the Magistrate court.

4.7.1 Practice directives

The superior courts have issued practice directives to promote effective case management,[313] which coincidently mirrors endeavours employed by other countries in curbing expert bias, such as encouraging parties to employ a single expert[314] and requiring experts to confer.[315]

4.8 Conclusion

This chapter has set out the legal framework governing the reception of expert evidence in court. It considers first, the common law requirements of the admissibility of expert evidence, with the main requirement for the admission of expert evidence namely relevance. Once admitted, the court considers what weight to attach to the expert opinion based on its probative value. The chapter explored how courts should assess mutually destructive expert opinion on opposing sides. This chapter also set out the various duties of the expert witness. It is against the backdrop of this significant restatement of the South African law that solutions must be considered to address the problem of adversarial expert bias in South Africa.

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[311] *Coopers* supra n43 at 371F.

[312] Van Loggerenberg & Farlam op cit n277 at B1-271.

[313] *Gauteng-Pretoria and Johannesburg High Court*: In Judge President's Practice Directive 2/2019, at para 7.4.1.4.3, para 7.4.1.4.1, para 7.4.1.4.1, para 15.2.7, para 7.4.1.4.2, para 7.4.2, para 8.1.3.1, para 15.2.5 & para 8.1.3. *North West-Mahikeng High Court:* Practice direction 24(1), 24(2) & 24(3) & 24(4k). The North West directives are duplicated in the *Eastern Cape Joint Rules of Practice.* In the *Western Cape- Cape Town High Court Consolidated Practice Notes*, at paras 39, 41(4) & 5(*d*). *Commercial Court of Johannesburg practice direction*, Rule 8.4. Where parties apply to have their action declared a commercial one, they effectively agree to submit themselves to the total discretion of the proactive court, which is at liberty to apply whatever procedure the court deems appropriate, see M Tselentis 'Will the Commercial Court achieve its objectives' as in Farlam & Van Loggerenberg *Superior Court Practice-Supplementary Volume* (2012) at 6-149; WP Schutz & C Plewman 'The commercial court' (1994) June *De Rebus* 411-412. This is an example where the strict adversarial rules have been relaxed.

[314] New South Wales Uniform Civil Rules of 2005.

[315] B De Villiers 'Conferral of experts and concurrent evidence-What to experts think of it?' (2015) 42(7) *Brief* 30-34.

Given the prevalence of expert bias in South Africa and the adverse consequences synonymous with adversarial expert bias, the next chapters will explore ways in which adversarial expert bias, as discussed in chapter 3, may be eliminated and specifically consider the pros and cons of such suggestions in the context of the South African political, economic, legal and social climate. The first response to adversarial expert bias in the next chapter looks at how experts are appointed and will explore court appointed experts, single experts and blind expert appointment.

CHAPTER 5

COURT EXPERTS, SINGLE EXPERTS AND BLIND EXPERT APPOINTMENT

5.1 Introduction

This chapter examines possible responses to adversarial bias that adapt the conventional adversarial methods by which experts are appointed. It considers the following three alternatives to adversarial party appointment and introduction of expert witnesses:

i. Court appointed experts.
ii. Blind expert appointment.
iii. Single experts appointed jointly by the parties.

5.2 Court appointed experts

5.2.1 What is a court appointed expert?

Experts appointed by the court are now the most common proposal for expert-evidence-law-reform in Anglo-American countries,[1] suggested for epistemic and cost-effective reasons,[2] but mostly to curb adversarial bias.[3]

[1] MH Erichson 'Mass tort litigation and inquisitorial justice' (1999) 87 *Georgetown Law Journal* 1983 at 1985.

[2] O Perez 'Judicial strategies for reviewing conflicting expert evidence: Biases, heuristics and higher order evidence' (2016) 64 *The American Journal of Comparative Law* 75 at 107.

[3] HA Hammelman 'Expert evidence' (1947) 10 *Modern Law Review* 32 at 33; I Freckleton *The Trial of the Expert* (1987) at Chapter 11; MN Howard 'The neutral expert: A plausible threat to justice' (1991) *Criminal Law Review* 98 at 98; J Spencer 'The neutral expert: An implausible bogey'(1991) *Criminal Law Review* 106 at 106; P Alldridge 'Forensic science and expert evidence' (1994) 21(1) *Journal of Law and Society* 136 at 142; EE Deason 'Court-appointed expert witnesses: Scientific positivism meets bias and deference' (1998) 77(1) *Oregon Law Review* 59 at 83; D Sonenshein & C Fitzpatrick 'The problem of partisan experts and the potential for reform through concurrent evidence' (2013) 32(1) *Review of Litigation* 1 at 36-45**;** TV Lee 'Court appointed experts and judicial reluctance: A proposal to amend rule 706 of the Federal Rules of Evidence' (1988) 6(2) *Yale Law & Policy Review* 480 at 492-493.

In diluting[4] the adversarial nature of expert evidence,[5] legal systems[6] that accommodate court experts procedurally allow for experts to be appointed at the behest of the court and not necessarily to be introduced by the litigants.[7] Court experts are believed to be neutral and impartial auxiliaries of the court,[8] whose opinions generally carry greater weight than party-introduced experts.[9]

In South African jurisprudence,[10] the appointment of experts by courts in civil litigation is unheard of and raises the question whether a civil court mero motu can appoint experts.

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[4] DE Van Loggerenberg *Hofbeheer en Partybeheer in die Burgerlike Litigasieproses: 'n Regshervormings-ondersoek* (unpublished LLD thesis, UPE, 1987) at 200; S Grobler 'The role of the expert witness' (2007) March *The South African Gastroenterology Review* 11 at 11.

[5] Partisan experts also are present in inquisitorial systems which mitigate the problem of bias, see L Meintjes-van der Walt 'Science friction: The nature of expert evidence in general and scientific evidence in particular' (2000) 117 *SALJ* 771 at 775; L Meintjes-van der Walt 'The presentation of expert evidence at trials in South Africa, the Netherlands and England and Wales' (2001) 12(2) *Stellenbosch Law Review* 283 at 284.

[6] For the United States of America, see Federal Rule of Evidence 706. For Australia, see New South Wales Uniform Procedure Rules of 2005, Rule 31.17 (*a*)-(*f*) & Rule 31.29-31.34; New South Wales Law Reform Commission, Project 109, *Expert Witnesses* (2005) at 41; Practice Note 128; HD Sperling 'Expert evidence: The problem of bias and other things' (2000) 4(4) *Judicial Review* 429-462. For New Zealand, see New Zealand Law Commission, Evidence Law, Preliminary Paper 18, *Expert Evidence and Opinion Evidence: A Discussion Paper*, 18 December 1991 at para 90; New Zealand Law Commission, Report 55 (vol I), *Evidence: Evidence Reform of the Law*, 1 August 1999. For Ireland, see s20 of the Civil Liability and Courts Act 2004. For the Netherlands, see Dutch Civil Procedure Code, art 194-200. Also see generally J Basten 'The court expert in civil trials- A comparative appraisal' (1977) 40 *Modern Law Review* 174 at 181.

[7] L Meintjes-van der Walt *Expert Evidence in the Criminal Justice Process: A Comparative Perspective* (2001) at 175; H S Williams 'Medical experts and homicide' (1897) 164 *North American Review* 160 at 167; LS Kubie 'The Ruby case: Who or what was on trial?' (1973) 1 *Journal of Psychiatry and Law* 475 at 478.

[8] L Meintjes-van der Walt 'Expert evidence and the right to a fair trial: A comparative perspective' (2001) 17(3) *South African Journal on Human Rights* 301 at 303; Dutch Code of Civil Procedure, art 194-200.

[9] *Bonisch v Austria* [1987] 19 EHRR 191.

[10] To the contrary, the American Federal Rule 706 provides for courts to appoint experts as follows: (1) The party or the court may file a motion for the appointment of experts. Parties may nominate and agree on suitable experts, but the ultimate decision lies with the court. (2) The experts that the court selects shall be informed of their role via a court in writing or orally, at a conference with the litigants. The experts report to both parties and the court or either party is at liberty to call an expert to testify, who may be cross examined by any party. (3) In civil matters, the court will

5.2.2 Can a civil court mero motu appoint expert witnesses?

In section 1.5 above, it was noted that, unlike in criminal cases, a court in a civil matter may not call witnesses (including expert witnesses) without the consent of all the parties to the case. This is the case even if a court cannot reach a decision without calling an expert witness.[11]

If the aim of the criminal law is for the court to administer justice and to see that justice is done and in doing so may appoint experts, there is no reason why the same discretion cannot be afforded the civil courts.[12] The law will have to be reformed if court experts are to be made compulsory (or even optional) in South African civil procedure and it is apposite to consider the advantages and disadvantages of court-appointed experts and to propose responses to counter these disadvantages, bearing in mind that most jurisdictions where court experts are employed make use of a jury system, where the jury and not the court is the fact-finder.

5.2.3 The advantages of court experts

The corollary to court experts, appointed (and paid for) by the court, is that some of the root-causes of adversarial expert bias (discussed in section 3.2) may be eliminated.[13] The expert's tendency to align opinion with the interests of one litigant may be eliminated.[14] Experts may be at liberty to be objective and express an opinion genuinely held and free of bias.[15] Objective expert opinions may enable parties to settle their disputes before the trial.[16] The mainstream opinion will more readily

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determine the reasonable payment by one or more litigant and will treat costs like any other hearing. (4) The court can inform the jury that an expert was court-appointed. (5) Parties are at liberty to appoint their own experts.

[11] *Rowe v Assistant Magistrate, Pretoria* 1925 TPD 361 at 369.

[12] A trial is an intensive search for the truth and not a game, determined by tactics and surprise, see *Greyhound Corporation v Superior Court* 56 C2d 355 (1961). In criminal law, accused persons enjoy more protection with the aim to achieve procedural equality, see S Negri 'The principle of "equality of arms" and the evolving law of International Criminal Procedure' (2005) 5 *International Criminal Law Review* 513 at 513-514.

[13] RS Gross 'Expert evidence' (1991) 6 *Wisconsin Law Review* 1113 at 1188; DM Dwyer 'The effective management of bias in civil expert evidence' (2007) 26 *Civil Justice Quarterly* 57 at 58-59.

[14] M Malsch & I Freckleton 'Expert bias and partisanship: A comparison between Australia and the Netherlands' (2005) 11(1) *Psychology, Public Policy and the Law* 42 at 53.

[15] *Re J (a minor) (Expert Evidence)* [1990] FCR 193; E Bell 'Judicial assessment of expert evidence' (2010) 2 *Judicial Studies Institute Journal* 55 at 77.

[16] *Abbey v Key Surveyors* [1996] 1 WLR 1534 at 1547; B McConnell 'Strange bedfellows in the witness box' (1996) *New Law Journal* 1746 at 1749.

be aired in court than a minority view, because experts do not owe allegiance to the instructing party and are discharged of sympathy that comes from time spent with the litigation team.[17] Court experts, as 'friends of the court',[18] may enable the court better to comprehend scientific issues[19] when the role of experts, as prize-fighters, may be replaced with that of proponents of science and knowledge who perform their function as inseparable auxiliaries to the truth,[20] freely, impersonally and unhindered.[21]

5.2.4 Disadvantages of court appointed experts

5.2.4.1 Courts are reluctant to appoint experts

The idea of court-appointed experts is pervasive, but implementation has been a consistent failure.[22] In jurisdictions where courts procedurally can appoint experts, they hardly ever are appointed[23] despite efforts to enhance their utilisation.[24] A reluctance to detract from the adversarial nature of proceedings appears to contribute to the reluctance to engage court- appointed experts.[25] Courts are further constrained by logistical concerns and uncertainty. For example, under what circumstances are they to appoint experts, how will experts be appointed and paid and what are the costs involved?[26] Rules which make provision for court experts are poorly structured, do

[17] Dublin Law Reform Commission, *Consultation Paper: Expert Evidence* (2008) at 227.

[18] Kubie op cit n7 at 478 & 484.

[19] Deason op cit n3 at 83.

[20] E Washburn 'Testimony of experts' (1866) 1 *American Law Review* 45 at 64.

[21] Williams op cit n7 at 165.

[22] Gross op cit n13 at 1220.

[23] DH Kaye, DE Bernstein & J Mnookin *Expert Evidence: The New Wigmore, A Treatise on Evidence* (2005) at 329-346. The apathetic approach to employing court experts was confirmed by two studies done by the US Federal Judicial Centre, see Gross op cit n13 at 1191. In a United States of America study, fifty out of eighty-six judges deemed court appointment of experts as extraordinary, see JS Cecil & TE Willging *Court-Appointed Experts: Defining the Role of Experts Appointed Under Federal Rule of Evidence 706* (1993).

[24] Gross op cit n13 at 1220.

[25] A majority of Australian courts do not appoint experts, despite the biased expert contention, see Malsch & Freckleton op cit n14 at 54. Also see the Australian Federal Family Law Rules 2004, Rule 15.46.

[26] I Freckleton, P Reddy & H Selby *Australian Judicial Perspectives on Expert Evidence: An Empirical Study* (1999) at 8; Cecil & Willging op cit n23 at 244.

not define areas where the courts ought to appoint experts and provide no assistance as how to locate them.[27]

In most jurisdictions where courts can appoint experts, the court has a discretion. In jurisdictions in the United States of America most courts approve of court experts, but not without reservations.[28] Courts resist creating the impression of undue influence by the expert, specifically the impression that the expert has the last word and Gross suggests for court experts to work incentives must be built into the use of court experts and that courts are relieved of the responsibility of selecting experts.[29] Because court-appointed experts are a luxury that can be added to the existing apparatus, their appointment is not compulsory and can be dispensed with and, as discussed in sections 5.2.4.2 and 5.2.4.9, courts and lawyers have an incentive to dispense with them. [30] An alternative solution lies in making court experts compulsory.[31]

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[27] The reluctance of courts appointing experts can be overcome by assembling a list of duly qualified and available experts, see E Tratschler 'The cost aspect of medical expert witnesses and the possible introduction of a medical expert panel in South Africa' (2018) 12 *Pretoria Student Law Review* 223 at 231; J Holschuh 'Advocacy in the preparation and presentation of medical evidence' (1960) 21 *Ohio State Law Journal* 160 at 166-173; Note 'The New York Medical Expert Project: An experiment in securing impartial testimony' (1954) 63 *Yale Law Journal* 1023 at 1024. The Expert Witness Directory of Ireland provides lists of expert witnesses, reference-checked and in more than one thousand disciplines, where experts are enrolled only when they meet with the requirements, see Dublin Law Reform Commission op cit n17. The New York Medical Expert Testimony Project's list of experts made a small impact in practice, see Association of the Bar of the City of New York, Committee on the Medical Expert Testimony Project *Impartial Medical Testimony* (1956) at 30-31. The Temple Law Quarterly conducted a survey in 1961 where eighty-three out of ninety-nine courts either rejected proposals to set up medical panels or never considered such an option, see H Menin & GC Leedes 'The present status of the impartial medical expert in civil litigation' (1961) 34 *Temple Law Quarterly* 476 at 479.

[28] ES Levy 'Impartial medical testimony revisited' (1961) 34 *Temple Law Quarterly* 416 at 425-426; LW Myers 'The battle of the experts: A new approach to an old problem in medical testimony' (1965) 44 *Nebraska Law Review* 539 at 577-589; L Harris 'Judges' opinions on procedural issues: A survey of state and federal trial judges who spent at least half their time on general civil cases' (1989) 69 *Boston University Law Review* 731 at 741.

[29] Lee, op cit n3, at 503, suggest amending US Rule 706 to recognize lethargic judiciary conduct as a violation of a court's judicial function.

[30] Gross op cit n13 at 1197 & 1220.

[31] Gross op cit n13 at 1220.

5.2.4.2 Legal practitioners do not support court experts

In courts in the United States of America the decision to appoint an expert may be influenced by the lawyers in two ways:[32]

i. Most judges are former legal practitioners and share the lawyers' sentiments.
ii. Legal practitioners are the dominant actors in court, who define the issues and they put up a concerted opposition to the courts imposing their will on lawyers.

Commentators suggest that the courts and the legal profession in the United States of America are ignorant of the possibilities court experts offer.[33] Considering that practitioners have been approached intermittently in campaigns to encourage court experts to be appointed, their reluctance may be more closely related to affirmative uninterest than to ignorance. [34]

The loathness on the part of legal practitioners to support court-appointed experts may reflect a systemic misperception; legal practitioners overestimate their own experts and undervalue opposing experts.[35] Literature in leading social science journals, points to pervasive cognitive biases that are the cause of the legal practitioner's reluctance to agree to court experts.[36] Legal practitioners repudiate the notion of court experts as a result of their position of control and their egocentrism.[37] A legal practitioner's main task is to maintain complete control so as to manage the risk in any litigation, [38] which is why practitioners are reluctant to abdicate their controlling role over expert witnesses.[39] A court expert does not fit this narrative and lacks the commitment and

[32] Gross op cit n13 at 1198.

[33] Note 'The doctor in court: Impartial medical testimony' (1967) 40 *Southern California Law Review* at 728 734.

[34] T Botter 'The court-appointed impartial expert' in MD Kraft (ed) *Using Experts in Civil Cases* (1977) at 57 & 62.

[35] Gross op cit n13 at 1197.

[36] RE Nisbett & L Ross *Human Inference: Strategies and Shortcomings of Social Judgment* (1980) at 228-237.

[37] Gross op cit n13 at 1200.

[38] Gross op cit n13 at 1202.

[39] Gross op cit n13 at 1201. In South Africa, litigants select experts freely, unseen by the court or the other litigants in the matter. The expert then prepares a written report, which is submitted to the instructing legal practitioner, who chooses whether to use the report and is not compelled to discover the report. Litigants can manipulate the collateral information which is submitted to the expert and can limit the scope and mandate of the expert, see generally Uniform Rule 36(1)-(2) of the High Court Rules.

allegiance to a particular litigant that allows the litigant to shape and organize the evidence.[40] The court's expert is deemed to be too unpredictable and lawyers rather will rely on less credible experts that are more controllable.[41]

5.2.4.3 Court experts usurp the court's role

Epistemic studies on court appointed experts reveal disparate results. A study in the United States of America shows that juries, as fact finders, display equal treatment to court experts, compared to party-appointed experts,[42] whereas another study reports that court experts had a powerful influence on the jurors' response.[43] Gross argues that the mere fact that it is the court that employs the expert does not make the expert infallible, nor does it amount to undue influence on the fact finder.[44] In support of his argument, he references an empirical study where data from 24 Pennsylvania trials revealed that in nine of the 24 trials the decision went against the opinion of court-appointed experts.[45]

Other writers argue that court experts are deemed as having too much power and their views are practically impossible to disprove: Their opinion is dispositive in all issues they allude to;[46] the court expert is invested with authority[47] and courts uncritically defer to them.[48] Because courts select the experts, the court's objectivity is compromised.[49] Courts perceive the experts they

[40] Gross op cit n13 at 1201.

[41] M Dombroff 'Court appointment can resolve battle of experts' (1985) April *Legal Times* at 18.

[42] For this study see NJ Brekke, PJ Enko, G Clavet & E Seelau 'On juries and court-appointed experts: The impact of non-adversarial versus adversarial expert testimony' (1991) 15(5) *Law and Human Behavior* at 451-474.

[43] For this study see BL Cutler, HR Dexter & SD Penrod 'Non-adversarial methods for sensitizing jurors to eyewitness evidence' (1990) 20(14) *Journal of Applied Social Psychology* at 1197–1207.

[44] Gross op cit n13 at 1194.

[45] Myers op cit n28 at 573.

[46] Gross op cit n13 at 1193.

[47] Malsch & Freckleton op cit n14 at 56.

[48] *R v DD* 2000 SCC 57; *Daubert v Mertell Dow Pharmaceuticals* 509 US 579 (1993).

[49] Perez, op cit n2 at 98, notes the Israeli court accepted 91.5% of their own expert's opinion in tort matters and 92% in road-accident-fund matters. Where the court deviated in its view from an expert that the court appointed, the deviation was marginal. Also see WH DeParq 'Law, science and the expert witness' (1956) 24 *Tennessee Law Review* 166 at 171; RF Record 'The Federal Rules of Evidence-Origins, analysis and impact' (1975) 24 *Defendant Law Journal* 111 at 130-131; TF Lambert 'Impartial medical testimony: A new audit' (1957) 20 *Nacca Law Journal* 25 at

select and appoint, as neutral and uncritically ascribe more weight to their opinion,[50] despite the fact that an expert is not completely impartial.[51] This tendency is the reason cases in which the courts appoint experts are more likely to go to trial.[52] The possibility that the court-expert may usurp the court's function, may be exacerbated in South Africa, owing to the fact the judge, who would be appointing the expert, also adjudicates the dispute, as opposed to a jury.

5.2.4.4 Court experts deliver substandard work

Court experts are deemed to deliver an opinion of poor quality because they do not have an incentive for thoroughness and a sense of devotion, as have adversarial experts.[53] Meintjes-van der Walt rejects this argument. She states that the notion that a market for experts creates incentives for competence, which is the only way quality experts can be provided, is a jaundiced view of independent experts and casts a grave aspersion on the integrity of experts and should not be engaged in lightly.[54] Gross however maintains, in the context of court experts appointed for the indigent, especially mental health experts, that they barely qualify as experts, they are inadequately compensated and often perform at the margin of acceptable practice.[55] He claims this to be the case, because these experts, especially psychiatrists and clinical psychologists, are inexpensively and conveniently appointed for the examination of indigent litigants at the court's expense.[56] On

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26; SA Saltzburg 'The unnecessarily expanding role of the American trial judge' (1978) 64 *Virginia Law Review* 1 at 74-80.

[50] A Appazov *Expert Evidence and International Criminal Justice* (2016) at 83; C Champod & J Vuille 'Scientific evidence in Europe- Admissibility, evaluation and equality of arms' (2011) 9 *International Commentary on Evidence* 1 at 51.

[51] Meintjes-van der Walt, op cit n7 at 123, notes that the fact finder considers expert opinion very compelling and, when it is reduced to writing, its authoritative status increases out of proportion to its value.

[52] Myers op cit n28 at 567-572.

[53] BL Diamond 'The fallacy of the impartial expert' (1959) 3 *Archives of Criminal Psychodynamics* at 221-236.

[54] Meintjes-van der Walt op cit n7 at 139.

[55] Gross op cit n13 at 1194.

[56] Gross op cit n13 at 1195. The main offenders fall in the domain of soft sciences, see Meintjes-van der Walt op cit n7 at 73. These are psychiatrist and psychologists, see H Weihofen 'Detruding the experts' (1973) 38(1) *Washington University Law Review* 38 at 56. It is in these disciplines that experts are accused of hidden biases, see BJ Ennis & TR Litwack 'Psychiatry and the presumption of expertise: Flipping coins in the courtroom' (1974) 62 *California Law Review* 693 at 746-747. Yerion alludes to the fact, as well as the psychiatric evidence, that experts in compensations proceeding also tend to be biased, see RA Yerion 'Expert medical testimony in compensation proceedings' (1935) 2

occasion, indigent litigants are examined by overworked and underqualified staff doctors, at state mental health hospitals, whose neutrality is impacted by institutional habits and biases.[57] Gross suggests these issues do not apply to experts in other disciplines and should not extend to civil trials where experts are well paid.[58]

5.2.4.5 Sound infrastructure is a prerequisite for court experts

In jurisdictions that procedurally cater for court-appointed experts, there is no reason for courts not to invoke the right to appoint experts,[59] however the legal system's infrastructural weakness may cause difficulty in implementing expert panels (of court-appointed experts).[60]

Court experts, whose evidence can be complex and wide-ranging, require meticulous advance pre-trial preparations to ensure that all angles which may come up during trial, an all-encompassing single event, are catered for and to make the presentation sufficient and acceptable to the court.[61] The court cannot expect parties to conduct the pre-trial preparations with court-appointed-experts, as legal practitioners will have a suspicious and hostile attitude towards the experts, whereas the experts aim to come across as impartial and would not want to work closely with either party.[62] Courts in the United States of America do not reveal an appetite for pre-trial preparation nor do they have the structural capacity owing to a low judge-to-legal-practitioner ratio and judge-per-capita ratio.[63] It is deemed improper conduct and contrary to existing norms of

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Law and Contemporary Problems 476 at 476. For extensive work on the subject see J Ziskin *Coping with Psychiatric and Psychological Testimony* (1981) 3ed; Comment 'The psychologist as expert witness: Science in the courtroom' (1979) 38(3) *Maryland Law Review* 539 at 545-546.

[57] Gross op cit n13 at 1195. See section 3.2 for some of these institutional biases.

[58] Gross op cit n13 at 1195.

[59] Gross op cit n13 at 1201.

[60] CM Van Heerden 'Perspectives on the procedure for pre trial exchange of expert evidence' (2006) 39 *De Jure* 555 at 571.

[61] Harris op cit n28 at 738.

[62] Gross op cit n13 at 1203. This is further exacerbated by the fact that ex parte communication with court experts is deemed unethical in the USA, see *Leesona v Vorta Batteries* 522 F Supp 1304 1312 n 18 (SDNY 1981).

[63] Gross op cit n13 at 1203.

practice for courts to engage in pre-trial preparation with expert witnesses.[64] The net result is that the position of a court expert is isolated and becomes a horse with no rider.[65]

5.2.4.6 Ill-suited to accommodate convergent opinions

It is argued that, generally, court experts are particularly problematic in their opinion when a discipline is divided on a particular question, because the true issue will not be ventilated and the individual position of the court-expert invariably becomes the position advanced to the court,[66] especially in a scenario where experts cannot be cross-examined to test their evidence.[67] It is important that the evidence of court experts is tested on the basis of the inferences and opinions formed by court experts, and that they are questioned as to how they arrive at their conclusions. A failure to perform these obligations runs the risk that experts are deferred to uncritically.[68] There is a danger expert evidence will provide theory rather than science and speculation instead of facts.[69] The court expert may not be able to deal satisfactorily with acceptable but contradictory expert views and the court is not competent to assess the difference between them.[70] Some authors view court experts to be of greater use where they only comment on evidence offered by partisan experts and provide the fact finder with assistance in understanding complicated evidence.[71]

Gross maintains that division of opinion in a discipline is limited and if an expert is carefully selected and his/her mandate is well-defined, the divergent opinion and reasons therefor

[64] The Canon 3(A)(4) of the Code of Judicial Conduct, prohibits any unilateral communication by a judge 'concerning a pending or impending proceeding', including communication with a court-appointed expert, see *United States v Green* 544 F2d 138.

[65] *Superior Beverage v Owens Illinois* 827 F Supp 477 (1993).

[66] CJ Schuck 'Techniques for proof of complicated scientific and economic facts' (1967) 40 *FRD* 33 at 38; BM Webster 'The use of economic experts as witnesses in antitrust litigation' (1962) 32 *FRD* 99 at 100.

[67] Meintjes-van der Walt op cit n7 at 123.

[68] Malsch & Freckleton op cit n14 at 56.

[69] Washburn op cit n20 at 56.

[70] Gross op cit n13 at 1226. The court expert may follow a school of thought, adopted by only one percent of experts in a discipline, but this minority view is the only version before the court.

[71] Appazov op cit n50 at 121-122. This is how the Israeli system works (see Regulation 127 of the Civil Procedure Regulations of 1984), with an exception of motor vehicle accident matters where the courts appoint the experts in terms of article 6a of the Compensation for Road-Accident Victims Act of 1975 (CRAVA).

can be duly aired.[72] The alternative practice is party-appointed experts who place divergent propositions before the court and there is no reason to argue that they will do any better than a neutral court expert.[73]

5.2.4.7 Limited opportunity to lay facts before the court or challenge evidence

In the United States of America court experts can be employed either in conjunction with or to the exclusion of party-introduced experts.[74] Where party-introduced experts are excluded, it is argued that this behaviour offends the adversarial rights of litigants to select witnesses and present their case.[75] Where parties are at liberty to secure experts, their experts are forced into a disenfranchised role and are restricted to submitting information to the court-appointed expert.[76]

In South Africa, section 34 of the Constitution guarantees a right to have a dispute resolved by the application of the law, in a public and fair hearing, before a court or another independent forum. A fair hearing affirms a founding value of the constitution; the rule of law.[77] A fair process in making an order is a prerequisite for a just and credible order.[78] The audi alteram partem rule requires the court to hear both sides in a case.[79] Rule 36 of the Uniform Rules of Court gives a

[72] Gross op cit n13 at 1196.

[73] Gross op cit n13 at 1196.

[74] Gross op cit n13 at 1188. Van Loggerenberg, op cit n4 at 200, proposes experts be court appointed from a panel, where parties may, on good cause shown, involve further experts by leave of the court, with punitive costs imposed, if later they are found to be unnecessary.

[75] *Re Saxton* [1962] 1 WLR 968 at 972; *Kian v Mirro Aluminium* Co 88 FRD 351 356 (Mich 1980); H Woolf *Access to Justice (Final report to the Lord Chancellor on the Civil Justice System in England and Wales)* (1995) at 186; H Woolf Access to Justice (*Interim report to the Lord Chancellor on the Civil Justice System in England and Wales)* (1996) at 142; Australian Law Reform Commission, Background Paper 6, *Experts: Review of the Adversarial System* at 47-49; R Chesterman 'Dealing with expert witnesses' (1998) 36 *Law Society Journal* 50 at 51; Editorial 'Expert evidence' (1991) 59 *Medico-Legal Journal* at 67; V Plueckhahn 'Legal dilemmas in the use of 'expert medical evidence' (1982) 14(4) *Australian Journal of Forensic Sciences* 158 at 158.

[76] Gross op cit n13 at 1220.

[77] *De Beer v North-Central Local Council and South-Central Local Council* 2002 (1) SA 429 (CC) at para 11.

[78] Ibid.

[79] Ibid.

civil litigant the right to call witnesses and barring a party from calling an expert of his choice may be construed as an infringement of the right to a fair trial.

5.2.4.8 The absence of cross examination/right to challenge expert opinion

In some systems, such as in the Netherlands, court experts are not deemed witnesses and are not cross-examined.[80] The experts report to the court and not the parties.[81] Once an expert comes across as biased, the expert will be treated as a witness and not an expert and then may be cross-examined.[82] There is a concern expressed by Howard that court experts place a bar on the right to challenge expert evidence, especially because effectively they cannot be cross-examined.[83] It is argued that parties' cases are supplanted by a decision taken by a court to appoint an expert, whose appointment has been decided in advance and in secret, based on unknown criteria and whose views cannot be challenged.[84]

According to Gross this concern is misguided. He accepts that cross examination of a party expert is a risky affair, because a party-selected expert has an incentive to undermine and turn the tables on the cross examiner.[85] Although the competence and integrity of the court expert will be difficult to question, such an expert has no incentive to indulge in power play and more readily will concede to limitations, uncertainties and alternative possibilities, thus supporting the cross examination which will be confined to the expert's opinion and not relate to their personalities.[86] Spencer suggests adopting the French system of challenging the evidence of a court expert, which ameliorates claims that experts cannot be challenged, which entails the following options:[87]

i. Parties may apply to court for an order that the court expert liaise with another expert.

[80] Meintjes-van der Walt op cit n8 at 303.

[81] CPM Cleiren & JF Nijboer (eds) *Strafordering: Tekst & Commentaar* (1999) at 464.

[82] Meintjes-van der Walt op cit n8 at 304.

[83] Howard op cit n3 at 105.

[84] Howard op cit n3 at 105.

[85] Gross op cit n13 at 1196.

[86] Gross op cit n13 at 1196.

[87] JR Spencer 'The role of experts in the common law and civil law: A comparison' in SJ Ceci & H Hembrooke (eds) *Expert Witnesses in Child Abuse Cases* (1998) at 29.

ii. The court may secure a second opinion or call for further testing amid legitimate criticism.

iii. Examination of the witness at a hearing is allowed in more serious cases.

iv. Parties are at liberty to call their own experts.

5.2.4.9 The method of selecting court experts is a burden on the court

It is a burden for courts to appoint experts.[88] Courts lack the deep understanding of the issue in dispute which erodes the epistemic credibility of the selection process.[89] There is an uncertainty regarding how experts can to be appointed[90] in a way that will encapsulate the issue of ethical integrity and avoid a conflict of interest in the vetting process.[91] The court's duty to brief experts has the potential to lead to continuing relationships between courts and experts that may close the door to incoming experts and form an ideological affinity (where pro-defendant judges choose pro defendant experts).[92] Court experts may have a systemic pro-defence bias in civil litigation.[93]

The problem with the institutional framework in how court experts are selected was highlighted in an Israeli Government report[94] that revealed the process as too secretive: there are no central lists of experts, there is a lack of co-ordination and too many channels via which an expert's services can be solicited.[95]

Not all fields of expert evidence are reliable or sound, such as the well-known deception detection evidence. Once a court-centred system accepts a field of expertise, such as DNA or fingerprint, there is little if any scepticism of such systems regarding the area of expertise.[96] Courts

[88] Gross op cit n13 at 1192.

[89] Perez op cit n2 at 109.

[90] Kaye et al op cit n23 at 329-346.

[91] GC Harris 'Testimony for sale: The law and ethics of snitches and experts' (2000) 28 *Pepperdine Law Review* 1 at 9-10; J Sanders 'Expert witness ethics' (2007) 76 *Fordham Law Review* 1539 at 1557-1561.

[92] Perez op cit n2 at 110.

[93] H Zeisel 'The New York Expert Testimony Project: Some reflections on legal experiments' (1956) 8 *Stanford Law Review* 730 at 733.

[94] Perez op cit n2 at 103.

[95] Perez op cit n2 at 103.

[96] Malsch & Freckleton op cit n14 at 56.

institutionally conform to the belief that such expertise exists[97] and are reluctant to question the degree of expertise or the basis of the expertise.[98]

Washburn proposes that litigants nominate experts, as is done when the court is asked to elect commissioners to take testimony, and, ordinarily, there is no difficulty in the parties themselves selecting which experts are employed.[99] An objection to a particular expert should be sufficient to put the court on its guard in selecting that particular expert.[100] Washburn argues that the court can easily identify the right expert, based on their character and fitness to act.[101]

There is a difficulty in the litigant nominating an expert whose ultimate opinion is unknown. Gross notes that experts are not creatures of the parties who appoint them and believes that expert bias sets in after the expert has been appointed, under circumstances where legal practitioners have a deep and sound relationship with experts who becomes friends of the law firm.[102] Nomination by parties and appointment by the court changes this familiarity.[103]

A counter argument is that legal practitioners, when asked to nominate experts, will pre-empt choice and know which expert will favour their clients and experts that are appointed will know at whose liberty they have been nominated and appointed.[104] Despite experts being selected with less information, such as their academic inclination or their general opinion in a discipline or area of expertise and despite fewer opportunities for manipulation, there is no guarantee of objective evidence and Gross suggests that at the worst the plan of parties nominating experts may generate a market for biased experts, but at least they will be known quantities.[105]

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[97] MJ Saks 'Merlin and Solomon: Lessons from the law's formative encounters with forensic identification science' (1998) 49(4) *Hastings Law Journal* 1069 at 1071, 1092-1093 & 1112.

[98] Malsch & Freckleton op cit n14 at 56.

[99] Washburn op cit n20 at 61.

[100] Washburn op cit n20 at 61.

[101] Washburn op cit n20 at 62.

[102] Gross op cit n13 at 1226.

[103] Gross op cit n13 at 1226.

[104] Gross op cit n13 at 1226.

[105] Gross op cit n13 at 1226.

5.2.4.10 Increase in costs

When litigants are allowed to appoint their own expert in conjunction with the court's expert, the procedure becomes time consuming and expensive.[106] Numerous experts are consulted on the same question without a countervailing benefit; yet where parties are barred from counter appointing experts, they still are required to appoint experts to consult on the outcome of the trial and assist in preparing for cross examination of the court expert.[107] Litigation costs are further increased by the necessity to regulate and police pre-trial preparation with court experts.[108]

5.2.4.11 False sense of security

Court experts may afford a false sense of certainty[109] because the elimination of partisanship does not ensure objectivity and independence with respect to scientific inclination.[110] In some disciplines, such as psychology, there is a general acceptance that experts inherently are partisan and any claim of neutrality is a fallacy.[111]

5.2.4.12 No ready access to information

Court-appointed experts are several steps behind party-appointed experts, as party experts have the benefit of the research and investigations conducted by lawyers prior to the expert's engagement.[112] The court expert, who may not readily have access to information, may nevertheless be subjected to cross examination.[113] Even though the expert is less assailable for hostile cross examination directed at the expert's bias, cross examination on other issues is less

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[106] Kaye et al op cit n23 at 329-346.

[107] Kaye et al op cit n23 at 329-346.

[108] Gross op cit n13 at 1226.

[109] DM Dwyer *The Judicial Assessment of Expert Evidence* (2008) at 178-179.

[110] J Hielkema 'Experts in Dutch Criminal Procedures' in M Malsch and JF Nijboer (eds) *Complex Cases: Perspectives on the Netherlands Criminal Justice System* (1999) at 38; *R v Ward* (1993) 96 Cr App Rep 1; C Champod & J Vuille 'Scientific evidence in Europe: Admissibility, evaluation and equality of arms' (2011) 9 *International Commentary on Evidence* 1 at 51.

[111] BL Diamond 'The psychiatrist as advocate' (1973) 1 *Journal of Psychiatry & Law* 5 at 19; BL Diamond & DW Louisell 'The psychiatrist as an expert witness: Some ruminations and speculations' (1965) 63(8) *Michigan Law Review* 1335 at 1344.

[112] Gross op cit n13 at 1204.

[113] Gross op cit n13 at 1205.

predictable and the expert may face more than one hostile counsel, which makes the prospect of appointment, as a court expert, even less attractive.[114] This contention may be ameliorated by a provision that experts may file written questions with the court, giving them direct access to the court, to clarify their instructions from the court.[115]

5.2.5 Conclusion: Court experts

The practicality of court experts in South Africa must be weighed against overburdened courts' limited resources and infrastructure and legal practitioners who represent clients on a contingent basis in a well embedded adversarial system. South Africa is a developing country which may not have the funds to achieve an elaborate court-expert system which no doubt will place a strain on state resources. Legal practitioners in South Africa, schooled in the adversarial tradition, may not support court experts, as well as because the single judge (who is to appoint the expert) is also the fact finder. These factors, together with logistical challenges, means this response to adversarial bias not viable. Many of the root causes of expert bias are addressed by court experts, but one of the greatest downsides to court-experts is that the court remains the fact finder, despite being ill equipped.

It is possible to adapt the conventional application of court experts. Gross, mindful of the disadvantages of court experts, proposes a workable model of court-appointed experts where partisan experts are not eliminated, thereby retaining an advocacy function in an adversarial system.[116]

In this model, Gross endeavours to address the criticism against court experts, and suggests parties appoint their partisan experts and their reports will be used in settlement negotiations.[117] If no settlement is reached, the court will be asked to appoint experts on the following terms:[118]

i. The expert must be court appointed but can be called to testify by either party or the court and can be cross-examined.

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[114] Gross op cit n13 at 1205.

[115] This is possible in England, see Civil Procedure Rule 1998, Rule 35.14(1)-(2).

[116] Gross op cit n13 at 1221.

[117] Gross op cit n13 at 1222.

[118] Gross op cit n13 at 1221-1224.

ii. The qualified and willing experts must be designated by a party, parties make suggestions to the court which adjudicates objections and the court restricts the number of experts.
iii. To assist and prepare the expert any stakeholder may communicate freely with the court expert, provided such communication is open to all parties.
iv. An expert that has ties to a litigant or pre-existing knowledge of the case is disqualified from being appointed by the court.
v. Experts are paid via the court but are funded by litigants in proportion to the time that the expert spent on behalf of each litigant.

In terms of Gross' model:[119]

i. The court is not burdened with the duty to select experts.
ii. Where there are two opposing schools of thought in one discipline, the court can appoint one expert for each school.
iii. Special status is not conferred on a specific expert.
iv. Cross examination will not be complicated by the identification of the expert as a court, plaintiff or defendant's expert.

Gross' model eliminates: [120]

i. The opportunity for distortion by private consultations with experts.
ii. The cultivation of partisanship by paying experts high fees.
iii. Long hours of work and the encapsulation of experts into the litigation team.[121]
iv. The manipulation of information received by the expert.
v. Unhelpful experts.
vi. The choreographing of expert presentations.

[119] Gross op cit n13 at 1225.

[120] Gross op cit n13 at 1224-1225.

[121] HD Sperling 'Expert evidence: The problem of bias and other things' available at https://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre2015%20Speeches/Assorted%20-%20L%20to%20Z/sperling_speeches.pdfspeech, accessed 15 April 2021 at 3.

Gross submits not awarding special status to court experts ought to carry more weight on the basis of the mere fact that they are not partisan, notwithstanding the disadvantages of court-appointed-experts.[122] Gross notes the objections to the court experts seem to be academic as no real criticism is levelled against specific court experts in academic journals, save for psychiatrists and clinical psychologists.[123]

Most academic research is based on jurisdictions that employ a jury system and often relate to First World economies. South Africa does not have a jury system (where the court which appoints the court expert is not the fact finder) and there is no reason to discount the criticism that experts will be deferred to uncritically, especially because the same court that appoints the expert must evaluate the probative value of the expert's evidence. Meintjes-van der Walt considers the Dutch system of neutral court experts as a possible introduction into South Africa's adversarial system,[124] but she accepts that the appointment of court experts is unlikely to meet with the approval of the South African legal fraternity.[125] Although the value of court experts cannot be discounted, there may be more effective means to achieve the eradication of expert bias.

[122] P Alldridge 'Scientific expertise and comparative criminal procedure' (1999) 3(3) *The International Journal of Evidence and Proof* 141 at 152.

[123] Gross op cit n13 at 1196.

[124] Meintjes-van der Walt op cit n7 at 123. In terms of this system, when expert evidence is required the court will ask the parties regarding the number and identity of the experts and the court appoints the expert, see art 194(2) of the Dutch Civil Code. The court will issue a list of questions and detailed instructions for the expert, art 194(1). The court may allow parties, on application, to appoint their own experts, art 200. Normally, reports are not required but can be ordered by the court, art 194(2). The judge asks the questions but may allow parties to put questions to the expert, art 194(5).

[125] L Meintjes-van der Walt 'The proof of the pudding: The presentation and proof of expert evidence in South Africa' (2003) 47(1) *Journal of African Law* 88 at 98.

5.3 Blind expert appointment

5.3.1 What is blind expert appointment

In order to curb expert bias,[126] experts can be appointed by blind selection via an independent intermediary.[127] The expert does not know if he/she is appointed by the plaintiff or the defendant. This method is inspired by the notion that justice is blind and by the veil of ignorance.[128] The expert is shielded from partisan selection, compensation and affiliation biases that come with domain-relevant information.[129] The double blindness, where the expert has not been contacted by either party (and vice versa), may speak to an expert's independence and objectivity.[130]

5.3.2 Advantages of blind expert appointment

Blind expert appointment is premised on the notion that an independent intermediary can make the expert selection for a litigant wishing to brief an expert, and easily can resort to a randomized selection mechanism in individual disciplines where the division between subdisciplines are well defined and developed and embedded in a sub-specialty dominated practice milieu.[131] For example, if DNA testing is required, a computer selection easily can be made, as DNA testing does not contain variables that bar an automated selection. In all other instances, where more variables are at stake, a non-automated mechanism must be employed.[132] Williams suggests, albeit

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[126] L Meintjes-van der Walt & A Olaborede 'Cognitive bias affecting expert opinion' (2019) 3 *SACJ* 324 at 347 albeit in a different context.

[127] R Koppl & EJ Cowan 'A battle of forensic experts is not a race to the bottom' (2010) 22 *Review of Political Economy* 235 at 257; CT Robertson 'Blind expertise' (2010) 85 *New York University Law Review* 174 at 205**;** G Whitman & R Koppl 'Rational bias in forensic science' (2010) 9 *Law Probability & Risk* (2010) 69 at 84-85; O Aronson 'Forum by coin flip: A random allocation model for jurisdictional overlap' (2015) 45 *Seton Hall Law Review* 63 at 63-64; R Perry & TZ Zarsky 'May the odds be ever in your favor: Lotteries in law' (2015) 66(5) *Alabama Law Review* 1035-1098.

[128] J Rawls *A Theory of Justice* (1971) at 11.

[129] Koppl & Cowan op cit n127 at 257. For a general discussion see M Risinger *et al* 'The Daubert/Kumho implications of observer effects in forensic science: Hidden problems of expectation and suggestions' (2002) 90 *California Law Review* 1-56.

[130] Williams op cit n7 at 165.

[131] DA Hirsh et al '"Continuity" as an organizing principle for clinical education reform' (2007) 356 *New England Journal of Medicine* 858 at 863.

[132] CT Robertson 'Blind expertise' (2010) 85 *New York University Law Review* 174 at 208.

speculatively, that experts appointed in this way will desire nothing more than to present their opinion freely, impersonally and unhindered.[133]

5.3.3 Disadvantages of blind expert appointment

Robertson argues for experts to be selected blindly from a pool of experts and addresses the criticism that this method takes away a litigant's right to employ an expert of choice.[134] He suggests that the litigant ought to be allowed to choose whether to disclose the blind appointed expert opinion to the court, and once this decision is in the affirmative, all blind opinions must be disclosed.[135] This suggestion does not address the criticism as parties are still not at liberty to appoint experts of their choice and it is unsatisfactory as it may waste the time and costs associated with such experts. A better solution is that the party selects the expert he/she wishes to employ but that the appointment is made by the intermediary without the expert knowing who it is that has appointed them. The party then places the expert evidence before the court, in terms of the South African Procedure, in the normal course and only the method of the appointment of the expert is different. A blind system does not guarantee truth or accuracy,[136] and requires legislative amendments.

5.3.4 Conclusion: Blind expert appointment

Considering the epistemic difficulty that courts face in adjudicating expert evidence,[137] the need to retain expert objectivity in an adversarial legal system and the need to retain the right of parties to advance evidence which it deems fit, a system of blind appointment of experts, via an intermediary, may be indicated in the South African milieu. [138] Many of the advantages of court experts set out in section 5.2.3, will apply, mutatis mutandis, to the appointment of experts via an intermediary and many root causes of bias will be eliminated. Also, there will be no cost implications for the judiciary. Although such a system is confronted by logistical problems, such as how the payments of fees will work, who is responsible for submitting documents to the experts

[133] Williams op cit n7 at 165.

[134] Robertson op cit n132 at 179.

[135] Robertson op cit n132 at 179-180.

[136] Robertson op cit n132 at 179.

[137] S Brewer 'Scientific expert testimony and intellectual due process' in E Selinger & RP Crease (eds) *The Philosophy of Expertise* (2006) at 111.

[138] Robertson op cit n132 at 179.

and preparing experts for trial and how the capacity (plaintiff or defendant) of the instructing litigant can remain completely anonymous, it allows the adversarial benefits of a trial to remain intact and disallows the manipulation of experts by unscrupulous legal practitioners. It is a suitable proposal for South Africa.

5.4 Single expert

5.4.1 What is a single expert?

The single (or joint) expert procedure requires litigants to jointly appoint a single expert on a particular question and where they cannot agree on such an expert's identity other means are employed to appoint the single expert.[139] In England, single experts are the norm rather than the exception[140] and some Australian jurisdictions have adopted the single expert procedure.[141] In Australia, if a litigant is unsatisfied with the opinion of the joint expert, the court may allow the litigant to adduce further expert evidence.[142] The single expert may be cross- examined by the parties.[143]

5.4.2 The position in South Africa

Apart from the Gauteng High Court encouraging parties to appoint a single joint expert when feasible or reasonable and to give reasons in a pre-trial minute why a single expert cannot be appointed,[144] single joint experts are not provided for in the law governing the appointment of experts and there is no reported case law reflecting this practice.

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[139] New South Wales Law Reform Commission op cit n6 at 107.

[140] *Peet v Mid Kent Healthcare NHS Trust* [2001] EWCA Civ 1703. United Kingdom, Department of Constitutional Affairs, *Emerging Findings: An early evaluation of the Civil Justice Reform* (2001) at para 4.16; United Kingdom, Department of Constitutional Affairs *Further Findings: A Continuing Evaluation of the Civil Justice Reforms* (2002) at paras 4.21 & 4.27-4.28.

[141] Uniform Civil Procedure Rules 2005 (NSW), Rule 31.19; Practice Note 128; The Queensland Supreme Court, the Australian Family Court and the Australian Capital Territory in personal injury matters: New South Wales Law Reform Commission op cit n6 at 106-107.

[142] New South Wales Law Reform Commission op cit n6 at 107.

[143] New South Wales Law Reform Commission op cit n6 at 107.

[144] Judge President's Practice Directive 2 of 2019 at para 8.1.3.

5.4.3 The advantages of a single expert

Single experts can eliminate expert bias, assist the court in reaching a just decision and improve the quality of the expert opinion.[145] A single expert may create an expeditious, cost effective[146] and unbiased opinion that will assist the court.[147] Conceivably, there are matters where a single expert is useful, usually in uncontroversial disputes.[148] The Queen's Bench on Chancery Division Guide[149] suggests that a single expert may be more appropriate in cases of quantum and less appropriate where the question is about liability, such as medical negligence[150] and causality.[151] A single expert also seems more appropriate in non-medical as opposed to medical cases.[152] A single expert is more suitable for small claims[153] and less complex matters or where expert fact as opposed to opinion is desired.[154] Sperling criticizes the practice where joint experts are discouraged in complex matters, arguing that the more complex, critical and difficult the question,

[145] G Davies 'Expert evidence: Court appointed experts' (2004) 23 *Civil Justice Quarterly* 367 at 367; HD Sperling 'Expert evidence: The problem of bias and other things' (2000) 4 *Judicial Review* 429 at 429-430.

[146] GL Davies & JS Leiboff, 'Reforming the civil litigation system: Streamlining the adversarial framework' (1995) 25(2) *Queensland Law Society Journal* 111 at 112; R Scott 'Court appointed experts' (1995) 25 *Queensland Law Society Journal* 87 at 88-89.

[147] New South Wales Law Reform Commission op cit n6 at 107.

[148] New South Wales Law Reform Commission op cit n6 at 109.

[149] The Queen's Bench Guide: A Guide to the Working Practices of the Queen's Bench Division within the Royal Court of Justice (2021), at para 10.46 (2), available at https://www.judiciary.uk/wp-content/uploads/2021/01/QB-Guide-2021-FINAL-003.pdf, accessed 20 September 2021.

[150] Para 4.11. In the English Commercial Court Guide, at H2.3-H2.4, it is noted that cases are often large and complex.

[151] New South Wales Law Reform Commission op cit n6 at 47.

[152] *Peet* supra n140.

[153] In *Daniels v Walker* [2000] 1 WLR 1382, at para 27-32, the court held that the amount involved must be considered as the costs involved in appointing a further expert, may be disproportionate to the amount claimed. This case was approved in *Cosgrove v Pattison* [2001] CP Rep 68, where the court held the following factors must be considered: The nature and number of disputes, the reasons why a further expert is proposed, the claim amount, the importance of the issues, the effect of allowing further experts, the delay in time, any special features of the case and overall justice.

[154] S Feola & RA Alcorn 'Expert witness advocacy: Changing its culture' (2009) 45(7) *Arizona Attorney* 24 at 30.

the more compelling it is for single or court experts to be appointed,[155] otherwise, the court will be at a disadvantage when judging between the two experts.[156]

Mnookin submits that single experts may diminish unethical disagreements among experts,[157] because experts are relieved of partisan restraints and are selected for their qualifications, fairness and reasonableness and not to boost a litigant's case.[158] A single expert will lead to the crystalizing of issues, reducing the length of trials, save money by appointing one as opposed to two experts and level the playing field between parties of unequal resources.[159]

5.4.4 The disadvantages of single experts

Parties must agree to the identity of the expert and about the instructions to be provided to the expert, something that is not easily achieved.[160] There is also a concern that where two schools of thought exist, a single expert will place only one of two or more legitimate theories before the court.[161] A solution to this problem is to allow parties to appoint their own experts, in addition to the single expert and to cross examine the single expert, [162] which option may give rise to additional costs.[163] In English law, where the court appoints a single expert on a substantial issue, the court may be reluctant to allow parties to appoint further experts.[164] In Australia, courts easily allow further experts to be appointed and the bar is set very low for further experts to be appointed; a

[155] HD Sperling 'Commentary on Lord Justice May's paper: The English high court and expert evidence' (2004) 6 *Judicial Review* 383 at 387-388.

[156] Sperling op cit n155.

[157] JL Mnookin 'Expert evidence, partisanship, and epistemic competence' (2008) 73 *Brooklyn Law Review* 1009-1033.

[158] New South Wales Law Reform Commission op cit n6 at 111. Kubie op cit n7 at 486.

[159] Woolf (final report) op cit n75 at 141.

[160] AS Murray *Expert Evidence and the Problem of Privilege* (unpublished Phd thesis, University of Sydney, 2018) at 182.

[161] Australian Law Reform Commission op cit n75 at chapter 13; P Heerey 'Recent Australian developments' (2004) 23 *Civil Justice Quarterly* 386 at 387-389; A May 'The English high court and expert evidence' (2004) 6 *Judicial Review* 353 at 353.

[162] Woolf (final report) op cit n75 at 139-141.

[163] Woolf (final report) op cit n75 at 140-142.

[164] May op cit n161 at 382.

practice that dilutes the objectives of the system.[165] Another solution, where there are two schools of thought, is to compel experts to set out both schools of thought and explain why one school is recommended above the other.[166] Australia[167] and England[168] have adopted the latter suggestions. Other contentions are:

i. When a single expert is appointed, the parties still appoint a shadow expert to advise them and to assist with cross examining the single expert, which eventuality may increase costs.[169]

ii. The single expert will usurp the court's decision-making powers;[170] a notion rejected by the New South Wales Law Reform Commission citing that the expert may be cross examined and submissions can be made to the court as to the weight that the court ought to attach to the expert opinion and the court may grant leave for further experts to be called.[171]

iii. When a single expert is employed by the parties and a matter is taken on appeal, the appellate court has no choice in upholding the appeal to remit the matter to the trial court as opposed to deciding the matter on one of the two opposing expert opinions.[172]

iv. The court vested with the discretion to order that a single expert be appointed may be responsible for an error of judgement, which may lead to successful appeals and further delay and greater costs.[173]

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[165] Murray op cit n160 at 181.

[166] Feola & Alcorn op cit n154 at 30.

[167] In Rule 35 of the Civil Procedure Rules of 1999 (NSW).

[168] Civil Procedure Rules of 1998 (Eng), Rule 35.7. There is, however, no presumption that a single expert will automatically suffice, see *Oxley v Penwarden* [2001] CPLR 1. The Code of Guidance on Expert Evidence, at para 35, encourages the courts to appoint a single expert, especially in large claims that are not complex.

[169] New South Wales Law Reform Commission op cit n6 at 108.

[170] Scott op cit n146.

[171] New South Wales Law Reform Commission op cit n6 at 113.

[172] Murray op cit n160 at 180-182.

[173] *Simms v Birmingham Health Authority* [2001] Lloyd's Law Reports 382; *Daniels v Walker* [2000] 1 WLR 1382.

5.4.5 Conclusion: Single experts

A single expert, jointly appointed by all the litigants to a case, no doubt will go a long way to eradicate conscious adversarial expert bias. Many root causes of bias will be eliminated, but the court remains the fact finder despite being ill equipped to find facts of an expert nature. The exigency of litigation is removed from the equation and the association with the litigant is eliminated. In Australia, where joint experts are procedurally possible, joint experts are not employed in most matters and parties still opt to engage their own experts.[174] Despite the Gauteng High Court encouraging the employment of single experts, as set out in section 4.7.1, this seems to be rarely done in South African courts. As a result, legislative changes will have to be made for its implementation. There are many downsides and the single expert may not be the best option for eradicating expert bias in the South African context. It is not a cost-effective proposal and requires legislative amendments. In adversarial systems, the litigants still will be allowed to appoint their own experts to protect a litigant's right to a fair trial and their right to adduce any evidence they may deem fit. Making single experts compulsory may be subjected to constitutional challenges for infringing s 34 of the Constitution (right to a fair public hearing). Allowing litigants to appoint their own experts, simply is a regression to the adversarial existing common law position. For as long as a single expert is an optional choice, as it will be in an adversarial system, it is not be an attractive option for either party and implementation will not gain traction.

5.5 Conclusion

This chapter has considered the responses to adversarial selection bias that relates to the way that experts are identified and appointed. It considered court experts, single experts and blind expert appointment as attempts to eradicate adversarial bias. It looked at the pros and cons of each system followed by an analysis of the proposed system in the South African context. The next chapter considers the responses to adversarial bias which relate to the identity of the fact finder.

[174] Murray op cit n160 at 182.

CHAPTER 6

EXPERT ASSESSORS AND REFEREES

6.1 Introduction

Van der Merwe[1] submits that the existing law of evidence can easily accommodate lay expert assessors as fact finders owing to the basic infrastructure in place. Specifically, it applies to a concentrated trial that is completed as a unit,[2] where evidence is presented viva voce,[3] and because of exclusionary rules which eliminate inadmissible poor character and hearsay evidence that are designed for a lay jury as the fact finder.[4] This chapter considers whether changing the identity of the legally qualified judge as the adjudicator, is a viable response to adversarial expert bias, specifically the introduction of expert's assessors, referees and an extra judicial expert administrative system.

6.2 Expert assessors[5]

6.2.1 Introduction

To curb expert bias, it has been recommended that experts with specialized knowledge, skill and experience, [6] and who are the peers of party introduced experts, be appointed as assessors to sit

[1] SE van der Merwe 'Die evolusie van die mondelinge karakter en uitsluitingsreëls van die engelse gemene bewysreg' (1991) 2(3) *Stellenbosch Law Review* 281 at 306-307.

[2] HJ Erasmus 'The interaction of substantive and procedural law: The Southern African experience in historical and comparative perspective' 1990 (1) *Stellenbosch Law Review* 348 at 355; H Kötz 'The role of the judge in the court-room: The common law and civil law compared' 1987(1) *TSAR* 35 at 40.

[3] I Dennis *The Law of Evidence* 3ed (2007) at 16.

[4] PJ Schwikkard & SE Van der Merwe *Principles of Evidence* 4ed (2016) at 15-17.

[5] Expert assessors are comparable to the role a mini jury plays, in so far as expert assessors make factual as opposed to legal findings, see *R v Solomons* 1959 (2) SA 352 (A) at 363; *S v Gambushe* 1997 (1) SACR 638 (N) at 643; *S v Maphanga* 2001 (2) SACR 371 (W) at 374. Unlike a jury, assessors must give reasons for their decision, see s 146(*d*) of the Criminal Procedure Act 51 of 1977 and s93*ter*(3)(*e*) of the Magistrates' Courts Act 32 of 1944 and they are under continuous judicial guidance, see Schwikkard & Van der Merwe op cit n4 at 16.

[6] D Van Zyl-Smit & N Isakow 'Assessors and criminal justice' (1985) 1(3) *SAJHR* 218 at 221.

with a court.[7] Expert assessors are appointed at the direction of the court, to sit with and consult with the court.[8]

Although expert assessors are compared to expert witnesses, an assessor is not to be treated as an unsworn expert witness and instead fulfils the role as an advisor to the court.[9] Dickey submits that the role of the assessor goes beyond mere interpretation and elucidation of technical evidence; the assessor finds facts of a technical nature.[10]

6.2.2 Can a civil court appoint assessors?

Expert assessors are not part of the South African civil litigation culture,[11] unlike in criminal trials[12] where mostly legally trained[13] assessors regularly are employed.[14] In trials before a superior court, where a life sentence or a substantial period of imprisonment is the potential verdict, a judge is

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[7] P Heerey 'Expert evidence: The Australian experience' (2001) 7(3) *Bar Review* 166 at 166-167; L Meintjes-van der Walt *Expert Evidence in the Criminal; Justice Process* (2001) at 139; GA Endlich 'Proposed changes in the law of expert testimony' (1898) 32 *American Law Review* 851 at 854-855.

[8] *Richardson v Redpath Brown* [1944] 1 All ER 110 at 113; A Dickey 'The province and function of assessors in English Courts' (1970) 33 *Modern Law Review* 494 at 501.

[9] *Richardson* supra n8 at 70. In the United States of America, technical advisors are appointed by the court, see *Ex parte Peterson* 253 US 300 (1920); *Reilly v United States* 682 F Supp 150 (DRI 1988); *Hemstreet v Burroughs Corp* 666 F Supp 1096 (ND III 1987).

[10] Dickey op cit n8 at 502; *SS Australia (Owners) v SS Nautilus (Cargo owners)* [1927] AC 145 at 150 & 152; *The Clan Lamont* (1946) 79 Lloyd Law Reports 521.

[11] J Visser & U Kruger 'Revisiting admissibility: A review of the challenges in judicial evaluation of expert scientific evidence' (2018) 31 *SACJ* 1 20 at 120.

[12] For a general discussion on assessors, see PM Bekker 'Assessore in Suid Afrikaanse strafsake' in SA Strauss (ed) *Huldigbundel vir WA Joubert* (1988) at 32; D Van Zyl-Smit 'The compulsory appointment of assessors' (1979) 96 *SALJ* 173-177; D Van Zyl-Smit 'The compulsory appointment of assessors reassessed' (1984) 101 *SALJ* 212-215; F Richings 'Assessors in South African criminal trials' (1976) *Criminal Law Review* 107-116; JP Swanepoel ''n Blik op onbekwaamheid, ontrekking en onstslag van 'n assessor' (1990) 3 *SACJ* 174 at 176.

[13] VG Hiemstra *Derde Kumulatiewve Byvoegsel tot Suid-Afrikaanse Strafproses* 3ed (1981).

[14] Section 145(2) of the Criminal Procedure Act 51 of 1977 & s34 and s93*ter* of the Magistrates' Courts Act 32 of 1944.

likely to sit with two assessors.[15] A magistrate, under certain circumstances, may also sit with assessors in criminal trials.[16]

Although a rule seldom invoked,[17] a court in civil matters,[18] in the magistrate's court,[19] may appoint one or two[20] assessors[21] upon the application of either party[22] to sit and act in an advisory capacity.[23] The Magistrates' Courts Rules require the parties to agree to the assessor/s to be appointed, failing which the court will make the appointment.[24] In the High Court,[25] there is no equivalent provision for the appointment of assessors in civil matters in the Superior Courts Act[26]

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[15] Section 145 of the Criminal Procedure Act 51 of 1977.

[16] The Magistrates' Courts Act 32 of 1944 allows a judicial officer, for the expedience of justice, prior to the leading of any evidence or when considering a community based punishment, to call up to two assessors for assistance, and when the accused is charged with murder the court shall be assisted by two assessors, see s93*ter*(1). In deciding whether to employ assessors, the court shall take into account the culture and social environment, the educational background, the nature and seriousness of the charges and potential sentence to be imposed and any other circumstances, see s93*ter*(2). The assessors become members of the court and shall give a verdict or opinion on the issues to be tried, based on the facts, but the magistrate alone decides issues of law, see section 39*ter*(3).

[17] DE van Loggerenberg *Jones and Buckle: The Civil Practice of the Magistrates' Courts in South Africa* Vol II (2011) at 59-2. There is judicial disdain for lay fact-finding, see Van Zyl-Smith & Isakow op cit n6 at 233.

[18] For assessors in criminal matters, see section 93*ter* of the Magistrates' Courts Act 32 of 1944. Also see the SALRC Discussion Paper 113 (Project 126) *Review of the law of evidence (hearsay and relevance)* (2008) at 7ff; MM Watney 'Assessore in die laerhof' (1992) *THRHR* 465 at 465-468; J Seekings & C Murray *Lay Assessors in South African Magistrate Courts* (1998) at 50.

[19] Per the Magistrates' Courts Act 32 of 1944.

[20] Magistrates' Courts Rule 59(4) limits the number of assessors to two.

[21] Magistrates' Courts Rule 59(1) provides that the court will have a list of qualified and willing assessors.

[22] Section 34. This section was substituted by section 1 of the Magistrates' Courts Amendment Act 67 of 1998, a section yet to be proclaimed, where the words 'who are suitable and available' are replaced with 'of skill and experience'. Rule 59(6)(*a*) provides that the party bringing the application must make payment of the assessor's fee; the costs of the assessor is a cost in the cause, see Rule 59(6)(*b*).

[23] Section 34 of the Magistrates' Courts Act 32 of 1944, as amended. The assessors have no authority to determine the outcome of the suit.

[24] Magistrates' Courts Rule 59(4).

[25] For assessors in the High Court, in context of criminal matters, see s145-147 of the Criminal Procedure Act 51 of 1977, as amended.

[26] 10 of 2013. The legislature missed an opportunity to fill this lacuna, which existed, also, in the predecessor to the Act, the Supreme Court Act 59 of 1959, despite criticism and a proposal for law reform by H Lerm 'Two heads are

or in the Uniform Rules of Court. High courts have inherent jurisdiction and are vested with the power to protect and regulate their own processes,[27] which allows the High Court to appoint assessors in civil matters,[28] especially in circumstances where the dispute is complex and warrants such an appointment.[29]

In *S v Nksatlala*[30] the court held that it would be ideal to have expert opinion evidence evaluated by assessors.[31] This notion is mirrored in international law reform commission reports, which suggest that assessors be used more regularly.[32]

6.2.3 What authority do assessors have?

The contribution that expert assessors can make in curbing expert bias, depends on the role and the decision-making capabilities of the assessor in the fact-finding process.[33] The assessor's role

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better than one: Assessors in High Court civil cases' (2012) Oct *De Rebus* 22 at 23-24. Section 118 of the Tax Administration Act 28 of 2011 provides that a tax court is constituted with two assessors, an accountant and a person from the commercial community. Also see s22 of The Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000, which provides that the equality court may appoint assessors.

[27] Section 173 of the Constitution.

[28] For a general discussion, see LTC Harms *Civil Procedure in the Superior Courts* (2011); J Taitz *The Inherent Jurisdiction of the Supreme Court* (1985). The Constitution requires the courts to forge new methods that are appropriate to protect the Bill of Rights, see *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at para 51. Judges, acting in their judicial capacity, must uphold the Bill of Rights, see section 7 of the Constitution. In *Phillips v NDPP* 2006 (1) SA 505 (CC) at para 48, the court held that it must use section 173 sparingly and only in exceptional circumstances, taking account of the interests of justice. Also see *Universal City Studios v Network Video* 1986 (2) SA 734 (A) at 754; *SABC v NDPP* 2007 (1) SA 523 (CC) at 524-528; *ABSA v Dlamini* 2008 (2) SA 262 (T) at para 20; *Moulded Components and Rotomoulding SA v Coucourakis* 1979 (2) SA 457 (W) at 462-463; *The Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) at para 116.

[29] Lerm op cit n26 at 24-25.

[30] 1960 (3) SA 543 (A).

[31] At 546.

[32] H Woolf *Access to Justice (Final report to the Lord Chancellor on the Civil Justice System in England and Wales)* (1996) at 151; H Woolf Access to Justice (*Interim report to the Lord Chancellor on the Civil Justice System in England and Wales)* (1995) at 87; Australian Law Reform Commission, Paper 6, *Experts: Review of the Adversarial System, Background* (1999) at 63-69; Dublin Law Reform Commission, *Consultation Paper: Expert Evidence* (2008) at 304.

[33] Meintjes-van der Walt op cit n7 at 140.

may be confined to giving advice to the court which is not compelled to follow it[34] or to become a joint partner in the decision-making function of the court.[35]

South African civil courts generally adopt the procedures set out in the Criminal Procedure Act when employing assessors, which allow assessors to make findings of fact but not of law.[36] Assessors enjoy judicial guidance, especially relating to the fundamental rules of assessing evidence.[37] Hoffmann and Zeffertt warn that the distinction between law and fact is riddled with complexities, which makes judicial guidance indispensable.[38]

If the assessor's decision on the facts differs from that of the court, the assessor must prepare a dissenting judgement, which will be handed down along with the main judgement.[39] Assessors, in their capacity as members of the court, must give reasons for their findings.[40] The majority of the members of the court (the presiding officer and assessors) shall make the decision for the court unless the court sits with one assessor, in which case the decision by the presiding officer will prevail.[41]

[34] HA Hammelmann 'Expert evidence' 10(1) *The Modern Law Review* 32-39.

[35] KA Findley 'Adversarial inquisitions: Rethinking the search for the truth' (2011-2012) 56 *New York Law School Law Review* 911 at 912.

[36] Section 93*ter*(3), of the Magistrates' Courts Act 32 of 1944, states that an assessor must take an oath that he/she will give a true verdict or a considered opinion, according to the evidence, and thereupon becomes a member of the court. In terms of s 145(4)(*a*) of the Criminal Procedure Act 51 of 1977, any matter of law or a question whether an issue is one of law or fact shall be determined by the magistrate, see *S v Lekaota* 1978 (4) SA 684 (A) at 688; Watney op cit n18 at 467; *S v Mukunga* 1976 (3) SA 193 (N) at 204.

[37] Schwikkard & Van der Merwe op cit n4 at 15-17; *S v Gambushe* 1997 (1) SACR 638 (N) at 645.

[38] LH Hoffmann & DT Zeffertt *The South African Law of Evidence* 3ed (1981) at 375; *R v Werthern* 1956 (2) PH H240; *S v Ngcobo* 1985 (2) SA 319 (W) at 320-321; *S v Mbatha* 1985 (2) SA 26 (D) at 31; *R v Solomons* supra n5 at 363-365.

[39] Schwikkard & Van der Merwe op cit n4 at 16.

[40] Section 93*ter*(3)(*e*) & s146(*d*) of the Criminal Procedure Act 51 of 1977.

[41] Section 93*ter*(3)(*d*).

6.2.4 Advantages of expert assessors

The court may not have the know-how competently to adjudicate complex matters and can receive appreciable help from expert assessors,[42] who may have advanced knowledge in the technical and scientific fields in a variety of disciplines.[43] Assessors will enrich the judicial system,[44] may expedite the process as issues are narrowed, as well, fewer appeals may follow and miscarriages of justice may be prevented.[45] Assessors may save legal costs and raise public confidence if used in conjunction with effective case management.[46] Also, the expert assessor can identify defects in expert opinion which follow as a result of partisanship.

6.2.5 Disadvantages of expert assessors

The main criticism of the system of appointing court assessors is that the principles of natural justice are disregarded, litigants are oblivious as to the input of assessors and are denied the right to cross examine the assessor or to challenge their inputs.[47] In the well-known criminal trial of Oscar Pistorius, the court appointed two assessors and litigants were oblivious as to the opinions of these experts and their input given to the court. [48] Although courts must make up their own mind on the technical question, their decision invariably is heavily influenced by the assessor's advice.[49] In South African jurisprudence, it is deemed against public policy to publish the deliberations and discussions between the presiding officer and assessors.[50] In Australian law, there is not a way to

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[42] HD Sperling 'Expert evidence: The problem of bias and other things', available at https://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Assorted%20%20L%20to%20Z/sperling_speeches.pdf, accessed on 27 June 2021 at 10.

[43] Lerm op cit n26 at 23-24.

[44] Seekings & Murray op cit n18 at 192.

[45] Lerm op cit n26 at 22-23.

[46] Lerm op cit n26 at 22-23.

[47] Great Britain Law Reform Committee (Report 17) *Evidence of Opinion and Expert Evidence* (1970) at 6-7; Meintjes-van der Walt op cit n7 at 139; Law Reform Commission of Western Australia Consultation Paper (Project 92) *Expert Evidence in Civil Proceedings (Review of the Civil and Criminal Justice System)* (1998) at 30-31.

[48] *S v Pistorius* (CC113/2013) [2014] ZAGPPHC 793 (12 September 2014).

[49] Also see *Richardson* supra n8 at 70; *Adhesives v Aktieselskabet Dansk Gaeringindustri* (1936) 55 CLR 523 at 580; *The Ship Sun Diamond v The Ship Erawan* (1975) 55 DLR (3d) 138 at 144; I Freckleton & H Selby *Expert Evidence* (1993) at 1-5255.

[50] *S v Baleka* 1988 (4) SA 688 (T) at 701-702. In New Zealand, in *Beecham Group v Bristol Myers* (1980) 1 NZLR 185, counsel objected to a court assessor, in a complicated chemistry matter, because the assessor may transgress the

test the assessor's independence or bias[51] and courts instead are deemed to rely exclusively on assessors and to abdicate their judicial functions[52] to the assessor, who may usurp the court's function.[53] The Australian Law Reform Commission suggested that parties be given a chance to address the court, where the assessor expresses a view contrary to an existing view of either party.[54]

Some argue that the natural-justice-infringement objection is misplaced and is premised on a misconception of the true function of an assessor, whose role is to consult with the court on issues where the court needs assistance in understanding the effect and meaning of technical evidence.[55]

Although expert assessors may be objective (and are not party introduced), they may have preconceived ideas or belong to a specific school of thought, which may unfairly favour a particular party,[56] and that preconceived idea is unchallengeable.[57]

Expert assessors come at great expense for the state and a court-appointed assessor does not ameliorate the need for party-introduced experts.[58] In long and complicated matters, there is difficulty in maintaining assessors, due to considerations of cost effectiveness and assessor fees.[59]

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limits of his role and may express views to the court that the parties may wish to challenge but will not be granted an opportunity. Also see *Genentech v Welcome Foundation* (1989) 15 IPR 423 190. The court held that the assessor may advise the court, in chambers, only on existing submissions and, if the assessor expresses contrary views, the court must seek comment from counsel. In another New Zealand matter, the court asked the assessor for comments and made these available to counsel, as opposed to discussing the expert evidence in private with the assessor, see *Smale v North Sails* (1991) 3 NZLR 19.

[51] Dublin Law Reform Commission op cit n32 at 304.

[52] CAG Jones *Expert Witnesses: Science, Medicine and the Practice of Law* (1994) at 40.

[53] Woolf (interim report) op cit n32 at 187, Woolf (final report) op cit n32 at 151; Australian Law Reform Commission op cit n32 at 63-69.

[54] Sperling op cit n42 at 11.

[55] *Richardson* supra n8 at 70.

[56] I Freckleton 'Court experts, assessors and the public interest' (1986) 8 *International Journal of Law and Psychiatry* 161 at 186. Especially in compensation matters requiring medical evidence there are conflicting schools, which situation gives room for genuine disagreement, see RA Yerion 'Expert medical testimony in compensation proceedings' (1935) 2 *Law and Contemporary Problems* 476 at 477.

[57] Freckleton op cit n56 at 186.

[58] Dublin Law Reform Commission op cit n32 at 304.

[59] I Freckleton, P Reddy & H Selby *Australian Judicial Perspectives on Expert Evidence: An Empirical Study* (1999) at 107.

In large and complex matters, where assessors are most useful, experts in a wide spectrum of disciplines may be consulted, which make the use of expert assessors cumbersome, laboured, impractical, unworkable and expensive.[60] Even if such a wide variety of experts can be appointed, the assessors often are ill-placed to assist the court, because assessors are barred from conducting their own tests and examinations and the assessors thus are confined to the facts and test results put before them by the parties, which may fall short of what is required to be of true assistance.[61]

Where assessors of similar disciplines are appointed by the court, who disagree with each other on what advice to give to the court, the court may be no better off in having to choose between two conflicting party-introduced opinions[62] and may lead to the court being unable to make a ruling and the issue must be deemed unproven.[63]

Courts are known to appoint the same assessors, who they know to be 'yes-men', repeatedly.[64] Professional assessors are not desirable, as they depend on the goodwill of the judge and may be less likely to exercise the expected degree of independence.[65] Van Zyl & Isakow propose that assessors be placed on a list and are allocated matters on a roster.[66]

Lerm submits that the practice of court assessors in South Africa is desirable, considering certain evidence is so complex that it poses severe problems for judges,[67]especially so, considering the need to heed the rights to a fair trial and that access to justice for the indigent and the middle class often is not in reach.[68] Because judges are reluctant to make use of assessors in civil matters, Lerm proposes a more structured approach in the employment of expert assessors.[69] Assessors are to be appointed as advisors to the court in complex matters at an early stage to facilitate better case

[60] Visser & Kruger op cit n11 at 21.

[61] Dickey op cit n8 at 505.

[62] *The Taiwan* (1947) 80 Lloyd's Law Report 580 at 585-586.

[63] *SS Australia* supra n10 at 153.

[64] Van Zyl-Smit & Isakow op cit n6 at 230.

[65] J Dugard 'Lay participation in the administration of justice' (1972) 1(2) *Crime Punishment and Correction* 55 at 56-57.

[66] Van Zyl-Smit & Isakow op cit n6 at 233.

[67] Lerm op cit n26 at 24-25.

[68] Lerm op cit n26 at 24-25.

[69] Lerm op cit n26 at 22-23.

management.[70] Lerm overlooks the principle that as assessors assist the court in assessing the trial evidence, they cannot be involved in the pre-trial stage.[71]

6.2.6 Conclusion- Assessors

To ameliorate the objections to expert assessors, Freckelton proposes that the assessor's role be confined to asking the party-introduced experts informed questions during the trial, so as to clarify factual issues for the court and to illuminate bias and inconsistencies.[72] The Western Australian Law Reform Commission suggested that expert assessors be confined to special cases (as opposed to run of the mill cases).[73] In Germany, parties must introduce evidence to the court by submitting expert opinion evidence, but the courts may rely on court-appointed experts as 'helpmeets' (informatores judicis) in situations where the court is unable to answer preliminary questions necessary to reach a judgement, who will know what the party-introduced expert is alluding to and what weight to attach to it.[74]

The legislature and rules board will do well to describe with sufficient particularity the role and practical application of assessors in civil litigation to address the following questions:

i. If assessors are co-founders of fact, surely this is limited to facts that involve their expertise?
ii. If there is more than one assessor of divergent disciplines, how are decisions of fact made and recorded?[75]
iii. To what extent are parties afforded an opportunity to confront and oppose the assessor's submissions of an expert nature and are parties at liberty to introduce their own experts?

[70] Meintjes-van der Walt op cit n7 at 353.

[71] Sperling op cit n42 at 12.

[72] Freckleton op cit n56 at 186.

[73] Sperling op cit n42 at 12.

[74] C Herschel 'Services of experts in the conduct of judicial inquiries' (1887) 21 *American Law Review* 571 at 575.

[75] This may well be necessary at the appeal, see *SS Melanie (Owners) v SS San Onofre* (1919) [1927] AC 162 (HL) at 164.

iv. Will an appeal court be allowed to rely on the assistance of an assessor, as suggested by Sperling?[76]

The appointment of expert assessors is unlikely to meet the approval of the South African legal fraternity.[77] Meintjes-van der Walt notes, considering the contentions with court assessors, that it is unlikely that their appointment as auxiliaries in decision-making, is a viable solution to expert bias.[78] It cannot be denied that the appointment of expert assessors may enrich the administration of justice[79] and has the potential to curb expert bias, but the meritorious criticisms levelled against expert assessors, especially the cost implications and the logistical concerns, are overwhelming and it is simply not a practical solution to curb expert bias. The implementation of expert assessors is not practical in all cases involving expert evidence. In personal injury matters there are normally various disciplines of expertise which makes their employment impractical. Assessors are not a cost effective solution and parties still are required to appoint their own experts. Assessors have no investigating authority and their input and submissions to the court remain a secret which may offend a litigant's audi ad alteram partem rights. The court may uncritically lean towards the views of the court appointed and elected assessor, which may meet with opposition in an adversarial accusatorial legal system. To work, the system requires indispensable and competent changes to the procedural rules and the law, so that the concerns raised in section 6.2.5 can be addressed or mitigated. Ultimately, expert assessors will be practicable only for novel expert evidence or in complicated matters which do not involve a large number of expert disciplines. These would be the most deserving cases. Appointing assessors in civil matters is an expense for the taxpayer and is deemed a luxury that is dispensable; the prospect of its implementation in the midst of budget constraints is seriously questionable.

[76] Sperling op cit n42 at 12.

[77] L Meintjes-van der Walt 'The proof of the pudding: The presentation and proof of expert evidence in South Africa' (2003) 47(1) *Journal of African Law* 88 at 98.

[78] Meintjes-van der Walt op cit n7 at 140.

[79] Seekings & Murray op cit n18 at 192.

6.3 Referees/ The expert court

6.3.1 Introduction: What is an expert referee?

Many writers propose that special fact finders or referees be appointed in adjudicating technical matters owing to their special knowledge and skill, especially in complex matters,[80] and ensuring that the referee is best placed to consider the dispute.[81]

A radical, yet potentially effective, way of dealing with expert bias, is to refer technical questions to an external referee[82] (also known as an expert-court/commissioner).[83] This process entails deflecting[84] judicial decision-making duties,[85] or a part, such as technical or medical fact-finding, from a court to a decision maker outside the sphere of the court.[86] A referral of this nature is akin to arbitration, where a dispute is referred to an arbitrator who has technical knowledge but not legal qualifications and where there is no limitation on the qualifications of the arbiter.[87]

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[80] N Howlin 'Special juries: A solution to the expert witness?' (2004) 12 *Irish Student Law Review* 19 at 19; Note 'The case for special juries in complex civil litigation' (1980) 89 *Yale Law Journal* 1155-1176.

[81] Dublin Law Reform Commission op cit n32 at 302-303.

[82] Sperling op cit n42 at 14; FE Elliot & R Spillman 'Medical testimony in personal injury cases' (1935) 2 *Law and Contemporary Problems* 466 at 467-470; GA Endlich 'Proposed changes in the law of expert testimony' (1898) 32 *American Law Review* 851 at 854; Note 'Expert testimony in judicial proceedings' (1874) *9 Albany Law Journal* 122 at 122; AF Konopka 'Applied social research as evidence in litigation' in MJ Saks & CH Baron (eds) *The Use/Nonuse/Misuse of Applied Social Research in The Courts* at 129 & 133-134; JA Martin 'The proposed science court' (1977) 75 *Michigan Law Review* 1058 at 1059.

[83] E Washburn 'Testimony of experts' (1866) 1 *American Law Review* 45 at 61. Elliot & Spillman, op cit n82 at 468 & 474, propose that this may ease the congestion of court rolls in an economical manner, save expert time and improve litigation in general.

[84] PS Milich 'Controversial science in the courtroom: Daubert and law's hubris' (1994) 43 *Emory Law Journal* 913 at 926.

[85] Part 72 of the Australian Rules, gives the court the power to refer the whole or part of the proceedings to a referee, to inquire and report back on any issue, see Sperling op cit n42 at 14.

[86] Elliott & Spillman op cit n82 at 467.

[87] Elliott & Spillman op cit n82 at 468-469. In cases that require a medical judge, a practitioner with integrity and sound medical experience may act as referee, see D Butler & E Finsen *Arbitration in South African Law and Practice* (1993) at 73-78.

The referee may consider facts that the parties wish to offer and then apply his/her knowledge, which must serve as a guide for the expert-court to form a final judgement.[88] The referee must be unprejudiced and act as an expert fact finder who determines certain facts in his/her expertise.[89] The referee must have legitimate means to solicit facts,[90] which can include the right to examine a party medically, to analyse the matter, to subpoena and examine witnesses and generally to do all that is possible to promote the ends of justice.[91] Williams proposes that such a referee must be appointed by the court and their findings submitted to the court to be adopted and accepted (or rejected) by the court.[92] In matters where many disciplines are involved, such as in personal injury cases, a chairperson can be appointed over a referee forum (made up of the various experts, such as an orthopaedic surgeon, occupational therapist and industrial psychologist). If a need arises, the chairperson of a referee forum can be called to enlighten the court and counsel may pose questions to the referee via the court.[93] The expert referee is not a witness but a fact finder and will not testify in the conventional sense but may appear before the court to explain how certain facts were found.

6.3.2 The position in South Africa

The Constitutional and High Courts, with the consent of both parties, may refer technical or scientific question, issues relating to accounts or any other matter which cannot conveniently be conducted by the court[94] to a referee, appointed by the parties.[95] The court shall vest the referee with powers to conduct an enquiry by making a special order.[96] Usually, the referee prepares a

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[88] Washburn op cit n83 at 61.

[89] HS Williams 'Medical experts and homicide' (1897) 164 *North American Review* 160 at 165.

[90] Williams op cit n89 at 166.

[91] Williams op cit n89 at 166; LS Kubie 'The Ruby case: Who or what was on trial?' (1973) 1 *Journal of Psychiatry and Law* 475 at 488; TB Barlow 'Medical negligence resulting in death' (1948) *THRHR* 173-190.

[92] Williams op cit n89 at 166 & 171.

[93] Kubie op cit n91 at 478.

[94] Section 38(1)(*a*) of the Superior Court Act 10 of 2013. Also see R Odendaal 'Rescued by a referee' (2013) May *De Rebus* 26 at 26-27.

[95] Section 38(1)(*a*) of the Superior Court Act 10 of 2013.

[96] Section 38(1)(*a*) of the Superior Court Act 10 of 2013. This may include securing the attendance of witnesses and the producing of documents, see s38(4)-(5).

report[97] and the court may accept the report in its entirety or partially, make modifications or remit the report for further consideration, investigation or reporting by the referee.[98] Once adopted, the referee's report becomes the findings of the court.[99] The fee of the referee is determined by the court and will usually be a cost in the cause.[100] The referee does not usurp the function of the court and merely assists the court in investigating the facts on which the court's judgement will be based.[101] A major limiting requirement is that parties must consent to the appointment of a referee and, despite criticism being levelled against the now repealed Supreme Court Act,[102] the legislature omitted to heed this criticism in enacting the follow up Superior Court Act.[103]

6.3.3 Advantages of expert referees

There are numerous benefits to appointing expert referees. Unlike the court, expert referees understand technical and complex issues, making them less likely to be misled by lawyers or irresponsible experts, which increases the chances of a well-reasoned and principled decision.[104] The ability of lawyers to unjustifiably inflate claims by employing unscrupulous experts will be eradicated.[105] Party-introduced experts may be asked to meet under the supervision of an independent expert who can cut through partisan positions.[106] Expert referees may curb expert bias and address the difficulties experienced by courts, which do not have the expertise to comprehend complex and technical issues.[107] The expert assessor's role in the trial will not be that of a witness but that of a unique fact-finder.[108]

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[97] Section 38(1) & (2) of the Superior Court Act 10 of 2013.

[98] Section 38(1)(*a*) of the Superior Court Act 10 of 2013.

[99] Section 38(2) of the Superior Court Act 10 of 2013.

[100] Section 38(6) of the Superior Court Act 10 of 2013. The referee has a lien over the report until due and adequate remuneration has been paid, see *Adam v Dada* 1912 NPD 109.

[101] WA Joubert (ed) *The Law of South Africa* 2ed Vol 1 (1996) 566.

[102] Section 19 of Act 59 of 1959.

[103] *Montres Rolex SA v Kleynhans* 1985 (1) SA 55 (C) 69; Odendaal op cit n94 26.

[104] RS Gross 'Expert evidence' (1991) 6 *Wisconsin Law Review* 1113 1182.

[105] Elliot and Spillman op cit n82 473.

[106] Sperling op cit n42 at 13.

[107] Sperling op cit n42 at 15.

[108] Gross op cit n104 at 1210.

6.3.4 Disadvantages of the expert referees

Referring a dispute to a referee is a rather ambiguous procedure to adjudicate a dispute that may be far-reaching, in so far as time, money and expertise are required, as parties still will appoint their own experts.[109] The Dublin Law Reform Commission recorded the following disadvantages:[110]

i. There may be a limited number of candidates who can sit as a special fact finder.
ii. Where there is a scarcity of experts in a discipline, those who qualify as an expert fact finder may have an acquaintance with the parties, where bias may be undetectable.
iii. Experts may not be willing to act as fact finders and to take time out of a busy schedule.

Some argue that payment of expert referees by the state/court will have an adverse bearing on their objectivity, but Williams dismisses this claim, citing that such an argument is tantamount to arguing that a judge is partial as the judge is paid by the state.[111]

6.3.5 An administrative referee system: A novel proposal

In the USA, in Workman's Compensation cases, expert opinion can be secured in three ways:

i. The court refers the case to the Medical Bureau of the Division of Industrial Accidents.[112]
ii. The court can appoint an independent expert.[113]
iii. Neutral experts may be agreed upon by the parties.[114]

The first option is a referee system, where technical facts are found extra judicially by the medical bureau, diverted outside of the court realm, and in most of these matters the experts are free of

[109] Odendaal op cit n94 at 26.

[110] Dublin Law Reform Commission op cit n32 at 303.

[111] Williams op cit n89 at 166.

[112] Large number of compensation laws created a Staff of State Medical Examiners, see Yerion op cit n56 at 480.

[113] Yerion op cit n56 at 480.

[114] Being the most common of the three options, see CL Swezey *California Worker's Compensation Practice* 3ed (1985) at §§ 8.27-8.31.

partisanship.[115] They are not called to testify but submit written reports instead and they tend to take up the role of neutral court experts.[116] Of the three options, the first is regularly invoked.[117]

The Workman's Compensation system is not judicial in nature but administrative, there is not a judge or a jury only a referee (commissioner),[118] who gains experience in medical issues, and the procedure is less formal.[119] The courts referring these matters to referees are in a rather peculiar position in that there is authority to suggest courts are bound to accept the decision of medical referees as true if their opinions are uncontradicted.[120] The reports of the Medical Bureau are automatically deemed evidence, are complemented by deposition records and experts are hardly questioned by parties.[121]

6.3.6 Ousting the court's jurisdiction in referee matters

If the referee option is to be adopted in South Africa, without the legislature's intervention, the prescripts of s 38 of the Superior Courts Act[122] (discussed in section 6.3.2) are apposite and the court's jurisdiction is retained. An alternative option (with the legislature's intervention, setting out empowering provisions) is to oust the court's jurisdiction in its entirety, in matters of an expert-nature which is better adjudicated by a specialist referee. The report of such a referee should be binding on the court, which means that the court must use the facts set out in the report, combined with other evidence, to finally adjudicate the disputes. But how can this work practically?

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[115] Yerion op cit n56 at 486.

[116] Gross op cit n104 at 1207. Workman's Compensation procedures are not complex and they are not bound by common law or statutory rules of evidence, however decisions must be supported by legal evidence, see *Carroll v Knickerbocker Ice Co* 218 NY 435 (1916).

[117] M Berkowitz *Workmen's Compensation-The New Jersey Experience* (1960) at 104; LW Myers 'The battle of the experts: A new approach to an old problem in medical testimony' (1965) 44 *Nebraska Law Review* 539 at 564-566; RM Pennington 'The impartial medical examination in workmen's compensation litigation in Pennsylvania' (1960) 34 *Temple Law Quarterly* 466 at 474-475.

[118] Yerion op cit n56 at 479.

[119] Swezey op cit n114 at § 1.9.

[120] *Evans v Gilbie* (1926) 96 LJKB 117.

[121] Swezey op cit n114 at §§ 8.26 & 8.31; JH Wigmore *Evidence in Trials at Common Law* (1979) at 760.

[122] 10 of 2013.

Parties to litigation, at a pre-trial hearing, will propose a list of expert facts, which ought to be found by the experts, to have the matter finalized once-and-for-all. In case of a dispute between the parties, the court must make a ruling. The court will then make an order, directing the expert tribunal to investigate several questions and to return a report with the answers together with reasons to the 'expert-questions'. The expert tribunal will compile a report during the pre-trial stages, in much the same way as party introduced experts are required to file a summary of their evidence prior to the trial in terms of Rule 36(9)(*b*), which report will be binding as a pre-trial joint-expert-minute is binding on the court, as set out in section 7.2.2.

A referee executes an administrative not a judicial function, and the referee's report is appealable to an appeal tribunal (also administrative in nature) and/or is taken on review to a High Court under the auspices of the Promotion of Administrative Justice Act (PAJA).[123] The expert tribunal shall constitute a committee, comprising of one or more experts, from one or more disciplines, who meet the qualifying norms and standards of expertise to be set by the legislature and who find the answers to the expert-questions. The legislature, naturally, must give the expert tribunal wide powers to enable it to exercise its mandate effectively and competently and including investigative and examining powers.[124]

Any party can review the administrative action of the expert tribunal, inter alia under PAJA, on these grounds: if the administrator acted without authority by an empowering provision,[125] was biased,[126] failed to comply with a mandating or material empowering provision,[127] if the process was unfair procedurally,[128] materially impacted by a legal error[129] and if the decision was taken for unauthorised reasons, with ulterior motives, with heed to irrelevant consideration, to undue influence, in bad faith or capriciously.[130] The administrative action of the

[123] Act 3 of 2000.

[124] Such powers may mirror that of the Appeal Tribunal of the Health Professions Council, see Regulation 3(11) of the Road Accident Fund Regulations, Government Gazette No 31249 of 21 June 2008.

[125] Section 6(2)(*a*)(*i*)-(*ii*).

[126] Section 6(2)(*a*)(*iii*).

[127] Section 6(2)(*b*).

[128] Section 6(2)(*c*).

[129] Section 6(2)(*d*).

[130] Section 6(2)(*e*).

expert tribunal can be reviewed if it contravenes a law[131] or if it is not rationally connected to the purpose for which it was taken, to the empowering provisions purpose, to the information at hand or the reasons advanced for its decision. [132] Lastly, it may be reviewed if there is a failure to take action[133] or if the action is so unreasonable that no reasonable person will so exercise the power.[134]

The exact scope of the expert tribunal's jurisdiction, which will oust the common law jurisdiction of courts, is a question for the legislature. The expert tribunal, owing to the principle of legality,[135] can exercise public power only within the bounds of the law.[136] The fact that a legally trained court may not be competent to judge expert evidence is discussed in section 3.7. This difficulty, which allows biased and pliable experts to act with impunity, means the court cannot find on the facts of an expert nature and issues that are ancillary to expert evidence, such as reliability, credibility and admissibility, fall outside the court's jurisdiction as a lay court is not best suited to deal with these ancillary questions. If a court's jurisdiction is ousted in the area of expert questions and the court does not receive expert evidence, it follows that the court cannot make findings on issues such as expertise, or the credibility and reliability of the expert evidence. The expert tribunal must be constituted of expert referees who are competent and qualified.

Once the court has received the report from the expert tribunal, the court is bound by it and, as a piece in the larger puzzle, the court relies on it to adjudicate the matter on all the proven facts in the normal course.

This proposal addresses most root causes of adversarial bias and is a way of ameliorating the following cumbersome paradox: the civil court seeks expert evidence from those with knowledge, experience and skill, which the court lacks, but the court ultimately must decide and

[131] Section 6(2)(*f*)(*i*).

[132] Section 6(2)(*f*)(*ii*)(*aa*)-(*dd*).

[133] Section 6(2)(*g*).

[134] Section 6(2)(*h*).

[135] *Road Accident Appeal Tribunal and Others v Gouws and Another* 2018 (3) SA 413 (SCA) at para 25.

[136] *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) at para 56-58; *Pharmaceutical Manufacturers Association of South Africa & another: In re ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) at paras 17-20.

evaluates the evidence that it cannot comprehend in the first instance.[137] Hand, in the context of mutually destructive expert opinion, notes the fact finder 'will do no better with the so-called testimony of experts than without, except where it is unanimous. If the jury must decide, they are as badly off as if they had none to help them.'[138]

The court's jurisdiction will be ousted partially if the legislature were to adopt the expert-referee proposal as an administrative action,[139] and which would require substantial legal changes. Even before consideration of the benefits of the administrative system, there is the question whether partially ousting the court's jurisdiction infringes s 34 of the Constitution which gives everyone the right of access to courts.

Administrative justice rights extend notions of accountability, responsiveness and openness to powerful public institutions and tribunals, which institutions previously have been evasive of responding to these demands.[140] An administrative action may even take on a judicial nature.[141] A court in adjudicating a dispute, tests the legality and not the wisdom of the decision, a feature that is relevant to administrative decisions.[142] Section 33 of the Constitution, the right to administrative justice, requires administrative actions be fair, equitable, impartial, lawful and procedurally fair, written reasons are to be provided and given publicly and the award is to be justifiable and consistent with an individual's rights.[143]

There is a question about the impartiality of the expert tribunal given that government institutions, such as the Minister of Health and the Minister of Police, also are litigants. Some administrative tribunals are part of the executive or are not structurally independent of the

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[137] DL Faigman et al 'Check your crystal ball at the courthouse door please: Exploring the past understanding the present and worrying about the future of scientific evidence' (1994) 15 *Cardozo Law Review* 1799 at 1801; Meintjes-van der Walt op cit n7 at 5.

[138] L Hand 'Historical and practical considerations regarding expert testimony' (1901) 15 *Harvard Law Review* 40 at 56.

[139] Defined as the exercise of public power or performing a public function in terms of legislation or an empowering provision in s 1 of PAJA op cit n123.

[140] I Currie & J de Waal *The Bill of Rights Handbook* (2005) at 735.

[141] *Carephone v Marcus* 1993 (3) SA 304 (LAC) at para 19.

[142] Currie & De Waal op cit n140 at 705.

[143] Currie & De Waal op cit n 140 at 735.

executive.[144] It is not a requirement of the constitution that tribunals and forums be independent in the same fashion as are the courts.[145] The requisite degree of independence is linked to the judicial functions performed by the tribunal.[146] For these reasons, in the context of its impartiality, there is less reason to differentiate between courts and other tribunals.[147] Some tribunals, because of their specialised nature, may become identified with the policies and interests in the areas which they regulate and may even make the rules that they apply or may oversee the enforcement of their own findings. In itself, this probability does not make the tribunal biased.[148]

The constitutional requirement that the hearing must be public does not necessarily entail oral hearings.[149] The administrative process can be fair without adopting adversarial customs. These attributes of administrative actions can be accommodated to an expert tribunal, which makes it an attractive option.

If the court's jurisdiction is ousted in favour of an administrative process, litigants cannot competently argue that they are denied access to courts as contemplated by section 34 of the Constitution. Section 34 is not implicated where a court does not have jurisdiction in the first instance[150] and does not deal with the substance or rationality of the law, but is solely[151] a guarantee of procedural fairness.[152]

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[144] Currie & De Waal op cit n140 at 731.

[145] *Freedom of Expression Institute v President of the Ordinary Court Martial* 1999 (2) SA 471 (C) at para 24.

[146] Currie & de Waal op cit n140 at 731.

[147] Currie & De Waal op cit n140 at 731.

[148] *Albert and Le Compte v Belgium* 5 EHRR 533 (1983); *H v Belgium* 10 EHRR 339 (1987); *Lanborger v Sweden* EHRR 416 (1989).

[149] See the Human Rights Committee's view, in *RM v Finland* (Communication 301/88), regarding the requirement of article 14 of the International Covenant on Civil and Political Rights of a Fair and Public Hearing. Appellate proceeding may also take place on written representation, see S Joseph et al *The International Covenant on Civil and Political Rights* (2000) at 304.

[150] Currie & De Waal op cit n140 at 718; *Jooste v Score Supermarket* 1999 (2) SA 1 (CC) at para 21.

[151] In *Lane & Frey v Dabelstein* 2001 (2) SA 1187 (CC) at 1190, the court held that section 34 of the Constitution does not guarantee correct decisions. Cf *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) at 124, which held s 33 of the interim Constitution is violated if procedures for enforcing existing rights are taken away.

[152] Currie & De Waal op cit n140 at 718; *De Beer v North-Central Local Council and South-Central Local Council* 2002 (1) SA 429 (CC) at para 27.

An administrative as opposed to a judicial process undoubtedly takes away from existing common law rights of litigants and replaces these with administrative rights. This change is not per se unlawful and in *Jooste*[153] the court held that the abolition of rights (common law or statutory) must be tested against other rights, such as the rights to property, human dignity and equality.[154]

It may be argued that ousting the court's jurisdiction and diverting the technical and expert fact finding to a binding expert tribunal that sits as an administrative body, is unconstitutional behaviour.[155] However, a litigant's constitutional right is simply to have a matter that is capable of being decided by the application of the law heard by a court of law or, where appropriate, another independent and impartial forum. The alternative right to have a matter adjudicated by an independent and impartial tribunal opens the door for an administrative expert tribunal, which, in law, can be given exclusive competence to decide matters of fact with no right of appeal to a court.[156]

A precedent for taking away a portion of the court's jurisdiction in delictual claims, is found in Road Accident Fund (RAF) litigation, specifically in the context of a claim for general damages, where an administrative system replaces a judicial determination of a factual question,[157] which relates to the seriousness of the injury and which question is a criterion for a claimant to qualify for general damages (a singular head of damages).[158]

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[153] 1999 2 SA 1 (CC) at at para 21.

[154] Currie & De Waal op cit n140 at 718.

[155] The Irish Law Reform Commission considered reforming the Fiscal Prosecutor and Revenue Court, replacing it with a court composed of experts outside law such as in fields of tax or accounting, however it was considered unconstitutional to have a court adjudicated by a non-legal qualified trier of fact, see Ireland Law Reform Commission (LRC 72-2004) *Report on a Fiscal Prosecutor and the Revenue Court* at 8.31; Elliot & Spillman op cit n82 at 469.

[156] *Carephone v Marcus* 1999 (3) SA 304 (LAC) at para 33; *Total Support Management v Diversified Health Systems* 2002 (4) SA 661 (SCA) at para 27.

[157] *Road Accident Fund v Faria* 2014 (6) SA 19 (SCA) at para 14; *RAF v Duma, RAF v Kubeka, RAF v Meyer, RAF v Mokoena* 2013 (6) SA 9 (SCA) at para 19; FHH Kehrhahn 'RS v Road Accident Fund (49899/17) [2020] ZAGPPHC (21 January 2020)' (2020) 53(1) *De Jure* 188 at 189-190.

[158] Section 17(1) of the Road Accident Fund Act 38 of 2005, as amended.

The RAF compensates victims for general damages only if their injuries are serious.[159] The RAF must be satisfied that the seriousness of the injuries was assessed correctly by medical practitioners.[160] The RAF makes the decision on the seriousness of the injuries and not the court. Until the RAF has decided the court's jurisdiction is ousted.[161] If a party is not satisfied with the RAF's decision, the matter may be referred to the RAF Appeal Tribunal.[162] This paradigm shift means that a decision on the seriousness of an injury is made administratively rather than judicially.[163]

The Constitutional Court held the RAF provisions to comply with the constitution.[164] There is no reason why the legislature cannot create an administrative body to determine issues of an expert nature and, if a party is not satisfied, an appeal is to be lodged with an expert appeal tribunal. Without further elaboration (the details are for the legislature to consider and beyond the scope of this work) it is proposed that a tribunal should be created on which experts from all relevant disciplines can serve. Parties in a trial can agree or the court can decide which disciplines are germane and from which experts are appointed to address the expert questions in a dispute. Specific instructions in regard to expert questions are to be submitted to the tribunal. The tribunal has authority to solicit facts and evidence and to examine physically any item or the parties. The tribunal must be vested with wide-ranging investigative authority, including the rights to solicit discovery and to subpoena any person to appear before it or to submit any document or item to it. The tribunal must prepare a report containing the answers to the facts requested and the court is to be bound by the facts as found by the tribunal.

Naturally, any administrative matter may be appealed to an expert appeal tribunal and can be taken on review to a high court.[165] The plaintiff should pay for the initial costs associated with

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[159] Section 17(1)(*b*).

[160] Regulation 3(3) of the Road Accident Fund Regulation of 2008, GG of 21 July 2009.

[161] *Duma* supra n157 at para 19.

[162] Regulation 3 op cit n160.

[163] *Faria* supra n157 at para 36; *Mahano v RAF* 2015 (6) SA 237 (SCA) at 241; *RAF Appeal Tribunal v Gouws* 2018 (3) SA 413 (SCA) at 424.

[164] *Law Society of South Africa v Minister for Transport* 2011 (1) SA 400 (CC) at 400-401.

[165] The Promotion of Administrative Justice Act 3 of 2000, s 6; C Hoexter *Administrative Law in South Africa* (2012) at 605.

the expert tribunal and the appellant-party pays for the initial costs associated with the appeal tribunal, but these payments are subject to the recovery of the costs under a cost award in the normal course.

6.3.7 Conclusion- Referee

South African courts would benefit from use of section 38 of the Superior Court Act.[166] The provision that parties must consent to the appointment of a referee needs to be deleted by means of a legislative amendment if the system is to have a chance to be effective. As in Australia, the referee ought to have free will to investigate and must observe only the rules of natural justice, but unlike Australia, where the court can accept, reject, or vary the referee's report,[167] the referee system works best if its findings bind the court. The rules of natural justice must apply when a statute empowers a public official or body to act or to make an adverse finding regarding a person's liberty, property or existing rights.[168]

The proposal is a significant overhaul of the existing method of accepting expert opinion which may not find favour with the legislature and, no doubt, will not be well- accepted among legal practitioners who will lose their ability to control the process.

It is a mammoth task to draft the necessary legislation and to set up an expert tribunal. The costs and expenses can be shifted onto the litigants in much the same way that litigants paying for private experts, indigent clients may be assisted on a contingent no-win-no-fee basis. Of all systems, which have the potential to curb bias, this by far is the best proposal, albeit it is not free from contention and criticism. There is only a hope the legislature has the political will to institute measures to curb expert bias.

6.4 Conclusion

This chapter considered the response to adversarial expert bias in a situation where the method of fact finding departs from that ordinarily adopted by courts. Expert referees and assessors have

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[166] 10 of 2013.

[167] Sperling op cit n42 at 14. The rules of natural justice entail acting fairly and heeding the audi alteram partem rule, the nemo iudex idoneus in propria cause est and the rule that justice must be done and be seen to be done, see D Butler & E Finsen *Arbitration in South Africa Law and Practice* (1993) at 165-167.

[168] *Omar v Law Society of the Northern Provinces* (42471/2013) [2014] ZAGPPHC 179 (9 April 2014) at para 23.

exceptional qualities that may contribute to curbing the ill effect of expert bias. In the USA decision of *Davis-Smith v Clausen*[169] the court held:[170]

> 'No one knows better than judges of courts of nisi prius and of review that the common-law method of making such awards…is most unsatisfactory. All judges have been witnesses to extravagant awards made for the most trivial injuries and trivial awards for injuries ruinous in the nature.'
>
> 'Nor is he [the court] aided in this respect by the testimony of medical experts. Conflicting as such testimony usually is, it tends rather to confuse than enlighten him. Perhaps the whole difficulty lies in the fact that the question is too much one of opinion, and not enough of fact.'

The next chapter considers the response to adversarial expert bias in respect of opposing-side expert collaboration.

[169] 65 Washington 156 117 Pac 1101 (1911).

[170] At 209.

CHAPTER 7

JOINT EXPERT REPORTS AND CONFERRING EXPERTS

7.1 Introduction

Experts are known to emphasise areas of dispute rather than agreement, which makes it difficult for a fact finder to detect points of agreement.[1] This problem is exacerbated by the party preparation and presentations of expert evidence and the challenge faced by courts in comprehending complex evidence.[2]

In this chapter, the term 'conferring experts' means experts appointed by opposing litigants who come together to collaborate, either during the pre-trial or trial stage. During the pre-trial stage, experts employed by opposing sides may be asked to prepare a joint expert report or minute, which is a report that encapsulates the experts' agreements, disagreements and the reasons for their disagreements. During the trial stage, conferring experts should testify, one after the other, giving concurrent evidence, as opposed to following the conventional sequence of civil procedure.

Lord Woolf, in advocating a retreat from adversarialism, suggested reducing the number of experts and removing disagreements from the trial, while encouraging courts to be proactive in decisions about the presentation and evaluation of expert evidence.[3] Conferring experts is one suggestion as how to move away from the rigid adversarial process where experts are treated harshly and allowing more incisive questioning of experts to be achieved in a collegial atmosphere where true differences can be readily identified.[4]

This chapter considers concurrent evidence, as a response to party selection bias in regard to the method in which expert evidence is presented. Concurrent evidence at the pre-trial stage is discussed as joint-expert-reports and during the trial stage as 'hot-tubbing'.

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[1] SR Gross 'Expert evidence' (1991) *Wisconsin Law Review* 1113 at 1184.

[2] Gross op cit n1 at 1184.

[3] MR Woolf *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996); Australian Law Reform Commission, Discussion Paper 62 *Review of the Federal Civil Justice System* (1999) at para 6.86.

[4] G Barrie & B De Villiers 'Revisiting the adversarial approach of dealing with expert evidence: The treatment of expert witnesses by the state administrative tribunal of Western Australia' (2017) 1 *Journal of SA Law* 59 at 64.

7.2 Conferring experts: Joint expert reports[5]

7.2.1 What is a joint expert report?

Experts, from the same or similar disciplines, who prepare reports for the respective litigants, are expected to meet, usually unmediated and in the absence of legal practitioners, with the aim of exchanging information, in order to resolve disputes in the realm of their expertise.[6] Conferring experts are required to produce a joint report,[7] containing issues on which they agree and disagree, as well as the basis for their disagreements.[8] Experts ought to bring to the table their independent professional judgement and refrain from being a mouthpiece for a party.[9] Conferring meetings are private[10] and, in the absence of the court's permission, no evidence may be led about what took place at such a conference.[11] The joint report is deemed the property of the court and at the subsequent trial, the court focus only on the disagreements.[12] Once experts achieve common ground, a litigant generally may not present evidence that offends such an agreement.[13]

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[5] For a general discussion see L Meintjes-van der Walt 'Expert evidence: Recommendations for future research' (2006) 19 *South African Journal on Criminal Justice* 276 at 287; H O'Flaherty 'The expert witness and the courts' (1997) *Medico Legal Journal of Ireland* 3 at 5-7.

[6] BJ Weinstein 'Improving expert testimony' (1986) 20(3) *University of Richmond Law Review* 473 at 483.

[7] G Edmond 'Merton and the hot tub: Scientific conventions and expert evidence in Australian civil procedure' (2009) 72(1) *Law & Contemporary Problems* 159 at 165.

[8] Gross op cit n1 at 1211-1212. In Australia, the courts remain responsible for the proceedings and in complex matters, may order that the joint expert meeting be chaired by an independent chairperson, see B De Villiers 'From advocacy to collegiality: The view of experts of 'concurrent evidence' and 'expert conferral' in the state administrative tribunal' (2015) 25 *Journal of Judicial Administration* 11 at fn 51; In *Triden Properties v Capita Financial Group* (1993) 30 NSWLR, at 403, the NSW Court of Appeal upheld an order that party experts must meet under chairmanship of a referee and in the absence of lawyers.

[9] Gross op cit n1 at 1149. For the same reason communication with opposing counsel is discouraged, see MH Graham 'Discovery of experts under rule 26(b)(4) of the Federal Rules of Civil Procedure: Part two: An empirical study and a proposal' (1977) *University of Illinois Law Forum* 169 at fn28.

[10] Lawyers and clients may not attend such a meeting, see New South Wales Law Reform Commission, Report 109 *Expert Witnesses* (2005) at 41.

[11] Barrie & De Villiers op cit n4 at 64.

[12] Barrie & De Villiers op cit n4 at 64.

[13] Barrie & De Villiers op cit n4 at 64.

Ensuring there is discourse among experts will enhance their opportunity to reach agreements.[14] The rationale behind conferring experts is not to achieve a process akin to mediation or a compromise but rather is designed to assist the court in resolving the dispute correctly, expeditiously and cost effectively.[15]

Legal practitioners are not fond of joint expert meetings, owing to their anxiety to retain control and their wish to preserve a tactical advantage.[16] Despite these protestations, in some countries conferring expert meetings in the pre-trial stage are legally required. For example, in Ireland experts are under a special duty to the court to limit contentious matters of fact where agreement between experts is possible.[17] In Australia,[18] conferring experts enjoy the approval of the judiciary.[19] The Australian Federal Court[20] issued a practice directive making it improper for

[14] Gross op cit n1 at 1184 & 1212; L Meintjes-van der Walt 'Expert odyssey: Thoughts on the presentation and evaluation of scientific evidence' (2003) 120(2) *SALJ* 352 at 361.

[15] D Parry 'Maximum value with minimum cost: Developments in the use of expert evidence in the state administrative tribunal of Western Australia' (2008) *Brief* 25 at 25-26; D Parry 'Revolution in the West: The transformation of planning appeals in Western Australia' (2008) *Local Government Law Journal* 119 at 120.

[16] Gross op cit n1 at 1149.

[17] *Graigola Merthyr v Swansea Corporation* [1928] 1 Ch 31; *Anglo Group Plc v Winther Brown and BML (Office Computers)* [2000] EWHC Technology 127 (8 March 2000). This means identifying agreements and disagreements, see *Stanton v Callaghan* [1998] EWCA Civ 1176 (8 July 1998); Dublin Law Reform Commission *Expert Evidence* (2008) at 163 & 252. In Ireland, the outcome of expert meetings, in competition and commercial courts, does not bind the parties, see order 63B Rule 6(1)(*ix*), Rules of the Superior Courts (1986).

[18] See generally the Australian Law Reform Commission, Report 89 *Managing Justice: A Review of the Federal Civil Justice System* (2000) recommendation 62; The Australian Federal Court Guidelines on Expert Evidence, guideline 7.4-7.11; J Cooper, W Bennett & H Sukel 'Complex scientific testimony: How do jurors make decisions?' (1996) 20 *Law and Human Behavior* 379-394; RE Cooper 'Federal court expert guidelines' (1998) 16 *Australian Bar Review* 203-211; BL Cutler, HR Dexter & SD Penrod 'Non-adversarial methods for sensitizing jurors to eyewitness evidence' (1990) 20 *Journal of Applied Social Psychology* 1197-1207.

[19] P Heerey 'Expert evidence: The Australian experience' (2002) 7(3) *Bar Review* 166 at 170.

[20] M Malsch & I Freckleton 'Expert bias and partisanship: A comparison between Australia and the Netherlands' (2005) 11(1) *Psychology, Public Policy and the Law* 42 at 55. This is also standard practice in the Administrative Tribunals, see Barrie & De Villiers op cit n4 at 62-64.

an expert to receive instructions from litigants to not reach an agreement.[21] Conferring experts in the pre-trial stage have been partially implemented also in the UK.[22]

The Dublin Law Reform Commission suggested that experts be allowed to ask each other questions during the pre-trial stage, the answers forming a part of the final report. The purpose is to gain clarity about uncertainties and to air facts unknown to the opposing expert.[23] Sperling argues that experts should be allowed to interrogate each other in writing.[24] In England, a litigant may submit questions for clarification of the expert report, (and beyond clarification with the permission of the court or opponent), where the expert's reply is part of that expert's report.[25] Gross notes that allowing experts to put questions to each other is a move away from the tacit understanding that only legal practitioners can be trusted to control and present evidence.[26]

7.2.2 The position in South Africa

Although the court rules do not provide for 'concurrent evidence',[27] the court's practice directives (discussed in section 4.7.1) make provision for joint-expert-reports during the pre-trial stage.[28] The majority decision in *Bee v RAF*[29] held that these joint expert meetings, a fundamental feature of case management, are entirely appropriate and when experts acting for opposing sides agree on

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[21] Experts can be asked to defer or to prepare a joint minute, either on their own or with the aid of lawyers, see HD Sperling 'Expert evidence: The problem of bias', available at https://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Assorted%20-%20L%20to%20Z/sperling_speeches. pdf, accessed 24 July 2021 at 5 & 13-14.

[22] In the UK, where awareness of the partisanship among experts has grown, courts increasingly highlight the experts' overriding duty towards the court, see Malsch & Freckleton op cit n20 at 55.

[23] Dublin Law Reform Commission op cit n17 at 255. This is already possible in England, see Civil Procedure Rules (Eng), Rule 35.6.

[24] Sperling op cit n21 at 14.

[25] Civil Procedure Rules 1998 (Eng), Rule 35.6(1)-(2).

[26] Gross op cit n1 at 1212.

[27] Uniform Rule 36(2) however allows a litigant to have his/her own expert present at the examination of the litigant by the opposing side's expert.

[28] B De Villiers 'Conferral of experts and concurrent evidence-What do experts think of it?' (2015) 42(7) *Brief* 30-34; L Meintjes-van der Walt 'The proof of the pudding: The presentation and proof of expert evidence in South Africa' (2003) 47(1) *Journal of African Law* 88 at 98.

[29] 2018 (4) SA 366 (SCA).

facts, the litigant is bound by the facts, unless the litigant specifically repudiates the joint report.[30] The court is not bound by the expert agreement and if the court rejects the joint minute, the court must alert the parties to this position so that they can present evidence, failing this action by the court, the parties may proceed on the basis that the expert agreement is an admitted fact.[31]

7.2.3 The value of a joint expert report

Joint expert reports (also called joint minutes) can act as a deterrent[32] to expert bias[33] by reinforcing the experts' overriding duty towards the court and trumping the experts' obligation to the legal practitioner.[34]

Pre-trial conferring experts create an immediate peer review system:[35] When experts are required to justify their opinion to their professional counterparts, extreme views tend to be moderated.[36] It then is not so easy to present a biased opinion, as the peer, unlike the court, is equipped to identify the bias.[37] Most studies that explore the value of the peer-review process agree that peer-review is more effective when focussed on evidence-sharing as opposed to detecting deceit.[38] Expert co-operation, in the context of conferring experts, usually is based on the

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[30] Para 64.

[31] Para 66 & 73. Also see *Malema v RAF* [2017] ZAGPHC 275 at para 92; *Thomas v BD Sarens* [2012] ZAGPJHC 161.

[32] L Meintjes-van der Walt Expert *Evidence in the Criminal Justice Process: A Comparative Perspective* (2001) at 146.

[33] I Knoetze le Roux 'Ways to curb expert bias' (2017) Sept *De Rebus* 37 at 38; L Meintjes-van der Walt 'Experts testifying in matters of child abuse: The need for a code of ethics' (2002) 3(2) *Child Abuse & Research in South Africa* 24 at 32; L Meintjes-van der Walt 'Expert evidence and the right to a fair trial: A comparative perspective' (2001) 17(3) *SAJHR* 301 at 313.

[34] S Feola & RA Alcorn 'Expert witness advocacy: Changing its culture' (2009) 45(7) *Arizona Attorney* 24 at 30.

[35] B De Villiers 'Accessibility to law: Adjusting court proceedings to the modern era-novel proceedings and procedures from down under' (2016) 14 *New Zealand Journal of Public and International Law* 229 at 239.

[36] Sperling op cit n21 at 13.

[37] Sperling op cit n21 at 13.

[38] EJ Chan 'The "Brave New World" of Daubert: True peer review, editorial peer review, and scientific validity' (1995) 70 *New York University Law Review* 100 at 100; S Haack 'Peer review and publication: Lessons for lawyers' (2007) 36 *Stetson Law Review* 789 at 789.

assumption that a colleague can be trusted to tell the truth, especially because their counterpart understands the evidence.[39]

Pre-trial conferring of experts is easy and inexpensive to implement and requires no changes to the structure of how experts currently are used.[40] Some commentators, such as Gross, propose that experts also should answer jointly, any pre-trial questions posed by the court and that the experts jointly identify an objective expert who can competently assess their remaining differences, but this approach will require changes to the existing procedural law.[41]

In England, most participants in a survey felt that joint-expert-meetings advanced settlement.[42] Disparity of opinion among experts often has its foundation in the divergent input data, which is data that legal practitioners submit to the experts, such as medical records, which data experts use in forming their opinions. Conferring experts will allow opposing experts to rely on common collateral or input data which can ameliorate their differences.[43] It may be wise for litigants to agree on a document bundle to be submitted to the experts, prior to the experts commencing with their work, in the same way that they must agree to the trial bundles.[44]

Conferring experts may save time and resources[45] and prevent aimless fishing expeditions in an endeavour to invalidate expert opinion.[46] Testifying time for experts may be reduced and courts will be better informed.[47] It is counter argued that there is no conclusive evidence that conferring experts are cost effective and can save time and, to the contrary, it often does not narrow

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[39] P Kitcher *The Advancement of Science: Science Without Legend, Objectivity Without Illusions* (1993) at 394. Scientists rarely prepare for an attack on deceit and betrayal, unless specifically warranted, see S Fuchs & S Ward 'What is deconstruction and where and when does it take place? Making facts in science, building cases in law' (1994) 59 *American Sociology Review* 481 at 489.

[40] Gross op cit n1 at 1211-1212.

[41] Gross op cit n1 at 1212.

[42] United Kingdom, Department of Constitutional Affairs, *Further Findings: A Continuing Evaluation of the Civil Justice Reforms* (2002) at para 4.26.

[43] Gross op cit n1 at 1116.

[44] Rule 37(6)(*j*).

[45] Gross op cit n1 at 1213.

[46] Meintjes-van der Walt op cit n14 at 367.

[47] Barry & De Villiers op cit n4 at 67.

the gap on issues and instead the loudest voice may dominate the proceedings.[48] Hostility among experts may derail real communication, senior experts may overpower junior ones and the process may be derailed where the experts are unsure about their role as an expert or the nature and purpose of the joint meeting.[49] For these reasons, the Australian Law Reform Commission suggested ground rules for the aim, conduct and outcome of joint meetings.[50]

Pre-trial conferring allows experts to present objections to their counterpart in time to respond intelligently and revise opinions, as opposed to leaving these for the actual trial.[51] There still will be disagreement among experts and one should not discourage honest disagreement, but this type of disagreement will be devoid of any mercenary considerations and subtle emotional affiliations.[52]

Experts in South Africa enjoy immunity from lawsuits.[53] The rationality for such an immunity has its foundation in the fact that an expert's duty towards the court may be in conflict with their client's interest, which may make the expert vulnerable to an action brought by their client, especially if they make concessions at a joint pre-trial expert meeting to the detriment of the instructing litigant.[54] There is a call for the abolition of immunity,[55] which was echoed by Judge Fisher in *MT v RAF; HM v RAF,*[56] against professional negligence lawsuits in order to achieve 'a chastening effect on experts'.[57] The UK Supreme Court in *Jones v Kaney*[58] abolished

[48] New South Wales Law Reform Commission op cit n10 at 93.

[49] New South Wales Law Reform Commission op cit n10 at 94.

[50] Australian Law Reform Commission op cit n3 at para 6.89.

[51] Gross op cit n1 at 1149.

[52] LS Kubie 'The Ruby case: Who or what was on trial?' (1973) 1 *Journal of Psychiatry and Law* 475 at 487.

[53] *MT v RAF; HM v RAF* [2021] 1 All SA 285 (GJ) at para 37. For a general discussion on expert immunity see M McSweeny 'Immunity from suit of expert witnesses' (2002) 22 *Australian Bar Review* 131 at 136-142. For matters where valuators were sued for damages see *Ocean Diners v Golden Hill Construction* 1993 (3) SA 331 (A) at 343; *Chelsea West v Roodebloem Investments* 1994 (1) SA 837 (C) at 851-852; *Perdikis v Jamieson* 2002 (6) SA 356 (W) at para 9; *Maceys Consolidated v TA Holdings* 1987 (1) SA 173 (ZS) at 181.

[54] *Re N* [1999] EWCA Civ 1452 (20 May 1999) at 17.

[55] T Hodgkinson & M James *Expert Evidence: Law and Practice* (2007) at 13-010.

[56] Supra n53 at para 37.

[57] *MT* supra n53 at para 37.

[58] [2011] UKSC 13.

such immunity. In *Jones*, an expert was sued for professional negligence, by the same litigant that instructed the expert, for making a joint-minute-concession, to his detriment. Judge Fisher, in *MT v RAF; HM v RAF* seems not to have considered that abolishing immunity can have the effect that experts will be reluctant to make reasonable concessions to the detriment of their instructing litigant and, instead, will stick to their guns out of fear of conviction in lawsuits; immunity from suit 'may encourage greater pre-trial conferment among experts'.[59]

The courts in South Africa ought to play a more active role in support of joint expert meetings; one way is for judges to act as the chairperson of a joint conference or to submit directives to the experts.[60] These actions may enhance expert agreement; although not a panacea for the problems related to expert evidence in the adversarial system, it is a weapon in the arsenal against expert bias.[61] Other obstacles to implementing a system of conferring experts are inertia and custom, by which legal practitioners will not let go of embedded adversarial habits.[62]

Sperling correctly notes that there is a jurisdictional problem. Courts issue a direction on experts to confer; however experts are not subject to the court's jurisdiction in the same way as litigants, they have not yet given evidence and may not become witnesses, which is a question mark on the court's authority to place such a mandatory injunction.[63] The threshold problem can be overcome by having experts consent to confer in advance (when retained) or by placing an obligation on the litigant that contractually binds the experts. [64]

7.2.4 Conclusion: Pre-trial conferring experts

There is a misplaced belief that when experts agree on an issue they have arrived at an infallible truth. [65] This proposition conflates that, among experts, there is difference of opinion and debate

[59] *Stanton v Callaghan* [1998] EWCA Civ 1176 (8 July 1998).

[60] L Van Zyl 'A case for judicial case management' (2002) 7 *De Rebus* 58 at 58-59.

[61] A Monichino 'Recent developments in expert evidence in Victoria' (2014) 3 *Journal of Civil Litigation and Practice* 16 at 22.

[62] Gross op cit n1 at 1213.

[63] Sperling op cit n21 at 12, describes this as a threshold problem.

[64] Sperling op cit n21 at 12.

[65] MJ Saks 'Merlin and Solomon: Lessons from the law's formative encounters with forensic identification science' (1998) 49 *Hastings Law Journal* 1069 at 1135.

with error and detracts from the notion that vigorous debate within a scientific field is healthy and a sign that uncertainties are being addressed.[66] Pre-trial conferring has helpful properties in the context of partisan experts, but Meintjes-van der Walt submits that pre-trial expert meetings will not solve the issue of partisanship, which is endemic to the adversarial system.[67]

7.3 Hot tubbing: Trial stage conferring experts

7.3.1 What is 'hot tubbing'?[68]

'Hot tubbing' requires experts to present a report during the pre-trial stage and give viva voce evidence at trial, at which point the issues have been refined, defined and clarified.[69] Disagreements and their basis are highlighted.[70]

Hot tubbing procedures change the conventional sequence in which experts are called to testify. In this procedure, experts from the same discipline file written statements before the trial[71] and at the subsequent trial present viva voce evidence, one after the other.[72] The idea is that the purpose of the experts is to inform rather than to advocate.[73] This type of expert evidence is

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[66] Saks op cit n65 at 1135.

[67] L Meintjes-van der Walt 'Tracing trends: The impact of science and technology on the law of criminal evidence and procedure' (2011) 128 *SALJ* 147 at 166.

[68] For a general discussion in relation to Australia, see The Australian Law Reform Commission Report op cit n3 recommendation 67; Sperling op cit n21; *Spika Trading v Royal Insurance Australia* (1985) 3 ANZ Ins Cas 60-663*; BGP Properties v Lake Macquarie City Council* [2004] NSWLEC 399 at para 121; D Parry 'Concurrent expert evidence' (2010) August *Brief* 8-12; *King v Military Rehab and Compensation Commissioner* (2005) 83 ADL 322 at para 22; *Stockland Division v Manly Council* 10428 (2004) WL 1926821 (NSW Land and Environmental Court) 3 August 2004; *BGP Property v Lake Macquarie City Council* (2004) 138 LGERA 237 at 263; *Re Queensland Independent Wholesalers* (1995) 132 ALR 225 at 231-232. For a discussion of jurisprudence in the United States America see S Welch 'From witness box to the hot tub: How the hot tub approach to expert witnesses might relax an American finder of fact' (2010) 5 *International Journal of Commercial Law and Information Technology* 154 at 160-164. In England since April 2013, see P McClellan 'New methods with experts: Concurrent evidence' (2010) 3(1) *Journal of Court Innovation* 259 at 264.

[69] P O'Sullivan 'A hot tub for expert witnesses' (2004) 4(1) *Judicial Studies Institute Journal* 1 at 4.

[70] M Malsch & I Freckleton op cit n20 at 55.

[71] O'Sullivan op cit n69 at 1-4.

[72] In jurisprudence in the United States of America, see Federal Rules of Evidence, Rule 611(*a*); California Evidence Code S765 (Deering 1991).

[73] *Quantas Airways* [2004] ACompT 9 (12 October 2004) 216.

presented during the trial phase and after the factual evidence had been presented,[74] which allows expert witnesses to rely on the veracity and cogency of the collateral input which has been presented as evidence at the trial (which otherwise is hearsay evidence).[75]

Practically, the experts are sworn in and asked to confirm or modify their previously rendered report in light of the factual evidence.[76] They then are asked to give an opinion with regard to the question at hand, in their own words, and not based on probing by counsel.[77] Each expert gives an opinion on the opponent's expert opinion.[78] This situation enables an elucidatory process and the court usually controls the presentation of the expert evidence during this stage.[79] For part of their testimony, the experts are relieved of enduring invasive questioning by a lawyer.[80] The experts may still be cross examined by counsel.[81] Opposing experts answer the same questions put by counsel, one after the other, and comment on each other's replies, entering into a dialogue with each other and questioning each other.[82] Experts can be asked to clarify their opinion, subsequent to cross examination. [83]

Hot tubbing creates a hybrid between the adversarial and inquisitorial models of presenting expert evidence, where the courts moderate the process and intervene with appropriate questions

[74] De Villiers op cit n35 at 242; Gross op cit n1 at 1211-1212.

[75] J Burchell 'Non-pathological incapacity: Evaluation of psychiatric testimony' (1995) 8 *SACJ* 37 at 42; S Maharaj 'The role of expert evidence in the defence of provocation and emotional stress' (2019) 40(3) *Obiter* 21 at 44.

[76] Feola & Alcorn op cit n34 at 30.

[77] Feola & Alcorn op cit n34 at 30.

[78] Feola & Alcorn op cit n34 at 30.

[79] G Edmond 'Merton and the hot tub: Scientific conventions and expert evidence in Australian Civil Procedure 72' (2009) *Law & Contemporary Problems* 159 at 164.

[80] Edmond op cit n79 at 162.

[81] Edmond op cit n79 at 164.

[82] Knoetze le Roux op cit n33 at 39.

[83] Feola & Alcorn op cit n34 at 30.

to enhance fact finding and the search for the truth.[84] Van Loggerenberg proposes that experts should be allowed to ask questions to lay witnesses and the parties.[85]

7.3.2 Position in South Africa

Hot tubbing is not practiced in South Africa despite it potentially being a practicable option for the High Court in terms of Uniform Rule 39(20). In terms of this rule, a court is vested with the authority to make any order, where it is convenient, regarding the conduct of the trial and to vary the conventional procedures encapsulated by Rule 39.[86] The constitution vests courts with an inherent authority to regulate their own processes taking into account the interest of justice.[87] A court is an impartial umpire and must refrain from entering the arena.[88] If no existing rights of litigants are offended, Rule 39(20) may potentially assist the court in embarking on hot-tubbing, but to eliminate any doubt, it is best that the Rules Board intervene.

7.3.3 Advantages of hot tubbing

In a conventional trial, the plaintiff's expert is called and gives evidence in chief and is cross examined, after which the plaintiff may present further evidence on a number of issues.[89] Then, possibly much later, [90] the defendant's counter expert testifies on the same issue, a procedure which has the disadvantage of facilitating rebuttal evidence which neutralizes the evidence of the first expert.[91] The disadvantage of delayed comparison and shifting assumptions, can be ameliorated if the sequence of expert evidence is altered, so that opposing expert evidence on any issue is

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[84] A Butt & H Stowe 'Playing in the hot tub- A guide to concurrent evidence in New South Wales' (2018) Spring *Bar News: The Journal of the NSW Bar Association* 44 at 45.

[85] DE Van Loggerenberg *Hofbeheer en Partybeheer in die Burgerlike Litigasieproses: 'n Regshervormings-Ondersoek* (unpublished LLD thesis, UPE, 1987) at 200-201.

[86] Uniform Rule 39(20).

[87] Section 173.

[88] *National Commissioner of Police v Gun Owners of South Africa* 2021 (1) SACR 44 (SCA) at para 12. Also see section 1.5, chapter 1.

[89] Gross op cit n1 at 1175.

[90] P Alldridge 'Scientific expertise and comparative criminal procedure' (1999) 3 *The International Journal of Editor & Proof* 141 at 150.

[91] WA Melcher 'Developing and regulating expert testimony' (1917) 24 *Case & Comment* 381 at 385; R Dennis, R Suplee & SM Woodruff 'Direct examination of experts' (1987) Dec *Practicable Law* 53 at 54.

presented simultaneously.[92] Courts can compare the findings of experts in real time and not compare counterpart evidence given weeks ago, which may be based on assumptions that are no longer relevant.[93] Expert witnesses will not be called back owing to an omission by counsel to put a key question to the witness that is a consequence of the rival expert's testimony.[94]

By this procedure, experts convey their opinions more efficiently and with less distortion introduced by clever advocates and in less time than it would otherwise have taken.[95] It makes expert evidence cost effective[96] and saves institutional resources.[97]

Hot tubbing has been proposed to curb adversarial expert bias.[98] By removing experts from belonging to a 'camp',[99] bias is eliminated, because experts can freely comment on the opinion of other experts,[100] transforming the antagonistic adversarial trial into a cooperative enterprise, in which scientific attitudes and values have an opportunity to flourish.[101]

In the normal course of presenting expert evidence, the prerequisite of submitting a report (as is required in South Africa) and subsequently testifying is beneficial. Simply filing a report, as opposed to also testifying, has the effect that the expert's authoritative status is disproportionately valued.[102] In an adversarial trial, the most effective way to test a witness is by cross examination and an expert report will have been submitted without its defects being highlighted in cross

[92] Gross op cit n1 at 1211.

[93] O'Sullivan op cit n69 at 4.

[94] O'Sullivan op cit n69 at 4.

[95] P McClellan 'Expert witnesses: The experience of the Land and Environment Court of New South Wales' in Edmond op cit n79 at fn14; *Walker Corporation Pty Limited v Sydney Harbour Foreshore Authority* [2004] NSWLEC 315.

[96] Barrie & De Villiers op cit n4 at 65.

[97] Edmond op cit n79 at 169.

[98] Gross op cit n1 at 1211.

[99] O'Sullivan op cit n69 at 4.

[100] Edmond op cit n79 at 162.

[101] Edmond op cit n79 at 168.

[102] L Meintjes-van der Walt 'The presentation of expert evidence at trials in South Africa, the Netherlands and England and Wales' (2001) 12(2) *Stellenbosch Law Review* 283 at 285.

examination.[103] Meintjes-van der Walt argues that bias is not dependant on written or on oral evidence, but is associated with the combative role that parties adopt.[104] When an expert gives viva voce evidence, the court has the benefit of observing the demeanour of the expert, which can be a basis for finding the evidence credible.[105]

Other benefits of hot tubbing are:[106]

i. The salutary effect of peer pressure can be observed.[107]
ii. Experts will be more likely to make concessions and be franker in their evidence.
iii. Experts are removed from an advocacy role and instead present evidence on the real issues in a structured and professional way among peers.

Hot tubbing enhances fact-finding, judicial decision-making and prospects for settlement[108] because courts observe the experts in a conversation with other experts, enabling the court to better assess the evidence.[109] The importance of cross examination is reduced,[110] because the process fosters scientific values and norms (ethos) enhances procedural efficiency and improves access to justice, through what is considered considerable testimonial latitude, in a cooperative and discursive mode.[111]

[103] Meintjes-van der Walt op cit n102 at 285.

[104] Meintjes-van der Walt op cit n102 at 285.

[105] *S v Kely* 1980 (3) SA 301 (A) at 301-302. See also HC Nicholas 'Credibility of witnesses' (1985) 102 *SALJ* 32 at 36-37. Cf *R v Masemang* 1950 (2) SA 488 (A) at 495 and P Devlin *The Judge* (1979) at 63, where the value of demeanour observations is called into doubt. Also see OG Wellborn 'Demeanor' (1991) 76 *Cornell Law Review* 1075 at 1104; *Standard Bank v Sibanda* 2021 (5) SA 276 (GJ) at paras 5-14; WH Gravett 'Spotting the liar in the witness box – How valuable is demeanour evidence really?' (1) 2018 (81) *THRHR* 437-450.

[106] Feola & Alcorn op cit n34 at 30.

[107] Sociological and biomedical literature questions the value of peer review, see G Edmond 'Judging the scientific and medical literature: Some legal implication of changes to biomedical research and publication' (2008) 28 *Oxford Journal of Legal Study* 523-531.

[108] Butt & Stowe op cit n84 at 45.

[109] Edmond op cit n79 at 167.

[110] Edmond op cit n79 at 168.

[111] Edmond op cit n79 at 160.

7.3.4 Disadvantages to hot tubbing

In contrast to the above, it is argued that hot tubbing will not prevent partisanship, intransigence or divergent expert opinion.[112] Hot tubbing targets the behaviour of experts and their role in the adversarial trial that are shaped by scientific conventions rather than addressing the problem that is based on legal conventions.[113] Temporarily marginalizing lawyers and holding a discussion in the middle of the adversarial process will not remove from the equation partisan bias or the expert's sensitivity to the cause of the party.[114] Lawyers simply will appoint experts they know will not make damning concessions or have their evidence compromised.[115] The proponents of hot tubbing idealize scientific norms and erroneously believe that the problem of expert bias lies with improper procedural methods while discounting the reality of scientific practice.[116] In science, owing to its complexity, there are epistemic difficulties that accompany expert evidence, which includes the fact that many variables are at play and true disagreement among experts is ever present.[117] Their role, fundamentally, is complicated by variables such as theoretical frameworks, professionalism, institutional influence, personal and financial factors.[118] From the inception, experts are selected on an assumption that their evidence is aligned with a litigant's case and under circumstances where courts are unable to discriminate between scientific conviction and a wilful breach of ethics on the part of experts.[119]

Hot tubbing encroaches on the adversarial practices, where legal practitioners are in control.[120] Hot tubbing may compromise the impartiality of the court.[121] At the end of the hot tubbing process there are two possible outcomes: either the court is left with two opposing versions, both well-reasoned and with neither expert having been shaken in their conviction or the

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[112] S Millett 'Ethics of expert evidence' (2013) 87(9) *The Australian Law Journal* 628-638.

[113] Edmond op cit n79 at 172.

[114] Edmond op cit n79 at 172.

[115] Edmond op cit n79 at 175.

[116] Edmond op cit n79 at 172.

[117] Edmond op cit n79 at 172.

[118] Edmond op cit n79 at 173.

[119] Edmond op cit n79 at 173-174.

[120] Gross op cit n1 at 1211-1212.

[121] *City of Johannesburg Metropolitan Council v Ngobeni* (314/11) [2012] ZASCA 55 (30 March 2012) at para 30.

court will be inclined to accept the more articulate and authoritative personality.[122] Presenting opinion evidence with authority may fallaciously convince the court of the expert's knowledge.[123] Experienced witnesses learn how to side-step and develop strategies to avoid questions about bias, which ability could contribute to aid partisanship rather than avoid it.[124]

Ultimately, the success of hot tubbing effectively depends on the complexity of the case and whether the court can control and structure hot tubbing.[125] Hot tubbing is not useful in all cases and in fact can be unhelpful and burdensome with no way to tell in which cases it will be useful.[126]

Litigants, in an adversarial system, may be reluctant to accept hot tubbing as they lose whatever legitimate role a legal practitioner has in testing and in the presentation of expert opinion.[127]

7.3.5 Conclusion: Hot tubbing

Edmond describes as exaggerated the benefit of hot tubbing in Australia, because its benefits are confined to enhancing comprehension[128] and communication, reducing time and costs and encouraging settlement.[129] There is little evidence that hot tubbing reduces bias and the proponents of hot tubbing, the Australian judges, are also the key benefactors.[130] Edmond submits that for those who believe it is possible to secure unbiased expert opinion, the reality of soliciting biased and insincere expert evidence presents an obvious threat to social order and to legal institutions.[131] True objectivity is not within reach and instead we must look to theoretically and empirically plausible models for introducing expert opinion.[132]

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[122] GL Davies 'Recent Australian developments: A response to Peter Heerey' (2003) 23 *Civil Justice Quarterly* 397 at 400.

[123] Gross op cit n1 at 1164.

[124] Millett op cit n112.

[125] Feola & Alcorn op cit n34 at 30.

[126] Welch op cit n68 at 159.

[127] Butt & Stowe op cit n84 at 45.

[128] Comprehension is paramount to the concept of justice, see Welch op cit n68 at 157.

[129] Edmond op cit n79 at 186-187 & 189.

[130] Edmond op cit n79 at 186-187 & 189.

[131] Edmond op cit n79 at 188.

[132] Edmond op cit n79 at 188.

Edmond makes the point that the adoption of an improved method of receiving expert opinion, amid the identified dangers and difficulties, is dependent on the circumstances of individual cases, the tendencies of its participants and the value of rights, fairness, accuracy, public confidence and efficiencies in the legal system at large.[133] Expertise and knowledge are not impartial, even outside the courtroom.[134] There are epistemic difficulties in assessing expert opinion, that are premised on the complexities that accompany expert evidence, including the variables that demarcate science and the fact that expert disagreement truly exists.[135]

Notwithstanding its shortcomings, hot tubbing may have value if introduced during the pre-trial stage or as a preliminary procedure aimed at narrowing the range of issues.[136] It can be introduced inexpensively and require minimal legislative intervention. It does not however address many of the root causes of adversarial bias and the trier of fact, the single judge, will remain at wits end in evaluating complex expert evidence. The proponents of hot tubbing seem to disregard that real differences of opinion do exist and not all differences are born out of partisan delinquency. There is merit in the proposal of hot tubbing, but it seems to be ineffective in practice. The proponents of hot tubbing presumptuously assume equality of arms, specifically that all parties to the litigation will make use of experts. In a country such as South Africa, many indigent litigants cannot afford lawyers, let alone experts and hot tubbing is better suited for use in richer countries.

7.4 Conclusion

This chapter considers joint experts in the pre-trial stage and conferring experts (or hot tubbing) during the trial stage, to address expert bias. The next chapter considers regulating the expert and legal profession in an endeavour to eradicate adversarial selection bias.

[133] Edmond op cit n79 at 189.

[134] Edmond op cit n79 at 189.

[135] Edmond op cit n79 at 189.

[136] M McInnis 'Expert evidence and the Federal Courts: Current developments' as in Dublin Law Reform Commission op cit n17 at fn 153.

CHAPTER 8

REGULATING THE EXPERT AND LEGAL PROFESSIONS

8.1 Introduction

This chapter considers options to respond to adversarial expert bias, specifically by better regulation of the system without resorting to radical changes in the law of evidence. his chapter will consider the adoption of a code of conduct for experts and legal practitioners, a compulsory declaration for expert witnesses, a peer review system, expert witness accreditation, guidelines for expert reporting and better regulation of pre-trial discovery, expert fees and expert reporting, all of which may contain valuable attributes in a response to adversarial expert bias.

8.2 Code of conduct for experts

8.2.1 What is a code of conduct and what might it contain?

Expert opinions must conform to a test of objectivity, to court standards, professional ethics and integrity.[1] Lord Woolf,[2] as well as Meintjes-van der Walt, proposes a code of ethics[3] (or conduct)[4] by which experts adhere to a set of fixed rules and guidelines to ensure the quality of expert opinion.[5] In general, expert selection, admission and evaluation intrinsically are linked to existing scientific, methodological and professional standards set by a regulatory body that makes imposing a code of ethics an attractive option.[6] It is in the interest of justice that the role, duties and responsibilities of expert witnesses be precisely codified.[7]

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[1] G Edmond et al 'Model forensic science' (2016) *Australian Journal of Forensic Sciences* 1 at 2–3; L Meintjes-van der Walt 'Experts testifying in matters of child abuse: The need for a code of ethics' (2002) 3(2) *Child Abuse & Research in SA* 24 at 28.

[2] H Woolf *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996) at 141.

[3] A Henderson 'An independent product – The role of expert evidence in the preparation and presentation of high court cases involving allegations of (professional) negligence' (1997) *De Rebus* 63 at 65.

[4] L Meintjes-van der Walt 'The proof of the pudding: The presentation and proof of expert evidence in South Africa' (2003) 47(1) *Journal of African Law* 88 at 93-94 & 99-100.

[5] L Meintjes-van der Walt 'Expert odyssey: Thoughts on the presentation and evaluation of scientific evidence' (2003) 120(2) *SALJ* 352 at 367. In the USA, a code of ethics was highly regarded and persuasive in determining accepted practice, see *Woods v Covington County Bank* 537 F2d 804 (1976).

[6] L Meintjes-van der Walt 'Ethics and the expert: Some suggestions for South Africa' (2003) 4(2) *Child Abuse Research South Africa* 42 at 44.

[7] L Meintjes-van der Walt 'Expert evidence: Recommendations for future research' (2006) 19 *SACJ* 276 at 282.

Codes of conduct, underwritten by medical organizations, clearly spell out the rules and goals which experts are to follow.[8] Duties and responsibilities, which may be encapsulated in a code of conduct, may include that expert witnesses ought to:[9]

i. Be objective.[10]
ii. Be an independent actor, uninfluenced in the form or content of the opinion by the exigencies of litigation, unbiased and not an advocate for a party.[11]
iii. Provide independent assistance to the court with objective unbiased opinion.
iv. Make it clear if an issue falls outside his/her expertise.
v. State the facts on which an opinion is based.
vi. Not omit material facts that could detract from concluded opinions.[12]
vii. Make it clear if an opinion is an interim one, where further data is required and qualify a report where appropriate or if inconclusive.
viii. When changing his/her report, expeditiously communicate this via the legal representative.
ix. Provide input data to the opposing side.
x. Ensure testing, analysis, theories, procedures and operations are adequate and accepted in the profession.
xi. Strive to understand the legal admissibility of expert opinion.
xii. Not hide or destroy documents or evidence.

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[8] S Grobler 'The role of the expert witness' (2007) March *The South African Gastroenterology Review* 11 at 11.

[9] Meintjes-van der Walt op cit n1 at 28-29; *Re J* [1991] FCR 193 226; L Meintjes-van der Walt 'Tracing trends: The impact of science and technology on the law of criminal evidence and procedure' (2011) 128(1) *SALJ* 147 at 167-169. Also see *National Justice Cia Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer)* [1993] 2 Lloyds Rep 48 at 81-82, as applied in *National Justice Cia Naviera SA v Prudential Assurance Co Ltd* (*The Ikarian Reefer)* [1995] 1 Lloyds Rep 455 at 496 and in *Vernon v Bosley (No 1)* [997] 1 All ER 577 601.

[10] *Polivitte Ltd v Commercial Union Assurance* [1987] 1 Lloyd's Rep 379 at 386.

[11] M Ryan 'The adversarial court system and the expert medical witness: The truth, the whole truth and nothing but the truth?' (2003) 15(3) *Emergency Medicine* 283 at 287; SH James & JJ Nordby *Forensic Science: An Introduction to Scientific and Investigative Techniques* (2005) at 158; H O'Flaherty 'The expert witness and the courts' (1997) *Medico-Legal Journal of Ireland* 3 at 5-7.

[12] *Coopers (South Africa) v Deutsche Gesellschaft für Schälingsbekämpfung MBH* 1976 (3) SA 352 (A) at 371; *R v Jacobs* 1940 TPD 142 at 146; *S v Baleka* 1986 (3) SA 1005 (T) at 1021; *S v Ramgobin* 1986 (4) SA 117 (N) at 146; *S v Adams* 1983 (2) SA 577 (A) at 586; *S v Mokgiba* 1999 (1) SACR 534 (OPD) at 548. Also see P Roberts 'Science in the criminal process' (1994) 14 *Oxford Journal of Legal Studies* 469 at 484.

xiii. Not present false or misleading evidence.

xiv. Not uncritically accept collateral information without exercising due diligence and confirming the authenticity and reliability of such facts.

xv. List all verbal and non-verbal instructions received[13]from the instructing attorney.

Some writers recommend a single self-governing expert witness regulating authority,[14] with a well-defined code of conduct, that encompasses all disciplines and that enforces compliance with the code by employing sanctions.[15] A separate[16] regulatory expert body would have to be created by statute.[17] The proposed statute can include a code of conduct which provides ethical guidelines[18] and confer the power on a regulating authority to inspect and audit experts and to investigate malpractice after receiving complaints from members of the public, peers, the legal fraternity or the court.[19] The regulating body, to be created by statute, must be able to take corrective action, to act as an educator, to make sure experts opinions comply with accepted principles[20] and be able to act as intermediary between the expert's profession and the judiciary.[21]

8.2.2 The need for a code of conduct

In South Africa, expert witnesses owe allegiance to their professional bodies which regulate the general practice of a specific profession,[22] but no specific ethical guideline applies to

[13] Lord Woolf recommended an expert report be inadmissible unless written correspondence and notes of oral instructions are attached to the report, see New South Wales Law Reform Commission, Report 109 *Expert witnesses* (2005) at 41.

[14] See Conseil National des Compagnies d'Experts de Justice 'Report: Access to judicial expertise in criminal matters implying more than one member state, especially in serious cases and organised crime', available at https://euroexpert.org/fileadmin/Tmpl/documents/downloads/Report-En-Anglais.pdf, accessed on 31 January 2021.

[15] Meintjes-van der Walt op cit n7 at 283.

[16] Dublin Law Reform Commission *Consultation Paper: Expert Evidence* (2008) at 320.

[17] Auld suggests professional organisations be amalgamated under a single organisation, see R Auld *A Review of the Criminal Courts of England and Wales by The Right Honourable Lord Justice Auld* (2001) at para 131.

[18] Meintjes-van der Walt op cit n7 at 276 fn 16.

[19] Dublin Law Reform Commission op cit n16 at 325-326.

[20] Meintjes-van der Walt op cit n7 at 284-285; Dublin Law Reform Commission op cit n16 at 321.

[21] Conseil Nationale op cit n14 at 75.

[22] Meintjes-van der Walt op cit n6 at 42.

experts as trial witnesses.[23] Professional organisations ought to play a more active role in establishing ethical guidelines and standards that are tailor-made to the expert witness and designed to expose delinquent experts.[24] It is not enough for experts to be regulated by existing general or profession specific regulating authorities, they ought to ascribe to an expert-witness specific code of ethics.[25] To bring clarity and guidance to a very grey (and unregulated) area,[26] Meintjes-van der Walt bases the proposition for an ethical code on the English code,[27] which contains guidelines similar to that of the '*Ikarian Reefer*' judgement[28] and that has the objective to ameliorate bias among experts.[29]

A code has pedagogical traits, it gives guidance to experts and will deter delinquency out of a fear of appraisal, scolding, discipline and impeachment when breaching the code.[30] Standards are an important antidote to cheating; when experts operate in an environment where moral standards are crystalized and experts are mindful of such standards, dishonesty is likely to be decreased as experts strive to protect their reputation.[31] A code of conduct will reinforce the notion that experts take up the role of disinterested educators and even if the code is only hortatory, without punitive sanctions for its breach, both the court and regulating authority can expect expert compliance,[32] preventing partisanship and increasing reliability of the expert opinion.[33]

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[23] But for a few guidelines in confined disciplines, see Meintjes-van der Walt op cit n1 at 27; JH Phillips & JK Bowen *Forensic Science and the Expert Witness* (1985) at 23.

[24] BL Diamond 'The psychiatric expert witness- Honest advocate or hired gun' in R Rosner & R Weinstock *Ethical Practice in Psychiatry and the Law* (1990) at 75 & 84.

[25] Meintjes-van der Walt op cit n1 at 28.

[26] R Ambrogi 'Updated: Code of ethics for expert witnesses', available at https://www.ims-expertservices.com /insights/updated-code-of-ethics-for-expert-witnesses/, accessed 21 January 2021.

[27] On 22 June 2005, the Civil Justice Committee approved the Code of Practice for Experts.

[28] Supra n9.

[29] This, to a large extent, is duplicated in the UK Civil Procedure Rules 1998, Practice Directions Part 35; Meintjes-van der Walt op cit n1 at 28; Meintjes-van der Walt op cit n6 at 44-45.

[30] RS Gross 'Expert evidence' (1991) *Wisconsin Law Review* 1113 at 1215.

[31] See Dublin Law Reform Commission op cit n16 at 307. N Mazar, O Amir & D Ariely 'The dishonesty of honest people: A theory of self-concept maintenance' (2008) 45(6) *Journal of Marketing Research* 633 at 643.

[32] J Sanders 'Science, law and the expert witness' (2009) 72 *Law and Contemporary Problems* 63 at 80.

[33] L Meintjes-van der Walt *Expert Evidence in the Criminal Justice Process: A comparative Perspective* (2001) at 144.

8.2.3 Arguments against a code

There are disadvantages to a code of conduct. Limiting the damage that can be done by delinquent experts by tightening the rules of conduct may stumble over the paradox of trust.[34] Trust, central to the question of ethics, is the foundation on which a professional society rests and on which the society depends.[35] The more attempts are made to legislate or to codify trust, the less likely it is that trust will be enhanced, because increased demands of trustworthiness will increase a notion of mistrust.[36]

Regulation and sanction may cause delay and further costs which are counterproductive to the interests of justice.[37] Too stringent sanctions may deter experts from testifying, making a fine balance in choosing options apposite.[38]A general problem with codes is that they are vague, too broad and fail to enforce ethical conduct,[39] allowing the expert too much 'wriggle room' to justify certain behavior.[40] This failure is captured by the dicta in *Abinger v Ashton*,[41] where the court held: '…the evidence is given on oath, …the person knows that he cannot be indicted for perjury, because it is only evidence of opinion'.[42] By the very complex and controversial nature of expert evidence, it may be difficult for the regulating authority to accuse an expert of giving a false opinion or of committing perjury.[43] To this end, in regulating the expert profession, there is an important question which relates to when it is proper for an expert to be deemed knowledgeable.

If the answer to this question is known, the regulation process can be underpinned by this knowledge and incompetent experts can be prohibited from giving opinion evidence, but it is not an easy question: Epistemologically, this question, about expert knowledge, entails the

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[34] O O'Neill *Autonomy and Trust in Bioethics* (2002) at 144.

[35] S Millett 'Ethics of expert evidence' (2013) 87(9) *The Australian Law Journal* 628 at 634-635.

[36] O'Neill op cit n34 at 144.

[37] Dublin Law Reform Commission op cit n16 at 307.

[38] New South Wales Law Reform Commission op cit n13 159.

[39] JP Murphy 'Expert witnesses at trial: Where are the ethics?' (2000) 14 *Georgetown Journal of Legal Ethics* 218 at 218.

[40] Millett op cit n35.

[41] (1873) 17 LR Eq 358.

[42] AS Murray *Expert Evidence and the Problem of Privilege* (unpublished thesis, University of Sydney, 2018) at 98.

[43] Meintjes-van der Walt op cit n1 at 27.

interplay of belief (subjective position of a proposition), truth (the reality of a proposition, independent of belief) and justification (quality of the reasons to believe).[44] For an expert to know something, the expert must believe the proposition to be true, it must factually be true and the reasons for believing it to be true must be justified.[45]

Experts, asserting a belief or knowledge in the absence of justification, is a situation fraught with contention[46] and their conduct amounts to an epistemic irresponsibility which is unethical.[47] Instrumentally, such beliefs are more likely to be wrong and to cause a mistake, whereas, normatively, an expert warrants a commitment to the truth of the proposition (belief) that he/she is entitled to the belief (justification). When the court attributes knowledge to an expert, the court accepts that the expert believes the proposition and has the right to such a belief.[48] It is irresponsible for an expert to assert knowledge without justification, a harmless notion when not inflicted on others but harmful when experts vouch for the truth and they invite others (the courts) to rely on this knowledge. [49] For an expert to act in an irresponsible fashion, by expressing an unjustified belief, is unethical.[50]

This dilemma is exacerbated further by the consideration of the question of how to judge if a subjective belief is unjustified.[51] Sanders argues that, when considering this question, one must judge ethical behaviour by the standard of the expert's discipline on the basis that the belief in the courtroom should be equal to the belief outside of the court.[52] This is colloquially

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[44] DM Risinger & MJ Saks 'Rationality, research and leviathan: Law enforcement-sponsored research and the criminal process' (2003) 4 *Michigan State Law Review* 1023 at 1024.

[45] See M Williams *Problems of Knowledge: A Critical Introduction to Epistemology* (2001) at 16; *Makita (Australia) v Sprowles* [2001] NSWCA 305; *Routestone v Minories Finance* [1996] EWCA Civ 964. In England, the expert's attention must be drawn to Rule 35.14, which stipulates consequences where experts subjectively act without an honest belief in the truth and integrity of an opinion, see Part 2.5 of the Practice Direction, Part 35.

[46] Sanders op cit n32 at 81.

[47] J Sanders 'Expert witness ethics' (2007) 76(3) *Fordham Law Review* 1539 at 1542.

[48] J Pollock 'Epistemic norms' in E Sosa & K Jaewon (eds) *Epistemology: An Anthology* (2000) at 192.

[49] Sanders op cit n32 at 81.

[50] Sanders op cit n32 at 81.

[51] Sanders op cit n32 at 81.

[52] Sanders op cit n32 at 81. This notion is consistent with the practice in some jurisdictions, for example, the admissibility of expert opinion requirements in the United States of America, see *Daubert v Merrell Dow Pharmaceuticals* 509 US 579 (1993); *General Electric Company v Joiner* 522 US 136 (1997); *Kumho Tire v Carmichael* 526 US 137 (1999).

known as the 'same-intellectual-rigor-in-the-courtroom-and-field' test. To introduce structure and ethical guidelines, a number of professional bodies adopted ethical codes, so that members who act as experts may act according to the view of the relevant discipline.[53] A rule that an opinion must be adopted in line with accepted norms in the profession does not constitute a single threshold in every profession and experts may hold a view with greater or less justification, but such a rule generally creates a body of norms and conventions, it defines acceptable methods, tools, analysis and interpretation of evidence and defines the intellectual rigour of a field.[54]

There are two contradictory objections to the 'same-intellectual-rigor-in-the-courtroom-and-field' test. First, Faigman submits it is too lenient as it allows individuals with little or no empirical data to make factual assertions simply because other members in the field are prepared to make them.[55] Second, Cohen suggests that professional standards may be too stringent to measure the adequacy of an expert's justification for his/her opinion.[56]

Cohen submits that the law's need for once-and-for-all closure and the balance-of-probabilities-test are two reasons why scientific conventions regarding knowledge are inappropriate in the legal context:[57] Experts are asked to exercise their skill on a different playing field, where the rules are different but are judged as if playing on the scientific field. In science, everyday answers to questions are 'yes', 'no' or 'the evidence suggests a specific fact, but we cannot pronounce on the question yet' however in the context of a lawsuit, experts must omit the 'suggested-but-not-proven' category.[58]

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[53] National Forensic Centre, Code of Professional and Ethical Conduct. as quoted in MA Shiffman 'Code of professional and ethical conduct' in MA Shiffman (ed) *Ethics in Forensic Science and Medicine: Guidelines for The Forensic Expert and the Attorney* (1999) at 280 & 285.

[54] Sanders op cit n32 at 82.

[55] DL Faigman 'The law's scientific revolution: Reflections and ruminations on the law's use of experts in year seven of the revolution' (2000) 57 *Washington & Lee Law Review* 661 at 667.

[56] NB Cohen 'The gatekeeping role in civil litigation and the abdication of legal values in favor of scientific values' (2003) 33 *Seton Hall Law Review* 943 at 949: 'Science, …routinely uses filters that prevent its experts from reaching exactly the sort of opinions as to the truth of ultimate facts that should be utilized in a civil trial governed by the preponderance of the evidence rule'.

[57] Cohen op cit n56.

[58] Cohen op cit n56 at 949 -951.

Cohen makes valid points, but Sanders submits experts are not expected to express their view with greater certainty than they possibly can.[59] Sanders argue that the legal view, that experts ought to testify with greater certainty (more than they can otherwise in the field), is not a response to the need for closure[60] but a response to the adversarial nature of expert opinion,[61] because one can only can ask experts to give their best estimate and underscore the fact that their opinion is a speculation that would not be given if there was no need for closure.[62]

A need for once-and-for-all closure does not legitimize every conjecture and the need for an answer does not justify a complete abandonment of the 'wait-and-see' or 'don't-know' responses.[63] There are grounds for considering abandoning the 'once-and-for-all' rule, which requires finality or closure in personal injury matters in favour of annuity or instalment compensation, as a response to adversarial bias. This change will remove the pre-morbid and post-morbid speculation required of experts in quantifying damages claims, but this consideration falls beyond the scope of this work.

As for the standard of proof, Sanders submits that it is difficult to imagine that experts should be asked to adjust their views in line with the required burden of proof and the burden is best left for the fact finder and not the witness.[64]

In many jurisdictions, where a code of conduct has been employed, expert bias has prevailed unabated. In Australia, neither the code of conduct nor the sanctions imposed can deter bias in experts in an adversarial system.[65] An example of a plan to discipline[66] dishonest or incompetent witnesses is the 'Minnesota plan' in the United States of America for reviewing medical testimony.[67] Gross submits there is no evidence that this plan has made an impact in

[59] Sanders op cit n32 at 83.

[60] Sanders op cit n32 at 88. Even the best science does not create complete certainty.

[61] And the 'once-and-for-all' rule.

[62] Cohen op cit n56 at 962.

[63] Sanders op cit n32 at 84.

[64] Sanders op cit n32 at 87.

[65] New South Wales Law Reform Commission op cit n13 at 74.

[66] The New South Wales Law Reform Commission, op cit n13 at 159, lists potential sanctions as: (1) A court may criticize where experts lose credibility. (2) Disciplinary steps against experts. (3) The court may make an adverse cost order. (4) The expert may be called to be charged with contempt.

[67] Adopted in 1940 and duplicated in various other jurisdictions, see J Holschuh 'Advocacy in the preparation and presentation of medical evidence' (1960) 21 *Ohio State Law Journal* 160 at 173-175; CJ Stetler 'Medical legal

practice, perhaps because it focused on punishing experts in the 'extreme and rare cases of clear incompetence or outright fraud' and failed to provide assistance in interpreting conflicting medical claims in the common situation where 'distortions and obfuscations are less clear cut but more prevalent'.[68]

In South African law, experts are bound by the duties and responsibilities of the dicta of the *Ikarian Reefer*[69] judgement,[70] but this demand seems to have done little to curb expert bias.[71] This finding is consistent with Edmond's argument; to make it an expert's overriding duty to be to the court will do little to change the status quo[72] as, currently, experts are required to testify under oath, which fails to deter biased and delinquent expert opinion.[73] It may be naïve or optimistic to expect changes to be brought about by a code of conduct, considering there is no clear definition of objectivity and the inherent difficulty of imposing sanctions on delinquent experts.[74] Adopting rules however will clarify the expert's role in relation to the client, lawyer and the court and would underscore an obligation to be objective and impartial, creating a normative benefit that could play a substantial role, notwithstanding the contention surrounding enforcement.[75]

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relations: The brighter side' (1957) 2 *Villanova Law Review* 487 at 498-501; I Younger 'Expert witnesses' (1981) 48 *Insurance Counsel Journal* 267 at 268. Grobler, op cit n8 at 12, submits transcripts can be peer reviewed.

[68] Gross op cit n30 at fn 325.

[69] *The Ikarian Reefer* supra n9 at 68.

[70] *Twine v Naidoo* [2018] 1 All SA 297 (GJ) at fn 6; *PWC v National Potato Co-operative* [2015] 2 All SA 403 (SCA) at para 98.

[71] *Twine* supra n70 at para 16; *MV Banglar Mookh Owners of MV Banglar Mookh v Transnet* 2012 (4) SA 300 (SCA) at 314; *William Grant & Sons v Cape Wine & Distillers* 1990 (3) SA 897 (C) at 912; *Menday v Protea Assurance* 1976 (1) SA 565 (E) at 569D; *PWC* supra n70 at paras 98 & 113; *Stacey v Kent* 1992 (4) SA 495 (C) at 497; *Slavin's Packaging v Anglo African Shipping* 1989 (1) SA 337 (W) at 345; *Stock v Stock* 1981 (3) SA 1280 (A) at 1296E; *P v P* 2007 (5) SA 94 (SCA) at paras 18 & 21; *Fulton v RAF* 2012 (3) SA 255 (GSJ) at para 45; *Schneider v Aspeling* 2010 (5) SA 203 (WCC) at 211J-212B; *Nicholson v RAF* (07/11453) [2012] ZAGPJHC 137 (30 March 2012) at para 17.

[72] G Edmond 'After objectivity: Expert evidence and procedural reform' (2003) 25(2) *Sydney Law Review* 8 at para 3.

[73] Edmond op cit n72; S Feola & RA Alcorn 'Expert witness advocacy: Changing its culture' (2009) 45(7) *Arizona Attorney* 24 at 28.

[74] Edmond op cit n72.

[75] Feola & Alcorn op cit n73 at 28.

8.2.4 Conclusion

Regulating bodies can be as easily fooled as can the court,[76] and Sperling suggests judicial criticism will achieve more than a code of ethics.[77] However, the limitations of a code of conduct should not bar adopting a code, especially because it may cause some experts to divulge more information or to structure their reports differently.[78] Notwithstanding the arguments against a code, a code encapsulates valuable traits and can serve as an effective weapon in the arsenal in the fight against expert bias and can easily be implemented by a developing country.

8.3 Declaration[79]

A compulsory expert declaration can be incorporated into a code of conduct. The Academy of Experts in England requires experts to declare: They accept a primary duty towards the court, that all adverse aspects for the litigant is encapsulated in the written report, all sources of information are listed, an independent opinion was formed relating to what was suggested by others, they undertake to notify their instructing solicitor if the opinion is to change or be qualified and acknowledge that a court may make adverse findings against the expert who failed to take proper care to comply with their duties and confirm that their fees are not linked to the outcome of the case.[80]

In Australia, such a declaration of this type was deemed to change the culture of delinquent experts, who previously were prepared to have their objectivity and neutrality

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[76] C Pamplin 'Bearing false witness: The regulatory effect' (2005) 155 *New Law Journal* 1756 at 1756.

[77] HD Sperling 'Expert evidence: The problem of bias', available at https://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre2015%20Speeches/Assorted%20%20L%20to%20Z/sperlin_speeches.pdf, accessed 24 July 2021 at 6.

[78] Edmond op cit n72.

[79] In England, a declaration that the expert appreciates their overriding duty is toward the court, is contained in the Civil Procedure Rule 35.10(2)(*a*)-(*b*). Also see the truth-and-complete-professional-opinion declaration, Part 2.3 of the Practice Direction, Part 35. Also see part 13 of the Civil Justice Council: Protocol for the Instruction of Experts to Give Evidence in Civil Claims of June 2005. The court, in *AM v MEC of Health Western Cape* 2021 (3) SA 337 (SCA), at para 26, recommended that the Rules Board consider making a similar expert statement mandatory.

[80] Meintjes-van der Walt op cit n1 at 30; Sperling op cit n77.

compromised.[81] Sanders favours a declaration, in that it would bring law and scientific convention closer and would help the attainment of the law.[82]

The introduction of a compulsory declaration will not mean the end of delinquent expert behaviour.[83] More empirical research is needed on its effectiveness but, considering the ease and low cost at which it can be implemented, it is a method to be embraced.

8.4 Code of ethics for legal practitioners[84]

In *Rondel v Worsley*,[85] it was held that a legal practitioner must do 'all he honourably can on behalf of his client', however he/she owes a paramount duty to the court not to conceal facts or to mislead the court and must disclose facts to the court even if fatal to his/her case.[86] Legal practitioners are officers of the court and must act honestly, fairly and conduct themselves with honour and integrity, and must avoid conduct, if known, that can damage their reputation.[87]

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[81] I Freckleton, P Reddy & H Selby *Australian Judicial Perspectives on Expert Evidence: An Empirical Study* (1999) at 113-115.

[82] Sanders, op cit n32 at 89, records three benefits: (1) Help the fact finder understand the disputes better. (2) Move unwilling but able experts to offer their expertise. (3) Improve the opinion on both sides. Meintjes-van der Walt, op cit n33 at 142, supports the English Academy of Experts declaration.

[83] Freckleton, Reddy & Selby, op cit n81 at 113-115, states that a declaration may create a culture of obligation, but it is limited in what it can achieve in addressing contentions and will do little to enforce expert accountability, where delinquency among experts will never be completely eradicated. The idea is to introduce checks and balances, with the aim to counteract the remaining experts who are willing to compromise their objectivity and neutrality. Edmond suggests that it is highly idealized and positivistic to think that a declaration will change the culture of party-introduced experts and to imply that experts are oblivious to existing ethical, legal and professional obligations, see G Edmond 'Judging surveys: Experts, empirical evidence and law reform' (2005) 33(1) *Federal Law Review* 95 at 122. At page 129, Edmond states that if it is accepted that experts legitimately may differ, the 'culture of partiality becomes highly suspect as an analytical tool'. This notion is underscored by the complexities in establishing deliberate bias on the part of experts: Alleging bias which involves ascribing interests and alignments on the expert's part, is one thing, but proving actual bias 'in a way that ought to change the status' of the expert's evidence is another.

[84] Meintjes-van der Walt op cit n7 at 282.

[85] 1967 (1) QB 443 (CA) at 502.

[86] *Inc Law Society v Bevan* 1908 TS 724 at 731-732; *Van der Berg v General Council of the Bar* [2007] 2 All SA 499 (SCA) at para 16.

[87] EAL Lewis *Legal Ethics: A Guide to Professional Conduct for South African Attorneys* (1982) at 7-17; JR Midgley 'Ethical and legal duties' (1990) Aug *De Rebus* 525 at 525; *Vassen v Law Society of the Cape of Good Hope* 1998 (4) SA 532 (SCA) at 538; *S v Nyoka* [2009] JOL 24504 (ECG) at para 33.

This section consider the merits of developing a code of ethics for legal practitioners that applies to their dealing with expert witnesses. After examining the necessity for such a code and the form it may take, the merits of such a code will be critically discussed.

Legal practitioners are bound to a code of conduct[88] but this code does not deal specifically with the practitioners' dealings with expert witnesses. This code does however contain general provisions which may be used to discipline delinquent legal practitioners. Because of role morality,[89] professionals prefer the interest of a client above others.[90] When lawyers employ expert witnesses, to aid their clients, they simply are executing their mandate. Inevitably, they will put pressure on experts and employ experts who conform to the interest of their clients.[91] Lawyers seem amoral when they treat their clients with preference in this way,[92] however it is not unethical to hire experts with favourable opinions, provided they are not asked to fabricate or falsify evidence.[93] It is unethical,[94] and a crime,[95] for counsel to ask a

[88] Code of Conduct for Legal Practitioners, Candidate Legal Practitioners and Juristic Entities, GG 42337 of 29 March 2019.

[89] A notion that, at times, people fail to live up to their own ethical standards, because they see themselves as playing a certain role that excuses them from those standards.

[90] R Wasserstorm 'Lawyers as professionals: Some moral issues' in D Luhan (ed) *The Ethics of Lawyers* (1994) at 7.

[91] Millett op cit n35.

[92] Wasserstorm op cit n90 at 7-10. Feola and Alcorn, op cit n73 at 25, state that owing to their role lawyers must act in a partisan manner and that it is appropriate to influence an expert to conform to the validity of the client's position, provided it is by legitimate and ethical means.

[93] R Slovenko 'The lawyer and the forensic expert: Boundaries of ethical practice' (1987) 5 *Behavioral Sciences and Law* 119 at 119; GP Stevens *The Role of Expert Evidence in Support of the Defence of Criminal Incapacity* (unpublished LLD Thesis, University of Pretoria, 2011) at 734.

[94] *Van der Berg* supra n86 at paras 15-17.

[95] Aiding and abetting perjury, see CR Snyman *Strafreg* (2006) at 352.

witness to testify falsely,[96] but a lawyer is not denied the opportunity to use the special skills of an expert strictly for the purpose of underscoring a case.[97]

If the opinion of the expert suits the case, the lawyer positively may use such an opinion, however the expert's opinion may not be artificially manipulated to satisfy the lawyer.[98] Lawyers play an important role in the preparation of expert reports (not in the substance, but as to their form) to ensure admissibility is addressed: It is common practice for legal practitioners to communicate the need and to make sure expert reports comply with existing rules and are written in comprehensible language.[99] Lawyers also prepare experts to testify at trial, which is essential for elucidating the truth, but also can be usefully employed for truth distortion.[100] Contingency fee agreements, where a higher award means a greater fee for the lawyer, creates a temptation to resort to hired gun experts.[101]

[96] Gross op cit n30 at 1146. Meintjes-van der Walt, op cit n33 at 136, submits that wilful misrepresentation of an expert opinion amounts to perjury, whereas suppressing relevant information amounts to obstructing the ends of justice. In rare cases an expert's conduct amounts to fraud, see IE Dror & D Charlton 'Why experts make errors' (2006) 56(4) *Journal of Forensic Identification* 600 at 601-602; R Koppl & EJ Cowan 'A battle of forensic experts is not a race to the bottom' (2010) 22(2) *Review of Political Economy* 235 at 236.

[97] CR McHenry, WL Biffl, WC Chapman & DA Spain 'Expert witness testimony: The problem and recommendations for oversight and reform' (2005) 137(3) *Surgery* 274 at 275-276.

[98] H Stowe 'Preparing expert witnesses: A (continuing) search for ethical boundaries' (2018) Spring *Bar News* 72 at 73-74; *Polivitte* supra n10 at 386.

[99] See *Harrington-Smith (on behalf of the Wongatha People) v Western Australia (No 7)* (2003) 130 FCR 424 at 427; *Traderight* 14 [2013] NSWSC 211 at para 23.

[100] Stowe op cit n98 at 73.

[101] *M T v Road Accident Fund; H M v Road Accident Fund* (37986/2018) [2020] ZAGPJHC 286 (16 November 2020) at para 31. Also see H Lerm 'Beware the hired gun- are expert witnesses unbiased?' (2015) May *De Rebus* 36 38.; T Hodgkinson & M James *Expert Evidence: Law and Practice* 2ed (2007) at 12-003; *Trendtex Trading Corporation v Credit Suisse* [1980] QB 629 at 789; *Wallersteiner v Moir (No 2)* [1975] QB 373.

To curb the distortion of truth,[102] some effort must be taken to reshape the professional character of legal practitioners from their existing partisan role (characterised by their need at all costs to give priority to their clients' cause) to professional diligence.[103]

A delinquent behaviour, that some attorneys engage in, is to withhold adverse facts from the expert, resulting in experts having a one-sided and biased picture.[104] In such a case, it is the attorney, and not the expert, who is delinquent.[105] In jurisdictions where a prior written report (a requirement in South Africa)[106] is not necessary, attorneys also may limit the scope of the work of the expert or ask experts not to prepare reports and only to testify in court[107] and to discard notes that can be sought by the rival.[108] In some practitioner journal articles, legal practitioners give advice as how to make an expert a colleague or an undetected advocate for a client.[109] From a cursory reading of these journals, lawyers deem it unethical to convince an expert to misrepresent an actual opinion, but that it is acceptable to suggest particular words be used or to consider that items of testimony are omitted, disregarded or minimized.[110]

In this narrative lies the inherent risk of improper influence of expert witnesses. The line between a legal practitioners' aiding and abetting perjury or falsification of evidence on

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[102] See for example see *Schneider* supra n71 at 213-214 & 220; *Whitehouse v Jordan* [1980] 1 All ER 650 42; *Universal Music v Sharman* (2005) 220 ALR 1; *Hudspeth v Scholastic Cleaning and Consultancy Services* (No 8) [2014] VSC 567.

[103] W May *Beleaguered Rulers: The Public Obligation of the Professional* (2001) at 75. See the change to the Arizona Rules of Professional Code which require attorneys always to act honourably, as a response to expert bias. Also see Feola & Alcorn op cit n73 at 26.

[104] Gross op cit n30 at 1145.

[105] RA Yerion 'Expert medical testimony in compensation proceedings' (1935) 2 *Law and Contemporary Problems* 476 at 477.

[106] In South Africa, a written report must precede oral testimony, see Rule 36(9)(*b*) or Magistrate Court Rule 24(9)(*b*).

[107] Gross, op cit n30 at fn 92, refers to D Danner 'Expert testimony' (1983) June *Medical Malpractice Cases for Defendants* at 14-15.

[108] Gross, op cit n30 at fn 73, refers to DR Suplee & SM Woodruff 'The pretrial use of experts' (1987) Sept *Practical Law* 20-21, as an example of this proposition.

[109] Gross, op cit n30 at fn 77, refers to JE Daniels 'Managing litigation experts' (1984) Dec *ABAJ* 66 and at fn 164 to HA Feder 'The care and feeding of experts' (1985) June *Trial* 49 & 52, as examples of this proposition.

[110] Gross, op cit n30 at fn 95, refers to RL Goldstein 'Hiring the hired gun: Lawyers and their psychiatric experts' (1987) 11 *Legal Studies Forum* 41 at 48, as an example of this proposition.

the one hand and trial preparation or bona fide error correction on the other, are fine, and virtually impossible for experts to detect.[111]

To curb undue influence, it may be worth forbidding lawyers discussing their opinion or personal knowledge with the experts, as occurs in the USA.[112]A code for legal practitioners may also help. As an example of the details in such a code, in Western Australia, legal practitioners must:[113]

i. Refrain from coaching an expert.[114]
ii. Heed the notion that the administration of justice is paramount, where practitioners owe a duty to the court.[115]
iii. Inform the court and experts of any persuasive authority which may hamper the case.[116]
iv. Refrain from moving an expert to give false evidence.[117]
v. Refrain from suggesting to a witness the content of his/her evidence.[118]
vi. Refrain from conferring with witnesses at a joint conference or affect the witnesses' testimony.[119]

With the GIGO (garbage in, garbage out) concept in mind, legal practitioners are obliged to advise experts that collateral and objective facts that the legal practitioner solicits must independently be verified by the experts.[120]

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[111] Gross op cit n 30 at 1146.

[112] USA Model Rules of Professional Conduct, rules 3.4(*e*), 3.7 and American Bar Association Model Code of Professional Responsibility DR 5-101(*B*), 5-102, and 7-106(*C*).

[113] Millett op cit n35 at 628.

[114] The Law Society of Western Australia, Ethical and Practice Guidelines, urges practitioners to familiarize themselves with the Western Australia Bar Association's Best Practice Guide (s11), which is incorporated into the Supreme Court Consolidated Practice Directions at 109 [4.5(9)].

[115] Legal Profession Act 2008 (WA) and the Legal Profession Conduct Rules (2010).

[116] Rule 32(2)(*b*).

[117] Rule 39 (1).

[118] Rule 39 (1).

[119] Rule 40.

[120] BL Garrett & PJ Neufeld 'Invalid forensic science testimony and wrongful convictions' (2009) 95 *Virginia Law Review* 1 at 184-190; G Edmond & MS Roque 'The cool crucible: Forensic science and the frailty of the criminal trial' (2012) 24 *Current Issues Criminal Justice* 51 at 58. This is complicated by the lawyer's inability

There is no doubt that regulation of the conduct of legal practitioners in their engagement with experts is long overdue and will serve in South Africa as a deterrent to the existing delinquent conduct described in this section.

8.5 Peer review

It matters to professionals what their peers think of their opinions.[121] A major limiting feature of the existing expert evidence system is insularity. What experts allude to in litigation is never aired before an audience of professional peers.[122] An expert is almost never held accountable by those best situated to evaluate their work and whose opinions may matter most to the expert's career and vanity.[123] The fear of being informally accountable or to be impeached by the expert's peers, may be the most powerful incentive for care and accuracy in giving responsible evidence.[124] Peer review would be an incentive for honesty and conscientiousness, especially because their peers can comprehend the intricacies of the matter underlying the opinion.[125]

A self-regulating and peer review system for expert witnesses has been proposed to curb expert bias.[126] Gross proposes a thorough method of peer review, where a specific trigger must be identified which prompts a peer review, because no peer review board can screen all expert reports and evidence, for example, a review may be initiated by the court or an opposing

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to comprehend the reliability problem, leaving the court unassisted, see J Visser & U Kruger 'Revisiting admissibility: A review of the challenger in judicial evaluation of expert scientific evidence' (2018) 31(1) *SACJ* 1 at 6.

[121] Gross op cit n30 at 1178.

[122] Peers are disinterested, see Gross op cit n30 at 1213 & 1178.

[123] Gross op cit n30 at 1213.

[124] N Vidmar 'Assessing the impact of statistical evidence: A social science perspective' in SE Feinberg (ed) *Panel on Statistical Assessments as Evidence in the Courts* at 279 & 296-297; HS Hulbert 'Psychiatric testimony in probate proceedings' (1935) 2 *Law & Contemporary Problems* 448 at 452; JB Weinstein 'Improving expert testimony' (1986) 20 *University of Richmond Law Review* 473 at 484; In *Re Air Crash Disaster at New Orleans, Louisiana* 795 F2d 1230 1234 (5th Cir 1986).

[125] Gross op cit n30 at 1178-1179.

[126] See *Austin v American Association of Neurological Surgeons* 253 F3d 967 at 973-974 (7th Cir 2001); Sanders op cit n32 at 1539; HB Lawrence & BS Bal 'Physicians giving expert testimony are regulated by law, professional associations' (2009) *Orthopaedic Today*, available at https://www.healio.com/orthopedics/business-of-orthopedics/news/print/orthopedics-today/%7Bc50534185bbe-4c69-a5e9-5318a6f6dd99%7D/physicians-giving-expert-testimony-are-regulated-by-law-professional-associations, accessed on 11 May 2020.

litigant.[127] Deceitful experts are easily exposed by their peers, but peers do not review other experts' opinions and for this reason the prosecution of delinquent experts is not taken seriously.[128]

Gross notes that experts may be unreasonable, ignorant or irresponsible, to a point where no competent expert would hold such an opinion.[129] As a result, the most dangerous expert is not the liar but the ignorant and irresponsible.[130] The best protection against ignorance and irresponsibility lies not in the legal system or its sanctions, but with the expert's relationships with others in his/her field and the substance of his/her evidence.[131]

Proponents of peer review argue that a peer review board's adverse findings ought to be available for future reference[132] to be used against the expert at trial[133] and, even informally, can be deemed a source of neutral expertise.[134] When experts know that they are at risk of being exposed, they may be deterred from delinquent conduct.[135] In practice, no records are kept of experts' reports or about experts acting as trial witnesses, which makes it difficult for counsel to find previous adverse particulars which may be used against an expert.[136] Grobler proposes that information which must be kept includes the number of times that an expert acts for a specific side.[137] Records of actual expert reports can be kept by expert-regulating authorities and be made available to the court, public or legal fraternity at large.[138]

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[127] Gross op cit n30 at 1213.

[128] Gross op cit n30 at 1178.

[129] Gross op cit n30 at 1178; *Kgasi v RAF* (4582/2016) [2018] ZAGPPHC 434 (14 May 2018) at para 7.7.1; *P v P* supra n71 at para 10; *Fulton* supra n71 at para 36; *Ntombela v RAF* 2018 (4) SA 486 (GJ) at para 32; *M v RAF* (12780/15) [2017] ZAGPJHC 65 (21 February 2017) at paras 16-17; *Hugo v RAF* (32007/12) [2014] ZAGPPHC 764 (2 October 2014) at para 17.

[130] Gross op cit n30 at 1178.

[131] Gross op cit n30 at 1178.

[132] Gross op cit n30 at 1213.

[133] Meintjes-van der Walt op cit n6 at 49; Meintjes-van der Walt op cit n1 at 28.

[134] Gross op cit n30 at 1213.

[135] Grobler op cit n8 at 12.

[136] Meintjes-van der Walt op cit n1 at 28; E Dror 'Biases in forensic experts' (2018) 360 *Science* 243 at 243; B Budowle *et al* 'A perspective on errors, bias and interpretation in the forensic sciences and direction for continuing advancement' (2009) 54(4) *Journal of Forensic Sciences* 798 at 803.

[137] Grobler op cit n8 at 12.

[138] Gross op cit n30 at 1215.

An incidental advantage is that a review report may aid in settlement negotiations and be a directive in respect of further investigation against an expert.[139]

Introducing a peer review board is not an easy task as a review will occur outside the sphere of litigation and involve a non-legal discipline, the science fraternity and its regulatory authorities.[140] Such organizations may be interested in embarking on a watchdog role only if they are concerned about the employment of their discipline, in litigation.[141] A peer review board can inexpensively review a written expert opinion, but the process will be complicated by the viva voce evidence, which will be cumbersome and expensive.[142] When the expert witness submits a written report prior to giving viva voce evidence at trial, the report is hearsay evidence and is not admissible,[143] unless it falls within an exception to the rule against hearsay evidence.[144] Courts are unlikely to consider the review board's report that is based purely on the trial expert's written report when the expert eventually gives evidence at trial, as this type of evidence is unsworn and independent of cross examination; the type of evidence the hearsay rule fundamentally is designed to prevent.[145] The contention against the value of the report can be overcome by making it compulsory for experts to present their reports with an affidavit, confirming their report under oath, and such evidence is then admissible under Uniform Rule 38(2).[146]

Peer review is a limited remedy to the problem of bias: It cannot be a substitute for a substantive and impartial investigation and, at best, can confirm if an expert acted within the

[139] Gross op cit n30 at 1214.

[140] Gross op cit n30 at 1214.

[141] Gross op cit n30 at 1215.

[142] Gross op cit n30 at 1214.

[143] Gross op cit n30 at 1214.

[144] See Chapter 4, section 4.5.4; Gross op cit n30 at 1214.

[145] Gross op cit n30 at 1214.

[146] In terms of this rule, a court may order that evidence be given upon affidavit or that the affidavit of the witness is read at the hearing. Also see section 34 of the Civil Proceedings Evidence Act 25 of 1965.

realms of professional ethics and acceptability.[147] A peer review process has other negative effects: [148]

i. Experts may be reluctant to testify.
ii. Experts may sue their peer-complainants for defamation when their adverse allegations and complaints are not upheld, as was the case in *Yancey v Weis*,[149] and the risk of a lawsuit acts as a deterrent to peer review.
iii. There is a belief that the court has sufficient mechanisms to deal with delinquent experts and to regulate this under peer review amounts to intimidating witnesses.

A peer review system, in the South African context, is to be welcomed as a means in curbing expert bias. The prospects for curbing adversarial bias seem good and the system can easily and inexpensively be implemented. The advantages are wide-ranging but there may be less onerous and more effective means to eradicate adversarial expert bias.

8.6 Expert accreditation[150]

Common law systems are particularly bad at selecting the best available experts. [151] Parties select experts at will[152] despite litigants (or their attorneys), just like the courts, being ill-suited to test skill, standard of specialisation, ability and the competence of experts, more so where the expertise is based on experience or where accreditation does not exist, because they are not trained in the relevant disciplines.[153]

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[147] Gross op cit n30 at 1214.

[148] *General Medical Council v Meadow* [2006] EWCA Civ 1390 (26 October 2006) at para 83; *R v Clark (Sally)* [2003] EWCA Crim 1020 at para 178; L Blom-Cooper 'Fault lines remain after Meadow' (2006) 156 *New Law Journal* 1697 at 1697.

[149] Dist Ct 4th Dist Minn 2009.

[150] For accreditation of surveyors see RICS 'Expert witness registration scheme', available at https://www.rics.org/en-za/surveying-profession/career-progression/accreditations/expert-witness-accreditation-service, accessed on 20 January 2021. Also see the Chartered Society of Forensic Science 'Educational accreditation application process', available at https://www.csofs.org/Accreditation, accessed on 20 January 2021.

[151] Gross op cit n30 at 1182.

[152] Dublin Law Reform Commission op cit n16 at 308.

[153] DW Shuman 'Expertise in law, medicine and health care' (2001) 26 *Journal on Health Politics, Policy and Law* 267 at 276.

Although experts must be duly qualified,[154] the standard to be evaluated as an expert is not high, and to testify experts need be only minimally qualified in the relevant discipline.[155] Washburn argues biased experts, serving the interest of an instructing litigant, will be eliminated if true and qualified experts are selected and appointed.[156] To place the selection of experts on more tangible grounds than mere qualifications will go a long way to ameliorate expert bias and keep fraudulent experts at bay.[157] The risk of allowing 'pseudo' experts to testify may lead to retrials, appeals, delays and wasted costs.[158]

Addressing the question of what qualifies someone to be an expert is not simple.[159] The proponent of an expert witness will advance, often in detail, the expert's qualifications at trial, to enhance the weight of the expert's evidence.[160] Character evidence, regarding the expert's reputation, is produced to make the evidence believable but is premised, not on the expert's rational and credible opinion, but on who the expert is.[161] In civil matters, character evidence is deemed inadmissible, because it is irrelevant.[162] This exclusionary rule of the adversarial system does not apply to experts.[163] Before the expert even begins evidence-in-chief, (but also during the substantive evidence-in-chief to amplify an argument),[164] his/her credibility is bolstered by regurgitating his/her credentials, even where expertise is not in dispute.[165] Being

[154] O'Flaherty op cit n11 at 5-7.

[155] Younger op cit n67 at 274; G Norman, in NG Poythress 'Mental health expert testimony: Current problems' (1977) 5 *Journal of Psychiatry & Law* 201 at 210, call Younger's opinion only a slight exaggeration, with reference to first-year residents qualifying as experts in psychiatry.

[156] E Washburn 'Testimony of experts' (1866) 1 *American Law Review* 45 at 63-64.

[157] HS Williams 'Medical experts and homicide' (1897) 164 *North American Review* 160 at 164.

[158] Dublin Law Reform Commission op cit n16 at 309.

[159] Gross op cit n30 at 1159.

[160] TV Harris 'A practitioner's guide to the management and use of expert witnesses in Washington civil litigation' (1979) 3 *University of Puget Sound Law Review* 159 at 161 & 173.

[161] Gross op cit n30 at 1159.

[162] PJ Schwikkard & SE Van der Merwe *Principles of Evidence* 4ed (2016) at 75.

[163] Gross op cit n30 at 1159; PS Bamberger 'The dangerous expert witness' (1986) 52 *Brooklyn Law Review* 855 at 866-869, with reference to *United States v Young* 745 F2d 733 (2d Cir 1984).

[164] N Critelli 'Trial technique' (1983) 30 *Medical Trial Technique Quarterly* 114 at 115-117 & 126; J McElhaney *McElhaney's Trial Notebook* (1987) at 356.

[165] M Belli 'The expert witness: Modifying roles and rules to meet today's needs' (1982) July *Trial* 34 at 36; WB Fitzgerald 'Direct examination of the medical expert' (1981) 4 *Trial Diplomacy Journal* 44 at 46; M Ladd 'Expert

cross examined on career gaps and embarrassing career traits deters many experts from testifying, despite these circumstances possibly having no bearing on the value of the evidence.[166] The question of the grounds on which an expert is selected remains.[167]

Diamond suggests that stringent minimum criteria be introduced for experts to qualify as expert witnesses, with a requirement that experts must be very knowledgeable on the subject in question.[168] For Washburn, the solution is that the court must ensure, on evidence and inquiry, that a person who professes to be an expert, meets the description of an expert,[169] but due to their own lack of knowledge, courts are ill-placed to evaluate whether experts are appropriately qualified and their opinions scientifically sound.[170]

Williams rejects the proposal that state medical societies must nominate suitable experts, owing to the prejudicial political nature of such societies.[171] Williams suggests, to qualify as an expert, he/she must possess more than mere good professional standing,[172] training and qualification.[173] Additionally, experts must have certain general and special qualifications as to education, moral standing in the community and have passed examinations prepared especially for particular qualifications and practical experience.[174] Grobler stresses that experience must be substantive, alternatively the expert must show demonstrable

testimony' (1952) 5 *Vanderbilt Law Review* 414 at 422; *Murphy v National Rail Road Passenger* 547 F2d 816 (4th Cir 1977).

[166] Gross op cit n30 at 1162; MS Guttmacher 'Problems faced by the impartial expert witness in court: The American view' (1961) 34 *Temporary Law Quarterly* 369 at 370.

[167] O Perez 'Judicial strategies for reviewing conflicting expert evidence: Biases, heuristics and higher order evidence' (2016) 64 *The American Journal of Comparative Law* 75 at 109.

[168] Diamond op cit n24 at 81-83. In the US context, see D Sonenshein & C Fitzpatrick 'The problem of partisan experts and the potential for reform through concurrent evidence' (2013) 32 *Review of Litigation* 1 at 3-19.

[169] See Washburn op cit n156 at 61; P Alldridge 'Scientific expertise and comparative criminal procedure' (1999) 3(3) *International Journal of Evidence & Proof* 141 at 152; HA Hammelmann 'Expert evidence' (1947) 387 *South African Law Review* 387 at 388.

[170] DL Faigman et al 'Check your crystal ball at the courthouse door, please: Exploring the past understanding to present the present worrying and the future scientific evidence' (1994) 15 *Cardozo Law Review* 1799 at 1801.

[171] Williams op cit n157 at 161.

[172] Grobler, op cit n8 at 11, proposes the expert should have an unrestricted licence to practice.

[173] Williams op cit n157 at 161.

[174] Williams, op cit n157 at 163-164, includes diagnostic and intervention experience.

competence and ongoing education in the field.[175] Meyer, et al suggest publications and research, knowledge and applications of a science, use of specific tests, techniques and procedures and court experience as valuable cursors.[176] The expert should be in active practice in his/her profession at the time of giving evidence[177] and the judicial temperament[178] of candidates also must be tested.[179]

The New South Wales Law Reform Commission (NSWLRC) considered an accreditation scheme for experts, to assist the parties in selecting experts and the court in applying weight to the expert's evidence.[180] The Dublin Law Reform Commission (Dublin LRC)[181] suggested accreditation which can serve as the admissibility criteria at trial.[182]

Accreditation may occur by way of membership of an accreditation body, but if membership is voluntary, competing regulating bodies may be created which may enhance standards among experts but lead to the absence of uniformity.[183] The Dublin Law Reform Commission noted that a compulsory uniform accreditation body may lead to an anti-competitive monopoly of experts and overburden once-off experts and instead proposed consideration of the following alternatives:[184]

i. A tiered system of accreditation, premised on the time an expert spends in the witness box.[185]

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[175] Grobler op cit n8 at 12.

[176] RG Meyer, ER Landis & JR Hays *Law for the Psychotherapist* (1988) at 222-223; GB Melton, J Petrila, NG Poythress & C Slobogin *Psychological Evaluations for the Courts* (2007) at 589.

[177] Grobler op cit n8 at 12.

[178] These include decisiveness, patience, freedom from bias, commitment to justice, courtesy, open mindedness and sensitivity, see JE Duffey 'Judicial temperament a matter of showing respect to all', available at https://www.courts.state.hi.us/docs/docs5/jtamosrta050204.pdf, accessed 3 March 2021.

[179] Williams op cit n157 at 164.

[180] New South Wales Law Reform Commission op cit n13 at 150.

[181] A register of qualifying expert will be kept, see The Dublin Law Reform Commission op cit n16 at 321, where a single voluntary regulatory association is proposed, where membership is subject to expert accreditation based on expertise, by qualifications and/or experience.

[182] Dublin Law Reform Commission op cit n16 at 310.

[183] Dublin Law Reform Commission op cit n16 at 311.

[184] Dublin Law Reform Commission op cit n16 at 323.

[185] Such a system is employed by the English Society of Expert Witnesses 'Membership classes', available at https://www.sew.org.uk/about/MClasses.cfm, accessed 6 February 2021.

ii. Existing regulating bodies must be encouraged to increase their power and regulation in the context of expert witnesses, making accreditation part of a code of conduct, which code can be discipline-specific, to cater for the loopholes and pitfalls in specific disciplines.[186]

Although regulating authorities will have the knowledge and expertise to know if an expert performs below the minimum standard required,[187] the contention made against accreditation, as part of a code of ethics, is that various disciplines may avoid accepting the introduction of novel (yet relevant) theories for experts to rely on in forming their opinions and considered a breach of the ethical code.[188]

Accreditation will not remove delinquent experts, but it will help to reduce their number to the benefit of justice.[189] Accreditation creates a need for the development of discipline-specific methods of assessment and training for competence.[190] Expert accreditation can occur under a regulatory regime, which considers skills and integrity among experts, as occurs in Germany, Japan, France and Italy. Here systems are in place to pre-vet experts,[191] either by numerous administrative bodies responsible for different professions or a single concentrated agency, cultivating a list of approved and accredited experts, from which the court can make a choice.[192]

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[186] Dublin Law Reform Commission op cit n16 at 324.

[187] Dublin Law Reform Commission op cit n16 at 327.

[188] Dublin Law Reform Commission op cit n16 at 327.

[189] UK Legal Services Commission *The Use of Experts Consultation Paper: Quality, Price and Procedures in Publicly Funded Cases* (2004) at para 6.14; P McClellan 'Contemporary challenges for the justice system: Expert evidence', available at https://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre2015 %20Speeches/McClellan/mcclellan_2007.07.20.pdf, accessed 6 February 2021.

[190] Ibid.

[191] Perez op cit n167 at 110.

[192] R Verkerk 'Comparative aspects of expert evidence in civil litigation' (2009) 3 *International Journal on Evidence and Proof* 167 at 172-173; Sonenshein & Fitzpatrick op cit n168 at 36-45; RF Taylor 'A comparative study of expert testimony in France and the United States of America: Philosophical underpinnings, history, practice, and procedure' (1996) 31(2) *Texas International Law Journal* 181 at 195; AW Jurs 'Balancing legal process with scientific expertise: A comparative assessment of expert witness methodology in five nations and suggestions for reform of post-Daubert U.S. Reliability Determinations' (2012) 95(4) *Marquette Law Review* 1329 at 1408-1410.

Gross argues that to identify the best experts, existing experts in the field must be consulted.[193] Elliot and Spillman propose a system similar to that of New York's Workman's Compensation,[194] where a commissioner, from a panel of qualified physicians, selects experts from a list of suitable experts, submitted by medical societies.[195] Perez says that a model based on a list may create the following non-trivial regulatory challenges:[196]

i. It is a difficult task to create a list for every discipline of expertise on which the law may rely. To alleviate this problem, the selection process may be deferred to professional associations, which in turn will need to be regulated.
ii. It is one thing to have a pool of accredited experts, but a particular expert must still be selected from this pool. Judges (and litigants) are ill-equipped, from an epistemic point of view, to make this selection, as one must understand the problem which require expertise to be resolved. Which expert is the best for a given question? In addition, there is the same problem as the relation between the courts and experts, where courts must keep track of expert accreditation and there is a risk of an anti-competitive monopoly of experts being created.

If set criteria are established for expertise, an expert list can be created of experts meeting the minimum criteria. But Wigmore rejects the notion that experts are appointed from a list (and by implication from fixed criteria) because:[197]

i. Partisan politics make it untrustworthy.
ii. The variety of scientific issues are too wide to have a list for each category.
iii. No single jurisdiction contains all the best experts.
iv. It is a constitutional right to secure any evidence that a litigant deems useful, regardless of some list.

Sanders suggests that leaving the matter for professional bodies to decide who qualifies as an expert may run into various problems. In accrediting experts, the bar may be set too high or too

[193] Gross op cit n30 at 1183.

[194] New York Laws 12935 c 258 §1 par 13(d).

[195] FE Elliot & R Spillman 'Medical testimony in personal injury cases' (1935) 2 *Law and Contemporary Problems* 466 at 474.

[196] Perez op cit n167 at 111.

[197] KJ Weiss 'John H Wigmore on the abolition of partisan experts' (2015) 43(1) *Journal of the American Academy of Psychiatry and the Law* 21 at 24-25.

low, making the opinion beyond the ambit of what the courts require.[198] Too low, when a field is bankrupt of data and not based on a rigorously researched foundation, creates an unreliable opinion, and too stringent, where empirical science employs filters which make it difficult for the expert to reach an opinion that will be helpful in a civil trial.[199] Further contentions with accrediting experts are:

i. Making accreditation compulsory may make well qualified experts reluctant to seek accreditation and the pool of available experts is made smaller and increases rather than eliminates bias.[200]
ii. At times, foreign or novel scientific principles may be necessary in evidence where these experts will not be accredited, which is counterproductive to the administration of justice.[201]
iii. There may be disciplines that do not lend themselves easily to accreditation, particularly disciplines which are not regulated by professional bodies.[202]
iv. Accreditation does not automatically lead to expert objectivity.[203]
v. The accreditation system places a burden on the court, which lacks the knowledge to conduct an accreditation of experts.[204] The onerous task of establishing and/or maintaining an expert accreditation list will be expensive and is disproportionate to any advantage which might be obtained.[205]
vi. Many professional organizations[206] accredit their members, based on qualifications, training and experience, but monitoring performance and training of individual experts may be time-consuming and extremely difficult.[207]

[198] Sanders op cit n32 at 1547.

[199] Sanders op cit n32 at 1547.

[200] New South Wales Law Reform Commission op cit n13 at 152.

[201] New South Wales Law Reform Commission op cit n13 at 152.

[202] Dublin Law Reform Commission op cit n16 at 318.

[203] New South Wales Law Reform Commission op cit n13 at 153.

[204] New South Wales Law Reform Commission op cit n13 at 153.

[205] New South Wales Law Reform Commission op cit n13 at 156.

[206] In the context of chartered accountants, see New South Wales Law Reform Commission op cit n13 at 151-152.

[207] New South Wales Law Reform Commission op cit n13 at 151.

Even in jurisdictions where accreditation bodies do exist, these are private entities where cooperation and harmonisation does not occur, making the setting of a common standard within disciplines unaccomplished.[208] The NSWLRC adds to this list of difficulties:[209]

i. Accreditation will not ensure that expert opinion is accepted.
ii. It may involve pre-judging the merits of the expert opinion before it is even heard.
iii. Credibility of the accreditation system would diminish when accredited experts fare poorly on the stand or non-accredited expert opinion is accepted over accredited experts' opinions.
iv. It may lead to a monopoly of experts where those with accreditation will be repeatedly used, to the exclusion of new developments and novel ideas.[210]

As discussed in section 4.3, in South Africa experts do not need any specific qualifications and need be only sufficiently qualified, skilled, trained, experienced or have specialised knowledge to assist the court in reaching a judgement.[211] In expert accreditation, the disadvantages outweigh the advantages and should not be adopted in South Africa as a means to curb expert bias. The logistical concerns against the backdrop of a financially struggling South Africa do not make this option attractive and there are questions about the constitutionality of such a system, given that in the South African adversarial system litigants have the right to present evidence from experts of their choice. It will simply be too onerous to implement, with no evidence of any benefit.

8.7 Guidelines for expert reporting

The court's ability to assess and review an expert's opinion is limited and to cure this symptom, there is a need to create alternative mechanisms for controlling the quality and reliability of the evidence.[212] Setting fixed methodological guidelines will improve the expert's quality of decision making, enhance inter- and intra-decision consistency and facilitate transparency in

[208] Dublin Law Reform Commission op cit n16 at 311, with reference to Bawdon 'A crowded throughfare' (1996) *New Law Journal* 1742.

[209] New South Wales Law Reform Commission op cit n13 at 154-155.

[210] Dublin Law Reform Commission op cit n16 at 318 with reference to Walton 'Deployed bias' (2006) 156 *New Law Journal* 1084.

[211] *Ruto Flour Mills v Adelson* 1958 (4) SA 235 (T) at 237.

[212] Perez op cit n167 at 112.

the expert's reasoning process.[213] An example where guidelines have been employed is in Road Accident Fund litigation, where injured victims qualify for general damages (non-pecuniary) only if an injury to a road accident victim is serious.[214] The regulations in terms of the Road Accident Fund Act employ the American Medical Association (AMA) guides,[215] aimed at improving the quality of inter-rated consistency of assessments by experts by adopting a diagnosis based (evidence based) approach to impairment rating.[216] Only if a victim meets a 30% Whole Person Impairment rating, as determined by the AMA guides, will the victim be compensated for general damages.[217]

In the field of forensic science,[218] the Australian-New Zealand Policing Advisory Agency National Institute of Forensic Science (NIFS) has developed a four-core forensic standard policy, covering the collection, analysis, interpretation and reporting of forensic science over and above individual discipline-related standards.[219] The contention associated with an 'expert report guide' are:

i. To develop such guidelines across a myriad of disciplines may be an insurmountable task, especially amid deep controversies between scientists, on methodology.[220]

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[213] Perez op cit n167 at 112.

[214] Section 17(1A) of the Road Accident Fund Act read with Regulations 3, GG 31249 of 21 July 2008.

[215] American Medical Association.

[216] RD Rondinelli et al *American Medical Association's Guides to the Evaluation of Permanent Impairment* 6ed (2009) at 649-651.

[217] Regulation 3(1)(*b*)(*ii*). This is disregarding the narrative test, which additionally can qualify a road victim for general damages, see Regulation 3(1)(*b*)(*iii*).

[218] Perez op cit n167 at 112.

[219] The NIFS standards go beyond the less stringent standards of the International Organization for Standardization, which provides general requirements for competence testing and calibration of laboratories, see LM Wilson-Wilde et al 'The future of forensic science standards' (2011) 3 *Forensic Science International: Genetics Supplement Series* e333 at e333-e334; J Robertson, K Kent & L Wilson-Wilde 'The development of a core forensic standards framework for Australia' (2013) 4 *Forensic Science, Policy and Management* 59 at 61.

[220] RS Nickerson 'Null hypothesis significance testing: A review of an old and continuing controversy' (2000) 5 *Psychological Methods* 241 at 241-301; L Kaplow 'The accuracy of traditional market power analysis and a direct adjustment alternative' (1982) 95 *Harvard Law Review* 1817 at 1817-1848.

ii. The design of a methodological standard is not a neutral process, on the contrary it is highly value laden.[221]

iii. Methodological guidelines may be susceptible to external corporate pressures, because guidelines may cut across an entire field of expertise.[222]

iv. The guidelines will not prevent conflicts among experts: Perez has demonstrated that the Israeli National Insurance Institute and AMA Guideline have not prevented a disparity of views among experts in the Whole Person Impairment (WPI) rating and this is especially so because of the complexity and remaining ambiguities of the guides.[223]

Perez suggests the following are adopted to give proposed methodological guidelines legitimacy:

i. *Cross-institutional process*: If the guidelines are created via a cross-institutional process, the views of the entire scientific community can be reflected and this can minimize the risk of corporates manipulating the process.[224]

ii. *Empirical validation*: To ensure that methodological guidelines work, they must be supported by empirical validation and research.[225]

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[221] Which exist in the science of climate change, see Perez op cit n167 at 113.

[222] The AMA Guides (op cit n215) are welcomed by insurance companies (defendants), but resented by plaintiffs, see J Causey, Y McFarren & J Nimlos 'The AMA 6th: Accelerating the demise of permanent disability in workers' compensation' (2008) 45(2) *International Association of Industrial Accident Boards and Commissions Journal* 49 at 50-52; A Colledge et al 'Impairment rating ambiguity in the US: The Utah impairment guides for calculating workers' compensation impairments' (2009) 24 *Journal of Korean Medical Science* S232 at S235-236. Also see RK Merton 'The normative structure of science' in NW Storer (ed) *The Sociology of Science: Theoretical and Empirical Investigations* (1973) at 267 & 268–270; Sanders op cit n32 at 66.

[223] Colledge et al op cit n222 at S236.

[224] Perez op cit n167 at 114.

[225] In the context of the AMA Guides (that assess the loss of body function and not the earning capacity), Perez suggests it is crucial to assess the Guides' ability to translate impairment ratings into compensation levels, see SA Seabury, F Neuhauser & T Nuckols 'American Medical Association impairment ratings and earnings losses due to disability' (2013) 55 *Journal on Occupational and Environmental Medicine* 286 at 290; J Bhattacharya et al 'Evaluating permanent disability ratings using empirical data on earnings losses' (2010) 77 *Journal on Risk & Insurance* 231 at 234.

iii. *Reflexive learning*: Methodological guidelines must be supported by an institutionalized learning process for ongoing monitoring and improvement, otherwise known as experimental governance.[226]

Meintjes-van der Walt suggests that quality checks be introduced, such as in the case of forensic experts, which subscribe to international quality control protocols and standards.[227] Stowe suggests that an expert-report-template is needed for the writing of an expert report, to limit the role and impact that lawyers may have on the writing process.[228]

Although fixed guidelines are an ideal, they are not a practicable or viable option to address adversarial bias, especially for a developing country such as South Africa. Fixed guidelines on reporting and reaching a conclusion on a scientific issue cannot be employed across all disciplines. It is difficult to imagine how fixed methodological guidelines can be employed in softer sciences where expert opinion is premised on indispensable disparate social and collateral input data or fact.

8.8 Ensure a large pool of experts

It is important that litigants can draw from a large pool of experts who hold divergent views.[229] Experts, belonging to a single organization, such as a laboratory working only for the state, may reduce such a pool.[230] In England, the former state criminal forensic laboratory and Science Service were given independent executive status[231] but this act was more about nomenclature than substance and did not improve access to services for the accused.[232]

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[226] O Perez 'Courage, regulatory responsibility and the challenge of higher-order reflexivity' (2014) 8(2) *Regulation & Governance* 203 at 214-215**;** C Overdevest & J Zeitlin 'Assembling an experimentalist regime: Transnational governance interactions in the forest sector' (2014) 8(1) *Regulation & Governance* 22 at 23-24.

[227] Meintjes-van der Walt op cit n33 at 119.

[228] Stowe op cit n98 at 78.

[229] M Malsch & I Freckleton 'Expert bias and partisanship: A comparison between Australia and the Netherlands' (2005) 11(1) *Psychology, Public Policy and the Law* 42 at 52.

[230] DE Bernstein 'Junk science in the United States and the Commonwealth' (1996) 21 *Yale Journal of International Law* 123 at 171; R Stockdale 'Running with the hounds' (1991) 141 *New Law Journal* 772 at 772-773.

[231] After the Royal Commission on Criminal Justice *The Role of Forensic Science Evidence in Criminal Proceedings* (1993) was published.

[232] P Alldridge 'Forensic science and expert evidence' (1994) 21 *Journal of Law & Society* 136 at 139.

Different experts reach different conclusions, especially in disciplines that are less 'hard and indisputable', such as in the medical and psychological sciences.[233] In forensic chemistry, the lack of available experts is troubling, because forensic chemists often are wrong in their findings.[234] A large pool of experts counters the notion of parking experts, a practice whereby experts are retained without the intention of calling them to testify in the service of pre-emption that such experts may be called on by the opponent.[235] If subsequently approached by the opponent, the experts must decline the brief on the basis of a conflict of interest.[236] In the case of lay witnesses, this conduct amounts to defeating the ends of justice, which is a criminal offence.[237]

In South Africa, there ought to be large pools of experts. This will address one of the root causes of adversarial bias, namely expert parking. Having many experts available will ventilate different approaches, skills, standards and may bring novel ideas to the fore in a particular discipline, all which may be in the interest of justice.

8.9 Criminal and civil prosecution of delinquent experts

Experts do not like being caught out lying and cross examination, to a limited extent, is useful in eliciting truthful evidence.[238] The formal perceived guarantee of candour is the oath, but it is not a guarantee of truth-telling: Deceit comes in more formats than lying.[239] Experts can be deceitful by colouring or shading their evidence without committing perjury[240] and the whole truth simply means to answer each question honestly.[241] To be convicted of perjury, the state

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[233] I Frekelton & H Selby *Expert Evidence: Law, Practice and Procedure* (2005) at 50; J Ziskin & D Faust *Coping with Psychiatric and Psychological Testimony* (1995) at 95.

[234] J Peterson et al *Crime Laboratory Proficiency Testing Research Programs* (1978) at 16.

[235] RP Karr 'Open forum: An analysis and demonstration of the use of experts in professional liability litigation' (1983) 50 *Insurance Counsel Journal* 67 at 68.

[236] Gross op cit n30 at 1130.

[237] Gross op cit n30 at 1130.

[238] Gross op cit n30 at 1176.

[239] Gross op cit n30 at 1176. For a discussion on the oath, see PJ Schwikkard 'The oath: Ritual and rationality' (2019) 32 *SACJ* 357-376.

[240] In *S v Vallabh* 1911 NPD 9, at 12, the court held that an untruthful submission can be expressed tacitly or based on an innuendo. In *Abinger v Ashton* (1873) 17 LR Eq 358, the court held that experts know they are immune to perjury charges because their evidence is an opinion.

[241] Gross op cit n30 at 1176.

must prove, beyond a reasonable doubt, that the expert had the intention to deceive, which makes it notoriously difficult to prove.[242] Even if perjury is suspected, not many resources are invested in the prosecution of perjury,[243] reflecting a diffuse conviction that it is better to let a few liars go unchallenged than discourage truthful evidence by threatening prosecution for perjury, which deters witnesses.[244] The crime of perjury is not defined well enough to cover less obvious deceit in the realm of expert evidence, and prosecuting experts for perjury is not an option.[245] It is difficult for the state to prove that an opinion is deliberately false or misrepresented, as experts resort to the 'opinion defence', where an opinion speaks to the state of mind and professional judgement of a witness.[246] It is not that a line has been crossed if an obscure view is legitimately held by an expert.[247] Opinion is notoriously flexible,[248] ambiguous and contradictory in its very nature and even if an expert tells a blatant lie, there hardly ever is external objective evidence to contradict such an opinion.[249] Other crimes which delinquent experts commit are to defeat the ends of justice, fraud and corruption.

In civil cases a litigant can sue his/her own experts for negligence or an expert testifying against the litigant for giving an unlawful/deceitful opinion negligently or intentional, discussed in section 7.2.3. In South Africa, any prosecution or action, taken against delinquent experts, is to be welcomed. Expert regulation and disciplinary steps taken against delinquent

[242] Snyman op cit n95 at 349; *S v Mokwena* 1948 (4) SA 772 (T) at 724; *S v Bushula* 1950 (4) SA 108 (O) at 116.

[243] Gross op cit n30 at 1176.

[244] Comment 'Perjury: The forgotten offense' (1974) 65 *Journal of Crime, Law and Criminology* 361 at 368; Comment 'The rule against civil actions for perjury in administrative proceedings: A hobgoblin of little minds' (1983) 131 *University of Pennsylvania Law Review* 1209 1211; M Thompson 'The truth about lies' (1989) 9 *California Law* 15 at 16.

[245] Gross op cit n30 at 1177.

[246] Gross op cit n30 at 1177.

[247] WL Foster 'Expert testimony- Prevalent complaints and proposed remedies' (1897) 11(3) *Harvard Law Review* 169 at 171.

[248] EJ McDermott 'Needed reform in the law of expert testimony' (1911) 1 *Journal of Crime, Law and Criminology* 698 at 698-699; Comment 'Impartial medical testimony plans' (1961) 55 *Northwestern University Law Review* 700 at 702. In *State v Sullivan* 130 A2d 610 (NJ 1957), the New Jersey Supreme Court sustained a perjury conviction of an expert, who gave opposite opinions to the same question in different trials. The lengthy judgement and the minority judgement demonstrate that such cases are rare.

[249] Gross op cit n30 at 1177.

experts, discussed in section 8.2, seem to be more viable in addressing and responding to adversarial expert bias.

8.10 Educating key role players[250]

8.10.1 Training experts

Basic legal training for experts is suggested, because bias may result from experts being ignorant of the law.[251] What is not meant is the type of training which coaches experts on orchestrating evidence to aid the instructing party,[252] but training to enhance their capacity to explain, present and communicate their opinions to a court.[253] In an Australian study, judges overwhelmingly supported the need for experts to receive training to better communicate their views and fulfil their role as forensic witnesses.[254] Failures in education which is patchy and unregulated, can lead to the miscarriage of justice.[255] Lord Woolf argues against training being a prerequisite for testifying in court, as this may lead to competent experts being excluded.[256]

Although training is a noble proposal, it may do little to curb expert bias in South Africa, considering the strong forces that cause and support delinquent expert conduct.

8.10.2 Training of courts

Meintjes-van der Walt submits that courts have not done enough to curb expert bias and more effort is needed to mitigate inaccurate and non-objective opinions and the abuse of expert

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[250] Meintjes-van der Walt op cit n7 at 282; Dublin Law Reform Commission op cit n16 at 305.

[251] E Tratschler 'The cost aspect of medical expert witnesses and the possible introduction of a medical expert witness panel in South Africa' (2018) 12 *Pretoria Student Law Review* 222 at 237.

[252] *R v Salisbury* [2005] EWCA Crim 3107 (30 November 2005): 'capable of converting a lying but incompetent witness into a lying but impressive witness'. In *R v Momodou and Limani* [2005] EWCA Crim 177, at para 48, the court held that there is a difference between witness coaching and witness training.

[253] Malsch & Freckleton op cit n229 at 57-58.

[254] Freckleton, Reddy & Selby op cit n81.

[255] F Gibb 'Most lawyers fail to check on their expert witnesses' *The Times* 12 November 2007, available at: https://www.thetimes.co.uk/article/most-lawyers-fail-to-check-on-their-expert-witnesses-jg78j0z2pdf, accessed 6 February 2021.

[256] Dublin Law Reform Commission op cit n16 at 313.

opinion, to favour litigants.[257] The function of an expert is to educate the court.[258] Although courts have no mandate to compel experts to be objective, which mandate lies with the professional regulating body, courts cannot be complacent and sanctions must follow on delinquent expert behaviour.[259] One option is criticism by the court, when bias is obvious.[260] In South African case law, courts often express their displeasure at expert bias, but fail to go so far to make a credibility finding against the expert in question.[261] This laxity may be because it is difficult to prove that the expert indeed is biased, owing to the inherent nature of expert evidence.[262] This difficulty is discussed in more detail in section 8.2.3.

A distorted or misplaced opinion may be legitimately held.[263] Proof of facts depends on the ability of human minds to make appropriate and useful distinctions and or connections among items of evidence.[264] To aid this process, it is suggested that the court and legal practitioners must learn more about the expert topic,[265] and, at the same time, accepting that in a trial setting judges are handicapped, because courts do not receive expert instruction.[266]

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[257] L Meintjes-van der Walt & A Olaborde 'Cognitive bias affecting forensic expert opinion' (2019) 3 *SACJ* 324 at 329.

[258] *Menday* supra n71 at 569 B; *S v Huma* (2) 1995 1 SACR 409 (W) at 410; Meintjes-van der Walt op cit n5 at 363; EJ Imwinkelried 'The next step in conceptualising the presentation of expert evidence as education: The case for didactic trial procedures' (1997) 1 *International Journal of Evidence and Proof* 128 at 129-130.

[259] Sperling op cit n77 at 6.

[260] Sperling op cit n77 at 6; *Hussein v William Hill* [2004] EWHC 208 (QB) (18 February 2004) 34.

[261] Supra n71.

[262] Meintjes-van der Walt op cit n1 at 28.

[263] Malsch & Freckleton op cit n229 at 48.

[264] L Loevinger 'Standards of proof in science and law' (1992) 32 *Jurimetrics Journal* 323 at 343.

[265] NJ Vidmar 'Assessing the impact of statistical evidence: A social science perspective' in SE Feinberg (ed) *The Evolving Role of Statistical Assessment as Evidence in Courts* (1989) 279 at 296-297.

[266] Gross op cit n30 at 1183; J Goodman et al 'What confuses jurors in complex cases' (1985) Nov *Trial* 65 at 65-66; WC Thompson & EL Schumann 'Interpretation of statistical evidence in criminal trials: The prosecutor's fallacy and the defense attorney's fallacy' (1987) 11 *Law & Human Behaviour* 167 at 184; RE Nisbett & L Ross *Human Inference: Strategies and Shortcomings of Social Judgment* (1980) at 122; AD Austin *Complex Litigation Confronts the Jury System: A Case Study* (1984) at 87; M Selvin & L Picus *The Debate over Jury Performance* (1987) 99; P Rosenthal 'Nature of jury response to the expert witness' (1983) 28 *Journal of Forensic Science* 528 at 530-531.

Meintjes-van der Walt proposes educating fact finders[267] and lawyers[268] in technical and scientific matters,[269] to assist with the assessment[270] and evaluation of expert evidence.[271] In South Africa, the task is made easier owing to presiding officers being legally trained.[272] The Dublin Law Reform Commission suggests that training courts may eradicate the need for other experts to help the court determine the reliability of expert evidence and detect bias or fraudulent expertise.[273]

Courts need to be aware that scientific findings are open to being questioned and that science is not infallible.[274] This reality must be seen in context of the limits of what can be achieved through scientific knowledge:[275] Courts must be cognizant of the type of claims science can make, how such claims are made and what the claims can be used for and that they

[267] By formulating guidelines for courts on the evaluation of expert evidence, see Meintjes-van der Walt op cit n7 at 300. For an insightful article on the assessment of expert evidence, see E Bell 'Judicial assessment of expert evidence' (2010) 2 *Judicial Studies Institute Journal* 55-96.

[268] Brown & L Meintjes-van der Walt 'The use and misuse of statistical evidence in criminal proceedings' (2007) 32 *Journal for Juridical Science* 1 at 40.

[269] Dublin Law Reform Commission op cit n16 at 305.

[270] In adversarial systems, courts are provided with few tools to evaluate expert evidence, see MJ Saks 'The aftermath of Daubert: An evolving jurisprudence of expert evidence' (2000) 40 *Jurimetrics* 229 at 230; Visser & Kruger op cit n120 at 4. In *Kirin- Amgen v Hoechst Marion Roussel* [2004] UKHL 46, the court was shown a series of seminars on DNA technology.

[271] Meintjes-van der Walt op cit n4 at 91 & 96. In the context of DNA, see JA Goodwin & L Meintjes-van der Walt 'The use of DNA evidence in South Africa: Powerful tool or prone to pitfalls?' (1997) 114 *SALJ* 151 at 152; B Budowle et al 'A perspective on errors, bias and interpretation in the forensic sciences and direction for continuing advancement' (2009) 54 *Journal of Forensic Sciences* 798 at 803; WC Thompson & N Scurich 'How cross-examination on subjectivity and bias affects jurors' evaluations of forensic science evidence', available at https://escholarship.org/content/qt12k520nc/qt12k520nc.pdf?t=ps861m, accessed 6 February 2021.

[272] Globally the provision of special and/or further education to legal decision makers is on the increase see FDJ Brand 'Perspective on judicial education' (1997) *Consultus* Nov 124 at 124; C Gillwald 'Legal education and receptiveness to change' (2000) 41 *Codicillus* 17 at 18.

[273] Dublin Law Reform Commission op cit n16 at 320.

[274] Millett op cit n35.

[275] There is not a logical bridge linking fact and value, see D Hume *A Treatise of Human Nature* 2ed (1978) book 3, at part 1, si-ii.

can be misused. There is a general lack of certainty in conductive claims [276] which can be used, if disingenuously, by an expert to hold one set of claims as being as sound as another.[277]

Bad and good science may emerge from an enquiry, and both can be presented in court, however knowing the difference is difficult for a lay court.[278] Judicial guidance on the evaluation of technical expert opinion is inadequate because the courts have none or little guidance in understanding technical expert opinion.[279]

The proposal to educate the courts cannot be a meaningful solution in South Africa to the problem of assessing expert evidence.[280] Any training in a particular discipline can at best be superficial and introductory, which defeats the purpose. Training in assessing complex evidence and the benefits and limitation of scientific knowledge is an ideal that paradoxically is an accurate description, in that to evaluate expert evidence one needs to be an expert in the first place.[281]

8.10.3 Training the legal practitioner

Legal practitioners need to develop a greater appreciation of the complexities of matters beyond the law that tend to arise in expert evidence.[282] To effectively cross examine an expert, counsel needs to be familiar with the subject matter.[283] This is especially necessary, because counsel is at risk of being befuddled by an expert's statements and unable to serve the purpose of the instructing litigant.[284]

Gross submits that training a lawyer in the discipline of an expert will make the lawyer competent in cross examination as the lawyer will comprehend the evidence, but such training for many is impossible, rarely achieved and ineffective.[285] The practical questions relating to

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[276] General positions derived from particular examples.

[277] Millett op cit n35.

[278] Millett op cit n35; BD Sales & L Simon 'Institutional constraints on the ethics of expert testimony' (1993) 3(3-4) *Ethics and Behaviour* 231 at 233 & 238.

[279] UK Law Commission Consultation Paper 190 *Expert Evidence in Criminal Proceedings in England and Wales: A New Approach to the Determination of Evidentiary Reliability*' (2009) at para 2.30. Also see *Stewarts & Lloyds SA v Croydon Engineering and Mining Supplies* 1979 (1) SA 1018 (W) at 1019.

[280] Gross op cit n30 at 1183.

[281] Gross op cit n30 at 1183.

[282] Malsch & Freckleton op cit n229 at 58.

[283] Washburn op cit n156 at 63.

[284] Washburn op cit n156 at 63.

[285] Gross op cit n30 at 1174.

when are lawyers to be trained, the costs implication, the difficulties in determining the required depth of training and the limitations imposed by the continuing consequences of unequal access to education remain as impediments to training.[286]

It is difficult to see how the training of legal practitioners will be practically implemented in South Africa. Given the vast number of disciplines of expertise and the in-depth training required to be effective, which will be expensive, this proposal is out of reach in the South African context.

8.11 A conflict of interest[287]

Revealing or declaring a conflict of interest, may go a long way in reducing expert bias[288] or its perception, where the court is allowed an informed opportunity to establish what weight to attach to the evidence.[289]

The manifestation of biased expert evidence, conscious or unconscious, has its foundation in personal, financial and intellectual interests, which exist externally and internally, in direct relation to litigation.[290] In respect of personal interest, an expert's trustworthiness is negatively impacted by their being predisposed to give a certain type of opinion, based on their personal beliefs and moral compass.[291] Preconceived ideas are formed,

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[286] Ibid.

[287] Part 5 of the Expert Witness Directory of Ireland's Code of Conduct, quoted in the Dublin Law Reform Commission op cit n16 at 164, imposes a duty on an expert to disclose: (1) Ownership of a business in competition with a client. (2) Financial or other interest in the issue in dispute. (3) A personal relationship with any individual involved. (4) The existence of competing interests.

[288] DR Richmond 'Regulating expert testimony' (1997) 62(2) *Missouri Law Review* 486 at 557. Alliance for Lobbying Transparency and Ethics Regulation 'A year of broken promises: Big business still put in charge of EU expert groups, despite commitment to reform', available at https://www.alter-eu.org/documents/2013/11/a-year-of-broken-promises, accessed 7 February 2021; C Robinson et al 'Conflicts of interest at the European Food Safety Authority erode public confidence' (2013) 67 *Journal of Epidemiology & Community Health* 717 at 718-719. In England, the Guidance Protocol, designed to supplement the Civil Procedure Rules, holds that an expert may not have a conflict of interest, see Civil Justice Council op cit n79 at 7.1.

[289] Dublin Law Reform Commission op cit n16 at 216.

[290] D Dwyer 'The causes and manifestations of bias in civil expert evidence' (2007) 26 *Civil Justice Quarterly* 425 at 427.

[291] See *Hertzler v Hertzler* (1995) WY 206, where the expert's view on homosexuality impacted the opinion.

based on personal relationships or affiliation.[292] A financial interest may arise, for example, were an expert to have invested financially in the litigant's enterprises and is reluctant to take an adverse stance against a litigant as this has a bearing on the expert's pecuniary interest.[293] To prevent bias, experts ought not to act as witnesses in cases where the expert has a pre-existing relationship or personal involvement with the party, as this dual role either causes a conflict of interest, which may have a negative impact on the professional relationship, or adversely affects the evidence.[294] Intellectual interest may generate bias (albeit not selection bias), where there is scope for opposing opinions and an interest may be advanced by the expert's desire to promote a particular theory, using the court as a platform.[295] As members of the same profession are institutionally and socially collegial, there is a belief that they owe an allegiance to the discipline or the expert has a need to enhance his/her status as an expert.[296]

Experts ought not to have any interest in the outcome of the case.[297] In the English case of *R (Factortame) v Secretary of State for Transport*,[298] the court held that an expert, whose fees are dependent on a contingency agreement, would not automatically be precluded but that

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[292] This is more fully discussed in chapter 3. In *Toth v Jarman* [2006] EWCA Civ 1028, [2006] All ER (D) 271 (Jul), an expert was a member of a committee, associated with the defence. In *Liverpool Roman Catholic Archdiocesan Trust v Goldberg* [2002] 1 WLR 237, the court refused to hear evidence from an expert, who had a close personal relationship with the defendant.

[293] Dublin Law Reform Commission op cit n16 at 201.

[294] R Slovenko 'On a therapist serving as a witness' (2002) 30 *Journal of the American Academy of Psychiatry and the Law* 10 at 12-13. There is not a general rule in South Africa. This rule is recommended by the HPCSA and the Society of Psychiatrists of SA, see T Zabow & S Kaliski 'Ethical considerations' in S Kaliski (ed) *Psycho-legal Assessment in South Africa* (2006) at 361. See the Rules of Conduct Pertaining Specifically to the Profession of Psychology, as contained in the Ethical Rules of Conduct for Practitioners Registered Under the Health Professions Act 1974, GN R717 of 4 August 2006: 'Conflicting roles - (1) A psychologist shall avoid performing multiple and potentially conflicting roles in psycho-legal matters.' A litigant may divulge facts to a psychiatrist, as a patient, which he would not want to have disclosed on the witness stand, see Dublin Law Reform Commission op cit n16 at 203; D Dwyer 'The effective management of bias in civil expert evidence' (2007) 26 *Civil Justice Quarterly* 57 at 57 & 77-78.

[295] Dublin Law Reform Commission op cit n16 at 203-204.

[296] Dublin Law Reform Commission op cit n16 at 204-205.

[297] *R (Factortame & Others) v Secretary of State for Transport* [2002] EWCA Civ 932 (3 July 2002); A*rmchair Passenger Transport Ltd v Helical Bar PLC* [2003] EWHC 367 at para 65.

[298] [2002] EWCA 932.

such agreements are to be disclosed.[299] In South Africa, experts are not barred from entering a contingent fee arrangement and they have no duty to disclose such a fee agreement. In the criminal law generally, many experts who testify for the state, are in the employ of the state (such as in the Netherlands, governed by the Netherlands Institute or Pieter Baan Centre) or they are in the employ of an agency with which the National Prosecuting Authority has a well embedded collaborating relationship (such as in South Africa) and this situation can be construed as a conflict of interest. [300]

Some experts, especially those employed in personal injury litigation,[301] work on a contingency basis, where their fee is contingent on the success of the litigant (no-win-no-fee), or on the extent of the win.[302] Experts may even be paid a bonus on a successful outcome in addition to their normal fee.[303] A no-win-no-fee agreement between an expert and attorney undermines objectivity[304] and offends the rule that experts should not have an interest in the outcome of a case.[305] The expert's conflict of interest is stark in a no-win-no-fee scenario and more subtle where the expert is paid a large fee and where his/her future instructions will be dependent on their effectiveness.[306] Placing a bar on a fee arrangement, as discussed in this section, with an expert, may increase the costs of litigation as a litigant otherwise will have to pay the expert upfront and there is no proof that completely independent experts will be less biased.[307]

Grobler proposes that expert contingency fee arrangements, which raise the spectre of adversarial bias, should be held unethical conduct.[308] The New South Wales Law Reform

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[299] *Davis v Stena Line Ltd* [2005] EWHC 420 (QB) 20.

[300] Hodgkinson & James op cit n101 para at 10-015. L Meintjes-van der Walt *Expert Evidence in the Criminal Justice Process: A Comparative Study* (2001) 86.

[301] New South Wales Law Reform Commission op cit n13 at 146.

[302] *MT v RAF* supra n101 at para 36. In most USA negligence cases, payment for the attending physician is dependent on the outcome of the case, See Elliot & Spillman op cit n195 at 473; E Mock 'Medical testimony' (1938) 1 *American Journal of Medical Jurisprudence* 119 at 120.

[303] New South Wales Law Reform Commission op cit n13 at 143.

[304] Lerm op cit n101 at 36.

[305] *Field v Liverpool City Council* [1999] EWCA Civ 3013 (8 December 1999); *Liverpool Roman Catholic Archdiocesan Trustees Inc v Goldberg (No 3)* [2001] 1 WLR 2337.

[306] New South Wales Law Reform Commission op cit n13 at 143.

[307] Dublin Law Reform Commission op cit n16 at 228.

[308] Grobler op cit n8 at 12.

Commission suggest that a ban or contingent fee agreements may be difficult to enforce[309] and has suggested that contingent agreements be retained and that experts instead disclose their financial arrangements to the opposing side and the court, which would allow the court to reduce the weight attached to the opinion.[310] Further empirical research is necessary on the prevalence of such agreements and the impact they have on an expert's objectivity. The advantage of allowing contingency agreements is that it may provide access to the courts for indigent litigants. To this end, making contingent fee arrangements between experts and litigants unlawful or disadvantageous may lead to the failure of meritorious claims.[311]

In the United States of America, the rule that prohibits communication with the opponent's legal representatives compels experts[312] to exclusively assist their own instructing litigant and maintain confidentially without the expert having consented to this exclusivity arrangement.[313] Exclusivity and confidentiality have a role where experts interpret privileged information and are allowed where experts consent to such confidentiality and accept the brief on such terms.[314] In the United States of America, experts can be disqualified if they consult with a litigant who did not retain them and subsequently act for the opponent, once it objectively is established that a confidential relationship existed, and that confidential information was factually disclosed to the expert by the former litigant.[315]

In South Africa, the practice is that a litigant does not liaise with opposing experts, but there is no bar on this in the Rules of Court or in the Code of Conduct,[316] which govern the legal practice of interviewing a non-party witness. There is also not a rule that regulates the presentation of expert opinion that binds an expert exclusively to a particular party.[317]

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[309] New South Wales Law Reform Commission op cit n13 at 147.

[310] New South Wales Law Reform Commission op cit n13 at 148.

[311] New South Wales Law Reform Commission op cit n13 at 145.

[312] J Huber 'Note Healy v Counts: Discovering informally consulted experts under Federal Rule of civil procedure 26(b)(4)(B)' (1988) 33 *South Dakota Law Review* 340 at 347.

[313] Gross op cit n30 at 1150.

[314] *Doe v Eli Lilly & Co* 99 FRD 126 128 (DDC 1983).

[315] Richmond op cit n288 at 558.

[316] For all legal practitioners, see Government Gazette No 42364 of 29 March 2019.

[317] Murray op cit n42 at 102. See *Harmony Shipping v Davis* [1979] 3 All ER, at 177, where it was held: 'Neither one side nor the other can debar the court from ascertaining the truth, either by seeing a witness beforehand or by purchasing his evidence or by making communication to him. In no way can one side prohibit the other from

Freckelton proposes that experts sign a declaration, undertaking to be available for discussion with all parties.[318] This proposal is consistent with the practice in other jurisdictions, where it has been held that unless information is privileged, an adversary may inquire before trial, what a witness knows, provided such a witness is willing.[319] An expert, who is paid for expert services, ought not to be silenced by the litigant paying the expert.[320]

In South Africa, the legislature will do well to regulate the relationship, including the fee agreements, between experts and clients and/or experts and legal practitioners. The lucrative nature of medico-legal expert work and being paid and employed by legal practitioners is one of the main root causes of adversarial bias. Naturally, this must be considered against the backdrop that many South Africans are indigent and may rely on such agreements to access justice. Any party ought to have access to liaise freely with any expert unless the information held is privileged but this is revisited in section 8.13.

8.12 Expert fees regulation

The fees that experts may charge are not specifically regulated in South Africa, as is the case in the United States of America.[321] Experts may charge exorbitant fees.[322] Grobler proposes that experts must disclose their fees received for accepting work as a witness, which fees ought to be reasonable and commensurate with the time spent and effort in the work.[323] The Dublin Law Reform Commission proposes that a court can cap the expert's fees as can be done in England.[324] Expert fees ought to be so regulated, as the amount has a bearing on access to justice.[325]

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seeing a witness of fact, from getting the facts from him and from calling him to give evidence or from issuing him with a subpoena.'

[318] Freckleton, Reddy & Selby op cit n81 at 113-114.

[319] *Doe* supra n314.

[320] *IBM v Edelstein* 526 F2d 37 42 (2d Cir 1975); *Alston v Greater Southeast Community Hosp* 107 FRD 35 (DDC 1985); *Arctic Motor Freight v Stover* 571 P2d 1006 1009 (Alaska 1977); *State ex rel Stufflebam v Appelquist* 694 SW2d 882 (Mo Ct App 1985); *Lazorick v Brown* 480 A2d 223 226-230 (NJ Ct App 1984).

[321] Rule 26(b)(4)(*C*) of the Federal Rules of Civil Procedure.

[322] JA Mellowitz 'Whatever the market will bear: Fighting exorbitant expert fees with Rule 26(b)(4)(c)(i)' (1995) 38 *Res Gestae* 15 at 15.

[323] Grobler op cit n8 at 12.

[324] Civil Procedure Rule 35.4(4).

[325] *Anthony v Abbott Laboratories* 106 FRD 461 (DRI 1985) 465. This may be considered anti-competitive.

Regulating (but not prescribing) the fees may address some of the more prominent root causes of adversarial bias in South Africa.

8.13 Pre-trial discovery[326]

8.13.1 Introduction

Better pre-trial discovery has been proposed to ameliorate expert bias.[327] Discovery serves the purpose of:[328]

i. Ascertaining the truth and checking and preventing perjury and obfuscation.
ii. Effectively detecting and exposing false, fraudulent and sham claims and defenses.
iii. Simply, conveniently and inexpensively airing and presenting facts placed in the reach of a litigant that would otherwise not be in their reach.
iv. Educating the litigants of the real value of their claim/defence, thereby encouraging settlement.
v. Safeguarding against surprise and ambush.
vi. Narrowing the issues and facilitating preparation for trial.

A litigant's ability to challenge opposing expert opinion and the efficient and fair administration of justice is dependent on the quality of information available to parties.[329] Pre-trial disclosure can be a means of securing equality of arms, address resource imbalance and ensure adversarial control.[330] With sound discovery, the game/sporting and surprise elements are removed while retaining the adversarial nature of the trial.[331] When facts and information are aired and parties are not allowed to prepare in secret and secure evidence to which the opponent and the court are oblivious, the court will be more likely to reach a just decision.[332]

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[326] In England, the expert must disclose their written and oral instructions, see Civil Procedure Rule 35.10(3).

[327] Meintjes-van der Walt op cit n4 at 98; B Fitzpartick 'Disclosure: Principles, processes and politics' in C Walker & K Starmer (eds) *Miscarriages of Justice: A Review of Justice in Error* (1999) at 39.

[328] *Greyhound Corporation v Superior Court* 56 C2d 355 (1961) at 376. Meintjes-van der Walt op cit n33 at 119.

[329] Meintjes-van der Walt op cit n33 at 105; L Meintjes-van der Walt 'Expert evidence and the right to a fair trial: A comparative perspective' (2001) 17(3) *SAJHR* 301 at 313.

[330] L Meintjes-van der Walt 'Pre-trial disclosure of expert evidence: Lessons learned from abroad' (2000) 13(2) *SACJ* 145 at 156.

[331] *Greyhound* supra n328.

[332] AB Gordon 'A search for the truth: Does our system provide for it?' (1991) Oct *Consultus* 94 at 95.

In civil trials, discovery of tape recordings and documents relating to any matter in question, in terms of Uniform Rule 35,[333] ranks with cross examination as one of the most effective engines in the Anglo-American legal tradition, designed for exposing the truth.[334] It can be a devastating tool employed against an opponent,[335] which can secure information once pleadings have closed.[336] There are other means to solicit information.[337] In South Africa, however, the focus on discovery in fact finding is much less concentrated when compared to the practice in the United States of America and counsel are expected to cross examine a witness to solicit facts which could and should have been known,[338] making the system ill-suited for preparation and presentation of evidence.[339]

As a rule of thumb in the United States of America, any information that will lead the opponent to become aware of evidence ought to be discovered, irrespective if the holder of such information deems the evidence inadmissible at trial.[340] In depositions in the United States of America, litigants, in the context of admissible evidence,[341] may scrutinize an expert (with his/her own experts present) and in such a way prepare for cross examination at trial; here counsel is educated and equipped to cross examine more efficiently, as opposed to where preparation is premised purely on a report.[342]

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[333] Rule 35. For examples, see *Durbach v Fairway Hotel* 1949 (3) SA (SR) at 1083; *Independent Newspapers v Minister for Intelligence Services: In re Masethla v President of the RSA* 2008 (5) SA 31 (CC) at 41F; *Replication Technology Group v Gollo Africa* 2009 (5) SA 531 (GSJ) at 535.

[334] DE Van Loggerenberg & I Farlam *Superior Court Practice* (2012) at B1-250.

[335] Van Loggerenberg & Farlam op cit n334 at B1-250.

[336] *STT Sales v Fourie* 2010 (6) SA 272 (GSJ) at 276.

[337] Other means to secure further facts are, Uniform Rules 35(8), 35(9), 38(8), 35(10), 35(14) [discovery], 37 [pre-trial] and 21 [further particulars].

[338] Mutual knowledge of relevant facts, gathered by the parties, is crucial for proper litigation, see *Hickman v Taylor* (1946) 67 SC 385.

[339] Gordon op cit n332 at 94.

[340] US Federal Rule of Civil Procedure 26(b)(1).

[341] Federal Rules of Civil Procedure 32(*a*).

[342] Gordon op cit n332 at 98.

8.13.2 Discovering of correspondence and communication

Communication between lawyers and experts is essential for the comprehension of the functioning of both roles and thus the handling of a suit.[343] Problems which plague expert evidence is the lawyer's involvement in engaging or managing the experts and monitoring their reports and communication with experts, where attorney and client privilege applies.[344] If bias cannot be controlled, let it be exposed by a requirement that all communication (written and verbal) be disclosed between the attorney and the expert and that the content of everything considered in the opinion (including correspondence) be discovered, which may ease the grip which attorneys have on the system.[345] This is one way in which expert bias can be reduced.[346] In section 8.3, a suggestion was made for a code of conduct for legal practitioners. Considering that the purpose of a trial is to seek the truth[347] and that an expert's primary responsibility is to the court, it is important to amend the discovery rules in South Africa.

In Australia, instead of placing a duty on the lawyer to discover such communication with experts, the duty is on the experts to disclose, inter alia, all instructions (original and supplementary) received orally or in writing and a list of all documents experts were asked to consider[348] and, unless evidence to the contrary emerges, there is a presumption that communication between representatives and experts did not alter the substance of the expert opinion.[349] The Australian Judge Cooper submitted that once an expert is instructed by a litigant any communication between the client or his/her advisors and the expert no longer is subject to professional privilege.[350]

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[343] GP Joseph *Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure* (1996) at 44.

[344] Murray op cit n42 at 142.

[345] SD Easton 'Ammunition for the shoot-out with the hired gun's hired gun: A proposal for full expert witness disclosure' (2000) 32 *Arizona State Law Journal* 465 at 474. Also see *Universal Music* supra n102.

[346] Meintjes-van der Walt op cit n33 at 146.

[347] G Edmund & L Meintjes-van der Walt 'Blind justice, forensic science and the use of closed-circuit television images as identification evidence in South Africa' (2014) 131 *SALJ* 109 at 110.

[348] Meintjes-van der Walt op cit n1 at 28.

[349] *Traderight* supra n99 at para 23.

[350] RE Cooper 'Federal court expert usage guidelines' (1997) 16 *Australian Bar Review* 203 at 210.

8.13.3 Abolish the attorney-client-privilege rule in exchanges with experts

The discovery of exchanges between litigants and experts and the practitioners work product[351] may enhance reliability in the fact-finding process, by ensuring the expert will testify independently, rather than resorting to echoing partisan views, and guarding against subtle influence.[352] In South Africa, the work-product-doctrine is not part of the law (a doctrine wider than attorney-client-privilege), however a litigant is exempted from discovering statements solicited for purposes of the proceedings and communications between attorney and client and attorney[353] and advocate.[354] Privilege attracts the following opposing interests:[355]

i. The community interest in the developments and retention of relationships.
ii. The interests of justice which requires all evidence to be aired in court.

Attorney client privilege does not extend to other professional relationships,[356] such as doctor-patient relationships,[357] and it can be argued that it does not apply to experts, however professionals may rely on a 'just excuse' not to testify to privileged facts.[358] Communication

[351] In United States of America, law, work-product refers to materials prepared in expectation of litigation, and this is exempted from discovery, see CD Bell et al *A Guide to the Attorney-Client Privilege and Work Product Doctrine for Tax Practitioners* (2007) at 11.

[352] Richmond op cit n288 at 547.

[353] Attorney-client privilege applies where communication was made in a professional capacity, in confidence, to secure legal advice and must be relied upon, see *R v Fouche* 1953 (1) SA 440 (W) at 445-446; *Van den Heever v Die Meester* 1997 (3) SA 93 (T) at 98-100; *Mohamed v President of the RSA* 2001 (2) SA 1145 (C) at 1154; *Danzfuss v Additional Magistrate, Bloemfontein* 1981 (1) 115 (O) at 117; *Lane v Magistrate Wynberg* 1997 (2) SA 869 (C) at 885C; *S v Nkata* 1990 (4) SA 250 (A) at 256; *Bogoshi v Van Vuuren* 1996 (1) SA 785 (A) at 790-791; *Kommissaris van Binnelande Inkomste v Van den Heever* 1999 (3) SA 1051 (SCA) at 1057; *General Accident, Fire and Life Assurance Corporation v Goldberg* 1912 TPD 494; *Harksen v Attorney General* 1999 (1) SA 718 (C) at 729.

[354] Rule 35(2)(*c*).

[355] Schwikkard & Van der Merwe op cit n162 at 166.

[356] *Trust Sentrum v Zevenburg* 1989 (1) SA 145 (C) at 150.

[357] *Botha v Botha* 1972 (2) SA 559 (N) at 559-560; *Davis v Additional Magistrate, Johannesburg* 1989 (4) SA 299 (W) at 303-304.

[358] *S v Cornelissen; Cornelissen v Zeelie* 1994 (2) SACR 41 (W) at 53.

between a litigant and a professional can be deemed protected against disclosure, based on the constitutional provision of privacy,[359] subject to the limitation clause.[360]

Some documents and correspondence exchanged between experts[361] and legal representatives may be protected by legal privilege, which may be withheld from discovery, but it is a rule that exacerbates the problem of party-commissioned experts.[362] Murray recommends that professional- and attorney-client privilege in exchanges with experts should be abolished.[363] So does Lord Woolf in his interim report, holding that once an expert is engaged, the communication between the expert and legal practitioners ought no longer to be subject to legal privilege[364] so that the suppression of relevant opinions is prevented.[365] Lord Woolf, after an outcry against his interim report which recommended expert opinion become admissible only when annexing all the instructions and notes of all oral instructions to the report, amended his report and instead held that privilege should not apply when experts are appointed.[366]

As for the argument that expert privilege is essential, as experts may err and need to be corrected by legal practitioners, Murray suggests that any contention relating to incorrect reports may be resolved by arguing before court that an incorrect opinion is not relevant:[367] If an expert is corrected for a bona fide error, there can be no rational objection or prejudice to discovering exchanges regarding the correction of the mistake.

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[359] Section 14 of the Constitution; Schwikkard & Van der Merwe op cit n162 at 167.

[360] The Constitution, s36.

[361] These include documents and correspondence, sent by legal practitioners and the litigant, to experts and vice versa, subject to professional privilege.

[362] Murray op cit n42 at 13.

[363] Murray op cit n42 at 174.

[364] H Woolf *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995) at 192.

[365] H Woolf *Access to Justice- Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996) at 144.

[366] Woolf op cit n365 at 145. Arguments for retention of the status quo, include: (i) Lawyers ought to be free to correct factual misconceptions, in a draft expert report. (ii) It wastes a great deal of time and (iii) It can be overcome by avoiding written communication. These are practical and not structural objections, see Murray op cit n42 183.

[367] Murray op cit n42 at 185.

8.13.4 Discovery of experts consulted

Litigants not only select experts to employ among a large pool of experts, additionally, they can choose which of the selected experts' opinions to use (or reject) before trial, whereas the court and the opponent remain oblivious to which experts are consulted.[368] A litigant also may choose not to call an expert for a strategic or practical reason.[369] Various experts, whose opinion is sought, need not even know about the opinions of their colleagues, working for the same litigant.[370]

In an Australian case, *Succar v Bankstown City Council,*[371] the court held that 'a party who engages in "expert witness shopping" in order to obtain the services of a witness willing to provide evidence favourable only to that party, risks compromising the impartiality of that expert evidence.' The paradigm of expert exceptionalism (or expert shopping/parking) is notoriously difficult to identify in the absence of a duty to discover their identity, because of professional and legal privilege where communication between experts and the litigant is not discoverable in most instances, unless exceptional circumstances exist.[372] Courts do not have a way of knowing which experts were engaged by a litigant, and where a litigant solicits an expert written opinion and then does not serve the report on the opposing litigant, the opponent is oblivious to this fact.[373]

Expert exceptionalism traverses a fine line in general, as litigants have a right to appoint a second expert and obtain a second opinion where the first may not be favorable, a practice which is not unethical per se.[374] In England, some jurisdictions have introduced measures to

[368] Gross op cit n30 at 1143; TV Harris 'A practitioner's guide to the management and use of expert witnesses in Washington civil litigation' (1979) 3 *University of Puget Sound Law Review* 159 at 164.

[369] J Vuille 'Admissibility and appraisal of scientific evidence in continental European criminal justice system: Past, present and future' (2013) 45(4) *Australian Journal of Forensic Science* 389 at 389.

[370] See Gross' reference to DR Suplee & MS Woodruff 'The pre-trial use of experts' (1987) *Practical Law* 11 op cit n30 at fn 90 and to PI Ostroff 'Experts: A few fundamentals'(1982) Winter *Litigation* 9 at fn 78.

[371] [2012] NSWLEC 157.

[372] Murray op cit n42 at 142.

[373] Murray op cit n42 at 161.

[374] Expert opinion may lack reasoning so that the opinion cannot be accepted. In *Beck v Ministry of Defence* [2005] 1 WLR 2206, the court allowed the litigant, who lost confidence in the first expert, to appoint a second expert, provided that the first report be discovered, to avoid expert shopping and an abuse of the court process.

prevent expert shopping, such as the Pre-Action Protocol for Personal Injury Claims,[375] where litigants must furnish their opponents with a list of names of experts whom they consider suitable to be appointed before such an appointment.[376]

8.13.5 Discovery of the expert report

It is essential that effective procedures are in place, to facilitate the exchange of expert opinion before trial, to enhance proper trial preparation.[377] Expert opinions are discovered in terms of the Rules of court, and often there are objections when an expert testifies to facts not part of the expert summary submitted during the pre-trial stage.[378]

In *Kincaid v Aer Lingus Teoranta*,[379] the court, applying the Irish rules of court,[380] held that only expert opinions which were to be used at court need to be discovered.[381] However, in the Irish case of *Payne v Shovlin*,[382] the court was asked to compel a litigant to disclose a preliminary report. The court held that the argument that the expert's opinion developed since the initial preliminary opinion holds no water and that once the opinion forms part of the substance of the evidence it must be discovered as this is in the interest of expeditiousness and efficiency.[383]

The New South Wales Law Reform Commission unfortunately rejected the proposal that all expert opinion solicited, including that which will not be tendered at trial, ought to be

[375] https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_pic, accessed 7 February 2021.

[376] Murray op cit n42 at 162. In *Ricky-Edwards-Tubb v JD Wetherspoon* PLC [2011] EWCA Civ 136, at para 28, it was held that 'once a party has embarked on the … selection of experts, there seems to me no justification for not disclosing a report obtained from an expert who has been put forward by that party as suitable for the case' and 'maximise the information available to the court and to discourage expert shopping'.

[377] CM Van Heerden 'Perspectives on the procedure for pre-trial exchange of expert evidence' (2006) 39 *De Jure* 555 at 558 & 560.

[378] *Hall v Multilateral Motor Vehicle Fund* 1998 (4) SA 195 (C) at 199.

[379] [2003] IESC 31 (9 May 2003).

[380] Rules of the Superior Courts (Disclosure of Reports and Statements) 1998 (SI No 391 of 1998), Rule 45(2), requires parties to exchange, within one month of the service of the notice of trial or other such time agreed by the court or the parties, the information and statements referred to in section 45(1)(*a*)(*iii*), (*iv*) and (*v*) of the Courts and Court Officers Act 1995.

[381] [2003] IESC 31 (9 May 2003).

[382] *Payne v Shovlin* [2006] IESC 5 (9 February 2006).

[383] [2006] IESC 5 (9 February 2006).

discovered.[384] The commission did not accept the argument that transparency would be enhanced and instead concluded that litigation may be prolonged, as some reports might be based on fundamental errors or a misunderstanding of instructions or a witness may become unavailable.[385]

In South Africa, Rule 36(9)(*a*) and (*b*) was amended and expert opinions must now be filed early in the litigation stage. As discussed in section 4.7, this amendment assists in curbing expert bias but is still widely open to abuse. Litigants may wait until the last minute to initiate litigation and use the pre-litigation stage to solicit and search and buy or park expert witnesses. Leave can be secured from the court and opposing litigants to file expert reports later than the prescribed time or condonation can be sought from the court for late filing. The amendment does not close the door to a litigant securing alternative opinions and does not compel discovery of the names of all experts consulted or the reports solicited. The Rules Board missed an opportunity to make it compulsory for a litigant to have a greater responsibility in discovery of information pertaining to experts.[386]

8.13.6 Conclusion- Pre-trial discovery

Despite the adversarial system allowing parties to rely on evidence which can advance their position, employing experts to favour a case is a practice that offends the interest of justice and disregards the following evidentiary concerns:[387]

i. Patent false and uncredible evidence undermines the adversary system.[388]
ii. Experts are not advocates and instead should be an advocate of the truth and allow judgement ultimately to be made on the facts.[389]
iii. Expert witnesses can be a powerful aid and at the same time can be misleading.[390]

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[384] New South Wales Law Reform Commission op cit n13 at 86-87.

[385] New South Wales Law Reform Commission op cit n13 at 87.

[386] See section 4.7.

[387] Ibid.

[388] *Johnston v United States* 597 F Supp 374 at 410-415.

[389] *Selvidge v United States* 160 FRD 153.

[390] Richmond op cit n288 at 487.

At the dictate of fairness and reliability[391] and the interest of justice further and full pre-trial disclosure is important, as Justice Traynor held, the truth is most likely to emerge when each side seeks to take the other by reason rather than by surprise.[392]

It is proposed that in South Africa the identities of experts consulted and retained should be disclosed to the opposing party, irrespective whether such experts will testify at trial. If an opinion is not favourable, that opinion must come to the attention of all the parties and the court to truly ventilate the issues in dispute between the parties, but Meintjes-van der Walt correctly submits that complete discovery cannot eliminate partisanship which is endemic to adversarial proceedings.[393]

8.14 Experts to spend limited time in court

The Dublin Law Reform Commission has suggested in order to avoid an unhealthy affiliation that an expert's time in court be restricted and to confine the expert's appearance to what is necessary to give evidence.[394] This is an ill-considered suggestion and should be rejected in the context of South Africa; experts should attend court to assist the lawyers with sound cross examination and to listen to the factual evidence given in open court as to incorporate the collateral facts into their expert opinion.

8.15 Expert's access to information and the court

Litigants ought to assist the court by placing all the material facts before the court, even if this may damage a client's case.[395] For an expert to provide an opinion, the expert must understand the relevant issues in the case,[396] which mainly comes from the litigant's instructing them, by submitting a variety of documents to the expert.[397] Experts on opposing sides may not have equal access to information and supporting documentation and giving experts access to these

[391] L Meintjes-van der Walt op cit n1 at 32.

[392] RJ Traynor 'Ground lost and found in criminal discovery' (1964) 39 *New York University Law Review* 228 at 249.

[393] Meintjes-van der Walt op cit n33 at 166.

[394] Dublin Law Reform Commission op cit n16 at 228.

[395] Meintjes-van der Walt op cit n1 at 31.

[396] ME Plunkett 'Comment, discoverability of attorney work product reviewed by expert witnesses: Have the 1993 revisions to the Federal Rules of Civil Procedure changed anything?' (1996) 69 *Temple Law Review* 451 at 451.

[397] Richmond op cit n288 at 543.

documents will enhance an equality of means.[398] A communication line between the expert and the court will allow experts to seek assistance and guidance from the court.[399]

This proposal ought to be employed in the South African context. It often occurs that experts form different opinions because they do not have access to the same facts and/or documents. This suggestion will address the problem that legal practitioners provide the expert with limited information to manipulate the expert's opinion, such as withholding adverse facts from the expert.

8.16 Conclusion

This chapter contains numerous proposals to eradicate expert bias. Of all the proposals peer review and pre-trial discovery are particularly meritorious in the context of eliminating bias. The code of ethics for experts and legal practitioners, guidelines on expert opinion, ensuring a large pool of experts and access to information are also worthy of implementation in South Africa, a developing country with a strong adversarial legal system. Expert accreditation will place a burden on courts and is too cumbersome for implementation, the rules against a conflict of interest and fee regulation will work less effectively in South Africa where indigent litigants rely on contingent arrangement to enjoy access to courts, criminal and civil prosecutions will deter experts and are not proven to be effective, and education of key role players will serve little purpose. If one considers that the endeavours to eliminate expert bias largely have been unsuccessful and the paradoxes that surround admitting and evaluating expert opinion, then clearly a different solution must be considered for reforming the law of expert evidence.

[398] Dublin Law Reform Commission op cit 16 at 257.

[399] As is possible in England, see Civil Procedure Rule 35.14.

CHAPTER 9

CONCLUSION AND PROPOSALS FOR LAW REFORM

9.1 Introduction

Expert evidence is a weak, yet indispensable, feature of the adversarial system[1] and, despite being the constant subject of proposed law reform, not much reform has occurred.[2] The question as how to deal with expert evidence is described as so intricate and having so many viciously circular problems as to strangle speech[3] and has been compared to the Churchillian refrain on democracy: it is the worst of all approaches, except for all other approaches.[4]

The question of how to approach expert opinion evidence was considered in the preceding chapters five to eight. Chapter two dealt with the legal history and how it came about that the form of expert witness was superimposed on the model of lay witnesses and they participate in the fact-finding process as a mere witness. Chapter three dealt with the definition and characteristics of adversarial expert bias and establishes that adversarial bias is a problem in South African jurisprudence which ought to be resolved. Chapter four sets out the South African law on expert opinion evidence. Chapters five to eight encapsulate methods of responding to adversarial expert bias, reporting on advantages and disadvantages.

Finding a competent response to the adversarial bias problem is no easy task and all the proposed responses have advantages and disadvantages. The question is this: Which response produces the least problematic outcome. Some of the above proposals can be implemented (individually or in combination) easily, whereas others require more stringent action, such as legislative amendments. Not all responses to adversarial bias are compatible with the South

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[1] CT McCormick *Handbook of the Law of Evidence* (1954) at §17 34-38; M Ladd 'Expert testimony' (1952) 5 *Vanderbilt Law Review* 414 at 416; JB Weinstein 'Improving expert testimony' (1986) 20 *University of Richmond Law Review* 473 at 475; E Washburn 'Testimony of experts' (1866) 1 *American Law Review* 45 at 60.

[2] SR Gross 'Expert evidence' (1991) 6 *Wisconsin Law Review* 1113 at 1116. By 1901, two renowned authors had written about expert bias, see W Foster 'Expert testimony: Prevalent complaints and proposed remedies' (1897) 11(3) *Harvard Law Review* 169-186, argues for the retention of party-appointed experts, whereas L Hand 'Historical and practical considerations regarding expert testimony' (1901) 15(1) *Harvard Law Review* 40-58, argues in favour of abolition.

[3] B Barnes & D Edge (eds) *Science in Context* (1982) at 33.

[4] AS Murray *Expert Evidence and the Problem of Privilege* (unpublished PhD thesis, The University of Sydney, 2018) at 141.

African legal,[5] social, political and economic milieu. Even if a specific response is tweaked to be more adapted to South African circumstances, many of these methods are better-suited to the situation in wealthier countries or where there is equality of arms among litigants. [6] In common law countries, historically, the adversarial system has been considered the fittest tool for ascertaining the truth, as discussed in section 3.5, and this system holds an honoured position in the minds of lawyers.[7] Legal culture,[8] which is a source of law and which determines the practice of legal norms in society,[9] can be resistant to change[10] irrespective how rational is the proposed change.[11]

For it to be viable, a proposal for law reform in South Africa should endeavour to retain these adversarial benefits. The chief differences between the adversarial and inquisitorial systems are discussed in section 3.5. For common law adversarial systems to change to an inquisitorial model probably is unacceptable[12] and is unlikely.[13] This response is also the case in South Africa.[14] In privatizing the investigation of civil matters and limiting the power of both the state and the court, the adversarial system achieves its most significant political goal.[15]

Owing to the role that culture plays and the positive attitude to the existing adversarial way of introducing expert opinion, as well as a deeply embedded and well- established culture

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[5] L Meintjes-van der Walt Expert *Evidence in the Criminal Justice Process: A Comparative Perspective* (2001) at 48.

[6] B Swart 'The European Convention as an invigorator of domestic law in the Netherlands' (1999) 1 *Journal of Law and Society* 38 at 42; EK Banakas 'The method of comparative law and the question of legal culture today' (1994) 3(2) *Tilburg Foreign Law Review* 113 at 119-124.

[7] LS Kubie 'The Ruby case: Who or what was on trial?' (1973) 1 *Journal of Psychiatry and Law* 475 at 477.

[8] Defined as the ideas, values, attitudes and opinions held by society about law and the legal system, see LM Friedman 'Is there a modern legal culture?' (1994) 7(2) *Ratio Juris* 117 at 118.

[9] Banakas op cit n6 at 119-124.

[10] P Alldridge 'Scientific expertise and comparative criminal procedure' (1999) 3(3) *The International Journal of Evidence and Proof* 141 at 144.

[11] Gross op cit n2 at 1113.

[12] Swart op cit n6; Kubie op cit n7 at 478.

[13] L Meintjes-van der Walt 'Experts testifying in matters of child abuse: The need for a code of ethics' (2002) 3(2) *Child Abuse & Research in South Africa* 24 at 31; HK Woolf *Access to Justice: Final report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996) at 186.

[14] Meintjes-van der Walt op cit n5 at 146.

[15] SR Gross 'The American advantage: The value of inefficient litigation' (1987) 85 *Michigan Law Review* 734 at 744-745.

of adversarial expert bias, cosmetic and superficial adjustment of court rules and procedures is insufficient in addressing the problems associated with adversarial bias. There is a need for significant structural changes to end old habits.[16]

In considering law reform important variables must be considered, such as wealth disparity in South Africa.[17] To deal with this significant reality, answers must be found to the question how the truth is best solicited,[18] how the inflation of claims and the purchasing of verdicts are best avoided and, specifically in the South African context, how to satisfy the duty of courts to act as stewards of state resources in litigation.[19] The state itself is a significant litigant and the practice of expert bias and the inflation of claims has an adverse influence on the burden of the taxpayer. Another important consideration in designing a better model,[20] is the dilemma of mutually conflicting opinions that confronts the courts when they make findings on questions that require expert knowledge of how fact finders arrive at complex conclusions.

Any proposal for law reform must address eliminating the root causes of expert bias (set out in section 3.3), as well as ameliorating the difficult situation which confronts courts faced with assessing conflicting complex evidence (set out in section 3.7). Expert opinion, which by the nature of its complexity and controversy, facilitates and allows to manifest partisanship and bias, means it is an untenable position to expect the courts to adjudicate. Most of the authors responding to the problem of adversarial bias, speak only to the root causes of

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[16] S Feola & RA Alcorn 'Expert witness advocacy: Changing its culture' (2009) 45(7) *Arizona Attorney* 24 at 26.

[17] *Soobramoney v Minister of Health* 1998 (1) SA 765 (CC) at para 8; South African Law Reform Commission Issue Paper 36 (Project 142) *Investigation into Legal Fees* (2019) at 6. Meintjes-van der Walt, op cit n5 at 106, submits that the theory of the adversary system is premised on the resources of the litigants being on an equal footing. Also see E Tratschlet 'The cost aspect of medical expert witnesses and the possible introduction of a medical expert witness panel in South Africa' (2018) 12 *Pretoria Student Law Review* 222 at 225, who considers poverty and unemployment in South Africa.

[18] P Fennell, C Harding, N Jörg & B Swart *Criminal Justice in Europe: A Comparative Study* (1995) at 42; R Verkerk 'Comparative aspects of expert evidence in civil litigation' (2009) 13 *International Journal on Evidence and Proof* 167 at 168-169.

[19] FHH Kehrhahn 'MT v Road Accident Fund; HM v Road Accident Fund [2021] 1 ALL SA 285 (GJ): Adverse findings against experts and legal practitioners without evidence or a hearing' (2021) 54 *De Jure* 265 at 265; *Ex parte le Grange* 2013 (6) SA 28 (ECG) at para 47; *Buffalo City Metropolitan Municipality v Asla Construction* 2019 (4) SA 331 (CC) at para 37; *PM obo TM v RAF* 2019 (5) SA 407 (SCA) at para 33.

[20] O Perez 'Judicial strategies for reviewing conflicting expert evidence: Biases, heuristics and higher-order evidence' (2016) 64(1) *American Journal of Comparative Law* 75 at 80.

bias in expert evidence and address a limited range of causes. Hardly ever is the focus specifically on the court's inability to detect bias and to assess complex evidence.

9.2 The way forward?

The existing adversarial system of using experts is viewed as contentious, as has been set out in the preceding chapters.[21] The adversarial notion in terms of which expert witnesses identify with the parties who appoint them is seen as contradicting in the first place a rationale for experts to be being called.[22] The problems associated with bias in expert evidence are the same today as they were in 1783 despite the system having been a bone of contention.[23] The problem of selection bias in the dealings of a neutral court makes it incumbent on the legal system to reject the entertainment of a gladiatorial combat among party-appointed experts[24] The party appointment of experts exerts a distortive value whereby the courts resort to employing a suboptimal heuristics (discussed in section 2.7) in an effort to resolve a dilemma, but which undermines evidentiary credibility in the context of an adversarial regime and will nullify any epistemic and deliberative advantage that may be linked to the proverbial battle of the experts.[25]

The goals in the adversarial system are truth (factual rectitude), fairness and efficiency.[26] In light of these goals, if the courts are not competent to assess expert evidence, then to get to the truth[27] it seems the courts cannot continue to find on the facts presented in

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[21] JH Wigmore, in *A Treatise on the System of Evidence in Trials at Common Law* (1923), at § 563, described it as a failure.

[22] Meintjes-van der Walt op cit n5 at 138; Meintjes-van der Walt op cit n13 at 25.

[23] P Roberts 'Science in the criminal justice process' (1994) 14(4) *Oxford Journal of Legal Studies* 469 at 501; C Krafka, MA Dunn, MT Johnson & JS Cecil 'Judge and attorney experiences, practices and concerns regarding expert testimony in Federal Civil Trials' (2002) 8(3) *Psychology, Public Policy and Law* 309 at 310-311; EK Cheng 'Same old, same old: Scientific evidence past and present' (2005-2006) 104 *Michigan Law Review* 1387 at 1392.

[24] New South Wales Law Reform Commission, Report 109, *Expert Evidence* (2005) at 74.

[25] Perez op cit n20 at 107. In *PWC v National Potato Co-Operative* 2004 (6) SA 66 (SCA), at para 45, the court held that the South African legal system is strong enough to withstand abuse among legal practitioners and their clients and rejected the notion that dishonest practitioners and clients are best placed to manipulate the facts to favour the desired outcome.

[26] G Edmund & L Meintjes-van der Walt 'Blind justice, forensic science and the use of closed-circuit television images as identification evidence in South Africa' (2014) 131 *SALJ* 109 at 110; LW Miller 'Cross-examination of expert witnesses: Dispelling the aura of reliability?' (1988) 42(4) *University of Miami Law Review* 1073 at 1098-1099; Meintjes-van der Walt op cit n5 at 189.

[27] Hand op cit n2 at 55.

expert evidence.[28] The court is ignorant if the expert's opinion is influenced by cognitive bias, is a genuinely-held view or is because there is an affiliation between the expert and a litigant.[29] The validity of the general laws upon which the propositions of experts are based can be tested and understood only with a specialized knowledge and skills gained by extensive reading and practical experience. These facts make of the court an incompetent tribunal as a fact finder. The court, presented with conflicting evidence, is as badly off as if it were without the expert's witness and justice is denied the use of knowledge of a scientific nature.[30]

Chapter six, section 6.3.5, proposes a multi-disciplinary administrative referee system, the expert tribunal. Here facts of an expert nature are finally and conclusively found extra-judicially by a multi-disciplinary expert tribunal and the findings are subject only to an appeal to an administrative expert appeal tribunal. This proposal entails the litigants appear before the court and identify the expert disciplines they require to adjudicate the dispute and which are the questions to be put to the experts (much in the way questions are put to a jury to answer) to resolve the dispute between the parties.

The court then refers the expert questions to a multi-discipline expert tribunal (to be created by an act of parliament), in which experts in the discipline must adjudicate and find on the facts of an expert nature, returning their answers to the court in the form of a written expert opinion or report.

Unlike the circumstances conventional to referee referrals, the court's jurisdiction on finding facts of an expert nature is ousted (other than in a potential review application in the normal course). The findings, for example of a medical tribunal, would be final and binding on the court, that will rely on the tribunal's findings in addition to other facts which the court found in the normal course of its proceedings to pronounce on the dispute between the parties. This proposal is compatible with the obligation on government to promote the resolution of disputes through legal means that prioritize the protection of the indigent and disenfranchised.

Under this proposal an expert tribunal brings an epistemological approach to fact finding that is divorced from partisan motivation. It makes it less necessary to employ a

[28] Hand op cit n2 at 54.

[29] G Loewenstein, CR Sunstein & R Golman 'Disclosure: Psychology changes everything' (2014) 6 *Annual Review of Economics* 391 at 402; DE Newman-Toker & MA Makary 'Measuring diagnostic errors in primary care: The first step on a path forward' (2013) 173(6) *Jama Internal Medicine* 425 at 426.

[30] Hand op cit n2 at 55-56.

heuristic in which psychological and institutional factors[31] generate rulings that are misaligned with the goals of the law.[32] The contention that expert witnesses usurp the function of the court is negated. The adversarial element in litigation is retained, sustaining the system's highly effective and competent attributes. Litigants are free to appoint any expert of their choice,[33] who can prepare an expert report to be submitted to the expert tribunal.[34] This proposal does not offend against the adversarial system in which the truth is expected to emerge from a clash between adversaries.[35] It does not preclude other proposals which encourage independence and impartiality in expert witnesses,[36] such as regulation of the expert and legal professions. Because the parties are allowed to appoint experts of their choice, many features of the other suggestions made in chapters five to eight (especially chapter eight) retain their usefulness and add value to the proposed system.

Under the proposal the problem of inflated claims will be a thing of the past and will eliminate the iniquity of purchasing verdicts. Many of the disadvantages identified in more mainstream proposals to curb expert bias are ameliorated by the introduction of an administrative expert tribunal will eliminate the root-cause of adversarial bias.

A serious criticism of the proposal of an expert tribunal, with the additional luxury of an appeal tribunal, is the cost. Although the legislature could introduce a system where the parties pay the costs of the tribunal, as costed in the course of the action, that approach retains characteristics of selection bias; best that, initially, the system is funded by the state and is recouped by the court's cost order. The question of funding and other proverbial nuts and bolts

[31] This includes cognitive constraints, a method of dealing with the commissioning bias that questions the inherent credibility of experts, and caseload pressure.

[32] Perez op cit n20 at 107.

[33] An important aspect of fairness is the *audi alteram partem* rule, see *De Beer v North-Central Local Councils and South Central Local Council* 2002 (1) SA 429 (CC) at para 11.

[34] M Malsch & I Freckleton 'Expert bias and partisanship: A comparison between Australia and the Netherlands' (2005) 11(1) *Psychology, Public Policy and the Law* 42, at 43, propose that a too inquisitorial or too adversarial system creates difficulties; the solution would be to negate the negative consequences of one system by introducing elements of the other.

[35] I Freckleton 'Wizards in the crucible: Making the boffins accountable' in JF Nijboer & JM Reijntjes (eds) *Proceedings of the First World Conference on New Trends on Criminal Investigation and Evidence* (1997) at 55.

[36] Malsch & I Freckleton op cit n34 at 43.

will need further research and is beyond the scope of this work. It is best that this work should be left to a body such as the South African Law Reform Commission or the legislature.

The proposed expert tribunal and appeal tribunal must be fair and impartial[37] and must be transparent, it must reach its decisions publicly.[38] The related attributes of independence and impartiality are fundamental to the public having confidence in the administration of justice;[39] the tribunal must be seen to be independent and impartial.[40] Individual and structural independence are qualities that are desirable in their own right, but also they promote public faith in the impartiality of a tribunal.[41] The right to procedural fairness is a well- developed feature in administrative actions and through the detailed rules of fairness established by the Promotion of Administrative Justice Act.[42]

An expert tribunal requires legislative amendments and in the interim other valuable responses that have been advanced as means to curb expert bias, individually or in combination, can be employed. A full evaluation of various proposals is made in chapter's five to eight. If these proposals were employed in combination, court experts, blind expert appointment, pre-trial conferring, better regulation as set out in chapter eight, as well as hot tubbing, they would be a viable option to curbing expert bias. The forms of regulation discussed in chapter eight, peer review, better pre-trial discovery, a code of ethics for experts and legal practitioners, the declaration, contribute to the reduction of expert bias and are practical to implement. On the other hand, expert accreditation, training of experts and legal practitioners and guidelines on expert reporting, ensuring experts spend less time in court, are viewed as impractical and are incompatible responses to expert bias. the judgement made is on the basis of which of the

[37] 'Impartiality' refers to a state of mind or attitude, in the case of a tribunal that state is in relation to the issues and to the parties appearing before it and connotes the absence of bias, see I Currie & J De Waal *The Bill of Rights Handbook* (2005) at 724.

[38] Currie & De Waal op cit n37 at 723.

[39] Currie & De Waal op cit n37 at 724.

[40] Page 724. *Van Rooyen v S (General Council of the Bar of South Africa intervening)* 2002 (5) SA 246 (CC) at para 33, citing *R v Généreux* (1992) DLR (4th) 110. In *Financial Services Board v Pepkor Pension Fund* 1999 (1) SA 167 (C), at 175, the court held 'the test for [institutional bias is whether] a fully informed person would harbour a reasonable apprehension of bias in a substantial number of cases'.

[41] Currie & De Waal op cit n37 at 724 fn 101.

[42] Currie & De Waal op cit n37 at 734.

proposals have the greatest potential to address the root causes of expert bias and are the best fit given the social, economic and political climate in South Africa.

Although meritorious, the proposals do not address the issue that the court remains the trier of fact and is ill equipped to find on facts of an expert nature. Many contemporary authors neglect this issue in writing about adversarial expert bias.

Other proposals to curb bias, such as a single expert, hot-tubbing and expert assessors, are evaluated favorably, but in the political, social, legal and economic climate in South Africa they are not expected to gain traction.

9.3 Conclusion

The recommendation is that the legislature needs to attend to the pressing problem of adversarial selection bias. Expert evidence has been shown to be both powerful and misleading as a result of the difficulties associated with its evaluation.[43] That is a great[44] and necessary[45] endeavour, which is a significant factor in modern litigation.[46] The role of experts is as great as that of legal practitioners in shaping, organizing and evaluating a client's case.[47] The pragmatic approach in relation to expert testimony is that it is ethical on the part of lawyers to do everything they can to advance their client's case, but the approach is oblivious to the primary judicial task (and to the associative difficulties) of fact finding and overlooks the broader evidentiary issues described in this work.[48] An expert opinion which lacks credibility undermines the integrity of the adversarial system.[49] The present situation facilitates the inflation of claims and shapes and manipulates judgements. These circumstances have an adverse effect on the interests of the indigent and organ-of-state litigants. The need for law reform is obvious and urgent. If the current system prevails, it will have a damaging effect on

[43] JB Weinstein 'Rule 702 of the Federal Rules of Evidence is sound: It should not be amended' (1991) 138 *FRD* 631 at 632.

[44] KJ Cook 'Reviving the dying spirit of Rule 704: Putting the legal conclusion doctrine to rest' (1995) 62 *Defendant's Counsel Journal* 564 at 564.

[45] *R v Abbey* [2009] ONCA 624 (CANL II); E Bell 'Judicial assessment of expert evidence' (2010) 2 *Judicial Studies Institute Journal* 55 at 96.

[46] DR Richmond 'Regulating expert testimony' (1997) 62(3) *Missouri Law Review* 485 at 486.

[47] *Murphy v AA Mathews* 841 SW 2d 671 at 682.

[48] Richmond op cit n46 at 486.

[49] *Johnston v United States* 597 F Supp 374 at 410-415.

the civil justice system and undermine the doctrines of proportionality[50] and access to justice.[51] As Lawton says:[52]

> 'In the lush pastures of the common law a number of sacred cows graze and no-one dares to cull them or even try to make them healthier. One answers to the name of "expert evidence" … It is a scraggy animal, despised by many, yet its continued existence is essential for the proper administration of justice. Properly cared for it could provide good progeny but the breeding would have to be selective as some strains may not be worth encouraging'.

[50] Proportionality safeguards the individual and entails maintaining a balance between competing interests and the objectives of the state and individuals, where appropriate 'means' are employed to achieve the 'ends'. These 'means' are those suitable, necessary and proportional and a valued gain to the community, see G Barrie 'The application of the doctrine of proportionality in South African courts' (2013) 28(1) *Southern African Public Law* 40 at 40-41.

[51] HK Woolf *Access to Justice (Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995) at 181; Woolf op cit n13 at 137.

[52] LJ Lawton 'The limitations of expert scientific evidence' (1980) 20 *Journal of Forensic Sciences* 237 at 237.

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