ASCHEMATISING THE POSITION OF COMMON LAW NATIONS: AN ANALYSIS OF ADMISSIBILITY OF EXPERT EVIDENCE

[*] *DEVERSHI MISHRA & KOMAL KHARE*

INTRODUCTION

> *"Undoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very natural, and it is so effectual, that we constantly see persons, instead of considering themselves witnesses, rather consider themselves as the paid agents of the person who employs them."*[1]

As our technology and legal system matured, use of expert evidence has gained prominence and is ever pervasive. In cases involving the question of science toxic tort, the process of imparting untainted justice depends significantly on expert evidence. The perils associated with the procedure of inviting expert opinion have increased and attracted attention over time. Historically, the neutrality and unbiasedness in expert opinion was guarded by two systems, wherein judges who were expert in the matter in issue and the potential expert witness both were called to conclude the matter with a well-reasoned decision.[2] This method eventually lost its essence and use of Professional Expert witnesses became more frequent within the legal circuit.[3] Gradually, however, various problems associated with expert evidence became very apparent.[4]

With the increase in the inconsistencies in relation to the expert testimonies, the common law countries became cautious and acknowledged the possibility of flawed expert evidence due to human fallibility. Thereon, not only common law countries but the world community started hosting modification regarding expert evidence in their own jurisdiction.[5]

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[*] NALSAR University of Law, Hyderabad.

[1] *Lord Abinger v Ashton* [1873] 17 L R E Q 358, 374 (Can).

[2] Learned Hand, 'Historical and Practical Considerations Regarding Expert Testimony' (1901) 15 Harvard L R 40.

[3] *R v D D* (2000) SCC 43 (Can).

[4] *R v J L J* (2000) SCC (Can).

[5] Bernard Robertson and GA Vignaux, 'Expert Evidence: Law, Practice and Probability Review Article' (1992) 12 Oxford Journal of Legal Studies 392.

Over the past two-three decades, we have witnessed a trend towards formal recognition of expert evidence laws in various common law nations. The impact of Woolf's "*Access to Justice*"[6] report in England, dominance of Daubert standard in U.S., impact of Australian Law Reform Commission in Australia, and formulation of expert duties in Canada are a few instances of the same.

The present study deals with the development of expert evidence laws in five common law countries, namely, U.S.A, Canada, Australia, England and India. The study seeks to examine the evolution of expert evidence and additionally, the reactions of the abovementioned nations to the need of tackling the hurdles of partiality and unaccountability associated with expert evidence.

UNITED STATES OF AMERICA: SUSTAINMENT OF *DAUBERT* STANDARDS THROUGH *JOINER, KUMHO* AND RULE 702

REIGN OF DAUBERT TRILOGY AND STANDARDS

The U.S. federal system encompasses not only the Federal Courts but also fifty State Courts. In recent times, an expectation has surfaced that the judges will play the role of "gate keeper" in controlling the admission of expert opinion evidence. Most of the jurisdictions follow one of the two principal approaches laid down in the leading cases of *Frye v. United States*[7] [Hereinafter '*Frye*'] and *Daubert v. Merrell Dow Pharmaceuticals*[8] [Hereinafter '*Daubert*'] Even though *Daubert* is commonly described as a four-five part test, it actually is only a two-part test which derives its source from Rule 702 of the Federal Rule of Evidence (FRE).[9] For an evidence to be admissible under the *Daubert* standard, two conditions need to be fulfilled: reliability and relevance.[10] It was by way of explaining the "reliability" criterion, that the court formulated four-five other criteria: (i) testing, (ii) peer review and publication, (iii) error rate and standards,[11] and (iv) general acceptance in the relevant scientific community.[12] These criterions were never formulated with the intention of being used as a checklist, but as a flexible

[6] Sir Harry Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HM Stationery Office 1996).

[7] *Frye v United States* 293 F 1013 (DC Cir 1923).

[8] *Daubert v Merrell Dow Pharmaceuticals* 509 US 579 (1993).

[9] ibid 588-89.

[10] *Daubert* (n 8) 594-95.

[11] *Bond v State*, 925 N E 2d 773, 779 (Ind Ct App 2010).

[12] Gary Edmond, 'Supersizing Daubert Science for Litigation and Its Implications for Legal Practice and Scientific Research Symposium: Expertise in the Courtroom: Scientists and Wizards - Panel Three: Science, Scientists and Ethics' (2007) 52 Villanova L R 857.

standard to be utilized to determine the admissibility of evidence, while adjudicating.

Daubert was further explained in the two appeals before the Supreme Court: *Electric v. Joiner*[13] [Hereinafter '*Joiner*'] and *Kumho Tire v. Carmichael*[14] [Hereinafter '*Kumho*'], which together constitute the Daubert Trilogy. Emphasizing the significance of flexibility in *Kumho,* the court explicated that the *Daubert* criteria may be utilized to determine the admissibility of non-scientific form of expert evidence, i.e., "technical" and "other specialized knowledge."[15] *Joiner*, significantly states that the standard of review adopted by the state courts to determine the admissibility of evidence is "abuse of discretion."[16] As a result, decisions determining the admissibility are not subject to strict review, and similar type of expert evidence can be treated differently in cases, courtrooms, across jurisdiction, and in the future.

DISTINCTION BETWEEN FRYE AND DAUBERT AND INCEPTION OF RULE 702

Rule 702 of the FRE, which formed the basis of *Daubert* and *Kumho*, was amended in the year 2000, in order to meet the requirement of "reliability" more explicitly.[17] It reads as:

A witness, who is qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise if: (a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) The testimony is based on sufficient facts or data; (c) The testimony is the product of reliable principles and methods; and (d) The expert has reliably applied the principles and methods to the facts of the case.[18]

However, the efficacy of the amended version seems limited and is largely understood as statutory codification of *Daubert* and *Kumho*.

Around sixteen states in U.S., some being among the most populous, continue to follow

[13] *Electric v Joiner* 522 US 136 (1997).

[14] *Kumho Tire v Carmichael* 526 US 137 (1999); *See* D Michael Risinger, 'Goodbye to All That, or a Fool's Errand, By One of the Fools: How I Stopped Worrying about Court Responses to Handwriting Identification (and Forensic Science in General) and Learned to Love Misinterpretations of Kumho Tire v Carmichael Symposium: Daubert, Innocence, and the Future of Forensic Science' (2007) 43 Tulsa L R 447.

[15] *Kumho* (n 14) 147-48.

[16] *Joiner* (n 13) 141.

[17] Fed R Evi 702(c) (2000).

[18] ibid.

"general acceptance" principle laid down in the *Frye* judgement.[19] The *Frye* approach is popularly called "deference" approach as under this approach, the trial judges tend to focus on how the "scientist community" is best placed to evaluate the evidence, rather than asking the trial judge to evaluate the validity and reliability of the evidence in place.[20]

Daubert test focus on the reliability of the evidence being presented in the court. Thus, while *Frye* standard talks about the general acceptability of the expert evidence, *Daubert*, on the other hand, is more case-centered at the inherent reliability of the expert opinion.

Today, around twenty nine states in US follow *Daubert* or a similar model.[21] It is also described as 'reliability validity' model.[22] The principle contribution of *Daubert*, as opposed to *Frye*, is that it mandates the trial court to initiate a separate assessment of the evidence to determine its admissibility.[23] This feature of *Daubert* has been criticized, especially by Chief Justice Rehnquist, for its presumption that Judges who lack scientific training, are assumed competent enough to decide upon scientific evidence.[24]

IGNORING FINKELSTEIN: INJUDICIOUS OUTLOOK TOWARDS EVOLUTION OF EXPERT WITNESS LAWS

The troubling issue attached to Rule 702 is its unforthcoming attitude towards the statutory codification of the independence of expert witness, which makes it similar to *Daubert* standard. In U.S., Federal Judicial Centre has also pointed this apprehension extensively and raised concern about the admissibility of the expert evidence. The Centre has extensively been able to prove that bias remains the most controversial topic in the U.S. evidence law. In *Finkelstein v. Liberty Digital*,[25] judges affirmed that often biased contributions are made by the experts claiming to have academic and scientific expertise.[26]

[19] Alice B Lustre, Annotation, 'Post-Daubert Standards for Admissibility of Scientific and ther Expert Evidence in State Courts' (2011) 90 ALR 5 453.

[20] Paul C Giannelli, 'The Admissibility of Novel Scientific Evidence: Frye v United States, a Half-Century Later' (1980) 80 Columbia Law Review 1197.

[21] David E Bernstein and Jeffrey D Jackson, 'The Daubert Trilogy in the States Developments' (2003) 44 Jurimetrics 351.

[22] David H Kaye, *The New Wigmore: A Treatise on Evidence/ : Expert Evidence* (Aspen Publishers 2011).

[23] *Daubert* (n 8) 585-593.

[24] ibid 600-601.

[25] 30 Del J Corp L (2005).

[26] ibid.

CANADA: CRYSTALLIZATION OF FOUR FUNDAMENTAL REQUIREMENTS ALONG WITH COST-BENEFIT ANALYSIS

Supreme Court of Canada has clearly laid down the criterion for the admissibility of expert evidence, securing *"reliability ... and emphasizing the important role that judges should play as 'gatekeepers' to screen out proposed evidence whose value does not justify the risk of confusion, time, and expense that may result from its admission."*[27] Canadian Supreme Court in *R v. Mohan*[28] formulated a two-point test to decide the admissibility of expert evidence:

A. The individual giving the evidence must meet the four basic requirements of admissibility.

B. If the basic requirement is fulfilled, then the trial judge should perform a cost-benefit analysis to decide "*whether otherwise admissible expert evidence should be excluded because its probative value is overborne by its prejudicial effect.*"[29]

FUNDAMENTAL REQUIREMENTS FOR THE ADMISSIBILITY OF EVIDENCE

Canadian Courts examine the following four factors in determining the admissibility of expert evidence- relevance, absence of an exclusionary rule, necessity in assisting the trier of facts and a qualified expert.[30] Courts consider one more factor i.e., reliability, if Novel Science is contested in any case.[31] The abovementioned four requirements form the basic premise that needs to be satisfied for the admissibility of expert evidence; any evidence failing these requirements is rendered inadmissible.[32] Once these conditions are met, only then does the evidence proceeds to the second level of "discretionary gatekeeping" step.[33]

i. Relevance

Expert evidence, like any other evidence, must be relevant.[34] In *White Burgess Langille Inman,* Court adopted the *R v. Abbey* definition of relevancy as "logical

[27] *White Burgess Langille Inman* (2015) SCC 23 [16].

[28] *R v Mohan* [1994] 2 SCR 10-12, 20-25.

[29] *White Burgess Langille Inman* (2015) SCC 23 [19].

[30] ibid.

[31] ibid 23.

[32] ibid.

[33] *White Burgess Langille Inman* (2015) SCC 23 [19].

[34] *Mohan* (n 28).

relevancy."[35] To be logically relevant, evidence must "*have a tendency as a matter of human experience and logic to make the existence or non-existence of a fact in issue more or less likely than it would be without the evidence*."[36]

ii. Absence of exclusionary rule

Due to the existing parallelism between expert and any other form of evidence, expert evidence must adhere to all exclusionary rules, whether statutory or otherwise, to be admissible.[37]

iii. Necessity in assisting the trier of facts

This standard requires that the evidence presented must necessarily be beyond the expertise and knowledge of the judges.[38] Further, expert evidence provided must enable the trier of facts, to assist the matter in issue, due to their technical nature.[39]

iv. Qualified expert

An expert, by virtue of being a witness, has some duties towards the court to maintain- impartiality, independence and absence of bias.[40] He must be aware of these duties and must be willing to carry them out.[41] To meet this standard, expert is required to attest and testify that he will be discharging these duties towards the court.[42]

v. Reliability

Canadian courts have followed the US *Daubert* decision to decide reliability of the expert evidence in the context of disputed Novel Science.[43] For his purpose, court looks into factors like: (1) "whether the theory or technique can be and has been tested;" (2) "whether the theory or technique has been subjected to peer review and publication;" (3) "the known or potential rate of error or the existence of standards;" and (4) "whether the theory or technique used has been generally accepted." [44]

[35] *White Burgess Langille Inman* (2015) SCC 23 [23]; *R v Abbey* 2009 ONCA 624 [82]).

[36] *R v Abbey,* 2009 ONCA 624 [82].

[37] *Mohan* (n 28).

[38] ibid 23.

[39] ibid.

[40] *White Burgess Langille Inman* (2015) SCC 23 [32].

[41] ibid [46].

[42] ibid [47].

[43] *J-LJ* (2000) SCC 51[33]; *Daubert v Merrell Dow Pharmaceuticals* 509 US 579 (1993).

[44] ibid.

COST-BENEFIT ANALYSIS

As per this standard, accepted expert evidence will not be allowed if its probative value overshadows the prejudicial effect.[45] Before *White Burgess Langille Inman,* the pressing significance of cost benefit analysis used to be emphasised but without the explanation about its space in the overall test.[46] But in this case, the court made it clear that the risks associated with expert evidence cannot be ignored, and mere relevance and assistance of the evidence is not enough for its admissibility.[47] This standard ensures the balancing of benefits and risks associated with expert evidence by judges and assure that benefits justify the risks.[48]

ENGLAND: ESTABLISHING THE PREMISE OF EXPERT LIABILITY THROUGH WOOLF REPORT

In *Pearce v. O.A. Partnership*[49], the court discussed the need to reformulate evidence laws to prevent the expert witnesses from developing the contentions of the advocates recruiting them, impartially. Justice Woolf in his report "Access to Justice"[50] carved out various reforms and suggestion pertaining to Expert evidence in England. Lord Woolf felt that the greatest difficulty faced by expert witnesses was to maintain neutrality in face of the authoritative ambit of their instructor. This complication arose from the fact that experts are initially recruited by an investigating team to work for a party and develop their contention, and are then expected to alter their roles to provide independent advice sought by the court.[51] Further, he suggested that new rules should be formulated to establish the overriding duty of the expert towards the court. Following are essential highlights of Woolf Report:

- The primary duty of the expert lies with the court, and this duty overrides any obligation arising out of the directives or enumeration received by an expert from any party.
- Experts must certify at the end of the report submitted that they understand and comply with their duty towards the court.

[45] *White Burgess Langille Inman* (2015) SCC 23 [19].

[46] ibid 20.

[47] ibid 23.

[48] ibid 24.

[49] 2001 EWHC Ch 455.

[50] Woolf (n 6).

[51] ibid.

- It is necessary to have the sanction of the court before calling or introducing expert opinion as evidence.
- The court at any stage may call for discussion among the expert for an agreed opinion or for reaching consensus on any issue where contention among experts, with substantive reasoning exists.

IMPACT OF THE WOOLF REPORT: ENUMERATION OF THE DUTIES

Following the recommendation of Justice Woolf, new Civil Procedure Rules (1999) were formulated in England. Under the new civil procedure rules, it is the duty of an expert to help the court on matters within their expertise and this duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid.[52] Further, at the end of an expert's report there must be a statement that the expert understands and has complied with their duty to the court.[53] The duties of the expert witnesses are as follows:

- Expert evidence must not only be independent of exigencies of litigation, but should also appear to be independent and uninfluenced.[54]
- Expert witness should also assist the court by providing objective unbiased opinion with respect to the matters within their expertise.[55]
- Expert witness should clearly state the material facts and assumption on which they premise their opinion. They should not consider omitting those material facts which could detract from their stated opinion.[56]
- They should clearly state if something falls outside the range of their expertise.
- If, in the opinion of the expert, evidence given is not properly researched due to lack of data, then he must state that opinion evidence provided is a just a provisional one.[57] In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.

[52] Civil Procedure Rules 1999, s 35.3.

[53] Civil Procedure Rules 1999, s 35.10 (2).

[54] *Whitehouse v Jordan* [1981] 1 W L R 246.

[55] *Pollivitte Ltd v Commercial Union Assurance Company* [1987] 1 Lloyd's Rep 379; Re J (1990) FCR 193.

[56] *Re J* (1990) FCR 193.

[57] ibid.

- If the expert witnesses alter their views after reading the other side's report or for any other reason, then that alteration must be communicated to the other party without any further delay.

REPERCUSSIONS OF NON-COMPLIANCE WITH THE DUTIES

In *Jones v. Kaney,*[58] the Supreme Court of United Kingdom clearly held that immunity from danages cannot be attributed to the experts in civil cases if they are negligent in discharging his duties. Failure of compliance with an expert's duties can result in the inadmissibility of evidence provided by him. The court can also reject the evidence tabled, which is otherwise admissible, if it develops unfavourable mindset about the impartiality of the expert providing it. There is suggestion in this respect that even unsubstantiated report of the expert, which does not fully adhere to civil procedure rules, must be tabled in the court, so that court can decide about its admissibility and reliability on their own.[59] Parallel situation arose in *Anglo Group Plc v Winter Brown*,[60] wherein an expert witness wrote an article expressing his views on expert evidence and the duty of expert witnesses towards his/her instructor, in addition to his testimony. The Judge dismissed the expert evidence citing skepticism about it.

AUSTRALIA: MANIFESTATION OF JUDICIAL PROGRESSIVENESS THROUGH 'COMMON KNOWLEDGE' AND 'ULTIMATE ISSUE' TO THE PRESENT LAWS

MAINTAINING THE STANDARDS: PAST TO PRESENT DEALING

Australia has always enjoyed the reputation of rigid common law jurisdiction with respect to expert witness provisions.[61] Australia, for a very long period of time, witnessed the application of two standards, 'Common Knowledge' rule and 'Ultimate Issue' rule.[62] According to 'Common Knowledge' rule, the court decides whether the jury is sufficiently capable to adjudicate upon a certain matter. This not only bars the entertainment of false expert testimonies in the court but also prevents the judges to be unduly influenced in an adversarial system. While 'Ultimate Issue' rule introduced in *Flavels v. Samuels*, mandates the presence of rigorous admissibility standard of expert

[58] [2011] UKSC 13.

[59] *Burgoyne v Pendlebury* July 26, 2000.

[60] 2000 EWHC Technology 127.

[61] Practice Note CM7, Federal Court of Australia 2011.

[62] Australian Law Reform Commission, *The Movement Towards A Uniform Evidence Law*, 2014.

evidence.[63] The court has propounded that expert evidence should be allowed only when it is absolutely necessary for deciding the matter in issue, and without which proper justice delivery cannot be assured. In fact, reading of *R v. Isobel Phillips*[64] suggests that evolution of Australian cases has been in a way that it significantly improvised the admissibility standard of expert evidence, warranting unbiased opinion and illustrious accountability in the Justice system.[65]

In contemporary Australia, Section 79 of the Uniform Evidence Act, 1995 guarantees the provision allowing for the admissibility of expert evidence, which is also followed by similar statutes in other jurisdiction. However, this provision only refers to the admissibility of the opinion of a person possessing special knowledge as an exception to the rule against opinion evidence. Furthermore, the act is silent on the operation of this exception and the duties expected from an expert.

SAME WINE IN DIFFERENT GLASSES

• Federal court

The Federal court in Australia has affected Practice direction for dealing with expert witnesses. These practice direction largely derive their source from the guidelines of Civil Procedure Rules [Hereinafter 'CPR'] and *Ikerian Reefer*.[66] The explanation of the memorandum of this Practice Direction explicates that these provisions aim to aid the expert witnesses in understanding the court's expectations with respect to their duties, and to ensure a restriction on perpetuation of unhealthy viewpoint of an expert as someone lacking objectivity and promoting impartiality.[67]

Part one of the Practice Direction states that the primary duty of the expert witnesses lies with the court, which overrides their duty towards any other person.[68] Furthermore, many states in Australia formulated their own code to guide the duties and obligation of expert witnesses.

• New South Wales

For instance, in New South Wales, Uniform Civil Procedure Rules (2005) were enacted,

[63] ibid.

[64] ibid.

[65] ibid.

[66] (1993) 20 FSR 563.

[67] ibid.

[68] ibid.

under Section 9 of the Civil Procedure Act, 2005. Schedule 7 of the Act contains the code of conduct for an expert witness.[69] This code is largely influenced by common law principles, provisions of England's Civil Procedure Rules and the *Ikerian Reefer* guidelines, all of which aver the need of an expert witness to not to act as a party's advocate but function independently and impartially.

Uniform Civil Procedure Rules also contains a section dealing with essentials of an expert report. But interestingly, NSW Law Reform Commission in its reports suggested the deletion of the provisos dealing with the numerous forms of expert evidence, instead of duties of experts, because in the commission's view too many procedural provisions might impact the efficacy of the Code.[70] In the Commission's view, it would be better to accord separate space to the procedural provisions by incorporating them in a Practice note or rule.[71]

- **Queensland**

Likewise in Queensland, Uniform Civil Procedure Rules 1999, rules 423 to 429, and 212(2) governs the expert witness laws. Unlike NSW, these rules are procedural in nature and do not prescribe a code of conduct for the expert witness, but they make inferential reference to the duty owed by experts towards the court. These procedural requirements were basically articulated to ensure reflection of expert obligations towards the court. An example would be rule 436 of UCPR, which requires submission of the report and attestation by the expert, reflecting overarching duty of the experts towards against the court.[72]

- **Australian Capital Territory (ACT)**

Australian Capital Territory witnessed a major overhaul of the system with the inauguration of the Court Procedural Rules in 2006. Primary motivation for the introduction of these rules was reform and consolidation of all the procedural rules applicable to ACT Supreme and Magistrate court.[73]

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[69] Supreme Court Rules 1970 (NSW) Part 36 rules 13C ff.

[70] NSW Law Reform Commission, Report 109, *Expert Witnesses* (June 2005) at 9.15; Community Relations Division and NSW Department of Justice, 'Expert Witnesses' (1 September 2015) <www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_completed_projects/lrc_completedprojects2000_2009/lrc_expertwitnesses.aspx> accessed 24 September 2016.

[71] ibid 9.

[72] Wilson J, 'The New Expert Witness Rules' Breakfast Address to Australian Insurance Law Association Brisbane Club (28 October 2004).

Part 2.12 incorporates the guidelines governing expert witness rules. Rule 1202 of the Part mandates the submission of written agreement by the expert, wherein he agrees to be bound by the code of conduct enlisted in Schedule 1 of the Rules.

The code of conduct includes the conduct rules of the expert witnesses that were previously mentioned in the practice direction, with slight additional inclusion of provisions from New South Wales and Queensland. The code initiates with the reference to expert witnesses overriding duty towards the court and goes on to state the format of the expert witness report. The fourth part of the code empowers the court to summon a conference of expert witnesses and list out rules governing such conferences.

- **Professional Bodies**

Professional bodies in Australia whose members may be called upon to undergo the role of an expert witness have also articulated their Code enumerating the guidelines for the experts. For instance, Australian Council of Professions has their own guidance paper detailing the role and duties of experts, if called as expert witness in any legal matter.[74]

INDIA: AUGMENTING THE NEED FOR CODIFICATION THROUGH EXPERT WITNESS STANDARDS ESTABLISHED IN LANDMARK JUDICIAL DECISIONS

EXPERT EVIDENCE AND INDIAN EVIDENCE ACT, 1872

Expert evidence is dealt from Section 45 to 51 under the Indian Evidence Act, 1872. Section 45[75] of the Act allows expert evidence in cases which involve any question of science or art demanding recourse to previous study, and on which an inexperienced person is likely to render erroneous judgement. The Act permits an expert to produce evidence pertaining to the fact in issue and display his scientific and unbiased

[73] Explanatory Statement to the Court Procedure Rules 2006 SL2006-29 available at: < www.courts.act.gov.au/supreme/content/pdfs/Ct%20Procedures%20Rules%202006%20Explanatory%20Statement.pdf > accessed 24 September 2016.

[74] Professions Australia ¯Role and Duties of an Expert Witness in Litigation (1998) available at: <www.professions.com.au/index.cfm?paraID=61> accessed on 25 September 2016.

[75] S 45 - Opinions of experts —When the Court has to form an opinion upon a point of foreign law or of science or art, or as to identity of handwriting [or finger impressions], the opinions upon that point of persons specially skilled in such foreign law, science or art, [or in questions as to identity of handwriting] [or finger impressions] are relevant facts. Such persons are called experts.

credibility. Section 46[76] says that facts, otherwise irrelevant, would be relevant if they are inconsistent or support the opinion rendered by an expert whose opinion is relevant. Section 47[77] deals exclusively with the opinion of experts with respect to handwriting, while admissibility of opinion evidence relating to customs is permitted under section 48.[78]

UNDERSTANDING THE EVOLUTION THROUGH LANDMARKS CASES AND THE NEED FOR CODIFICATION

In *Delhi Administration v. Pali Ram*,[79] the court elucidated that, "*no expert could be absolutely sure of his opinion, as the opinion depends to a large extent upon the material put before him and the nature of the question asked.*"

In *Ramesh Chandra Agarwal v. Regency Hospital Ltd,*[80] court defined expert as any person who invested his study and time to a special subject of learning. It was said that expert is not a judge but a mere witness possessing credibility. Further, in order to admit expert witness's evidence, it must be shown that he possesses special knowledge of the subject and has expertise appertaining to the same. The true function of an expert is to bring forth a report along with reason which helped him reach the conclusion, so that the court, who although is not expert, can pronounce a judgement, based on its observation of the report. An expert witness is of advisory character due to the absence of first-hand witnessing of the fact in issue. Hence, the duty of the expert is to render all scientific/specialised assistance to inspect accuracy of a conclusion, so that the judge can deliver a judgement by relying on those standards.

Further, in *State of Maharashtra v. Gopinath Shinde,*[81] it was held that mere assertion or mention without prudent rationale basis or data cannot be counted as evidence, even if it is produced by an expert. The court also said that such evidence although admissible, may be discarded or rendered inconsiderable later when it does not assist in reaching

[76] S 46 - Facts bearing upon opinions of experts—Facts not otherwise relevant, are relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant.

[77] S 47 - Opinion as to handwriting, when relevant.—When the Court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact.

[78] S 48 - Opinion as to existence of right or custom, when relevant.—When the Court has to form an opinion as to the existence of any general custom or right, the opinions, as to the existence of such custom or right, of persons who would be likely to know of its existence if it existed, are relevant.

[79] *Delhi Administration v Pali Ram* (1979) 2 SCC 158.

[80] *Ramesh Chandra Agarwal v Regency Hospital Ltd* (2009) 9 SCC 709.

[81] *State of Maharashtra v Gopinath Shinde* AIR 2000 SC 1691.

a correct judgment. Hence, expert opinion needs to be corroborated. Supreme Court through this decision, in a way, raised the standard of admissibility of expert evidence.

In *Kabul Singh v. Gurinder Singh*,[82] expert opinion regarding handwriting was sought. However, if in addition to the opinion sought, expert also delivers some opinion which was not required, such an opinion would be ignored. It further held that, unsought opinion should not be delivered and expert should limit their opinion to relevant facts and what is required to render justice. Furthermore, in cases where probability of the expert opinion going in favor of the party inviting them exists, and a possibility of conflict of opinion between the experts, the court in such cases can formulate and rely on its own opinion vis-à-vis signature on a documents or any such issue. This case is important in two aspects: first, it absolutely discouraged judicial interpretation of any additional expert opinion provided and second, it mandated an expert to maintain an unbiased attitude.

In *Malay Kumar Ganguly v. Dr. Sukumar Mukherjee*,[83] in response to whether courts are bound by the opinion submitted to them on a particular fact in issue, court held that courts are not at all bound by the expert evidence delivered, which are basically advisory in nature. The court further added that it has the right to admit only that portion of the expert evidence which it considers necessary.

CONCLUSION

The present study of expert evidence within common law nations suggests a trend towards increased codification of expert evidence laws in various nations. It is submitted that codification is a healthy and welcome step, if taken in the right direction. However, it is essential to ensure the formulation of a well developed expert law, outlining the rights, functions and standard of duty for expert witnesses and the consequences of failure to non-compliance with these standards. Well codified laws can ensure the liability of the expert giving false testimony, as that testimony given can be used subsequently to indict him.

Canada has been quite successful in launching potential steps towards modification of expert evidence laws to ensure unbiasedness and objectivity. In Canada, the expert is liable to specifically declare that his primary duty lies towards the court. This declaration warrants liability of the expert witness as mentioned above. Furthermore in Canada, expert is necessitated to pass the two point test laid down in *R v. Mohan* for the admissibility of his evidence. Under the aforementioned test, firstly, expert is required

[82] *Kabul Singh v Gurinder Singh* PLR (1999) 121 P&H 816.

[83] *Malay Kumar Ganguly v Dr Sukumar Mukherjee* (2009) 9 SCC 221.

to meet the four basic admissibility criteria and secondly, the probative value given by the expert must not overshadow the prejudicial effect.

England has also maintained decent expert evidence standards by incorporating the changes suggested by Woolf report. In England, duty of the expert witness lies towards the court and he is required to certify that he understands those duties and will comply with them. Additionally, an expert is required to procure the approval of the court before the admissibility of the evidence. These steps have proven effective in ensuring objectivity and impartiality of expert opinion in England.

In Australia, the use of 'Ultimate Issue rule' and 'Common Knowledge rule' for a very long period of time had guaranteed the authenticity of expert evidence. Moreover, Australian courts have declared that the mechanism of expert evidence should be employed only when it is *absolutely necessary* for deciding the case. Furthermore, many states in Australia have also developed their own strict admissibility standards for expert evidence mandating written acknowledgement by the expert that their primary duty is towards the court.

However, US appears to be only nation that almost reproduced the Daubert standard in the Rule 702. Therefore in US, *Daubert* continues to reign as the dominant expert admissibility standard criteria mandating no requirement of express declaration by the expert witness that his primary duty is towards the court. Hence, it is submitted that U.S. has failed to evolve their expert evidence laws properly, relying entirely on the Daubert standards. Hence, in US, there is an absence of codified expert admissibility standard which mandates a written or oral acknowledgement by the expert witness regarding his primary duty towards court and maintaining impartiality and neutrality. However, United States has adopted a careless and irresponsible attitude towards the requirement of codification even at the later stages of adjudicatory discourse. United States has emphatically ignored the judicial pronouncement in *Finkelstein v. Liberty Digital* wherein judges highlighted the frequent biased contributions by experts claiming to have academic and scientific expertise. Hence, it is submitted that there is need of codification in US, on the lines of Canada, to ensure better objectivity and impartiality.

Indian courts have been quite progressive in this aspect by coming up with well reasoned and coherent judgements in cases like *Pali Ram, Ramesh Chandra Agarwal, State of Maharashtra v. Gopinath Shinde, Kabul Singh* and *Malay Kumar Ganguly,* regarding expert admissibility standards. These judgments have clearly specified the duty of an expert witness towards the court to provide impartial opinion. In doing so, the Courts have clearly demarcated expert admissibility standards. However, there still persists a need of statutory codification of the standards enshrined in these judgments in India to prevent any remote possibility of miscarriage of justice.