Procedural Reform to the System of Expert Evidence in Medical Negligence Cases in Malaysia

Joseph Lee*

Abstract

The system of expert evidence in medical negligence cases in Malaysia is adversarial. Under the rules of the court, litigants may engage their own medical experts to advance their case although limited authority is conferred upon a High Court judge to appoint an independent expert. Although medical experts owe an obligation to the court to be impartial in their testimony, judicial commentary from Malaysia, United Kingdom and Australia shows that this common law duty has failed to curb the problem of biased expert testimony. Whilst the United Kingdom and most state jurisdictions in Australia have implemented procedural reform to move away from the system of litigant-appointed experts in, among others, medical negligence proceedings, there is no indication that Malaysia is heading towards any form of procedural reform. This article analyses the problems facing the use of experts in medical negligence litigation in Malaysia and argues for procedural reforms by drawing on the developments in the United Kingdom and Australia.

Introduction

In Malaysia, the use of experts in all civil proceedings, including medical negligence litigation, is governed by the *High Court Rules 1980* and *Subordinate Court Rules 1980* respectively. Although both sets of rules govern proceedings in different court hierarchies, they bear a resemblance in many aspects. One of them is the presumption in favour of litigant-appointed experts in all civil proceedings. Neither rules of the courts explicitly allow nor prohibit litigants to engage their own experts. What is clear is that only the *High Court Rules 1980* authorises judges to appoint a court expert if an application for this expert is made by one or more parties.[1] Litigants are therefore at liberty under the present procedural framework to choose experts whose opinions can support their case. The only condition is that a 'reasonable sum' is paid to the experts to cover the costs associated with the preparation of expert reports, attendance and the giving of testimony in courts.[2] This raises the contentious issue of adversarial bias. This term, formerly used by the New South Wales Law Commission in its review of the system of

* LLB (Hons) (Tasmania); LLM (Tasmania), Research Associate, Faculty of Law, University of Tasmania.
This paper was based on the author's thesis submitted in fulfilment of the Master of Laws by Research (LLM) at University of Tasmania. The author wishes to express his gratitude to Distinguished Professor Donald Chalmers and Professor Margaret Otlowski, both of University of Tasmania, for providing valuable comments on the previous drafts of this paper.

1 *High Court Rules 1980* Order 40 Rule 1.

2 *High Court Rules 1980* Order 38 Rule 22 and *Subordinate Court Rules 1980* Order 25 Rule 4. Both statutory provisions do not define the term 'reasonable sum'. Hence, the payment of expert fee is subject to a mutual agreement between an expert and his or her client.

expert witnesses in civil proceedings, refers to three forms of bias in expert testimony: deliberate partisan, unconscious partisan and selection bias.[3]

This paper analyses the extent of adversarial bias in litigant-appointed experts and how it may affect the due administration of justice in civil proceedings, particularly medical negligence litigation in Malaysia. It is argued that the common law duty of experts and the procedural framework in Malaysia are inadequate to safeguard adversarial bias in medical negligence litigation. As it is shown in the analysis which follows, adversarial bias in medical negligence cases is a significant issue and this problem has, to a certain extent, contributed to inordinate delays in the resolution of medical disputes in Malaysian courts. The analysis draws upon judicial commentary in the United Kingdom and Australia, as well as the reforms implemented by legislators in both jurisdictions to minimise adversarial bias in civil proceedings. This paper ends with proposals for the implementation of a single agreed or a single court appointed expert prior to the commencement of medical negligence proceedings, in line with the procedural reform in the state of Queensland, Australia.

The Adequacy of The Common Law and The Procedural Framework In Curbing Adversarial Bias

At common law, it is established that the primary role of experts is to assist judges to adjudicate technical issues with unbiased testimony.[4] In other words, experts must be truthful about the basis of their opinion and should not deliberately omit material facts which could otherwise jeopardise the interests of the litigants who engage them.[5] Codes of practice for experts, more specifically for medical experts, have long been issued by the courts. In the English House of Lord decision in *Whitehouse v Jordan*, Lord Wilberforce gave the following cautionary remarks to experts testifying in medical negligence litigation:

> '... While some degree of consultation between experts and legal advisers is entirely proper, it is necessary that expert evidence presented to the court should be, and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation. To the extent it is not, the evidence is likely to be not only incorrect but self defeating.'[6]

---

[3] New South Wales Law Reform Commission, *Expert Witnesses*, Report No. 109 (2005) 71-74. 'Deliberate Partisan' refers to intentionally manipulation of evidence by experts to support their clients' case. In the case of 'unconscious partisan', experts do not intentionally mislead the court. However, they give evidence in such a way that supports their clients' case mainly under the influence of financial inducement. 'Selection bias' relates to situations where litigants choose experts whose opinions are known to support their case.

[4] *National Justice Compania Naviera S.A v Prudential Assurance Co. Ltd.* ("The Ikarian Reefer") [1993] 2 Lloyd's Law Reports 68, 81 (Cresswell J).

[5] Ibid.

[6] [1981] 1 All ER 267, 276.

These statements are sufficiently clear to remind experts of the overriding duty to give fair and independent opinion. Questions, however, are raised as to the effectiveness of this common law principle in preventing expert bias.[7] Significantly, Lord Wilberforce did not address the consequences or remedies that flow from an expert breaching his or her duty to the courts. At common law, a judge cannot hold a biased expert for contempt of court.

The common law aside, the procedural rules in Malaysia equally lack adequate mechanisms to safeguard against bias expert opinion in medical negligence litigation. Currently, only the *High Court Rules 1980* provides for the appointment of court experts. However, the exercise of the authority by a High Court judge to engage this independent expert is limited in that it is dependent upon an application by one or more litigants in a medical dispute.[8] There are no statutory provisions under either of the court rules authorising Malaysian judges to appoint medical experts on their own initiative. Given that litigants may engage their own medical experts, it is doubtful whether they would seek the direction of a judge to appoint court experts.

The inadequacy of the common law and the procedural framework is manifested in the widespread problem of adversarial bias in civil proceedings, including medical negligence litigation in Malaysia. This problem, it is contended, has adversely affected the due administration of justice, particularly the speed at which medical negligence proceedings are resolved by judges.

Adversarial Bias In Medical Negligence Litigation In Malaysia

An appropriate way to examine the extent of adversarial bias is arguably through an analysis of judicial observations and commentary stemming from judges' first-hand experience in dealing with expert testimony. In Malaysia, these judicial observations can be seen in a number of recent reported cases.

A good illustration is the Federal Court decision in *Foo Fio Na v Dr Soo Fook Mun*.[9] *Foo Fio Na* involved a tragic medical accident. The appellant Miss Foo was injured when a car in which she was a passenger hit a tree. Prior to admission to the hospital, she was able to walk freely without any assistance. After undergoing an open neck surgery conducted by the respondent doctor, the appellant suffered from paralysis. The central issue before the trial judge was whether the respondent was negligent in failing to disclose material risks of the proposed open neck surgery and in the subsequent performance of the surgical operation. At the trial, the respondent doctor engaged a

[7] See also Mia Louise Livingstone, 'Have We Fired the Hired Gun? A Critique of Expert Evidence Reform in Australia and the United Kingdom', (2008) 18 *Journal of Judicial Administration* 39, 40.

[8] *High Court Rules* 1980 Order 40 Rule 1.

[9] [2007] 1 MLJ 593.

British expert to testify on his behalf. This British expert was a council member of the Medical Protection Society of which the respondent doctor was also a member.[10] The trial judge, Mokhtar Sidin JCA, rejected the opinion of this British expert on the ground that his testimony was 'self-serving' aiming to favour the respondent doctor.[11] This finding was not altered by the Federal Court which affirmed the ruling of the trial judge that the respondent doctor was liable for both claims of negligence.[12]

The aftermath of *Foo Fio Na* saw a higher degree of judicial scepticism towards the testimony of litigant-appointed experts in medical negligence cases in Malaysia. This development is evident in a recent High Court decision in *Sanmarkan a/l Ganapathy v Dr V Thuraisingham*.[13] *Sanmarkan* was a case where the plaintiff sued the defendant doctor for failing to diagnose his wife's colon cancer much earlier. One of the defendant's medical experts was a representative of the Medical Protection Society. Chew Soo Ho JC, having cited the decision in *Foo Fio Na*, rejected the opinion of this expert. The trial judge offered two reasons for this decision. One was that the opinion of the defendant's expert was based on medical records and pleadings, both of which were submitted to him by the solicitors for the defendant. The other reason was that the defendant's expert was a representative of the Medical Protection Society and the defendant was also a member of this organisation. This latter reason, though indicating only a probability of bias in the testimony of the defendant's expert, nonetheless had a significant bearing on the decision of the Court to reject this opinion. In his Honour's judgment, Chew JC commented:

> '.... As a member of the Medical Protection Society and being so requested by the society's solicitors acting for the defendants to prepare the report, one cannot erase the element of doubt in the report so prepared and the independence of [the defendant expert's] opinion. [The defendant expert's] could probably be unbiased and honest in his opinion. Howsoever it may be, as long as his opinion and product are tainted with the probability of non-independence, it would be unsafe for the court to rely on such evidence to ensure a fair trial ...'.[14]

It appears from the decisions in *Foo Fio Na* and *Sanmarkan* that judges may regard medical experts to be biased if they are selected from an organisation with which the litigants are directly associated.

---

[10] Quoted in Foo Fio Na v Hospital Assunta [1999] 6 MLJ 738, 758 (High Court). One of the objectives of this organisation, as stated by the trial judge, was to protect the interests of its members against medical negligence claims.

[11] Ibid. Mokhtar Sidin JCA gave a number of reasons for this conclusion. They included that the omission of the respondent's sole expert witness to examine the physical condition of the appellant and her X-rays; the basis of this expert's opinion was entirely grounded on case notes of the appellant given to him by the respondent doctor; and the suspicious nature of the case notes which were not the ones produced in court.

[12] Foo Fio Na [2007] 1 MLJ 593, 602-603.

[13] [2012] 3 MLJ 817 (Sanmarkan).

[14] Ibib, 836.

Another High Court case in which the independence of expert medical opinion was questioned was *Abdul Ghafur bin Mohd Ibrahim v Pengarah Hospital Kepala Batas*.[15] The plaintiff in this case sued the defendant hospital and its doctors for medical negligence over the treatment and care administered to his wife who had subsequently died. The death was stated to have resulted from the rupture of an aneurysm,[16] leading to subarachnoid haemorrhage.[17] At the trial, the Court found the plaintiff's medical expert untruthful about his past experience in the field of neurology. This finding raised the suspicion of the trial judge with respect to this witness's entire testimony and prompted the judge to evaluate his opinion 'with great care'.[18] In rejecting the opinion of the plaintiff's expert, Chew Soo Ho JC made the following observations:

> '... This court is of the view that the failure to take into account the constraint or limitation in the resources and procedures in the Kepala Batas Hospital and the consideration of irrelevant matters would have affected adversely the opinion of the [plaintiff's medical expert] which this court finds to be doubtful and suspicious whether it was a fair opinion or one which is bias [sic] ...'.[19]

The Court dismissed the plaintiff's claims as a result of the inadmissibility of the expert medical opinion which supported his case.

Judicial observations in *Foo Fio Na*, *Sanmarkan* and *Abdul Ghafur* may not be interpreted as applying to all litigant-appointed experts who have received a direct or indirect pecuniary interest in the outcome of medical disputes. These instances, however, expose a fundamental flaw in that litigant-appointed experts are inclined to be biased in favour of the party who engages them. This may be reinforced by the experience in the United Kingdom and Australia which, prior to procedural reforms, had relied heavily on the system of litigant appointed experts in civil proceedings.

Adversarial Bias In The United Kingdom And Australia

The issue of adversarial bias had been a perennial problem in the United Kingdom and Australia before legislative changes were implemented and it has attracted a flurry of judicial commentary. In the United Kingdom, 'paid agents'[20] and 'hired guns'[21] were among the most common judicial descriptions of litigant-appointed experts. Whether these were fair comments remains academic. What was more important in the judicial commentary was the message that the problem of adversarial bias had reached a critical

---

15 [2010] 6 MLJ 181 (*Abdul Ghafur*).

16 Aneurysm is a blood filled balloon-like bulge in the wall of a blood vessel.

17 Subarachnoid haemorrhage is bleeding into the area between the arachnoid membrane and the pia mater surrounding the brain. This medical condition may occur spontaneously, often resulting from a ruptured cerebral aneurysm or head injury.

18 *Abdul Ghafur* [2010] 6 MLJ 181, 211-212.

19 Ibid 214.

20 Abinger v Ashton (1873) 17 LR Eq 358, 374 (Sir George Jessell, during argument).

21 Lord Woolf MR, 'Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales' (HMSO, London, 1995) 183.

stage and reforms were needed. One significant judicial comment was made by Sir Thomas Bingham MR in the English Court of Appeal in *Abbey National Mortgages v Key Surveyors Nationwide*:

> ' …For whatever reason, and whether consciously or unconsciously, the fact is that expert witness instructed on behalf of parties to litigation often tend, if called as witnesses at all, to espouse the cause of those instructing them to a greater or lesser extent, on occasion becoming more partisan than the parties…'.[22]

Similar observations had also been noted in medical negligence cases in the United Kingdom.[23] In 1996, Lord Woolf further questioned the efficacy of litigant-appointed experts in ensuring a fair trial and saving costs and time in his *Access to Justice (Final Report)*[24]. A series of procedural reforms concerning the use of expert witnesses were implemented in England and Wales following his insightful observations.[25]

In comparison, judicial commentary concerning adversarial bias is relatively rare in Australian courts.[26] Extra-judicial observations of such a nature are nonetheless more common and have been made by judges from all levels of the court hierarchy. One influential voice came from the former Chief Justice of Australia, the Honourable Murray Gleeson. At a judicial conference in 2007, Chief Justice Gleeson revealed:

> '... there seems, however, to have been a marked increase in the use of experts in cases where the true technical or specialist expertise involved is limited, and the experts are used mainly for the purposes of advocacy.'[27]

These statements are arguably a subtle form of criticising the system of litigant-appointed experts in Australia. A more critical picture of adversarial bias was painted by Justice Gary Downes who raised the following concerns in his capacity as a judge of the Australian Federal Court and President of the Administrative Tribunal:

> '... 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

---

22 [1996] 3 All ER 184, 191.

23 One of these cases is the English Court of Appeal decision in Whitehouse v Jordan [1980] 1 All ER 650, 655 where Lord Denning MR criticised the expert reports prepared for the respondent doctor as the result of 'long conferences' between the expert of the respondent and his counsel.

24 Lord Woolf, 'Access to Justice' (Final Report to the Lord Chancellor on the Civil Justice System in England and Wales, HMSO, London, 1996).

25 These reforms are analysed in the subsequent sections of this paper.

26 One notable example is in the New South Wales Court of Appeal case of Lowns v Woods (1996) Aust Torts Report 81,376, 63,158 where Kirby P affirmed the observation of the trial judge who reprimanded the appellant's medical expert for 'abandon[ing] the role of independent expert in favour of that of the advocate'.

27 Chief Justice Anthony Murray Gleeson, 'Some Legal Scenery' (Paper presented at the Judicial Conference of Australia, Sydney, 5 October 2007) 13.

> 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, ... to shade views, conceal doubt, overstate nuance and downplay weak aspects of the client's case...'.[28]

The argument that adversarial bias existed in Australian courts was not new and had in fact been proven by empirical studies. In a 1999 survey based on a questionnaire sent to all Australian judges with trial experience in civil and criminal actions, the respondents were asked, among others, to comment on the extent of expert bias in courts.[29] Among the 244 judges who responded to the survey, 68 per cent stated they 'occasionally encountered' biased testimony, whilst 27 per cent rated it 'often'.[30] Forty per cent of the respondents stated that partisanship in expert testimony 'was a significant problem for the quality of fact finding in court'.[31] Judges were also invited to make comments. Sperling J, judge of the New South Wales Supreme Court, gave the following critique in relation to his experience in personal injury cases:

> 'In the ordinary run of personal injury work and to a lesser extent in other work, the expert witnesses are so partisan that their evidence is useless. Cases then have to be decided upon probabilities as best one can'.[32]

These comments indicated the seriousness of adversarial bias in Australian courts. However, it was not until the early and mid 2000s that reforms to the system of litigant-appointed experts were implemented across a number of Australian state and territory jurisdictions. These reforms, as discussed later, were considerably influenced by the Woolf reforms in England and Wales.[33]

Other Related Problems In Medical Negligence Litigation In Malaysia

Adversarial bias may generate a number of impediments in the administration of justice in medical negligence proceedings. Among them are delays in the conclusion of medical negligence proceedings and unnecessary costs as a direct consequence of prolonged

---

28 Justice Gary Downes, 'Court Appointed Experts', (2005) 5(1) Q.U.T Law and Justice Journal 89, 91.

29 This survey was conducted on behalf of the Australian Institute of Judicial Administration and the National Institute of Forensic Science. The questionnaire was sent to 478 Australian judges and response to this survey was voluntary. Judges at the Australian appellate courts were excluded from this empirical study.

30 Ian Freckelton, Prasuna Reddy and Hugh Selby, 'Australian Judicial Perspectives on Expert Evidence: An Empirical Study' (Australian Institute of Judicial Administration Incorporated, 1999) 25 and 144.

31 Ibid 154.

32 Justice Hal Sperling, 'Expert Evidence: The Problem of Bias and Other Things', (2000) 4 Judicial Review 429, 430. Similar comments have also been made in Australia by Justice of Appeal Geoffrey Davies, 'The Reality of Civil Justice Reform: Why We Must Abandon the Essential Elements of Our System' (Paper presented at the 20th AIJA Annual Conference, Brisbane, 12-14 July 2002).

33 New South Wales Law Reform Commission, above n 3, 50[4.27].

litigation.[34] In Malaysia, the problem of delay is particularly acute in the resolution of medical negligence litigation and can be illustrated through a number of cases. One is the Federal Court decision in *Foo Fio Na*, a case resolved 19 years after litigation commenced. Legal action in this case was filed in the High Court in 1987 but judgment was delivered by this first instance court 12 years later. Delays were also encountered in the appellate courts. The Court of Appeal handed down its decision in 2001, two years after the High Court decision. The Federal Court took another 5 years to finally resolve the case. The severity of the problem is also evident in the Court of Appeal case of *Dr Chin Yoon Hiap v Ng Eu Khoon*[35] which took a period of 16 years to complete. Litigation was initiated in the High Court in 1981, but judgment was not delivered by the trial judge and the Court of Appeal until 1995 and 1997 respectively.

Various reasons have been proffered to explain inordinate delays in the resolution of medical negligence litigation in Malaysia. Some of these reasons are identifiable at different stages of the litigation process and may be beyond the control of the courts and the litigants: where litigants are waiting for documents and information from hospitals; during exchange and investigation of documents; and adjournments due to circumstances such as the illness of key witnesses.[36] What seems lacking in this analysis, however, is the mention of the shortcomings within the system of expert evidence and their negative impact on the speedy resolution of medical negligence litigation in Malaysia.

The current procedural framework relating to the use of experts is arguably inadequate to facilitate a speedy resolution of medical negligence litigation. A major concern lies in the number of experts who may be called to testify. There is no doubt that the rules of the courts contain provisions authorising judges to limit the number of experts who may be called to testify in medical negligence trials.[37] However, this provision is silent on its maximum threshold and the exercise of this judicial function remains discretionary. More often than not, each litigant in medical negligence cases may call more than one medical expert witness, and judges, for reasons of considering different schools of thoughts in medical science, rarely object to this practice. The existence of a number of experts in litigation means that there is bound to be conflict of opinion. Inevitably, issues concerning medical negligence are often complex and technical. All these factors, in combination with the issue of adversarial bias and the limited authority of judges to appoint independent experts, make the task of resolving medical issues onerous,[38] and hence, more time is needed to resolve medical negligence litigation.

---

34 Lord Woolf, above n 24, Chapter 13[7].

35 [1998] 1 MLJ 57.

36 Puteri Nemie Binti Jahn Kassim, 'Mediating Medical Negligence Claims in Malaysia: An Option for Reform', [2008] 4 *Malayan Law Journal* cix, cxi-cxii.

37 *High Court Rules 1980* Order 38 Rule 4 and *Subordinate Courts Rules 1980* Order 25 Rule 4.

38 See also Justice of Appeal Geoffrey Davies, 'The Reality of Civil Justice Reform: Why We Must Abandon the Essential Elements of Our System', (2003) 12 *Journal of Judicial Administration* 155, 166-167. The Honourable Geoffrey Davies is a former judge of the Queensland Court of Appeal. He retired on 11-2-2005.

Is Procedural Reform Needed In Malaysia?

Reforms to the use of expert witnesses in civil proceedings, or specifically medical negligence litigation, have yet to be introduced in Malaysia. In early 2012, the Malaysian judiciary adopted a series of measures to expedite the resolution of civil litigation. Among the measures that have been implemented are: increasing the number of sittings in the Federal Court and Court of Appeal; setting a time limit for the disposal of civil cases of 6 months for the Magistrate's Court and 9 months for the Sessions Court; implementing the system of e-filing;[39] introducing mediation as an alternative dispute resolution mechanism; establishing specialised courts dealing with admiralty and corruption cases; and providing continuing legal education for judges.[40] These measures, however, fall short of addressing the substantive procedural rules relating to the use of expert witnesses in civil proceedings, particularly medical negligence cases.

It is therefore suggested that legislative reform is required to resolve these issues. In England and Wales, the Australian Capital Territory, New South Wales and Queensland, procedural changes have been implemented to resolve the various problems associated with litigant-appointed experts in civil proceedings. A common feature of the reforms in these jurisdictions is the implementation of the appointment of a single agreed[41] or a single court-appointed expert whilst conferring upon the courts the authority to appoint additional experts should the need arise. In view of this, it is of great interest for Malaysia to consider this reform option.

The System of A Single Agreed or A Single Court Appointed Expert In England and Wales, The Australian Capital Territory, New South Wales and Queensland

The implementation of a single agreed or a single court-appointed expert in civil actions in England and Wales, New South Wales, Queensland and the Australian Capital Territory can be divided into two categories. One is the appointment of this expert before legal actions are filed in courts. The state of Queensland in Australia implemented this reform under the amended *Uniform Civil Procedure Rules 1999* (Qld) in 2004.[42] The other is the more usual procedure, namely appointment of this expert after litigation commences. This system was introduced in England and Wales under Part 35 of the *Civil Procedure Rules 1998* (England and Wales); in New South Wales by virtue of Part 31 Division 2 of the *Uniform Civil Procedure Rules 2005* (NSW); and in the Australian Capital Territory

---

39 E-filing is a facility which enables litigants to file cause papers online without the need to file hard copies. It means that a case may be filed anywhere in Malaysia without the need to be physically present in the courts in the state jurisdictions where the cause of actions arise.

40 See Chief Justice of Malaysia Tan Sri Arifin bin Zakaria, 'Speech by The Honourable Justice Arifin bin Zakaria, Chief Justice of Malaysia, at the Opening of the Legal Year 2012', [2012] 1 *Malayan Law Journal* cxxiv.

41 The term 'a single agreed expert' refers to an expert who is appointed by litigants in a medical dispute under mutual agreement.

42 The reform was introduced by the *Uniform Civil Procedure Amendment Rule (No 1) 2004* (Qld) and took effect from July 2004. The procedural rules of the Queensland model can be retrieved at <www.legislation.qld.gov.au/LEGISLTN/SLS/2004/04SL115.pdf>.

under Sections 85 and 86 of the *Civil Law (Wrongs) Act 2002* (ACT) read together with Division 2.12 of the *Civil Procedures Rules 2004* (ACT).[43]

The implementation of a single agreed or a single court-appointed expert in civil proceedings in England and Wales, the Australian Capital Territory, New South Wales and Queensland consists of a number of important common characteristics. One is that the reforms impose an overriding duty on the single agreed or the single court-appointed expert to assist the courts to adjudicate technical issues and to provide impartial testimony.[44] The other is that the courts in these jurisdictions may allow the appointment of more than one agreed or court-appointed expert if it is in the interests of justice to do so.[45] The procedural reforms in all these jurisdictions, however, do not expressly exclude the retention of litigants' own experts. This means the courts have the discretion to allow litigants to retain their own experts if circumstances warrant it.[46] Despite the rules in each of these jurisdictions allowing more than one expert to be appointed, the courts retain the authority to limit the number of experts who may be called in a trial.[47]

The implementation of a single agreed or a single court-appointed expert in Queensland is novel[48] and it is worth noting the relevant procedures. The *Uniform Civil Procedure Rules 1999* (Qld) established a presumption in favour of appointing a single agreed or a single court-appointed expert prior to and after the commencement of legal proceedings in all civil proceedings in the Supreme Court of Queensland. If parties to a medical dispute cannot reach an agreement on who should be appointed prior to legal actions, either party may make an application for a court-appointed expert.[49] This application must include the names of at least 3 experts who are qualified to give expert evidence and consent to being appointed.[50] The courts may, however, appoint an expert other than an expert named in the application.[51] The costs of the application and the appointment of this court-appointed expert will be borne by the party who makes

---

[43] Division 2.12 of the *Civil Procedures Rules 2006* (ACT) governs the giving of expert evidence in court.

[44] *Civil Procedure Rules 1998* (England and Wales) Rule 35.3; *Uniform Civil Procedure Rules 1999* (Qld) Rule 426; *Civil Law (Wrongs)* Act 2002 (ACT) Section 87(1)-(3); *Uniform Civil Procedure Rules 2005* (NSW) Schedule 7 Clauses (2)-(3) of Rule 31.23.

[45] Civil Procedure Rules 1998 (England and Wales) Rule 35.1 and 35.4(1); Uniform Civil Procedure Rules 1999 (Qld) Rule 423(d); Civil Law (Wrongs) Act 2002 (ACT) Section 86(2)(b); Uniform Civil Procedure Rules 2005 (NSW) Rule 31.17(e).

[46] One good example in which the court exercised this discretion is the English High Court decision in *Simms v Birmingham Health Authority* [2001] Lloyd's Rep Med 382 (*Simms*). *Simms* concerned liability for negligent management of the plaintiff's delivery during a Caesarean operation and his consequent cerebral palsy. The district court judge ordered the appointment of a single agreed medical expert or experts to give opinion on issues of breach of duty of care and causation. On appeal to the English High Court, Curtis J overturned this order and allowed litigants to engage their own medical experts on the basis that the issues involved were highly complex.

[47] *Civil Procedure Rules 1998* (England and Wales) Rule 35.4; Uniform *Civil Procedure Rules 1999* (Qld) Rule 423; *Civil Law (Wrongs) Act 2002* (ACT) Section 81; *Uniform Civil Procedure Rules 2005* (NSW) 31.20(e).

[48] New South Wales Law Reform Commission, above n 3, 54[4.45].

[49] Uniform Civil Procedure Rules 1999 (Qld) Rule 429S(1).

[50] Ibid Rule 429S(4)(d).

[51] Ibid Rules 429S(6).

the application, unless the courts order otherwise.[52] Should either a single agreed or a single court-appointed expert be engaged, this expert will be the only expert witness when litigation process commences.[53]

The Queensland model also allows the appointment of an additional agreed or court-appointed expert or experts after the commencement of legal proceedings.[54] If no agreement can be reached, either litigant may apply for a court-appointed expert by naming three potential experts,[55] although the courts may appoint an expert other than those who are named in the application.[56] In considering this application, the courts may consider a number of factors, namely the complexity of the issue; the impact of the appointment on the costs of the proceedings; the likelihood the appointment would expedite or delay the trial; the interests of justice; and any other relevant consideration. Trial judges may, at any stage of the proceedings, also appoint experts on their own initiative if they think that these experts may help in resolving the substantive medical issue.[58] In situations where more than one expert is appointed, the trial judge may at any stage of a proceeding direct the experts to identity the matters on which they agree and to resolve any disagreement.[59]

A Critique of A Single Agreed or A Single Court-Appointed Expert In Medical Negligence Litigation

The implementation of a single agreed or a single court-appointed expert in the United Kingdom and some jurisdictions in Australia raises the question of whether this system is useful and appropriate in medical negligence litigation. It is therefore necessary to weigh its advantages and disadvantages in order to ascertain the merit of this approach for adoption in Malaysia.

The advantages

The appointment of a single agreed or a single court-appointed expert would solve the problem of adversarial bias in medical negligence litigation.[60] An expert appointed by the parties jointly or by the courts is more likely to be impartial than a party's own expert. In April 2002, a study assessing the impact of the implementation of a single agreed or a single court-appointed expert in England and Wales found that medical experts were

---

52 Ibid Rule 429S(12).
53 Ibid Rules 429R(6) and 429S(11).
54 Ibid Rule 429G(1).
55 Ibid Rule 429(I)(2).
56 Ibid Rule 429(I)(4).
57 Ibid Rule 429(K)(1). Similar requirements apply to an application for a court-appointed expert prior to legal proceedings: See Ibid Rule 429S(7).
58 Ibid Rule 429G(3).
59 Ibid Rule 429B(1).
60 Lord Woolf, supra n 24, Chapter 13[21].

less partisan in clinical negligence cases as a result of the reform.[61] A further empirical study released in August 2002 revealed that the system of a single agreed or a single court-appointed expert 'has contributed to a less adversarial culture and helped achieve earlier settlements'.[62] Early settlement of disputes may be encouraged by the system of a single agreed or a single court-appointed expert as the parties to a medical dispute could assess the success of their case against the opinion of this expert before the conclusion of court proceedings.[63]

The appointment of a single agreed or a single court-appointed expert would also save costs for litigants as they would not have to engage a number of medical experts. Litigants would also contribute to the costs of engaging this single expert on an equal basis or as directed by the courts. This creates a level playing field between the parties of unequal resources particularly in favour of injured patients who, in most instances, have less financial means than defendant doctors to engage medical experts.[64]

The appointment of a single agreed or a single court-appointed expert could also reduce the time taken to conduct medical negligence litigation in a number of aspects. One is that the opposing parties in a medical dispute may narrow down disputed facts and issues with this expert at an early stage. The other is that it could resolve the issue of multiple experts in litigation, the existence of whom may complicate the dispute with conflicting medical opinions. Further, since the appointment of additional agreed or court-appointed experts during legal proceedings is subject to the needs and discretion of the courts, judges could control the number of medical experts who may be called to testify.

The disadvantages

The system of a single agreed or a single court-appointed expert may not be suitable for all medical negligence cases particularly concerning complex issues of diagnosis and treatment. It has been argued that reliance on the testimony of one medical expert is flawed in that it only recognises one answer to complex medical diagnosis and treatment issues.[65] This criticism may be supported by judicial recognition that there are genuine differences of opinion in the areas of medical diagnosis and treatment.[66] In the *Access to Justice (Final Report)*, Lord Woolf also acknowledged that the appointment of a single expert, either jointly or by the courts, may only be appropriate in cases where there is an established area of medical science:

---

61 Tamara Goriely, Richard Moorhead and Pamela Abrams, 'More Civil Justice?: The Impact of the Woolf Reform in Pre-Action Behaviour' (Law Society and Civil Justice Council, 2002) xxi.

62 United Kingdom Department for Constitutional Affairs, *Further Findings: A Continuing Evaluation of the Civil Justice Reforms* (August 2002) <http://www.dca.gov.uk/civil/reform/ffreform.htm>.

63 Lord Woolf, supra n 24, Chapter 13[21].

64 Ibid.

65 See Justice Garry Downes, 'Expert Evidence: The Value of Single or Court-Appointed Experts' (Paper presented at the Australian Institute of Judicial Administration Expert Evidence Seminar, Melbourne, 11 November 2005).

66 *Maynard v West Midlands Regional Health Authority* [1985] 1 All ER 635, 639 (Lord Scarman); *Hunter v Hanley* [1955] SC 200, 204 (Clyde LP).

> '... There are in all areas some large, complex and strongly contested cases where the full adversarial system, including oral cross-examination of opposing experts on particular issues, is the best way of producing a just result. That will apply particularly to issues on which there are several tenable schools of thought, or where the boundaries of knowledge are being extended. It does not, however, apply to all cases. As a general principle, I believe that single experts should be used wherever the case (or the issue) is concerned with a substantially established area of knowledge and where it is not necessary for the court directly to sample a range of opinions...'.[67]

This observation has also been accepted in Australia, particularly in New South Wales. It is this recognition of the limitation of a single agreed or a single court-appointed expert that arguably explains why the procedural rules in England and Wales as well as the jurisdictions in Australia do not expressly exclude the right of litigants to engage their own experts.

There is also a concern that a single agreed or a single court-appointed expert might usurp the role of a trial judge if the conclusion or opinion of this expert is unquestioningly adopted.[69] As the decision of the courts would be mainly based on the testimony of the single agreed or a single court-appointed expert, there is a fear that this expert might become an 'almost quasi-commissioner or a judge'.[70] If these concerns are real, the emphasis on judges as the final arbiters of the standard of care in medical negligence cases as decided by the Malaysian highest court in *Foo Fio Na*[71] may not achieve this desirable effect in practice.

The Proposed Procedural Reform of Expert Evidence For Malaysia

It has been shown in the preceding analysis that although the use of a single agreed or a single court-appointed expert could ensure a more independent expert testimony as well as save time and costs, it may not be suitable for all medical negligence cases. The system is particularly inappropriate in situations where there are highly complex medical issues, the areas of medical science are developing or where there are major

---

[67] Lord Woolf, supra n 24, Chapter 13[19].

[68] New South Wales Law Reform Commission, supra n 3, 115[7.29].

[69] Justice Garry Downes, 'The Use of Expert Evidence in Court and International Arbitration Processes' (Paper presented at the 16th Inter-Pacific Bar Association Conference, Sydney, 3 May 2006).

[70] Julie Lewis, 'Breaking the Mould', (2006) 44(9) October *Law Society Journal* 22, 23.

[71] The Federal Court in *Foo Fio Na* [2002] 2 MLJ 593, 594 ruled that the *Bolam* test is no longer applicable in 'all aspect of medical negligence cases' in Malaysia. In adopting the Australian High Court decision in *Rogers v Whitaker* (1992) 175 CLR 479, a case concerning a duty to warn medical risks, the Court stated that the issue of the standard of care in medical negligence cases should ultimately decided by judges after an evaluation of all evidence, including expert medical opinion. Subsequent cases, particularly in the Malaysian Court of Appeal, had interpreted this decision as equally applying to the determination of the standard of care in the areas of medical diagnosis and treatment. See *Hasan bin Datolah v Government of Malaysia* [2010] 2 MLJ 646, 647 and 654; *Dominic Puthucheary v Dr Goon Siew Fong* [2007] 5 MLJ 552, 559.

genuine differences of opinion. On the basis of the analysis, it is proposed that the system of a single agreed or a single court-appointed expert should not be adopted as the only solution to the problems of delay and adversarial bias in medical negligence litigation in Malaysia.

What Malaysia should adopt is a flexible procedural framework that caters to medical issues of different complexities. It may be argued that the procedural reforms in the United Kingdom, the Australian Capital Territory, New South Wales and Queensland satisfy this important criterion. In a situation where there is an established area of medical science, courts in these jurisdictions may rely on the testimony of a single agreed or a single court-appointed expert. A more complex medical issue may be resolved by allowing the appointment of an additional agreed or court-appointed expert or experts during the commencement of legal proceedings. More importantly, judges in these jurisdictions may exercise discretion to allow litigants to engage their own experts should circumstances warrant it. The remaining questions for Malaysia to consider are which model should be adopted and what measures should be taken to improve the chosen procedural framework.

It is proposed that Malaysia should adopt the Queensland model on the use of expert witnesses in medical negligence litigation. The benefits of the Queensland model in saving time and costs may provide one of the long term solutions to the issue of inordinate delay in the resolution of medical negligence litigation in Malaysia. Unlike the procedural reforms in England and Wales and in other Australian jurisdictions, the Queensland model can encourage parties to a dispute to narrow down disputed facts and issues, or negotiate settlements, even before litigation commences. More significantly, the Queensland model takes a better approach to save costs. In practice, parties to a medical dispute often have already engaged their own respective expert or experts for advice before legal actions are filed in the courts. The statutory provisions requiring the appointment of medical experts after the commencement of legal proceedings would mean wastage of additional costs.[72]

There are two aspects in the implementation of the Queensland model in Malaysia that need to be clarified. The first relates to situations where the courts may allow litigants to engage their own experts, and the second the requirements the courts should consider in exercising this discretion. It is proposed that the exercise of this judicial discretion should be limited to exceptional circumstances or the problems associated with litigants' appointed experts would arise. It is also proposed that this issue be decided at an early stage in the legal proceedings. In determining whether to allow litigants to engage their medical experts, a trial judge should take into account a number of factors: the complexity

---

[72] See the analysis of the Queensland model from the perspective of a former English Court of Appeal judge, Sir Robin Jacob, 'Court-appointed Experts v Party Experts: Which is Better?', (2004) 23 Civil Justice Quarterly 400, 406-407.

of the medical issues; the novelty of the area of medical science; the existence of different schools of thought; the impact on costs and delays should multiple experts be called in a trial; the interests of justice; and other relevant considerations.[73]

The other aspect relates to the selection of medical experts. It is proposed that these experts may be selected from a list of medical specialists approved by the Academy of Medicine of Malaysia. The Academy of Medicine of Malaysia, whose members consist of local and foreign doctors, is similar to the Royal Colleges in the United Kingdom and Australia except that it embraces all medical specialities.[74] The Academy has a high standard of professional and ethical practice. Entry into the Academy is based on merit and application is subject to a stringent vetting process. Applicants must possess a recognised higher professional qualification and must be certified to be specialists by the appropriate medical authorities. The appointment of medical specialists approved by the Academy would ensure that the courts may be assisted with credible and reliable expert testimony in the adjudication of medical negligence cases.

Legislative Options For Enacting The Reform Proposals

The implementation of the modified version of the Queensland model in Malaysia must be placed in appropriate legislation to facilitate easy reference and centralisation of regulation. There are two options available in this proposed legislative reform. An appropriate form would be to incorporate the proposed procedural changes on the use of expert witnesses in medical negligence litigation into a single piece of legislation, to be named the Medical Liability Act. This specific legislation would be the sole reference point by which doctors, patients, judges and legal practitioners assess liability for medical negligence as well as ascertain its relevant procedural rules in Malaysian courts. Any future reform pertaining to the duty and liability of doctors in Malaysia could be introduced in this proposed single Act. The alternative would be to codify the reform proposals in existing legislation, namely the *Malaysian High Court Rules 1980* and the *Subordinate Courts Rules 1980*. The major shortcoming of this alternative option is that the proposed legislative reform would be implemented in a piecemeal fashion and may lead to confusion.

Conclusion

The objectives of this paper have been to identify the shortcomings of the procedural framework concerning the use of litigant-appointed experts in medical negligence litigation and to propose appropriate legal reforms in Malaysia. It was argued that the system of litigant-appointed experts is flawed in that it potentially leads to the problem

---

[73] See also Paul Freeburn, 'Single Experts' (2012) 56(June) Hearsay <http://www.hearsay.org.au/index.php?option=com_content&task=view&id=164&Itemid=48>. These requirements are in fact an adaptation of the factors for considering the appointment of a court-appointed expert after the commencement of legal proceedings under Rule 429K(1) of the *Uniform Civil Procedure Rules 1999* (Qld).

[74] The Academy of Medicine of Malaysia has established its own Specialist Register since 2000. This Specialist Register is available in the Academy's website at <www.acadmed.org.my.index.cfm> for inspection and reference.

of adversarial bias, inordinate delays and additional costs incurred in the resolution of medical negligence proceedings. These problems, this paper argued, cannot be effectively safeguarded by the common law and the procedural framework on the use of experts in civil proceedings. The system of a single agreed or a single court-appointed expert, as implemented in England and Wales and in Australia, may provide a solution in Malaysia. This paper suggests the adoption of the Queensland model under the *Uniform Civil Procedure Rules 1999* (Qld) with slight modifications, although litigants may also appoint their own experts in limited circumstances. The benefits of this proposal in saving time and costs, as well as encouraging litigants to negotiate early settlements, mean that the backlog of medical negligence cases in Malaysian courts may be eased in the long run. While the success of the modified Queensland model can only be proven with time, it is argued that this proposal is the best reform option that may be adopted in medical negligence litigation in Malaysia.