COURT APPOINTED EXPERTS

THE HON G L DAVIES AO, QC*

I INTRODUCTION

If we were to start afresh to design a system for the resolution of questions involving expertise, we would probably start with the idea that an expert, or a panel of experts, should decide such questions. If someone were to suggest to us, as a possible system, one in which a person who had no expertise would decide such questions after hearing competing arguments from opposing experts, we would dismiss it as bizarre.

But of course we are not starting afresh. We are starting with the system I last described. And the reason for that is that we have a "one size fits all" adversarial system; a system which assumes that the best way to resolve all questions is by evidence and strong argument on both sides before an independent arbiter, a judge or a jury, who will then decide them.

Whether that is the best way to resolve disputes generally may be seriously doubted. It is plainly not the best way to resolve questions involving expertise. There are several reasons for this.

In the first place, the adversarial system tends to cause such questions to be presented to a court as a clear dichotomy between opposing views; whereas many such questions, including scientific ones, do not admit of resolution in that way. This polarization of opinions which the adversarial system causes, may result in distortion of both the real question and the real answer. That distortion is then exacerbated by adversarial bias, an almost inevitable consequence of evidence given in an adversarial context.

Secondly, the independent arbiter, the judge or jury, may not even understand the question. There is an increasing number of questions which arise in litigation, mostly of a scientific nature, the understanding of which, at least without considerable assistance, is beyond the capacity of most judges. An adversarial presentation of such questions by experts is likely to increase the risk of misunderstanding by judge or jury.

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* Former Justice of Appeal (1991-2005), Court of Appeal, Supreme Court of Queensland. This paper is based upon a public lecture delivered on 13 April 2005 as part of the Trilby Misso Public Lecture Series, presented by the Faculty of Law, Queensland University of Technology. An earlier version of this lecture was delivered at the Annual Supreme and Federal Court Judges' Conference, Auckland, New Zealand, 29 January 2004 and published at 23 CJQ (October 2004) 367.

And thirdly, an adversarial battle of the experts, with cross-examination on both sides by barristers who, like the judge, may know little or nothing of the subject, takes substantial time and comes at a substantial cost for what is, in the end, an unsatisfactory result. A comparison of a system such as this with the one I posited at the outset shows that.

These consequences of the application of our adversarial system to the resolution of questions involving expertise are problems upon which I need to expand a little. I then propose to say something about reforms made so far and the extent to which they have helped to resolve those problems. And then I want to tell you something about the new Queensland Rules and why I think that they, unlike their predecessors, will best resolve those problems. I do not propose to touch on what is expert evidence and where its boundaries lie. But the problems which I discuss and their solution are, it seems to me, central to the just resolution of disputes involving questions of expertise.

II THE PROBLEMS

A *Polarization and Adversarial Bias*

The adversarial imperative, by which I mean no more than the strong urge of a client and his or her lawyer to win, requires the lawyer to "sell" that client's version of the truth to the judge or jury. This includes expert "truths" and it is the expert on whom the client and lawyer rely to sell their version of the expert "truth" to the jury. The question which the expert is asked by the client's lawyer is not "what is your opinion on this question?" but, in the first place, "can you give me an opinion which will prove my 'truth'?" and then "how can you express your opinion in a way which will best prove my 'truth'?". That is not what is said. It is usually a good deal more subtle than that. But that is what is implicit in what is said. And the expert is not engaged unless he or she answers the first of those questions in the affirmative.

This gives rise to two related problems. The first is polarization of opinions on questions involving expertise. And the second is adversarial bias. The second is part of the first but I need to say something about it separately.

Many questions involving expertise, including scientific ones, do not admit of an unequivocal answer, let alone one which necessarily favours one side rather than the other. Yet that is what the adversarial system demands; one side or the other must be "right". And so experts are engaged by clients on each side only if their opinions are deemed favourable. From that point on there are polarized opinions. That may be, but is not necessarily because of adversarial bias. But the likelihood will be that each will be at one extreme end of the range of opinions on that question, the end most favourable to the client.

Once engaged, the expert is then encouraged to emphasize and expand on such of these aspects of his or her opinion as are likely to support the client's version and to downplay or omit those aspects which do not. If the expert has not given the opinion in the first place in order, at least partly and perhaps subconsciously, to secure his or her engagement, in other words, because of adversarial bias, this is where adversarial bias will begin.

We all have biases which may affect judgments which we make, whether or not we admit to them or even know of them. All experts have biases, some of which may affect the opinions which they give. Some of these are capable of being observed or detected: a financial or other association with a particular interest group or a known antagonism to a particular interest group; or that the expert is the product of a particular school of thought. In many other cases they will remain concealed.

But the adversarial system introduces an overlay, in the case of all witnesses including expert ones, of an additional bias, adversarial bias; by which I mean the natural human tendency to feel the need to do your best for the side you represent. Writing in 1985, the American academic John Langbein put it this way:[1]

> "At the American trial bar, those of us who serve as expert witnesses are known as 'saxophones'. This is a revealing term, as slang often is. The idea is that the lawyer plays the tune, manipulating the expert as though the expert were a musical instrument on which the lawyer sounds the desired notes. I sometimes serve as an expert in trust and pension cases, and I have experienced the subtle pressures to join the team - to shade one's views, to conceal doubt, to overstate nuance, to downplay weak aspects of the case that one has been hired to bolster. Nobody likes to disappoint a patron; and beyond this psychological pressure is the financial inducement. Money changes hands upon the rendering of expertise, but the expert can run his meter only so long as his patron litigator likes the tune. Opposing counsel undertakes a similar exercise, hiring and schooling another expert to parrot the contrary position. The result is our familiar battle of opposing experts. The more measured and impartial an expert is, the less likely he is to be used by either side."

There is a more recent article by an economist, expressing the same opinion.[2] These are American opinions but those of us who have practised in civil litigation, and that includes many in this room, know that, even if that description is slightly exaggerated, something like that routinely occurs in our own experience. Lawyers on each side "shop around" for a favourable expert; that is one who can give an opinion which will support their client's "truth". Some less scrupulous ones may even retain unfavourable experts to prevent them from giving evidence for the other side. Once engaged, the expert is subjected in conference to subtle pressure, as Langbein has said, to shade views, conceal doubt, overstate nuance and downplay weak aspects of the client's case. And we all know that, in most cases, an expert earns more from giving evidence in court than in the practice of his or her profession; so that there is also an economic pressure to give evidence which will

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1 'The German Advantage in Civil Procedure' (1985) 52 (4) *Uni Chicago Law Review* 823, 835.

2 Steven Moss, *Opinion for Sale: Confessions of an Expert Witness* (2003) Legal Affairs <http://www.legalaffairs.org/issues/March-April-2003/review_marapr03_moss.msp> at 11 November 2005.

support the client's case. There have been notorious examples in Australia,[3] as well in the USA,[4] of partisan experts altering their reports at the request of a party's lawyer.

The polarization of questions involving expertise and the inevitability of adversarial bias in a system such as ours has two unfortunate consequences in the resolution of questions involving expertise. The first is that the judge or jury may never hear what the real question is, let alone how it should be resolved. That is because each of the adversarial experts, or possibly even the client's legal adviser, may have restated the question in a way more likely to lead to an answer favourable to his or her client. And the second unfortunate consequence is that the judge is as likely to be persuaded by the expert who is more articulate and positive in manner, or who otherwise has the more persuasive personality, as by his or her own rational analysis of the conflicting opinions.

B *The Difficult Question and the Non-expert Judge*

There is an increasing number of questions coming before courts, especially scientific ones, which are, I believe, quite beyond the capacity of most judges to understand, let alone decide, at least without considerable assistance.

In a recent paper[5] Justice Sperling of the New South Wales Supreme Court gave two examples, from his own experience, of such questions. The first involved a child born mentally defective. The question was whether this was the result of untreated syphilis in the mother during pregnancy, which the defendant doctor failed to detect, or whether it was a genetic defect unrelated to the syphilis. Unsurprisingly, two very well qualified but adversarially opposed geneticists disagreed, the opinion of each supporting the side which called him.

The second involved the question whether the brain of an embryo was capable of forming scar tissue at the time the child's mother was involved in a car accident or whether the brain damage with which the child was born was due to some other cause such as infection. In this case there were, on each side, batteries of highly qualified experts who disagreed, one side with the other, again with the opinions dividing on party lines. It cannot be known how much adversarial bias contributed to these divisions of opinion but it is difficult to believe that it did not play a part in each case.

Questions of medical science are perhaps the most commonly arising such questions,[6] but difficult scientific questions are increasingly arising in cases involving computer technology and, of course, there have always been difficult scientific questions arising in

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3 A recent example occurred in *Marsden v Amalgamated Television Services Pty Ltd* [2001] NSWSC 510 defamation trial in which a psychiatrist admitted in cross-examination that he had removed significant material from his report at the request of the solicitor for the party which had engaged him.

4 'Dealing with Draft Dodgers: Automatic Production of Drafts of Expert Witness Reports', Easton and Romines II, (2003) 22 *Review of Litigation* 355, 356 - 357.

5 Commentary on Lord Justice May's paper: 'The English High Court and Expert Evidence', Supreme Court of New South Wales Annual Conference, 22-24 August 2003.

6 See also, for example, *Wood v Glaxo Australia Pty Ltd* [1994] 2 QdR 431 where the question was whether an oil based dye, iophendylate, injected into the plaintiff's spine for the purpose of a myelogram, caused adhesions called adhesive arachnoiditis.

copyright and patent cases. Moreover as scientific knowledge increases so also do the phenomena which are found to be capable of scientific explanation; so it is indisputable that the volume of difficult scientific questions which may become the subject of litigation will increase.

Let me give you an apparently simple example of how such a question may arise. Some years ago a dispute involving the sale of a coal-mine came on appeal to my Court. Experts on both sides agreed that you value a coal-mine by capitalizing future profits and that future profits depended on the future sale of coal on world markets. But when they came to consider how to predict the price of coal on world markets they differed markedly. Predictably each one ended with a value which suited his client, one much higher than the other. The question involved complex economic analysis and it was difficult, in the absence of economic expertise, which none of the judges who heard the trial or appeal possessed, to find any rational basis for choosing one method of assessment from another.

There are two related points which these examples illustrate. The first is that the more complex the question is, the more difficult it becomes for a judge or jury to determine the extent to which opinions given on each side are polarized by the adversarial process. And the second is that the more complex the question is, the more the judge or jury needs the help of an independent expert who can assist the court to understand the question and consequently to resolve it.

C *The Waste of Time and Cost*

Before the question is finally decided by the court, lawyers will have spent many hours, and a great deal of money, in selecting some and discarding other experts, in conferring with the selected experts for the purpose of "preparing them for trial" and in engaging in the trial including in the cross-examination of opposing experts.

But in engaging in trial, by examination-in-chief, if any, and cross-examination, it is not the purpose of the lawyers to assist the judge in understanding and resolving the question. Rather it is to persuade the judge that their client's "truth" is the correct one. So the process is, in an objective sense, a wasteful one. Moreover, when opposing experts are called there is inevitably duplication, much of it unnecessary. So the result is a great expenditure of time and cost, most of it for a purpose inconsistent with the just resolution of the question.

III THE SOLUTIONS SO FAR

A *Pious Hopes*

A number of systems now include in their rules statements about an expert's duty. The New South Wales "Expert Witness Code of Conduct" is a good example. It provides that an expert has an overriding duty to assist the court impartially and that he or she is not an advocate for a party. A practice direction under Part 35 of the *Civil Procedure Rules of England and Wales* goes a little further, requiring an expert to confirm, in his or her report that "the opinions I have expressed represent my true and complete professional opinion".

The duties sought to be imposed by these Rules are, in practice, unenforceable. Their expression is no more than a pious hope. It cannot, in my opinion, overcome the adversarial imperative. Parties to actions and their lawyers want to win; and there will always be experts who will, whether consciously or not, assist in that endeavour in the way I have described. Those experts who, in the past, have offered their opinions only objectively will continue to do so. And those who, in the past, have been prepared to "assist" will also continue to do so. So I do not think that such statements will have much, if any, effect in solving the problems I have mentioned.

B *Disclosure of Expert Reports*

In some jurisdictions, including this State, reports obtained from experts, intended for use in litigation, have been made disclosable. This has resulted in greater frankness between parties though, if the existing system of party appointment of experts were to be retained, it would be vastly improved if parties were obliged to disclose not only the reports of experts whom they proposed to call but also those of other experts who had provided reports but whom they did not intend to call; and the names and addresses of those other experts whom they had approached for an opinion but did not intend to call. This reform has also, no doubt, reduced costs a little. But any effect which it may have had on polarisation of opinions and adversarial bias is, in my opinion, negligible and it does nothing to assist a judge to answer questions beyond his or her expertise.

C *Limiting the Number of Experts*

There has also been a general trend to limit the number of experts whose evidence may be received on any one question. In some cases this has been done by limiting that to one on each side. In others it has been achieved by providing that no expert evidence shall be received except with leave of the court. In each case it has had a salutary effect on costs. But self-evidently it does nothing to solve the other problems I have mentioned.

D *Conferences Between Experts*

A number of systems have also, for some time, either had rules permitting or had practices requiring opposing experts to confer and to produce a joint report stating where they agree, where they disagree and why. These have had some beneficial effect. They have tended to reduce costs and they have tended to eliminate extreme views, views which might otherwise have been given but which would not withstand peer review.

But they suffer from the fundamental defect that they will invariably apply too late in the process of litigation to avoid polarization. They apply, generally for the first time, after party appointed experts have been engaged, on both sides, for the purpose of selling their client's "truth" rather than expressing an opinion unaffected by adversarial bias. And whilst it is true that this reform may narrow the area of conflict between such experts and may therefore lead to compromise, it does not follow, for reasons which I have already given, that any such compromise bears a close relationship to the opinion which either would have offered if engaged independently.

E *Swearing Opposing Experts Together*

This is a process favoured by the Federal Court called, for obvious reasons, the "hot tub method". Like conferences between experts, it tends to eliminate extreme views and to crystallise points of difference. But it also suffers from the same defects; that, by the time they are sworn, opposing experts will have been chosen because their opinions support the parties for whom they are called and that they will have been subjected to the pressures to which, as I have earlier mentioned, the adversarial process subjects partisan witnesses. In addition, in many cases each expert will have been "prepared" for the hot tub contest by their party's lawyer; including by being told the kind of questions which they are likely to be asked and how those questions may be answered without giving ground.

In short, whilst the hot tub method has some advantages over the process of calling expert witnesses as part of each party's case, it remains, in substance, a partisan procedure which has a high risk that adversarial bias will distort the result. And it saves little in costs.

F *Joint Experts or Court Appointed Experts*

This may mean, relevantly, either of two things: such experts appointed to give evidence in addition to that of party appointed experts; or such experts appointed to give evidence in lieu of that of party appointed ones.

In most jurisdictions courts have long had the power to appoint experts. It is a power of the former kind and has been rarely exercised. There are obvious reasons for this. The question of appointing experts under such power arises, if it arises at all, at or close to trial when each side has already engaged its own expert, or battery of experts. An appointment by the court of an expert, at that stage, would add costs to the proceedings and, depending on the time of such appointment, may even delay proceedings. For that reason, and because of the adversarial imperative, it has been rare for a party to ask for such an appointment. And because judges have, in the past, been unwilling to act on their own initiative in making such orders, they have almost never been made in the absence of an application. Modern rules which do little more than provide more specifically for the same thing will, I believe, suffer the same fate.

There may be an element of unfairness, additional to cost, in a power to require that the evidence of a court appointed expert, or an agreed expert, be received in lieu of that of prior party appointed ones where, at the time the parties appointed their experts, they did not have the possibility of court appointment. Not only may costs, already incurred, be thrown away. Parties would also have had no choice but to appoint their own experts and each, rightly or wrongly, may, by the time of court appointment, have become convinced of the correctness of their own expert's opinions.

In 1994 when I was Chairman of the Litigation Reform Commission we produced a proposal, and a draft set of rules for a system of appointment of experts in which the court

appointed expert, or panel of experts, would replace party appointed ones.[7] In addition to that critical feature, the proposal contained three other critical features all of which were, at that time, novel.[8] I want to say something about each of these features, not just to reminisce or to lament their failure to receive acceptance - they were roundly criticized by the profession and abandoned - but because they have re-emerged as critical features of rules which have now become law in Queensland and about which I shall say more a little later.

The first of these features was that it permitted parties to a dispute which involved such a question to agree, before any litigation had commenced, on appointment of an expert to report on that question; and permitted one party, before commencement of litigation, to apply to the court for the appointment of an expert to furnish such a report; in either of which cases the expert so appointed would become the court appointed expert on that question if litigation ensued. By permitting a party to a dispute to appoint an independent expert in this way before the commencement of litigation, the proposal pre-empted the criticism of existing rules permitting court appointment of experts that, by the time such appointment could be made, one or both of the parties would probably have already retained their own experts.

The second critical feature of the proposal was a recognition of the fact that there might be some questions on which there is more than one opinion commanding peer acceptance. In that event it permitted the court to appoint more than one expert.

And the third was that, although, prima facie, evidence from the court appointed expert, or panel, would be the only evidence received on the question, the proposal recognized that there may need to be exceptions to this. An example which springs to mind is of an engineer who had been engaged by a building owner to inspect its alleged faulty foundations urgently before the building, said to be dangerous, was demolished. At the time of litigation over alleged faulty design of the building some years later, that expert might be the only person capable of giving expert evidence of the state of those foundations. So the proposal provided for such exceptional cases.

I had hoped that Lord Woolf, armed with that proposal as he was, might propose something similar; and I suspect that in his interim report he may have had some such proposal in mind. But in the end that was not to be. The relevant provisions of Part 35 of the *Civil Procedure Rules*, providing for single joint experts, retain many of the old problems.

In the first place a single joint expert cannot be appointed under these Rules until after litigation has commenced; whereas in any case in which there is a substantial issue involving expert evidence, at least one and usually both parties will have retained their own experts by then. The result seems to have been, unsurprisingly, that single joint experts have been appointed only for subsidiary issues or in simple routine cases.

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7 See for example 'Some Proposed Changes in Civil Procedure: Their Practical Benefits and Ethical Rationale' in Parker, S and Sampford, C (eds) *Legal Ethics and Legal Practice: Contemporary Issues*, (1995) 127, 138 - 139; (1993) 3 (2) JJA 111, 120 - 122.

8 See for example 'Justice Reform: A Personal Perspective' (1997) 15(2) *Aust Bar Rev* 109, 112.

Secondly the appointment of a single joint expert appears to preclude the appointment of a second joint expert although the court may permit the calling by a party of another expert.

Consequently the practice of partisan expert evidence appears to continue, only slightly abated, in England and Wales.[9]

IV THE NEW QUEENSLAND RULES[10]

These are in Chapter 11 (Evidence) Part 5 (Expert Evidence) of the *Uniform Civil Procedure Rules*. One criticism which I have of these Rules is their sequence. The true starting point is Division 4 headed "Experts appointed before proceeding started". That Division is also, in my opinion, the most important of the provisions. I shall explain later why I say that is so.

Division 4 applies either where two or more persons agree that there is a dispute between them that will probably result in a proceeding and that obtaining expert evidence immediately may help in resolving a substantial issue in the dispute; or where a person believes on reasonable grounds that there is a dispute between that person and one or more others that will probably result in a proceeding and that obtaining expert evidence immediately may help in resolving a substantial issue in the dispute. In the first of those cases the disputants may jointly appoint an agreed expert; in the second the person may apply to the court for appointment of an expert. In either case, in any proceedings between any of those persons to which the opinion is relevant, unless the court otherwise orders, the expert will be the only expert who may give evidence on that question.[11] This was the first critical feature of the 1994 proposal to which I referred earlier.

The main criticism in the past of court appointed experts has been that, by the time they are appointed, one or both parties will have obtained their own experts. It is therefore said, with some justification as I have pointed out, that to appoint yet another expert may result in costs being thrown away and will, at least in some cases, also delay the resolution of the case. Remaining unstated and lying behind this criticism is the additional reality that each party's expert will have produced a report which supports that party's "truth"; and neither party (and neither lawyer) will wish to forego the possibility that the judge will accept their expert.

To permit an independent expert to be appointed before litigation has commenced pre-empts this criticism and, as I shall show later, flushes out this reality. By the time a party to a dispute would ordinarily have engaged his or her own partisan expert, he or she has the opportunity of obtaining the opinion of an expert whose evidence is likely to be the only evidence received on the question by the court.

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9 The procedure in New South Wales is now similar to that in England and Wales, the only significant difference being that, in the latter, no expert may be called without permission of the court.

10 These may be found at http:/www.legislation.qld.gov.au/LEGISLTN/SLS/2004/04SL115.pdf.

11 Any doubt that such a provision would not ordinarily be within the rule making power under the *Supreme Court of Queensland Act* 1991 (Qld) was resolved by an amendment to that Act in 2003; see s 118 and Schedule 1, part (2)(c).

Let me now turn back to Division 3 headed "Experts appointed after proceeding started". It provides for three situations. The first is that if two or more parties to a proceeding agree that expert evidence may help in resolving a substantial issue in the proceeding, they may jointly appoint an expert to produce a report on that issue. The second is that if parties to a proceeding are not able to agree upon appointment of an expert, any party who considers that expert evidence may help in resolving a substantial issue in the proceeding may apply to the court for appointment of an expert to produce a report on that issue. And the third is that the court may, on its own initiative at any stage of the proceeding, if it considers that expert evidence may help in resolving a substantial issue in the proceeding, appoint an expert to produce a report on that issue. In all of those cases, unless the court otherwise orders, the expert is to be the only expert who, in relation to those parties, may give evidence in the proceeding on that issue. These provisions thus mirror those in Division 4.

The opportunity earlier afforded by Division 4, it seems to me, answers any criticism of an appointment under Division 3 on the ground that parties have already appointed their own experts. And, similarly, it justifies the Court in refusing to receive the opinions of any such experts. That is why Division 4 is the most important of the new provisions. It is also unique and distinguishes these rules from rules providing for court appointed experts in other jurisdictions in Australia and England. This critical distinction cannot be overemphasized.[12]

The second critical feature of the 1994 proposal is now contained in r 429N(3)(a)(i) of Division 3 which provides that the court may, either on its own initiative or on the application of a party, appoint another expert where the court is satisfied that there is expert opinion different from that of the first expert, that is or may be material to deciding the issue. This permits a second expert to be appointed by the court where, as is sometimes the case, there is more than one opinion which commands peer acceptance; or where the opinion of the first expert appointed does not command peer acceptance. This answers the criticism which might otherwise be made of any system for appointment of a single expert on any issue, that it prevents genuine differences of opinion from being aired. The rules also provide that directions may be given to experts to meet in order to identify matters on which they agree and disagree, and the reasons why, and to attempt to resolve any disagreement.[13]

The third critical feature of the 1994 proposal is now contained in r 429N(3)(a)(ii) and (3)(b). The first of these provides that a second expert may be appointed where the court is satisfied that the other expert knows of matters, not known by the first expert, that are or may be material to deciding the issue. This provision should be read with an earlier one[14] which excludes the operation of the Rules to the evidence of a doctor or other person who has given treatment or advice to an injured person as to the results of any examination, a description of the treatment or advice, the reason for that treatment or advice and its results. But the former provision permits, more generally, the receipt of evidence from a second

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12 Yet it appears to have been overlooked by some including in the annotations to these rules which state that "Queensland now marches in step with other jurisdictions …".

13 Rule 429B in Division 2.

14 Rule 424(1)(c) in Division 1.

expert where the court is satisfied that that expert, by reason of his or her knowledge of a fact or facts not known to the first, is able to express a different opinion.

Rule 429N(3)(b) provides that a court may appoint another expert is where there are other special circumstances. Both of these provisions would probably cover the example which I gave earlier of an engineer who had inspected allegedly defective foundations of a building, before its demolition.[15]

Let me now go backwards once again to Division 1 of the Rules in which their main purposes are stated. These are to:

> "(a) declare the duty of an expert witness in relation to the court and the parties; and
> (b) ensure that, if practicable and without compromising the interests of justice, expert evidence is given on an issue in a proceeding by a single expert agreed to by the parties or appointed by the court; and
> (c) avoid unnecessary costs associated with the parties retaining different experts; and
> (d) allow, if necessary to ensure a fair trial of a proceeding, for more than 1 expert to give evidence on an issue in the proceeding".

The first of these is to provide for the pious hope to which I referred to earlier. I have not taken you to the Rule[16] which declares that duty, which is similar to the way in which it is declared elsewhere.

However the main purposes of the Rules, it seems to me, can be seen from paras (b), (c) and (d). In the future, under those Rules, all experts who give evidence in a case will, generally, be either agreed by the parties or appointed by the court, either on the application of a disputant or a party or on the court's own initiative. And except in the cases which I have outlined, the court will receive only one expert opinion on an issue. An expert so appointed will give his or her report to the court and, only through the court, to the parties.

The advantages of such provisions are obvious. Adversarial bias is eliminated. So too is the risk that the question is distorted by the adversarial process so as to suit one side's case rather than another's. And because the expert in almost all cases will be chosen by the parties, and they will have ready access to the expert so chosen, they will become disinclined to engage separate experts whose fees they will be unable to recover as costs. The reform will therefore reduce costs by reducing the number of experts engaged and reducing the time taken in examining and cross-examining the expert.

However, as I have endeavoured to show, provision for court appointed experts cannot be effective unless they contain the three critical features to which I have referred; the opportunity for parties to a dispute to appoint such an expert before litigation commences, the opportunity which they will also have to appoint an additional expert where there are genuine differences of opinion and the opportunity to appoint another expert in other

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15 But it should be emphasized that the phrase "special circumstances" is intended to strictly limit the circumstances in which an appointment will be made under r 429N(3)(b).

16 Rule 426 of Division 2.

exceptional circumstances. The Queensland Rules are unique in having all of those critical features.

V THEIR RECEPTION

Pleasingly, all expert bodies, with the exception of town planners to whose evidence in the Planning and Environment Court the Rules will not, for the present, apply, supported the proposed Rules, most of them enthusiastically. Unsurprisingly, the Bar and the Law Society were "implacably opposed" (the Bar's words) to it.

Equally unsurprisingly, the opposition from the profession is to the substantial reduction in party control (in reality lawyer control) of opinion evidence. The Bar put it this way:

> "We regard it as fundamental to the administration of justice and the vindication of individual rights that parties should be entitled to call relevant and admissible evidence".

Grand words indeed! But it should be noted that the emphasis is on the party's right (for which a cynic might substitute a litigation lawyer's right) to call evidence on a question involving expertise; and that the statement implies that a party (substitute his lawyer) not only has the right to call expert evidence on such a question, however biased that evidence may be, but to call as much of it as he or she likes.

What is missing from that statement is any recognition of the almost inevitable existence of adversarial bias in party appointed experts; any recognition of the huge cost of preparing for trial, examining and cross-examining multiple experts on one question; or any recognition of the need which lay tribunals (judges or juries) have to rely on non-partisan assistance from an expert witness. In short, the criticism assumes that there is nothing wrong with the system now, so why change. And so is flushed out the reality that lawyers will not willingly forego the possibility that the court, judge or jury, will accept their adversarial expert and reject their opponent's. The adversarial imperative dies hard.

All of this is unfortunate for it portrays the legal profession as unwilling to accept that there are problems and to embrace change. It must also give rise to a suspicion (I hope unjustified) that the opposition is self-motivated; for under the new rules cases will be shorter and costs will be less.

VI CONCLUSION

Let me return now to where I started. Perhaps the worst way, in a substantially adversarial system such as ours, of resolving a question involving expertise, is by presenting two opposing opinions to an arbiter, judge or jury, who, more often than not, lacks expertise, and expect that arbiter, without independent assistance, to resolve it justly. Permitting cross-examination on these opposing views is as likely to polarize them further as it is to eliminate or reduce areas of difference.

If we accept, as I think we realistically must, that presenting evidence in an adversarial way is likely to induce and in most cases will result in adversarial bias in the witnesses, we must

also accept that that adversarial bias would be immediately eliminated, in the case of expert evidence, if those who gave such evidence gave it as witnesses of the court not as witnesses of one party or another. And if we are being realistic about human nature we must know that the elimination of adversarial bias can never be achieved merely by statements that an expert witness' overriding duty is to the court; the adversarial imperative is too strong for that.

It follows, it seems to me inevitably, that the only way in which we can ever eliminate adversarial bias in expert witnesses is by requiring, at least generally, that all expert evidence which will be received by a court must be that of an expert appointed by the court; elimination of party appointed experts eliminates experts with adversarial bias. I do not mean to imply by that that we will, at last, have truly objective evidence, whatever that means. All witnesses, including experts, will give evidence with some preconceptions or biases. But the adversarial bias, in addition to these, will thereby be eliminated.

The elimination of adversarial bias and the consequent neutrality, as between the parties, of expert evidence gives, as a consequence, increased confidence to judges in seeking and relying on the assistance of the appointed expert or experts in comprehending and resolving the question in issue.

And finally there can be no doubt that, if expert evidence is generally restricted to that of experts appointed by the court, costs will be substantially reduced. There will be fewer expert witnesses whose evidence is received. Cross-examination will be substantially shortened (it is difficult to see how there could be any substantial cross-examination of a witness upon whom the parties have agreed) and differences of opinion between experts will be narrowed or even eliminated.

But a system of court appointed experts cannot, I think, operate effectively unless parties to a dispute have the opportunity, for which this proposal provides, to agree upon or appoint an expert before litigation commences. For it is only when there is such a provision that duplication or waste of cost, and the risk of delay, can be avoided.

Notwithstanding the opposition to which I referred earlier, I am confident that the Rules which I have described will succeed in their objectives. For the reasons I have given, I commend them to you.