Singapore Journal of Legal Studies
[2000] 241 – 262

WHEN EXPERTS DISAGREE

It has long been recognised that where expert witnesses disagree on a matter within their expertise, the court is placed in an unsatisfactory situation of having to choose between experts in a matter which is not within the competence of the judge. This article examines some recent cases where the court has had to make such a choice. It will try to pin down exactly how the court made that choice, and to ask if the way in which judges break the expert deadlock is satisfactory. Some reform proposals are discussed briefly.

I. The Paradox

IT is well known that a court of law is not normally interested in the opinions or factual conclusions of the witnesses who come before it.[1] Witnesses, as the name suggests, inform the court of what they themselves see, hear or experience. The judge makes his or her own factual inferences, drawing upon generalisations developed from the judge's training, knowledge and life experiences. For example, a witness testifies that the accused in a murder trial had a motive to kill the victim. The judge makes the factual inference that this is circumstantial evidence of the guilt of the accused, implicitly acting upon the generalisation that people with a motive to kill are more likely to have killed than people who do not have such a motive. Occasionally, these "lay" generalisations which judges explicitly or implicitly adopt also come within the competence of experts who study the particular phenomenon. For example, where the accused under a drug trafficking charge alleges in his or her defence that the drugs were for self-consumption, but the accused does not display serious drug withdrawal symptoms, the court has to decide if it will hear the opinion of addiction experts in deciding whether it will adopt the generalisation that heavy drug users are likely to have severe

[1] In the Evidence Act (Cap 97), the rule against the admissibility of opinions exist by implication from the existence of exceptions to the rule, principally s 47 which makes opinions on "a point of foreign law or of science or art" admissible. S 385(3) of the Criminal Procedure Code (Cap 68) makes non-expert opinion admissible in criminal cases, but only "as a way of conveying relevant facts personally perceived ... as evidence of what [was] perceived".

drug withdrawal symptoms.[2] In such situations, the court has to decide whether it will permit the expert to testify as to the validity of generalisations which it would in other cases adopt without question. The precise criterion for the admissibility of expert opinion is fascinatingly complex,[3] but it will suffice for the moment to use the language of the Court of Appeal in *Chou Kooi Pang* v *PP* (paraphrasing the famous case of *R* v *Turner*[4]):[5]

> [I]t is well established that expert opinion is only admissible to furnish the court with scientific information which *is likely to be outside the experience and knowledge of a judge.* If, on the proven facts, a judge can form his own conclusions without help, the opinion of an expert is unnecessary.

Of course, matters are not quite so categorical as to be "outside" or inside the experience and knowledge of a judge. For example, we all have some knowledge or even experience of mental abnormality, but this has not precluded the admissibility of expert psychiatric evidence. The real question is whether the court is willing to acknowledge that the expert, by virtue of his expertise in the field, is better able to provide the judge with the necessary generalisations. A decision to admit expert evidence is a judgment that expert generalisation is superior to lay generalisation (of a judge).

Yet the moment the court opens the door to expert testimony, it is immediately faced with the possibility of the contending parties producing experts who will contradict each other. That experts may disagree should not be surprising. Judges themselves who are experts in the law often disagree over the interpretation of a case or a statutory provision. However, while disagreements over the law are settled by people learned in the law, disagreements in other areas of expertise, in our present system of justice, is to be resolved, not by an expert, but by the judge, a layman as far as that expertise is concerned. The situation is as strange as it would be if we were to ask a doctor (of medicine) or an engineer to settle a dispute between legal experts

2 Our courts have in fact routinely allowed such evidence, the discussion which follows contains some such cases.

3 The Evidence Act says nothing more than that it must be a point of "science or art". This is a topic which deserves an article of its own, but I defer discussion of it until there are enough local decisions on the issue to discern clear attitudes and trends.

4 [1975] 1 All ER 70. It has become customary to quote from the judgment of Lawton LJ in the common law world, but its deficiencies in difficult cases has led the courts in the United Kingdom to relax either the rule, or the application thereof: *R* v *Ward* [1993] 2 All ER 577; *R* v *Robinson* [1994] 3 All ER 347.

5 [1998] 3 SLR 593 (italics added).

over a point of law. To quote from *Tengku Jonaris Badlishah* v *PP* (again paraphrasing English authority), another recent Court of Appeal decision:[6]

> There was a sharp divergence of opinion between [the experts]. The trial judge was *entitled to elect* between the evidence of these two expert witnesses...The court may elect between the two or reject them both; it cannot adopt a third theory of its own, no matter how plausible such might be.

Not only is the judge "entitled" to choose – indeed, he or she must choose. If the judge is not competent to adopt a third theory of its own, how can it be competent to choose between two sharply conflicting theories? The very lack of experience and knowledge which justifies the admissibility of expert evidence ought surely to disqualify the judge from playing the "super-expert", the authority which decides between experts. As the American jurist, Learned Hand, said some time ago and more elegantly, (translating "jury" into "trier of fact"):[7]

> The trouble with all this is that it is setting the jury to decide where doctors disagree. The whole object of the expert is to tell the jury, not facts, but general truths derived from his specialized experience. *But how can the jury judge between two statements each founded upon an experience confessedly foreign in kind to their own?* It is just because they are incompetent for such a task that the expert is necessary at all.

Faced with this undeniable paradox, what do judges do in real life? It is often glossed over under the convenient label of "a question of fact". That cannot be the end of our inquiry. Judges choose between conflicting experts for a number of articulated and unarticulated reasons. It is the object of this article uncover these reasons and to subject them to scrutiny.

There are some (conceptually) easy situations and we need not waste too much time on them. For example, expert opinion is always based on a substratum of facts, and the expert "conflict" might simply be on the question of exactly what the underlying facts are. The prosecution psychiatrist gives his or her diagnosis on the assumption that a certain set of symptoms exist. The defence psychiatrist bases his or her competing diagnosis on the

6 [1999] 2 SLR 260, 271 (italics added). The English authority is *McLean* v *Weir* [1973] 3 CCLT 87.

7 "Historical and Practical Considerations Regarding Expert Testimony" (1902) 15 Harvard LR 40 (italics added).

assumption that a different set of symptoms exist. The judge makes a factual determination as to precisely which set of symptoms existed and prefers the corresponding expert opinion.[8] This is not really a problem of choosing between opposing expert generalisations – both experts are agreed on the generalisations, but are in disagreement over the underlying facts. A second example is where the supposedly "contending" experts do not actually contradict each other materially – there is again no real choice to make.[9]

II. A Presumption of Expert Bias?

It is glaringly obvious to anyone who cares to look at the law reports that in criminal cases, where prosecution and defence experts clash, the court almost invariably prefers the prosecution expert. Exactly why this should be so is not evident from the reasons articulated in the judgments.[10] The impression is given that both prosecution and defence experts start on an even footing, but the result in the decisions point to the operation of an unspoken presumption. Some time ago, Winslow J in *Ong Chan Tow* v *R* came very close to expressing this:[11]

> The expert called for the appellant [accused] would naturally tend to give evidence in favour of the appellant's version – otherwise he would not have been called as a witness – and to that extent, every such witness can be said to be biased against the version of the other side.

More recently, Selvam J in *The H156*, a civil case, said:[12]

> All too often experts are extremely tendentious towards the party by whom he is retained. This warning is succinctly stated in (14th Ed,

8 See, *eg, Somwang Phatthanasaeng* v *PP* [1992] 1 SLR 850.

9 See, *eg, John Benjamin Cadawanaltharayil* v *PP* [1995] 3 SLR 805, where in a charge of outrage of modesty by a doctor, both prosecution and defence experts agreed that the kind of breast examination done by the accused was one of the ways in which the exercise could be done, although they disagreed as to whether it was medically the best way of doing it. The prosecution's expert evidence clearly could not advance the prosecution's thesis that the accused had outraged the modesty of his patient.

10 Recent decisions give a host of reasons why in a particular case, the prosecution's expert is preferred (and I discuss some of these below), but none of them appears to explain why the prosecution's expert almost always emerges victorious.

11 [1963] MLJ 160.

12 [1999] 3 SLR 756.

> 1990) [of *Phipson on Evidence*] ... 'It is proverbial that expert witnesses are, perhaps unwittingly, biased in favour of the side which calls them as well as over-ready to regard neutral facts as confirmation of preconceived theories, moreover, support or opposition to given hypotheses can generally be multiplied at will'.

In civil cases, this presumption of expert bias applies equally to the plaintiff's expert as well as to the defendant's expert – one presumption broadly cancels out the other. Although this does not help the judge decide which expert to believe, at least no one party is prejudiced anymore than the other. The situation is entirely different in criminal prosecutions. While the presumption of expert bias works in full force against the defendant's expert, it seems to be entirely missing when the court deals with the prosecution expert. It is not difficult to surmise why this is so. The prosecution expert is normally a public officer with presumably no motive to tailor his or her expert opinion to favour the prosecution. The chances of the prosecution "shopping" around for a favourable expert also seems remote. It is easily thought that prosecution experts are not to be presumptively tainted with bias.

Much as all this would appear to comport with common sense, we need to scrutinise the fundamental assumption which underlies the exemption of the prosecution's experts from the presumption of expert bias. We simply do not know enough about how the prosecution's experts are chosen. Take, for example, the familiar situation of the accused pleading diminished responsibility to a charge of murder. It appears that the prosecution's psychiatrist is normally the one who assessed the accused for competence to stand trial. He or she is normally a psychiatrist working for the Government, but we do not know how he or she is chosen for the particular case. Do all government psychiatrists take turn, or are there only one or two persons who are given this job? And if the selection is not at random, could there be hidden biases in the choice of the government psychiatrist. Government psychiatrists do not, of course, have security of tenure beyond that of any public servant. They are not immune from being transferred or from feelings of identification with the prosecution with whom they share a common employer. This might be pure speculation, but how do we know whether or not a government psychiatrist who is perceived as "lenient" will be told off, or worse deselected as an expert witness? Psychiatry, it as often been remarked, is an inexact science – so it becomes crucial how the expert is chosen. The crucial selection process of the prosecution expert, whose views the court will almost always accept, is unfortunately hidden in the murky recesses of government bureaucracy. It cannot be safe to rely on any *a priori* presumption, implicit or otherwise, that the defence expert is biased, but the prosecution expert is not.

It is not suggested that the prosecution expert is preferred without exception

– a presumption is after all rebuttable.[13] Nevertheless, the exceptions are few and far between, attesting to the strength to which this implicit presumption of defence expert bias is now held.

III. The Burden of Proof

One other tie-breaking device is used in criminal cases, and this is explicit. In all the contexts in which experts clash most often, the burden of proof is on the accused. The law decrees that it is the accused who must prove on a balance of probabilities the defence of diminished responsibility,[14] the defence of intoxication,[15] or the defence of self-consumption under the Misuse of Drugs Act.[16] If indeed it is true that, where experts clash, the court is ill equipped to play the "super-expert", then it will seldom be the case that the defence can prove these defences on a balance of probability. Even without any presumption of expert bias against the defence, one expert's opinion is as good as another – the defence will not be able to prove that its expert is better, on a balance of probabilities.[17] I have, in the past, expressed my strong reservations about any attempt to cast the burden of proof on the accused[18] – my views have not changed.[19] Indeed, I did not realise how

[13] See, *eg, PP* v *Tan Ho Teck* [1987] SLR 226 (defence of intoxication); *PP* v *Dahalan bin Ladaewa* [1996] 1 SLR 783 (defence of self-consumption of illicit drugs); *Ong Teng Siew* v *PP*, unreported, High Court, 17 April 1998 (diminished responsibility). There are not many, if any, more.

[14] This is because of s 107 of the Evidence Act.

[15] Also because of s 107 of the Evidence Act.

[16] S 17 of the Misuse of Drugs Act, Cap 185, provides that, on proof of possession of a certain amount of drug, it shall be presumed that the accused possessed it for the purpose of trafficking.

[17] See, *eg, PP* v *Hanafi bin Abu Bakar*, unreported, Court of Appeal, 10 Aug 1999 (self-consumption case), where the court was not all too happy with either expert, but preferred the prosecution expert, appealing, *inter alia*, to the burden of proof on the accused. Although in *Ong Teng Siew* v *PP*, unreported, High Court, 17 Apr 1998, the court held that the accused had proved diminished responsibility on a balance of probabilities, one cannot help but feel that the strict burden of proof had somehow been lowered to achieve this effect. The experts clashed over the linkage of Darier's disease (a skin problem) with mental disorders. There was "medical evidence in an evolving psychiatric frontier" of a "plausible exceptional linkage of Darier's disease to the other neuropsychiatric disorders". This does not sound like proof on a balance of probabilities – there simply was not evidence to prove that the linkage was more likely than not.

[18] "The Presumption of Innocence – A Constitutional Discourse for Singapore" [1995] SJLS 365.

[19] See the opposing views of Attorney-General Chan, "The Criminal Process – The Singapore Model" (1996) 17 Sing LR 431; but see "Rethinking the Criminal Justice System of Singapore for the 21st Century", speech to the Millennium Law Conference, April 10th – 12th 2000,

pernicious these reverse onus provisions are in the context of a likely clash of expert opinions. The court may ultimately think that the defence version is as likely to be as true as the prosecution version, but that, according to the law, is not enough. This is especially likely to occur where psychiatric experts clash, for the science of the mind is (it has to be repeated) an inexact science. Barring a situation where the prosecution expert bungles his or her testimony badly, it will be almost impossible for the defence to succeed in any of these defences.[20] The realities of expert evidence combine with the law on the burden of proof to relegate these defences to near insignificance. This cannot be desirable.

IV. Comparing Credentials

It is only natural for the layman, judicial or otherwise, to compare credentials. When we are unable to assess *what* experts are saying, we often turn to the question of *who* is saying it. A striking example of a court resorting to this to break the expert deadlock is *Muhammad Jeffrey* v *PP*.[21] The expert conflict was over the now-familiar question of the whether or not there was a strong correlation between withdrawal symptoms and the scale of drug consumption. The context was an accused who was caught in possession of illicit drugs, and he alleged that they were for his own consumption. The prosecution expert testified that the story was untrue because the withdrawal symptoms of the accused (after apprehension) would have been much more severe if the accused were consuming drugs to the extent that he claimed he was. The defence expert testified that there was no "direct correlation" between the rate of drug consumption and withdrawal symptoms.

where the Attorney-General mentioned the limitations on casting the burden of proof on the accused in European law and said that "our courts may have to consider the ECHR (European Convention on Human Rights) paradigm of criminal justice and decide whether it suits our circumstances".

[20] The prosecution expert's failure in *PP* v *Dahalan bin Ladaewa* [1996] 1 SLR 783 might be attributed to the "weak" testimony of the prosecution expert, who seemed ultimately to agree with the defence expert's views.

[21] [1997] 1 SLR 197. See also a similar approach in *Png Chong Hua* v *PP* [1997] 2 SLR 41, and in *Leong Wing Kong* v *PP* [1994] 2 SLR 54. A variation on this theme is *Teh Thiam Huat* v *PP* [1996] 3 SLR 621, where the prosecution expert was preferred because he had personally examined the accused (although what this had to do with the dispute about withdrawal symptoms and the rate of consumption is unclear). See also *Jusri bin Mohamed Hussain* v *PP* [1996] 3 SLR 29 where the court viewed the prosecution expert favourably because he had examined the accused shortly after he was arrested, while the defence expert only saw the accused 10 months later (although what this has to do with the essential dispute is again unclear).

The prosecution expert was accepted by the court for a number of reasons, but the one which we are concerned about at the moment was expressed in this manner:[22]

> Dr Lim [the defence expert] ... had only managed drug addiction patients ... who were psychologically disturbed and required psychiatric treatment. Although Dr Lim had seen numerous patients, it was only after the inmates had been examined and categorised by DRC [Drug Rehabilitation Centre] doctors (like Dr Leow [prosecution expert] himself) for drug withdrawal symptoms and decided on their admission...
>
> On the other hand, Dr Leow [prosecution expert] ... had over the years gained considerable experience in recognising drug withdrawal symptoms, understanding addiction and treating the addiction from admission to discharge [from DRCs]. He had therefore *more expertise* in expressing an opinion on the rate of consumption of heroin by an addict, having regard to the signs and symptoms an addict showed or claimed he had.

The credentials game is a dangerous one.[23] Conceivably, there could be situations where a particular expert's qualification or experience is clearly inappropriate for his or her testimony – the testimony will probably be ruled inadmissible in any event.[24] That apart, it is not easy to distinguish expert evidence on the basis of credentials.[25] Both experts had experience dealing with drug addiction. Although the prosecution expert had the task of categorising inmates according to the severity of their addiction (but not the defence expert), there is no evidence that the prosecution expert had done so correctly. Both prosecution and defence expert probably had to rely on the inmate's word as to what his or her consumption rate was. Again, both experts probably had to rely on their own observation of what the corresponding withdrawal symptoms are – and this, to an extent, is capable of being manipulated by the inmate. Although it was the case that the prosecution expert had

[22] *Ibid,* p 214.

[23] Brewer, "Scientific Expert Testimony and Intellectual Due Process" (1998) 107 Yale LJ 1535, pp 1666-1671 cogently argues that the untrained judge will not have the necessary competence to discern the relationship between credentials and expertise.

[24] S 47 of the Evidence Act says that the expert must be "specially skilled" in the appropriate discipline before his or her opinion is admissible.

[25] The Court of Appeal seemed to have recognised this in the more recent case of *Hanafi bin Abu Bakar* v *PP*, unreported, 10 Aug 1999.

to deal with more inmates than the defence expert, quantity is not always quality. Experts are human, limited and coloured by preconceptions and prejudices like anyone else. Of course, experience may change what we are already inclined to believe, but it is also possible that experts perceive reality according to the prejudices which they hold – like any of us. Apart from being a convenient way to tell an expert from a non-expert, credentials do not tell us much more about which of two competent but conflicting experts the court should accept.

There is another problem with credentialism – this time in the context of a small jurisdiction like Singapore. Taking, for example, *Muhammad Jeffrey's case*, no one but the psychiatrist attending to the DRCs would have experience with categorisation of drug addicts according to the severity of addiction. This psychiatrist will almost invariably testify as the prosecution expert. The defence will seldom be able to find a psychiatrist in Singapore with a similar experience. The alternative is to import an expert from another jurisdiction, but this is an extremely expensive affair which few can afford. An emphasis on credentials will almost always result in an uneven contest in which the prosecution has the upper hand. The problems of a small jurisdiction extend beyond credentialism. Take, for example, the question of diminished responsibility. Experts in forensic psychiatry probably cannot make a living anywhere except in government service. They will testify for the prosecution. The defence is left with little choice but to rely on former government psychiatrists who no longer specialise in forensic psychiatry, or on psychiatrists who have never specialised in forensic psychiatry. The contest will be uneven.

V. Parsing Expert Performance

It is only human nature to be more impressed with someone who expresses his or her views with confidence. The court is more likely to rely on the expert who testifies categorically and confidently. In *Lim Chwee Soon* v *PP*,[26] the court was faced with conflicting testimony on unsoundness of mind in a capital firearms trial.[27] The Court of Appeal sympathised with the trial judge who was "at a loss as to what to make of [the defence expert's] prevarications and equivocality". Indeed, the defence expert "was so equivocal as to mean nothing at all". The court poured scorn on the defence expert's written report:[28]

[26] [1997] 2 SLR 60.

[27] S 4A of the Arms Offences Act, (Cap 14) makes it a capital crime to discharge a firearm in the course of committing one of the listed offences (which includes robbery). The defence of unsoundness of mind is now very rare and pleaded only in the face of a capital crime which is not murder (in which event, the invariable course is to plead diminished responsibility).

[28] *Supra*, note 26, p 64.

> [W]e feel compelled to make some observations on his [Dr Kong, the defence expert's] written report ...[I]t will be noticed that he uses such expressions as, 'appeared to be exhibiting'; 'might be having'; 'suggestive of'; 'very likely'; 'is not inconsistent' when describing symptoms and what those symptoms indicate. These expressions convey a degree of inconclusiveness in the mind of the author...

The court also quoted examples of the defence expert's "prevarications and equivocality" in his testimony:[29]

> Well, I suppose he [the accused] may or may not be aware of what he is doing. He may well be aware of what he is doing but I suppose the issue is, is he in control of himself...
>
> I think there is a certain degree of unsoundness of mind here.
>
> Yes, awareness I the sense that he knows what he is doing, obviously he knows what he is doing, but awareness in the sense whether it is wrong, I think there is big question mark, whether he sees this as wrong, as morally wrong, there is a big question on that. Because I don't think he can think in that abstract sense.

The court much preferred the cut and dried opinion of the prosecution psychiatrist who reported that the accused "behaved normally and was calm and collected". He, said the prosecution expert, was also "relevant, coherent and spontaneous in speech". The prosecution expert concluded that the accused had "no psychotic symptoms", "was aware of what he was doing and not of unsound mind", although he did suffer from an "antisocial personality disorder".

We have to be very careful about judging an expert witness' demeanour in this fashion. Much as the court would like the expert to express categorical opinions, many fields of learning, and especially psychiatry, does not lend itself to black and white conclusions. The question of whether and to what extent someone is suffering from mental illness is quite different from the question of whether someone has broken a bone in an accident. Lawyers know that some questions of law are capable of simple and uncontroversial answers, but others are not. In a difficult point of law, where different and conflicting views are possible, it would be folly for a lawyer to state conclusively and confidently that the law is thus and can be nothing else.

[29] *Supra*, note 26, p 65.

Yet we expect the psychiatrist to do just that.

A second and related reason why we have to cautious about assessing expert testimony by the degree of confidence with which the view is expressed is that defence experts are not normally forensically or legally trained. Neither are prosecution experts, but at least they learn the tricks of the trade after a few court appearances.[30] When an expert uses words or terms which the court might construe as "prevarication" and "equivocality", he or she might merely be saying all that can be said, given the inexactitude of the science concerned. A more practised expert will, of course, trim down the offending words – Dr Kong will doubtlessly be using less of these words in the future[31] – but the validity (or invalidity) of the expert opinion expressed does not change with the way in which it is expressed. The court may not (and did not) ultimately accept the defence psychiatrist's evidence, but the so-called prevarication and equivocality should not have been held against him, and more importantly, against the accused.

Indeed one may well have more questions for the prosecution psychiatrist's opinion. A simple declaration that the accused was aware of what he was doing is not enough. What exactly was he aware of – the physical, moral or legal nature of his acts? Neither should the confident and conclusive opinion that the accused "was not of unsound mind" unduly impress.[32] How is it that someone can suffer from an "antisocial personality disorder" and yet still be entirely of sound mind? There may well be good reasons for this, and there may be much more in the testimony than this, but the Court of Appeal did not think it necessary to say any more about the prosecution expert.

Rather than parsing the language used by the expert, the court would have done much better to have extracted the gist of what he was saying – that there was a significant possibility of the accused not being aware that what he was doing was morally wrong, and then to assess whether that opinion was made out.

[30] The prosecution witness in most of the recent diminished responsibility and self-consumption cases appears to be one or two doctors in the Prison Medical Unit.

[31] For example, the prosecution expert witness who did not perform quite so well in *PP* v *Dahalan bin Ladaewa* [1996] 1 SLR 783 seems to have "redeemed" himself subsequently: see *Jusri bin Mohamed* v *PP* [1996] 3 SLR 29.

[32] The matter is not uncontroversial, but The United States Federal Rules of Evidence 1999, Rule 704, does not even permit a psychiatrist to testify that a defendant in a criminal case "did or did not have the mental state or condition constituting an element of the crime charged or a defense thereto".

VI. Appellate Restraint

A simplistic assessment of the demeanour and performance of the expert witness is risky business. Yet this is made the touchstone of the time-honoured policy of appellate restraint. To use the words of an old Privy Council decision, which has since been quoted with approval in Singapore on a number of occasions:[33]

> In assessing the relative value of the testimony of expert witnesses ... their demeanour, their type, their personality, and the impression made by them upon the trial judge ... may powerfully and properly influence the mind of the judge who sees and hears them ... These advantages which were available to the trial judge are manifestly denied to their Lordships sitting as a Court of Appeal ... [Where] the respective theories having been carefully and dispassionately weighed ... and a clear conclusion in fact having been reached ... it would not be proper or safe, or in accordance with sound practice, that their Lordships should reverse the conclusion.

I have expressed my doubts about the use of things like "demeanour", "personality" and "type" in the assessment of expert testimony. The true reason for appellate restraint is not really that the trial judge is in a better position to choose between the experts, but that the appellate court is in no better position than the trial judge. So the expert deadlock is broken at the appellate level by the strong presumption that the trial decision was right. The point is that the policy of appellate restraint means that the problems and deficiencies of choosing between experts at the trial stage is preserved at the appellate level. The existence of an appeal process does not in any way begin to solve anything. In criminal cases, the policy of appellate restraint, coupled with the informal presumption of defence expert bias, normally results in the near inevitable defeat of the defence expert both at the trial and at the appeal.

VII. Extraneous Circumstances

As in most other areas situations when the law does not clearly point the

[33] *Tengku Jonaris Badlishah* v *PP* [1999] 2 SLR 260, 271, quoting *Antonio Dias* v *Frederick Augustus* (1936) AIR PC 154.

way, extraneous circumstances which evoke judicial sympathy for one party or the other can sometimes operate to resolve expert conflict. A striking example of this is *Swee Hong Exim Ltd* v *Saigon Shipping Co* where, in the words of the judge:[34]

> The principal question to be decided by me was whether Serimax [the owner of the arrested vessel] was a separate legal entity or not according to Vietnamese law. The expert evidence ... contained in the respective affidavits ... were ... in conflict ... It appeared that the Vietnamese authorities whilst permitting ... the defendants' expert to travel to Singapore to give evidence would not permit the plaintiffs' two expert witnesses to leave Vietnam...I got more help from the two paragraphs of the [plaintiffs' expert affidavit] than form the evidence I heard from [the defence expert].

Although the learned judge did not expressly link the behaviour of the Vietnamese authorities to the finding in favour of the plaintiffs' absent experts, it seems clear that it was that which sealed the fate of the defendants more than anything else. None of this was made explicit by the judge, but it seemed almost irresistible to infer that the surprisingly partial attitude of the Vietnamese authorities was procured by the defendants. In effect, the defendants were trying to subvert the course of justice in the Singapore claim. All this really had no direct bearing on the validity of the plaintiffs' or defendants' expert interpretation on Vietnamese law, but the broad justice of the situation probably became the tiebreaker.

An example in the criminal context is *PP* v *Ang Soon Huat*.[35] Trafficking in excess of 15gm of heroin is punishable with a mandatory death penalty.[36] The accused was charged with trafficking 18.77gm of heroin. The defence expert testified that the procedure adopted in testing the quantity of the drug was not in accordance with current standards. The judge said:[37]

> We accept the general criticism [of the defence expert] that the laboratory procedures ... were not sufficiently rigorous ... We are constrained to agree with this criticism not only because the highest standards of

[34] [1994] 3 SLR 76, 79.
[35] [1991] 1 MLJ 1.
[36] Second Schedule to the Misuse of Drugs Act, Cap 185.
[37] *Supra*, note 35, p 9.

> laboratory practice should be followed at all times in respect of any analysis, whatever it purpose may be, *but particularly on a occasion when, the result to the analysis was literally a matter of life and death for the accused!*

It seems likely that the same procedure, found wanting here, was the one used in most of the trafficking cases before this case. Yet something tilted the balance, and this was the mandatory death penalty. Logically, it should not matter whether the penalty was death or a day's imprisonment – the only question was whether the prosecution could prove beyond reasonable doubt that the amount of drugs exceeded 15gm. Three factors combined to produce a rare defence victory in this case: the burden of proof which was on the prosecution, the closeness to the crucial 15gm limit, and the mandatory death penalty.

Whether and to what extent a court will make use of extraneous factors to break the expert deadlock is unpredictable. One can imagine another judge sticking to the rules and refusing to be influenced by the general justice of the situation. Compartmentalisation of thought is the orthodoxy of legal theory, but it is artificial and it is unlikely that such extraneous considerations can ever be banished from the application of the law.

VIII. Playing the "Super-Expert"

The means of choosing between competing experts we have discussed so far do not yet touch the heart of the problem. Indeed they skirt the core difficulty – that of the judge, a layman, choosing between conflicting expert opinion on *its merits.* How successful have the courts been in playing the super-expert, the arbiter of experts?

Many a battle has been fought over the defence of diminished responsibility. The defence expert advances a theory that the accused is suffering from a particular mental illness. This is countered by the prosecution expert who testifies as to the opposite view – that the accused does not have the mental illness alleged. Sometimes the matter is resolved at a factual level – the defence and prosecution experts base their opinion on a different set of symptoms, and the court makes a finding of fact as to which set of symptoms existed and prefers the corresponding expert view. As we have seen, this is not a real clash of opposing expert generalisations. The problems really begin when the facts (or symptoms) are agreed upon and the experts disagree as to whether or not, on the same set of symptoms, there is a recognised mental illness.

One expert dispute that has arisen concerns the appropriate diagnostic criteria for a particular mental illness. In *Tengku Jonaris Badlishah,* the Court of Appeal, proceeding on the assumption that the accused suffered

from depression for seven to eight months, preferred the opinion of the prosecution expert whose view was that this was not enough for a diagnosis of dysthymia, saying:[38]

> As Dr Chan [the prosecution expert] pointed out, there is much controversy amongst psychiatrists as to the diagnostic criteria for dysthymia. One school of thought, as evinced by Dr Tsoi's [the defence expert] opinion, is that the minimum two-year period laid down in ICD-10 [the World Health Organisation's Manual of Classification of Diseases] as a diagnostic guideline applies only to neurotic depression, which is the more severe sub-type of dysthymia. Another school of though, as reflected in Dr Chan's evidence, is that the two-year requirement applies to dysthymia of both the sub-types neurotic depression and depressive neurosis. Faced with this conflict in expert evidence, the trial judge was entitled to prefer Dr Chan's opinion ... and to hold, accordingly, that one of the conditions essential for a finding that the appellant [accused] suffered from dysthymia at the material time was lacking.

What is interesting is that the court did not resort to the burden of proof to resolve the conflict. The result in the Court of Appeal could possibly be attributed to the policy of appellate restraint – but even so, as we have seen, the appellate court is still under an obligation to ensure that the competing theories have been "carefully and dispassionately weighed". There is no evidence in the Court of Appeal judgment that this was done. The defence expert's opinion, which was rejected, was not an idiosyncratic one, but represents a "school of thought". On what possible basis could the court have decided between two, presumably established, schools of thought? We simply do not know.

An emerging trend in the diminished responsibility cases is the use by judges of Diagnostic Manuals to test the opinion of contending psychiatrists. Typically the manuals give a list of symptoms and state that the subject has to have a given number of these symptoms to qualify for a particular mental illness. In *Chan Chim Yee* v *PP*,[39] the defence expert was of the view that the accused had killed while in a "dissociative fugue state" – a "significant departure from one's home or one's customary activities with inability to recall some or all of one's past" associated with "syndromes of psychological stress such as Depression and ...Reactive Paranoid Psychosis". The Court of Appeal approved of the trial judge who disposed of the defence expert's view thus:[40]

[38] *Supra*, note 33, p 275.
[39] Unreported, Court of Appeal, 11 Feb 2000.
[40] *Ibid*.

> I am not satisfied that the accused was in a dissociative fugue state ... because Criterion A set out in DSM-IV [a diagnostic manual] – the sudden unexpected travel from home or one's customary place of daily activities with inability to recall some or all of one's past, was not satisfied. Firstly, the accused had not strayed from his home or workplace. Secondly, there was no inability to recall. Dr Kong's [the defence expert] explanation that the accused's account of his activities was amnesia disguised by dissociative confabulation was unacceptable because the available authorities state that the confabulations are temporary and the patients are aware that they are confabulating. The accused was sticking to his accounts of events up to the trial ... and that is inconsistent with dissociative confabulation. Criterion B – the confusion about personal identity or assumption of a new identity, was also not present ... There is also no evidence on Criterion D – clinically significant distress or impairment in social, occupational or other important areas of functioning.

It is tempting for a legally trained judge to treat diagnostic manuals as if they had some sort of statutory force, and then to scrutinise each symptom like a required element of a crime or tort. It would be unfair to accuse either the trial judge or the Court of Appeal in this case to have done so – the published material does not warrant it. However, it might be timely to draw attention to the potential danger of too rigid or simplistic a reliance on diagnostic manuals. One cannot help but see that there is fair degree of subjectivity in the drafting of such manuals. Deviation therefrom is not necessarily a sign of poor expert opinion. In an unfortunately unreported decision, *Ong Teng Siew* v *PP*,[41] Amarjeet Singh JC took the prosecution expert to task for applying a diagnostic manual too mechanically. The learned judge quoted this illuminating passage from another edition of the manual:[42]

> Most of the classifying we do in everyday life is categorical: a table is a table and a chair is a chair. Unfortunately, *life and mental disorders can be complicated, and the categorical model breaks down in situations characterized by unclear boundaries* and heterogeneity within a category. In geometry, a triangle and a square are never the same; all squares have four sides and 90-degree angles; all triangles have three sides. In contrast, most mental disorders merge imperceptibly into near neighbours (*eg*, for Mood Disorders, there is no absolute boundary with either Schizophrenia or Anxiety Disorders).

[41] High Court, 17 Apr 1998.
[42] *Ibid.*

It is heartening that at least one judge demonstrates an awareness of the pitfalls of using diagnostic manuals to decide between conflicting experts. Even so, if we take a step back, what the judge is forced to do under our present rules on expert evidence is peculiar indeed. If the judge is going to second-guess the experts and apply the manuals himself or herself, then why bother with the experts at all – it would save everybody's time if we exclude the experts and give the diagnostic manual to the judge so he or she can apply it. To return to Learned Hand's observation, it is because the judge is thought to be insufficiently competent to use a diagnostic manual that expert testimony is required. Yet the moment expert testimony is required, there is almost always bound to be conflicting expert testimony, and the judge has no choice but to do what he or she is not competent to do.

A more common way in which courts decide between competing experts in diminished responsibility cases is behaviour of the accused, during, and shortly before and after, the commission of the act in question. In *Chua Hwa Soon Jimmy* v *PP*,[43] the accused was charged with a murder which to all appearances was motiveless. The defence psychiatrist testified, in support of a diminished responsibility plea, that the accused was suffering from a psychosis which was accompanied by visual and auditory hallucinations (which included a voice commanding the accused to kill). This was contradicted by the prosecution psychiatrist who said that the accused was not suffering form psychosis, but only a "mild depersonalisation". The court, in rejecting the defence, said:[44]

> [W]e concluded that the appellant could have restrained himself, even if we accepted that he was commanded by a voice. His abnormality of mind (if any) was not such as to substantially impair his mental responsibility for the offence committed. After all, he had *the presence of mind* to try and tie the deceased up when assaulted; to avoid electrocution by using the telephone cord instead of pulling the plug; to look for the keys to make his escape; to put on his boots before leaving the crime scene; and to dispose of his bloodied clothes. His behaviour immediately after the murder was also inconsistent with a person who claimed to be out of control. Therefore, the entire episode, in our judgment, demonstrated that the appellant's mind was not substantially impaired as to absolve him of mental responsibility for his foul crime.

[43] [1998] 2 SLR 22. See also *Mimi Wong* v *PP* [1972] 2 MLJ 75; *Mansoor Abdullah* v *PP* [1998] 3 SLR 719; *Lim Chwee Soon* v *PP* [1997] 2 SLR 60; *Contemplacion* v *PP* [1194] 3 SLR 834.

[44] *Ibid*, p 33.

It is where the accused kills for trivial reasons or no reason at all that we are most anguished – and there have been a number of such cases reaching the Court of Appeal. Our gut reaction is that normal people just do not kill unless there is a good reason to do so. Yet in these cases, the court plays the super-expert, rejecting the opinion of the defence psychiatrist that there was psychosis, and accepting the prosecution expert's view that abnormality of mind did not exist or was not substantial enough. The defence psychiatrist obviously thought that the accused could have had his responsibility for his acts diminished for the killing, and yet still retain "presence of mind" with respect to other matters happening during or shortly after. The prosecution expert presumably thought otherwise. Yet on what basis did the court prefer the prosecution witness? Again, we really do not know. One might speculate that, faced with conflicting expert opinions on the nature of this kind of psychosis, the court retreated to a common-sense question – was he mad generally? If he had general "presence of mind", then the accused must have also had "presence of mind" when he killed. Yet, are diseases of the mind this simple? As an American study (in the context of the insanity defence) said:[45]

> [C]omplex actions such as concealment are often taken as incontrovertible evidence of awareness of criminality and hence of criminal responsibility, when in fact they may constitute regressive behaviour driven by psychosis.

Using the more or less contemporaneous actions of the accused to break the expert deadlock is fraught with difficulty. Whether or not the accused can be out of control with respect to the killing and yet retain control in matters such as prevention of detection or self-preservation is precisely a matter not within the judge's competence to decide. That is why the psychiatrist is needed. If defence and prosecution psychiatrist disagree, it is impossible for the judge to arbitrate the dispute in any meaningful way.

An interesting example of the court playing the super-expert in a civil context is found in the admiralty case of *The Sangwon*.[46] As in the case of the Vietnamese vessel, it became necessary in the proceedings to decide whether under North Korean law it was possible for an entity apart from the state to own a North Korean vessel. North Korean legal experts provided conflicting views of North Korean law. The plaintiff's expert, relying on

[45] Bursztajn, Scherr and Brodsky, "The Rebirth of Forensic Psychiatry in the Light of Recent Historical Trends in Criminal Responsibility", (1993), http://www.forensic-psych.com/articles/artRebirth.html.

[46] Unreported, High Court, 22 Sept 99; [2000] 1 SLR 321 (Court of Appeal).

Article 21 of the Constitution, argued that only the State may own the vessel. The defendant's expert, relying on Article 22 (and some other provisions), was of the contrary view. The trial judge correctly perceived a potential contradiction between the two provisions in the Constitution and set out to interpret North Korean law himself. Article 21 applied to international vessels, but Article 22 applied only to vessels not travelling beyond national boundaries. The plaintiffs won round one. On appeal, the Court of Appeal was clearly uneasy with this attempt by a Singapore judge to adjudicate between two North Korean legal experts on a point of North Korean law. Instead it resorted to the now familiar device of the burden of proof. It was for the plaintiff, the court said, to prove its case. In the face of conflicting experts (and potentially conflicting constitutional provisions) the plaintiffs failed to discharge its burden. Playing the super-expert is a dangerous game.

IX. Is There a Better Way?

Save in clear cases where an expert's opinion is fatally flawed because of a finding of fact which under-cuts the opinion, or because the expert opinion cannot logically stand, none of the ways in which the court now breaks the expert deadlock is satisfactory. As litigation, both civil and criminal, becomes more sophisticated in years to come, expert clashes are likely to happen more often; and with more practice, counsel will be more adept at choosing "impressive" experts and expert witness will perform better. It will become increasingly difficult to choose between conflicting experts. If we have no choice, then nothing more need be said. Courts do have to decide questions of fact all the time, and often in the context of conflicting testimony. Until we can find better people to do this task, we have no reason to change the present state of affairs where society entrusts that duty to its judges. Although expert generalisations necessary for the determination of a case is technically also a question of "fact", here there are people who are better equipped to decide which of two contending expert generalisations should apply – an expert in the particular field of study. As we have seen, the system now in place is schizophrenic – the judge is at the same time incompetent to make expert generalisations, but is competent to choose between two conflicting expert generalisations. Asking a lawyer to adjudicate between two expert medical opinions is as ludicrous as asking a doctor to decide a dispute between two legal experts on a question of law.

I shall discuss three proposals for reform. The first, and less radical one, is the compulsory use of neutral, court-appointed experts. The power of

[47] Order 40 Rule 1, Rules of Court 1996.

the court to appoint its own expert is available to the civil court "on the application of any party".[47] There is no clear power to do so in criminal cases.[48] At least in the reported cases, the appointment of a neutral expert is rare in civil cases[49] and unheard of in criminal prosecutions. The United States Federal Rules of Evidence take matters a little further:[50]

> The court may on *its own motion* or on the motion of any party enter an order to show cause why expert witnesses should not be appointed ... The court may appoint any expert witness agreed upon by the parties, and may appoint experts witnesses of its own selection.

The Federal Rules apply to both civil and criminal proceedings, and, significantly, empowers the judge to appoint an expert even if all the parties do not want it. The system is not yet compulsory because the judge retains a discretion to make the appointment. It is now established that in practice, such appointments are rarely made. Professor Gross attributes this to the strong adversarial mentality of lawyers and judges trained in the common law tradition:[51]

> All major attempts at reform, however, have been variations on a single theme: the discretionary use of court-appointed experts who operate outside the process of adversarial fact finding. This is barren ground. In our system of litigation, virtually all resources and incentives are adversarial. Giving judges the option to discard this reality is predictably ineffective; they know better.

To be effective, the use of neutral experts will have to be made compulsory. This cuts deep into the prevailing adversarial philosophy, but there is no merit in preserving the adversarial nature of our trials for its own sake. Yet the compulsory appointment of experts is not without its problems. The choice of the expert will be pivotal, for the court is likely to accept his or her opinion over and above any expert called by the parties. A fair way of choosing the court expert will have to be devised. Even so, although

[48] Appeal could be made to Rule 19, First Schedule to the Supreme Court of Judicature Act, Cap 332, which empowers the court to order a medical examination of any party to the proceedings where the physical or mental condition of the person is relevant to any matter in question.

[49] See, *eg, Teo Geok Fong* v *Lim Eng Hock*, unreported, High Court, 11 Aug 1998, where both the court expert and an expert appointed by the dissatisfied party surprisingly agreed with each other.

[50] Rule 706.

[51] "Expert Evidence" [1991] Wisconsin LR 1113, 1231.

the court expert may be presumed to be free from *partisan* bias, he or she may not be free from *professional or experiential* bias. For example, a court appointed psychiatrist may, for some reason of conviction or experience, be unduly reluctant to say that someone is suffering from a mental illness. Conversely, another court appointed psychiatrist may be rather too generous in certifying that an accused person is mentally abnormal. The fact is that even the court appointed expert remains a witness, and his or her testimony will still have to be tested against testimony offered by expert called by the parties, and problems of competence (of the decision-maker) resurface.

Hence, the second proposal for reform – an expert tribunal to decide between competing expert generalisations. Learned Hand describes it thus:[52]

> [M]y path has led to a board of experts or a single experts, not called by either side, who shall advise the jury of the general propositions applicable to the case which lie within his province ... [T]o this tribunal would be transferred the present so-called expert evidence. Either side might call experts ...[T]he right of cross-examination could be exercised without limitation. Only the difference would be that the final statement of what was true would be from the assisting tribunal.

Here the decision-maker is no longer a lawyer, but an expert in the particular field. The clear advantage is that the judge no longer gets involved with conflicting experts. A super-expert, who is himself an expert, makes the choice – the situation is analogous to the (legally trained) judge deciding between opposing legal counsel presenting conflicting submissions on the law. Some administrative and constitutional problems will need ironing out – satisfactory means will have to be found to appoint appropriate experts to the "expert bench" and their positions may have to be guarded with security of tenure. The expert tribunal may have to receive some training in the law – it will need to conduct proceedings and some expert generalisations will be so enmeshed with ordinary question of fact and law that the tribunal may have to touch upon those matters in making a decision. I do not think any of these are insurmountable, but the structural changes will be radical.

The third solution is the most recent one. The strategy of the expert tribunal proposal is to take away that part of judicial power concerned with choosing expert generalisations from the legally trained judge to the appropriately trained expert tribunal. This proposal seeks to make the legally trained judge also conversant in the particular expertise. This is, of course, ideal, but

[52] "Historical and Practical Considerations Regarding Expert Testimony" (1902) 15 Harvard LR 40, 56.

its practicality is problematic. Judges normally have neither the time nor the inclination to pick up expertise in other fields. Yet it has been argued that this might already be going on in practice. In the words of Professor Brewer:[53]

> It is not unreasonable to suppose that some judges, who are repeatedly and predictably faced with proffers of scientific evidence, may find the time and energy required to become decently competent in manipulating the aims, methods, and results of some of the specific sciences they are likely to come into their courts.

The idea is to formalise the process. The education of a lawyer can be made more broad-based, as it is in the United States where law is a graduate programme available only to graduates of some other discipline. Continuing education for lawyers and judges in the kinds of expertise likely to come before them can be developed. The fields of expert knowledge which a court is likely to be presented with are, from the law reports, actually quite limited. Organising judges into informal divisions where they are likely to hear the same kind of expert evidence will help. If the judge has to play the super-expert, then it is only fair that the judge is as close to being an expert as is possible. Judges simply have to find the time and make the effort.

It is not my intention to prefer any one of these proposals over the others. Too much depends on factors beyond my knowledge and experience. The burden of this discussion is simply that the way in which we now deal with expert evidence is not satisfactory, and that in criminal cases, the accused is unfairly treated. If we have no choice, then nothing more need be said, but I hope I have made it sufficiently clear that something can be done about it.[54]

MICHAEL HOR*

[53] *Supra*, note 23, p 1678.

[54] This article was expanded from a series of lectures delivered to Evidence and Procedure students in the National University of Singapore in the academic year 1999-2000. I thank my co-teachers and students for their feedback on the views expressed.

* LLB (NUS), LLM (Chicago), BCL (Oxford), Associate Professor, Faculty of Law, National University of Singapore.