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RESEARCH ARTICLE

# The Admissibility of Expert Evidence in Criminal Proceedings in Malawi: A Call for Reliability Safeguards

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**Abstract**

Expert evidence is an increasingly prominent feature of criminal litigation. Confidence in the reliability of such evidence is therefore vital to the integrity of the justice process. Of late, there have been concerns in most jurisdictions that liberal admissibility standards allow expert evidence of doubtful reliability to be admitted by courts, leading to miscarriages of justice. Consequently, most adversarial common law systems now apply reliability standards to the reception of expert evidence. Malawian law makes provision for the admissibility of expert evidence on mere production if the parties to the case consent. This article critically evaluates this position, arguing that it provides no safeguards for assessing the reliability of expert evidence, thereby making the criminal justice system prone to injustices and challenges related to the use of such evidence. It proceeds to consider how the law and the courts can enhance the reliability of expert evidence in criminal proceedings.

**Keywords:** Expert evidence; admissibility; reliability; criminal proceedings; Malawi

## Introduction

Roberts and Zuckerman say that the first general principle of criminal evidence is promoting factual accuracy.[1] To this end, where the issues in dispute involve matters so specialist or technical that they are considered to be outside the everyday experience of the fact-finder, expert evidence will be admitted to inform the fact-finder's decision, thereby contributing to the accuracy of the verdict.[2] Accuracy may be essential in other areas of law, but its importance in criminal law cannot be overstated because of the nature of the sanctions involved in the event of a conviction. Criminal sanctions are so drastic that we should never risk imposing them if there is the slightest chance that the facts may be inaccurate. Recently, there have been concerns in most jurisdictions about liberal admissibility tests which only require that an expert witness be qualified and the evidence be relevant, and particularly that such liberality allows expert evidence of doubtful reliability to be admitted too freely, with insufficient explanation of the basis for reaching specific conclusions, to be challenged too weakly and to be accepted too readily by the court, leading to failures of justice.[3]

Consequently, most adversarial common law systems now apply reliability standards to the reception of expert evidence.[4] Malawi is principally a common law system. Section 180 of its

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1 P Roberts and A Zuckerman *Criminal Evidence* (2nd ed, 2010, Oxford University Press) at 697.

2 R Munday *Cross and Tapper on Evidence* (12th ed, 2010, Oxford University Press) at 535. See also *R v Turner* [1975] QB 834.

3 S Ring "Due process and admissibility of expert evidence on recovered memory in historic child sexual abuse cases: Lessons from America" (2012) 16 *International Journal of Evidence & Proof* 66.

4 G Edmond "Is reliability sufficient? The Law Commission and expert evidence in international and interdisciplinary perspective (part 1)" (2012) 16 *International Journal of Evidence & Proof* 30 at 32.

Criminal Procedure and Evidence Code ("the CP&EC") is the principal provision regulating expert evidence in criminal matters.[5] This section makes provision for the admissibility of expert evidence on mere production if the parties to the case consent. This article argues that this law provides no safeguards at all for checking the reliability of expert evidence, thereby making the Malawian criminal justice system prone to injustices and challenges, especially where the cases turn solely or predominantly on expert evidence.

This article begins with a discussion of the nature of expert evidence and the key problems associated with such evidence. The next section considers how various common law jurisdictions have attempted to mitigate such problems. I then proceed to evaluate the regulation of expert evidence in Malawi, highlighting the gaps in this regard. I conclude that it is imperative for Malawian law and courts to establish reliability standards for the reception of expert evidence, and make various proposals in this respect. Key among these are that courts should only admit expert evidence if satisfied as to its reliability, and in cases of doubt should use section 201 of the CP&EC to call for corroborating expert evidence to enhance the reliability of such evidence.

## The nature of expert evidence

An expert includes anyone whose knowledge of a subject matter extends beyond that of the average fact-finder.[6] In simple terms, expert evidence is testimony or opinion presented to a court by an expert witness. For such experts, there is no requirement of formal training or paper qualifications, relevant professional employment or experience, or even membership of a related organization or learned society.[7] In the celebrated presidential elections case, the court accepted the expert testimony of Mr Daud Suleiman, despite him conceding that he was not an IT auditor by formal qualification.[8] Similarly, in *R v Silverlock*, a solicitor who had studied handwriting for ten years was allowed to give expert evidence on the subject, and in *R v Chatwood* the defendant was held to be qualified to know whether the substance in issue was indeed heroin by his long usage of it.[9] As long as the witness possesses expert knowledge relevant to an issue before the court, it does not matter how they acquired it.

The range of recognized fields or subjects of expertise is not exhaustive. Section 180(1) of the CP&EC outlines a wide range of fields of recognized expertise, which includes "any body of knowledge or experience sufficiently organized or recognized as a reliable body of knowledge or experience". The key factor is therefore whether a particular field of expertise meets this definition. We have moved from having a few fields of specialized knowledge to a world abounding in specialities and sub-specialities.[10] As the world continues to make advances in science and technology and many other areas, the range of subjects that may require expertise in our courts is tremendous. It must however be noted that fields of expertise may not include fringe disciplines like astrology, alchemy or witchcraft, which lack any basis in validated scientific principles and methodology and cannot provide a rational basis for judgment.[11]

At common law, expert evidence is admissible without much ado. It only needs to be relevant, presented by a qualified expert and to go beyond the ordinary understanding of the court.[12] The general test for the admissibility of expert evidence was elaborated in *R v Turner*, which held that:

5 Cap 8:01.
6 Roberts and Zuckerman *Criminal Evidence*, above at note 1 at 477.
7 Ibid.
8 *Dr Saulos Chilima & Dr Lazarus Chakwera v Professor Arthur Peter Mutharika & Malawi Electoral Commission* Constitutional Reference no 1 of 2019.
9 [1894] 2 QB 768; [1980] 1 WLR 874.
10 RJ Allen and E Nafisi "Daubert and its discontents" (2010) 76/1 *Brooklyn Law Review* 131 at 132.
11 Roberts and Zuckerman *Criminal Evidence*, above at note 1 at 477.
12 T Ward "A new and more rigorous approach to expert evidence in England and Wales" (2015) 19 *International Journal of Evidence & Proof* 228 at 235.

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> "An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary. In such a case, if it is given dressed up in scientific jargon, it may make judgment more difficult. The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality, any more helpful than that of the jurors themselves; but there is a danger that they may think it does."[13]

Thus the purpose of expert testimony is to aid the court in determining issues that are outside the ordinary experience and knowledge of the judge or jury. Courts have rejected expert testimony in matters of common knowledge, such as the likely deterioration of an ordinary witness's memory over time, that an unidentified person shown in a photograph is under the age of 16, a witness's credibility, and the mens rea of an ordinary witness, among other things.[14]

The admissibility of expert evidence constitutes an exception to the rule against opinion evidence. Opinion evidence from lay witnesses is ordinarily inadmissible, principally to prevent witnesses from usurping the role of the judge and jury but also because it is regarded as being unreliable. On the other hand, there are some fundamental characteristics of expert evidence that distinguish it from non-expert evidence, warranting its exemption from the general rule against opinion evidence. Firstly, expert evidence is considered to represent statements of opinion not fact, and secondly, expert evidence comprises specialist knowledge outside the competence of the courts.[15] Dwyer argues that "once we view legal fact-finding in terms of probabilistic inferential reasoning, involving the application of generalisations to basic experiences, the traditional distinction between evidence of fact and evidence of opinion is shown to be one of operational convenience rather than epistemological substance".[16] There is a thin line between expert evidence of fact and expert evidence of opinion, just as there is between fact and opinion for lay witnesses. At the end of the day, even if the distinction between expert evidence of opinion and non-expert evidence of fact may appear overrated, the fact remains that expert evidence is a product of specialist knowledge outside the court's ordinary competence. It is not the mere opinion of the witness which is decisive but their ability to satisfy the court that, because of their special skill, training or experience, the reasons for the opinion which they express are acceptable.[17] Expert opinions therefore still have high probative value, and the benefit to the court may override the risks involved – which can anyway be controlled.

Similarly, expert evidence constitutes an exception to the rule against hearsay evidence. Hearsay evidence is ordinarily inadmissible; this is principally to avert the danger of manufactured evidence or inaccuracy, even mistakes, due to repetition.[18] By hearsay we mean, simply speaking, evidence that one hears but has not directly perceived with one's own senses. At common law, hearsay defines any statement other than one made by a witness in the course of giving their evidence in the proceedings in issue, by any person, which is offered as evidence of the truth of its contents.[19] Expert evidence is considered hearsay because it is necessarily premised on the expert's training and experience, both of which involve the acceptance of hearsay information.[20] In *R v Njobvuyalema*,

13 [1975] QB 834.

14 *R v Browning* [1995] Crim LR 227; *R v Land* [1998] 1 Cr App R 301; *R v Henry* [2006] 1 Cr App R 118; *R v Wood* [1990] Crim LR 264.

15 D Dwyer *The Judicial Assessment of Expert Evidence* (2008, Cambridge University Press) at 75–76.

16 Id at 75.

17 *Menday v Protea Assurance Co Limited* [1976] (1) SA 565.

18 A Keane, J Griffiths and P Mckeown *The Modern Law of Evidence* (8th ed, 2010, Oxford University Press) at 269.

19 Id at 10.

20 *Phipson on Evidence* (16th ed, 2005, Sweet & Maxwell) at 971.

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the judge was of the view that expert evidence cannot be categorized as hearsay or an exception to the rule against hearsay if the expert testifies in person in court.[21] However, the rationale for categorizing such evidence as hearsay does not essentially pertain to the question of whether it is given in court by the expert. It is just that in making opinions, experts mostly rely on the general body of knowledge and experience constituting their field: they rely on knowledge, experience, theories, data and concepts generated by peers, authors and professors, making individual experts directly responsible for only a tiny fraction of the knowledge base of their discipline.[22]

This may explain why section 180(4) of the CP&EC gives the impression that the conditions for admissibility of expert testimony are to be complied with, whether the expert attends court or not. In addition, *R v Kafukilira* reinforces the above sentiments by stating that an expert may refer to textbooks to refresh their memory or to correct or confirm their opinion, and any passages which they describe as accurately expressing their views may be read as part of their testimony.[23] Short of the impossible exercise of summoning the original generators or discoverers of particular knowledge, ideas or disciplines, expert evidence will inherently remain hearsay evidence, whether the expert testifies in court or not. It therefore warrants the same caution accorded to hearsay evidence and other risky types of evidence. The Supreme Court of Malawi has indicated that admission of expert evidence constitutes an exception to two general rules of evidence, ie the rules against hearsay and opinion evidence, making it imperative to be cautious and strictly comply with the provisions of the law regarding its admissibility.[24]

## The dangers of expert evidence

As indicated above, the common law does not have stringent requirements for the admissibility of expert evidence. It only requires that the evidence be relevant, presented by a qualified expert and that the subject matter be outside the ordinary knowledge and experience of fact-finders. The notion of the reliability of expert evidence is therefore not fundamental to common law jurisprudence. However, over time, as the world has made great strides in technological and scientific advances and as forensic and novel science has assumed significance in the courtroom, problems associated with expert evidence have become apparent, especially in adversarial jurisdictions. This has led to the establishment of minimum standards to check the validity and reliability of expert testimony in many developed countries. Other countries, however, for instance Malawi, Zambia and Zimbabwe, continue to admit expert evidence without further requirements other than the prescriptions of the common law. The subsequent paragraphs will highlight the key problems and challenges with expert evidence which are of concern to Malawi.

### *Reliability*

One of the biggest problems with expert testimony is the issue of reliability. Is expert evidence reliable and safe to convict or acquit upon, especially in instances where it is outcome determinative? Literally speaking, reliability means trustworthiness or dependability. Reliable evidence is evidence that provides the judge or jury with sound reasons for relying on it.[25] Testimony is considered reliable if it is justifiable to rely upon its being true.[26] Reliability goes beyond the content of the expert's opinion to examine the process of arriving at such opinion; a process used by an expert to arrive at an opinion is reliable if it is objectively probable that a belief or result formed by that process will

21 Criminal Appeal Cause no 71 of 2007 (Lilongwe District Registry).
22 Roberts and Zuckerman *Criminal Evidence*, above at note 1 at 417.
23 [1964–66] ALR-Mal 38.
24 *R v Jafuli* [1978–80] ALR-Mal 351.
25 Ward "A new and more rigorous approach", above at note 12 at 228.
26 Id at 230.

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be true.[27] If the evidence is outcome determinative or the sole or decisive evidence against the defendant, it becomes imperative for such evidence either to be demonstrably reliable or for its reliability to be effectively tested in court.[28] If it cannot be demonstrated that incriminating expert opinion evidence is grounded on techniques that are valid and reliable, then that evidence is unacceptable.[29]

Practical examples from various jurisdictions show that experts have and do give unreliable, misleading, exaggerated or wrong expert opinions (sometimes contradictory ones) that can cause fact-finders to determine crucial issues on the basis of erroneous evidence, leading to unfairness and injustice. Such unreliable expert evidence could be given deliberately due to the nature of adversarial proceedings, whereby an expert can fail to maintain independence from the party instructing them to make findings favourable to that party, but it could also be attributable to the expert's lack of familiarity with legal and courtroom processes.[30] It might also be attributable to limited or incomplete scientific knowledge in instances where novel science is in issue, as was the case in *R v Cannings*, discussed below.

*R v Hurst* and *R v Cannings* illustrate how unreliable evidence can be admitted in the name of expert testimony if the court is not vigilant.[31] In *Hurst*, an expert report from a psychiatrist was tendered in evidence by the defence in a bid to establish that the suspect had been involved in cocaine smuggling under duress. The suspect informed the expert about her background, medical history and the intimidation, and the expert restated these assertions in his report as though they were established fact. There was no data by way of tests upon which to found the expert's opinion. The court was of the view that this was unhelpful speculation which did not meet the general test for the admissibility of expert evidence elaborated in *R v Turner* above.

Further, in *R v Cannings*, the appellant's infant children died for reasons that were not clinically explicable, and she was charged with murder.[32] There was no direct evidence against the appellant and the prosecution's case was solely premised on expert evidence to the effect that a conclusion of smothering could be drawn from the extremely rare occurrence of three separate infant deaths in the same family. The appellant, on the other hand, argued that the deaths were attributable to sudden infant death syndrome, which is infant death where the immediate cause of death is apnoea, loss of breath or cessation of breathing occurring naturally, the underlying cause of which is yet unknown. She was convicted, and on appeal adduced fresh expert evidence to the effect that infant deaths occurring in the same family can and do occur naturally, even though unexplained. Some of this evidence was the result of further research or research published after the trial into the problem of sudden infant death syndrome. The court considered whether the rarity of a number of inexplicable natural infant deaths in the same family raised the inference that the deaths must have resulted from deliberate harm, as the prosecution alleged. Additionally, the court considered whether a conviction based solely on specialist evidence is safe. It was held (allowing the appeal) that:

> "Where a full investigation into two or more sudden unexplained infant deaths in the same family is followed by a serious disagreement between reputable experts about the cause of death, and a body of such expert opinion concludes that natural causes, whether explained or not, cannot be excluded as a reasonable possibility, a prosecution for murder should

27 Ibid.

28 Id at 232.

29 G Edmond "Specialised knowledge, the exclusionary discretions and reliability: Reassessing incriminating expert opinion evidence" (2008) 31/1 *University of New South Wales Law Journal* 1 at 36.

30 J Hartshorne and J Miola "Expert evidence: Difficulties and solutions in prosecutions for infant harm" (2010) 30 *Legal Studies* 279.

31 [1995] 1 Cr App R 82, CA; [2004] 1 ALL ER 725. The same is apparent in other English decisions like *Dallagher* EWCA Crim 1903; *Clark (Sally)* (no 2) [2003] EWCA Crim 1020; *Harris and Others* [2005] EWCA Crim 1980.

32 [2004] 1 ALL ER 725.

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> only be commenced or continued if and only if there is additional cogent evidence, extraneous to the expert evidence that supports the conclusion that one of the infants was deliberately harmed … If the outcome of a trial depends exclusively or almost exclusively on a serious disagreement between distinguished and reputable experts, it will often be unwise and, therefore, unsafe to proceed."[33]

The court further emphasized the fact that particular caution is necessary where medical experts disagree and that the court has to be on its guard against the overdogmatic expert, an expert whose reputation or amour propre is at stake or one who has developed a scientific prejudice. In the further words of the court, "it should never be forgotten that today's medical certainty may be discarded by the next generation of experts or that scientific research will throw light into corners that are, at present, dark".[34]

In fact, following the successful *Cannings* appeal, the Attorney General announced a review of 258 convictions relating to homicide or infanticide of a baby under two years old by a parent, and a similar review in civil cases was ordered by the Minister for Children.[35] All this emphasizes the fact that admission of expert evidence without any reliability safeguards may occasion miscarriages of justice. No science is infallible, and human intervention increases the risk of error.[36] In actuality, problems with expert evidence abound when people are seduced into thinking that science is an evidential panacea, devoid of blind spots, limitations or special demands of its own.[37] Mistakes are inevitable, especially since expert evidence is a mixture of fact and professional opinion.[38] Even the most qualified and experienced medical and science experts disagree with one another, and they are not immune from personal vanities.[39] Furthermore, with later advancements in research, almost every specialist body of knowledge is dynamic.

Unfortunately, cross-examination, a process known for its exposition of inconsistencies and mistakes, is rendered ineffective with respect to expert evidence. Giannelli argues that cross-examination is not an effective safeguard against unreliable expert evidence.[40] Research indicates that courts and lawyers overestimate the value of cross-examination in dealing with the problems of unreliable expert evidence, and emerging research has questioned the effectiveness of all potential trial safeguards, individually and in combination.[41] Even traditional ways of weighing evidence, like witness credibility and demeanour, are inadequate to check the reliability and validity of specialized evidence.[42] Cross-examination is a useless weapon without the necessary scientific and technical knowledge to appropriately address fallacies in the opposing counsel's evidence.[43] Evidence suggests that lawyers do not effectively probe, test or challenge expert evidence, preferring instead the easy approach of trying to undermine the expert's credibility.[44] There is no evidence that

33 *R v Cannings* [2004] EWCA Crim 01, para 178.
34 Ibid.
35 Keane, Griffiths and Mckeown *Modern Law of Evidence*, above at note 18 at 524.
36 F Raitt *Evidence: Principles, Policy and Practice* (2nd ed, 2013, W Green & Son Ltd) at 61.
37 Roberts and Zuckerman *Criminal Evidence*, above at note 1 at 471.
38 Raitt *Evidence*, above at note 36 at 57.
39 Roberts and Zuckerman *Criminal Evidence*, above at note 1 at 505.
40 PC Giannelli "Forensic science: Daubert's failure" (2018) 68 *Case Western Reserve Law Review* 869 at 933; M Kovera, M Russao and B McAuliff "Assessment of the common sense psychology underlying Daubert" (2002) 8 *Psychology, Public Policy and Law* 180.
41 D Lorandus "Expert evidence post-Daubert: The good, the bad and the ugly" (2017) 43/3 *Litigation* 18.
42 L Meintjes-Van der Walt "The proof of the pudding: The presentation and proof of expert evidence in South Africa" (2003) 47/1 *Journal of African Law* 88 at 89.
43 J Visser "Defence challenges of forensic scientific evidence in criminal proceedings in South Africa" (2015) 28/1 *South African Journal of Criminal Justice* 24 at 34.
44 K Shaw "Expert evidence reliability: Time to grasp the nettle" (2011) 75 *Journal of Criminal Law* 368 at 371.

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cross-examination meaningfully exposes the limitations of expert evidence or that it overcomes the danger of unfair prejudice caused by admitting unreliable expert testimony.[45]

Giannelli also observes that "many defendants have been convicted and spent countless years in prison based on evidence by arson experts who were later shown to be little better than witch doctors".[46] Even some of the common forensic techniques like fingerprint examinations, firearm and tool-mark identifications, handwriting examinations, microscopic hair analysis and bite-mark comparisons are supported by little rigorous systematic research to validate their basic premises and techniques.[47] The problems associated with unreliable expert evidence cannot therefore be overstated.

### Judge / juror deference

Studies show that when exposed to complex expert testimony, juries as well as judges are more likely to resort to peripheral processing cues when evaluating the reliability of that evidence, for instance, the extent of the expert's credentials.[48] Expert witnesses, especially in highly technical or scientific areas, are cloaked with prestige and authority and exert great influence on fact-finders.[49] The fact-finder's own knowledge and experience does not allow them to assess the evidence accurately, a factor which necessitated the calling of the expert in the first place. The expert evidence is therefore likely to carry more weight and relate to an ultimate issue, thereby influencing the fact-finder to just defer to the expert's opinion and knowledge. Deference is a concern especially where the case turns solely on expert evidence, making it conclusive to the ultimate issue. In such cases, the expert can be said to indirectly assume responsibility for the outcome of the dispute, and where their evidence is unreliable, injustices are bound to occur. Empirical studies indicate that even if cross-examination of expert witnesses exposes the weaknesses of their position, this may not have much effect on the juror's initial confidence in the expert.[50] Numerous studies have also observed that even judges sometimes fall back on simplistic criteria like qualifications and experience.[51] This might explain why some countries officially recognize the expert witness's quasi-judicial status and treat them as officers of the court rather than witnesses.[52]

Although it is anticipated that experts will educate the court in relation to the facts, which they do in less complex areas of specialized knowledge, in complex cases the court may simply defer to the expert's own knowledge and opinion in resolving the disputed factual issues to which expertise pertains.[53] Such prospect of passive deference to expert evidence increases the case for caution generally, but especially where a case turns solely or predominantly on expert evidence. It is therefore important to ensure that such evidence is valid and reliable. The law of evidence renders inadmissible evidence whose probative value is outweighed by its prejudicial effect, for instance evidence relating to the bad character of a party. In the same vein, our courts surely need to scrutinize the probative value of expert evidence, in part because of this danger of fact-finder prejudice

45 Edmond "Specialised knowledge", above at note 29 at 37.

46 Giannelli "Forensic science", above at note 40 at 869.

47 Id at 874 (citing the National Academy of Sciences Forensic Report, 2009).

48 J Cooper, EA Bennett and HL Sukel "Complex scientific testimony: How do jurors make decisions?" (1996) 20 *Law and Human Behaviour* 379. See also RJ Goodwin "Roadblocks to achieving 'reliability' for non-scientific expert testimony: A response to Professor Edward J Imwinkelreid" (1999–2000) 30 *Cumberland Law Review* 215, and A Roberts "Expert evidence on the reliability of eyewitness identification – some observations on the justifications for exclusion: *Gage v HM Advocate*" (2012) 16 *International Journal of Evidence & Proof* 93.

49 KW Waterway and RC Weill "A plea for legislative reform: The adoption of Daubert to ensure the reliability of expert evidence in Florida courts" (2011) 36/1 *Nova Law Review* 1.

50 Ward "A new and more rigorous approach", above at note 12 at 241.

51 Lorandus "Expert evidence post-Daubert", above at note 41.

52 Dwyer *The Judicial Assessment of Expert Evidence*, above at note 15 at 194.

53 The Law Commission Consultation Paper no 190: The Admissibility of Expert Evidence in Criminal Proceedings in England and Wales, part 2, para 2.3.

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towards expert testimony. If the court in *R v Hurst* had simply "deferred" to the expert report, it was bound to occasion a miscarriage of justice.

### Adversarial bias

Science undertaken for the purpose of litigation is prone to bias, because scientists engaged for such purposes do deviate from the norm of disinterested inquiry to focus on advocacy.[54] The defects of the adversarial process are particularly apparent in the context of the evidence of expert witnesses.[55] In adversarial systems, the parties are expected to present their best versions of the contested case, thereby increasing the opportunity of party manipulation of the experts concerned.[56] This may cloud the objectivity of the expert's opinions and the accuracy of any verdict premised thereon.

Expert testimony may be tainted by the expert's employment relationship with the party tendering the evidence. Chin, Growns and Mellor refer to this as association bias, and it is compounded by what they call selection bias, whereby experts are often chosen because they hold a view favourable to that of the tendering party.[57] Together, these biases can be referred to as adversarial bias.[58] Aligning an expert opinion with the litigant's objectives happens consciously and unconsciously. Conscious bias arises when the expert adopts the position of a "hired gun" and aligns their opinion to the needs of the hiring party, while unconscious bias is the natural bias to appropriately serve those that employ and remunerate us.[59] It would be strange for a party to parade an expert witness whose opinions do not align with their objectives, and this may and does affect the independence and integrity of expert evidence.

### Fair trial concerns

Another flaw of expert evidence has been the concern that it undermines the accused's right to fair trial. The right to fair trial is guaranteed under section 42 of the Malawi Constitution. Key aspects of the right to fair trial include the right to adduce and challenge evidence[60] and the right to have adequate time and facilities to prepare a defence.[61] Cross-examination is a significant aspect of the right to challenge evidence in adversarial systems, and entails that one must have the fullest opportunity of cross-examining meaningfully and effectively.[62] As indicated above, expert evidence is specialized evidence that goes beyond the ordinary knowledge and experience of the court. It can be highly technical and complex, only understandable to the trained expert – the reason why the expert was invited in the first place. Lawyers and judges lack the expertise in issue and are unable to fully discern the limits of the methods used or the interpretation of the results. One key to successful cross-examination is for the cross-examiner to anticipate the witness's responses, yet this is not always possible with expert testimony. In fact, reviews of extensive research conducted on wrongful convictions and DNA exonerations in the USA indicate that in the overwhelming majority

54 Allen and Nafisi "Daubert and its discontents", above at note 10 at 138.

55 *Phipson on Evidence*, above at note 20 at 1021. See also R Slovenko "The role of the expert (with focus on psychiatry) in the adversarial system" (1988) 16 *Journal of Psychiatry & Law* 335.

56 L Meintjes-Van der Walt "Science friction: The nature of expert evidence in general and scientific evidence in particular" (2000) 117 *South African Law Journal* 778. See also J McEwan *Evidence and the Adversarial Process: The Modern Law* (2nd ed, 1998, Hart Publishing) at 162 and MN Howard "The neutral expert: A plausible threat to justice" (1991) *Criminal Law Review* 98.

57 JM Chin, B Growns and DT Mellor "Improving expert evidence: The role of open science and transparency" (2019) 50 *Ottawa Law Review* 365 at 384.

58 Ibid.

59 Allen and Nafisi "Daubert and its discontents", above at note 10 at 137.

60 Sec 42(2)(f)(iv). See also DM Chirwa *Human Rights under the Malawi Constitution* (2011, Juta and Co Ltd) at 448.

61 L Meintjes-Van der Walt "Expert evidence and the right to a fair trial: A comparative perspective" (2001) 17/3 *South African Journal on Human Rights* 301 at 309.

62 Id at 307.

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of wrongful convictions based on questionable forensic evidence, the defence counsel did not cross-examine the experts concerning their invalid testimony.[63] The ability of the defence counsel to properly test and challenge forensic evidence through cross-examination has also been criticized in England and Wales.[64]

One needs another expert to advise on the strength and merit of the expert evidence, to suggest alternative ways of scientific investigation, to provide alternative interpretation of the other side's data and results, and to scrutinize the procedures and methods followed.[65] Unfortunately, in criminal cases only the prosecution has easy access to expert assistance and facilities like forensic laboratories and hospitals, which regularly conduct investigations on their behalf. The challenges of expert evidence are amplified when such testimony is directed towards an indigent accused, who lacks the ability to secure expert assistance.[66] In developing countries, most suspects, unlike the prosecution, have no resources to acquire experienced defence experts and skilled representation, so criminal proceedings are conducted in unequal and unfair circumstances.[67] Ironically, the right to adduce and challenge evidence includes the concept of equality of arms, and particularly that the accused should participate in the proceedings on an equal footing with the state.[68] However, the indigent accused are denied the fullest opportunity to effectively challenge the expert evidence, and this undermines their right to fair trial. A right afforded without the means to actualize it is hollow and ineffective.[69]

For Malawi this problem is compounded by the inadequate number of lawyers available.[70] Due to the low availability of lawyers, legal representation at the state's expense is only guaranteed in homicide cases. Yet most litigants are unsophisticated and uneducated people who find the adversarial procedures applicable in the courts too complicated and who do not appreciate the importance of cross-examination, let alone know how to conduct it.[71] Unfortunately, even against this context it is the norm in cases involving force, like rape and assault, for the state to present expert medical testimony against an unrepresented accused. It is high time our system introduced standards for scrutinizing expert evidence for reliability before admissibility to avert these highlighted problems. The injustices attributable to unreliable expert evidence that have occurred elsewhere should serve as motivation for change.

## Modern trends in the admissibility of expert evidence

There is now a renewed focus on the reliability of expert evidence at the admissibility stage in most adversarial jurisdictions as a primary response to the problems with it.[72] Most common law countries now apply reliability safeguards to expert evidence.[73] Developments in this regard were spearheaded by the tests propounded by common law courts in two cases which attempted to provide more concrete guidance for trial judges faced with the difficult task of assessing the reliability of expert evidence incorporating novel theories, recent scientific discoveries or technological

63 Visser "Defence challenges", above at note 43 at 31.
64 Ibid.
65 Meintjes-Van der Walt "Expert evidence", above at note 61 at 308.
66 Ibid.
67 Visser "Defence challenges", above at note 43 at 46.
68 Chirwa *Human Rights*, above at note 60 at 448.
69 Meintjes-Van der Walt "Expert evidence", above at note 61 at 311.
70 GD Makanje "The protection of vulnerable witnesses during criminal trials in Malawi: Addressing resource challenges" (2020) 20 *African Human Rights Law Journal* 206 at 210.
71 W Scharf et al "Access to justice for the poor of Malawi? An appraisal of access to justice provided to the poor of Malawi by the lower subordinate courts and the customary justice forums" (2002, unpublished DFID Malawi Report) at 12. Although there is no recent data available, this problem seems to persist.
72 Edmond "Is reliability sufficient?", above at note 4 at 32. See also A Roberts "Rejecting general acceptance, confounding the gate-keeper: The Law Commission and expert evidence" (2009) *Criminal Law Review* 551.
73 Roberts and Zuckerman *Criminal Evidence*, above at note 1 at 503.

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innovation.[74] The first was the *Frye* test, a general acceptance test which requires that a scientific theory or technique should be generally accepted by members of the relevant community.[75] *Frye* also requires that the methodology used by the expert in reaching their conclusions be generally accepted by the relevant scientific community.[76] The second was the *Daubert* test, which says trial judges should be gatekeepers, with responsibility to assess the reliability of the expert opinion by asking the following questions: whether the theory in issue can be and has been tested; whether it has been subject to peer review; the known or expected rate of error; and whether the theory or the methodology employed is generally accepted in the relevant scientific community.[77] These two cases are particularly significant due to the influence they have had on the development of the law in most common law jurisdictions.[78] They have been applied in both civil and criminal proceedings.[79]

Following *Daubert* there have been two other prominent Supreme Court decisions that have supplemented the *Daubert* criteria for determining the reliability of expert evidence. In *Kumho Tire Co v Carmichael*, the court reaffirmed *Daubert* but expanded it to apply to all expert testimony, not just technical and scientific testimony.[80] In *General Electric Company v Joiner*, the court indicated that courts can make an inquiry into the connection between the expert's experiments, data and analysis and the conclusions reached such that, if the conclusions reached are too disconnected from the methodology used to reach them, such evidence is inadmissible.[81] This case therefore enjoins courts to assess the reliability of the expert's reasoning process as well. These two cases, alongside *Daubert*, now form what scholars call the *Daubert* trilogy on reliability of expert evidence.[82]

The English approach to the reliability of expert evidence seems to accord with the *Frye* test, that expert evidence based on novel or developing scientific techniques that are not generally accepted by the scientific community should be excluded.[83] On the other hand, Canada's leading expert evidence decision is the Supreme Court of Appeal case of *R v Mohan*, which held that expert evidence is admissible upon meeting four conditions: relevance; necessity in assisting the trier of fact; not falling under any exclusionary rule; and tendered by a properly qualified expert.[84] In determining relevance, the court considers the reliability of the evidence and the ability of the fact-finder to rationally evaluate the basis of the opinion.[85] Canada further requires that expert evidence which advances a novel scientific theory or technique should undergo special scrutiny, including meeting a threshold level of reliability and being essential to the trial.[86] Canadian decisions post-*Mohan* have accepted and refined it by elaborating how to assess reliability, and some Supreme Court decisions have expressly applied the *Daubert* test.[87] It has also been established that an expert's lack of independence and impartiality can be a cause to exclude such evidence.[88]

Australia applies the following criteria to assess expert evidence: the evidence must be relevant; it must have sufficient probative value; the expert witness must be well qualified based on training and

74 Ibid.
75 *Frye v US* [1923] 293 F 1013 (DC Cir).
76 AM Joukov "Who is the expert? *Frye* and *Daubert* in Alabama" (2016) 47/2 *Cumberland Law Review* 275; Z Alter "Unpacking Frye-Mack: A critical analysis of Minnesota's Frye-Mack standard for admitting scientific evidence" (2017) 43/3 *Mitchell Hamline Law Review* 626.
77 *Daubert v Merrell Dow Pharmaceuticals Inc* [1993] 509 US 579; Joukov "Who is the expert?", above at note 76 at 276.
78 Roberts "Expert evidence", above at note 48 at 93.
79 Alter "Unpacking Frye-Mack", above at note 76 at 632.
80 [1999] 523 US 137.
81 [1997] 522 US 136.
82 Joukov "Who is the expert?", above at note 76 at 276; Alter "Unpacking Frye-Mack", above at note 76 at 632.
83 *R v Gilfoyle* [2001] 2 Cr App R 57.
84 [1994] 2 SCR 9; Chin, Growns and Mellor "Improving expert evidence", above at note 57 at 380.
85 Id at 381.
86 Ibid.
87 Ibid; *R v LJ* [2000] SCC 51; *White Burgess Langille Inman v Abbott and Haliburton Co* [2015] SCC 23.
88 Id.

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experience; and their opinion must be based wholly and substantially on that specialized knowledge.[89] On the other hand, in continental jurisdictions like the Netherlands, experts testify at the behest of the court and are not party-based, which to some extent dilutes the adversarial bias discussed above. Thus, the current trend is to scrutinize expert evidence for reliability before applying it.[90]

Closer to home, in Zambia, the law does not require much beyond the common law requirements for the admissibility of expert evidence.[91] However, the court may in its discretion summon an expert to give oral evidence beyond submitting the expert report and may cause written interrogatories to be submitted to the expert for reply. This does not eliminate the dangers of expert evidence discussed above. Section 180(4) of Malawi's CP&EC only allows written submissions to be submitted to an expert for reply if the expert is not within the country. The Zimbabwean provisions on expert evidence are very similar to Malawian law. Other than the common law requirements for admissibility, there has to be consent between the parties to the admissibility of the expert evidence or service of the expert report coupled with notice of its intended production in court.[92] The court can also require the expert to give oral evidence or cause written interrogatories to be submitted to the expert for reply. Here too, reliability safeguards are lacking.

It appears that, compared to developed countries, developing countries do not require much for the admissibility of expert evidence other than the requirements of the common law and the issues highlighted above. This could be attributable to the low levels of scientific and technological advancements, which entail that novel or forensic science is virtually never an issue in the courtroom. Nevertheless, the dangers of expert evidence are existent even in dealing with ordinary, non-novel expert evidence.

While it is tempting to try a copy-and-paste approach and just import the *Frye* and *Daubert* or related tests for reliability of expert evidence following the trends in other common law jurisdictions, it must be noted that these tests have their own limitations. The *Frye* test, with its focus on general acceptance of a theory by members of the relevant community, dwells on quantity and may, among other things, overlook the quality of the evidence.[93] In fact, recent evidence suggests that *Frye* guidelines have lost popularity, and in the US most courts seem to prefer the *Daubert* standard of admissibility, while some combine *Frye* and *Daubert* guidelines.[94] Yet the *Daubert* test also presents its own challenges. For instance, the degree of scientific literacy that it demands of judges is unreasonable, and there are doubts about the extent to which judges understand and properly apply the *Daubert* criteria.[95] Many scholars have written about the weaknesses of judges in applying these criteria, and it appears that such weaknesses are compounded in criminal cases.[96] In addition, these tests are not necessary for some forms of expert evidence and may not be suitable for the Malawian context. Malawi is not very advanced scientifically, technologically or even forensically.[97] Most of the expert evidence that comes into play is regarding medical and post-mortem

89 R Wong "Judging between conflicting expert evidence: Understanding the scientific method and its impact on apprehending expert evidence" (2014) 26 *Singapore Academy of Law Journal* 169 at 205.

90 Meintjes-Van der Walt "Expert evidence", above at note 61 at 303.

91 Laws of Zambia, Criminal Procedure Code, part V (cap 88).

92 Laws of Zimbabwe, Criminal Procedure and Evidence Act (cap 9:07), sec 278.

93 JA Epps and K Todorow "Refryed forensics: Screening expert testimony in criminal cases through *Frye* plus reliability" (2018) 48 *Seaton Hall Law Review* at 1161.

94 W Mangrum and RC Mangrum "Evidence-based medicine in expert testimony" (2019) 13 *Liberty University Law Review* at 337; R Dioso-Villa "Is the expert admissibility game fixed? Judicial gatekeeping of fire and arson evidence" (2016) 38 *Law and Policy* 55.

95 DW Barnes "General acceptance vs. scientific soundness: Mad scientists in the courtroom" (2004) 31 *Florida State Law Review* 303.

96 PW Grimm "Challenges facing judges regarding expert evidence in criminal cases" (2018) 86 *Fordham Law Review* 1615.

97 For instance, DNA technology is not available in the country.

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examinations, with very little demand for expert evidence in other areas of knowledge.[98] These tests may be more suitable for jurisdictions with advanced levels of science and technology, where novel science is sometimes an issue in the courtroom. This does not mean that reliability safeguards are not suited for non-novel science; it is not only expert evidence relying on novel science that needs to be scrutinized for validity and reliability but all expert evidence generally.[99] Even if this were otherwise, considering the current pace of scientific, medical and technological advancements worldwide, Malawi and other developing countries will make advances over time, and the need for expert evidence in the courtroom can only increase. All this underlines the necessity of caution and vigilance about the quality of evidence admitted in the name of expertise and the introduction of standards for testing the reliability of such evidence.

## The admissibility of expert evidence in criminal proceedings in Malawi

The principal legislation regulating criminal procedure and evidence in Malawi is the above-mentioned Criminal Procedure and Evidence Code of 2010. Originally promulgated in 1929 as the Criminal Procedure Code, the CP&EC was re-enacted in 1969, at which time its name changed to the present one; since then it remained largely unchanged until 2010, when it was comprehensively reviewed.[100] In its report on reviewing the CP&EC, the Law Commission had initially noted that the section in issue, section 180, is deficient in many respects and considered expanding it.[101] However, the Commission later felt that although the section defines "expert report" restrictively, it is quite helpful in that it lists the traditional areas of organized knowledge. The only recommendation the Commission made, therefore, was that section 180 should be opened up to cover other areas to which expertise may extend. Thus the only amendment to the original section 180 was the insertion of the phrase "or any body of knowledge or experience sufficiently organized or recognized as a reliable body of knowledge or experience" in sub-section (1), immediately after the word "geography" in the fourth line. The rest of the section was retained in its original form. Most cases discussed in this article, though premised on the previous section, therefore remain relevant.

Section 180(1) of the CP&EC provides as follows:

> "Whenever any facts ascertained by any examination, including the examination of any person or body, or by any process requiring any skill in pathology, bacteriology, biology, chemistry, medicine, physics, botany, astronomy or geography or any body of knowledge or experience sufficiently organized or recognized as a reliable body of knowledge or experience and the opinions thereon of any person having that skill are or may become relevant to the issue in any criminal proceedings, a document purporting to be a report of such facts and opinions, by any person qualified to carry out such examination or process (in this section referred to as an "expert") who has carried out any such examination or process shall, subject to subsection (5), on its mere production by any party to those proceedings, be admissible in evidence therein to prove those facts and opinions if one of the conditions specified in subsection (3) is satisfied.
>
> 180(3) The conditions referred to in subsection (1) are –
>
> (a) that the other parties to the proceedings consent; or
>
> (b) that the party proposing to tender the report has served on the other parties a copy of the report and, by endorsement on the report or otherwise, notice of his intention to tender it in evidence and none of the other parties has, within seven (7) days from such service, served on

98 Malawi Law Commission, Report of the Law Commission on the Review of the Criminal Procedure and Evidence Code (Cap 8:01) at 95.

99 Roberts and Zuckerman *Criminal Evidence*, above at note 1 at 494.

100 Report of the Law Commission, above at note 98.

101 Ibid.

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> the party so proposing a notice objecting to the report being tendered in evidence under this section."

Thus expert evidence in criminal proceedings in Malawi, usually given in the form of reports, is admissible if the party against whom such evidence is tendered has consented to its production in evidence or such a party, having been served with such an expert report with an endorsement that it will be produced as evidence, does not raise any objection to it within seven days of such notice. It has been held that these two conditions should be read disjunctively, so a party can satisfy one or the other, though there is no harm if both are satisfied.[102] Section 180(1) seems to encompass all the common law requirements for admissibility of expert evidence. It highlights "relevance to an issue in the criminal proceedings", the fact that the expert must be a qualified person, and outlines fields of knowledge or experience that are outside the norm for the court.

It can be argued that although on the face of it we have two conditions for admissibility, it is safe to say that the only condition for admissibility of expert evidence is consent, because the issue of consent is implicit in the second condition, section 180(3)(b). If a party is served with an expert report endorsed with a notice that it will be tendered in evidence, and they do not raise any objection within the stipulated period, the report becomes admissible whether they consent to it explicitly or not, under section 180(3)(a). In such cases, arguably, the consent is presumed from the lack of objection. So a party either consents explicitly or is duly served and raises no objection, in which case they are barred from not consenting in court as the consent is presumed. If an objection is raised, then clearly the party does not consent to the report's admissibility. If the service was wrongful, the other party can simply object to the admissibility of the report in evidence on the basis of section 180(3)(a). It can therefore be said that the only condition for the admissibility of expert evidence in Malawi other than the usual common law requirements is consent of the parties to the case. The courts religiously apply section 180(3), such that if none of the conditions therein are satisfied and the case predominantly turns on expert evidence, a conviction can be quashed on appeal on the basis that the accused person was denied an opportunity to object or consent to the reception of the expert evidence.[103] It has been held in many cases that if any of the conditions in section 180(3) are not complied with, the expert evidence is rendered inadmissible.[104]

One of the key authorities on the admissibility of expert evidence in Malawi is *R v Njobvuyalema*, in which the accused was charged with the offence of assault occasioning actual bodily harm and a medical report in this regard was admitted in the magistrate court.[105] The accused had been duly served with the report and had written by hand on it "I have seen it but I am unable to read its contents". He was convicted and appealed to the High Court, one of the grounds being that the medical report in issue was admitted without his consent, in breach of section 180(3). The court stated that:

> "There must be consent unless the other condition is satisfied … it is however important that the consenting party be fully aware of not just the existence of the report but also of its contents. Only then would the consent be valid. In the alternative, the report must have been served on the accused with an endorsement that it is intended to be produced in evidence. If there is no such endorsement then there must be credible evidence to prove that the accused was notified of the intention to produce the report in evidence. It cannot be assumed that by

102 *R v Njobvuyalema*, above at note 21; *R v Mphatso Chimangeni* Criminal Appeal no 2 of 2003, High Court Principal Registry.

103 *R v Livingstone Nkhata and Frank Yiwonde* Criminal Appeal no 29 of 1993 (unreported).

104 *R v Mafukeni Kavalo* Criminal Appeal no 20 of 2017 (unreported); *R v Jafuli*, above at note 24; *R v Mapwesa* [1984–86] 11 MLR 190; *R v Hassain* [1990] 13 MLR 151; *R v Zobvuta* [1994] MLR 317; *R v Matilda Luka Zulu* [2008] MWHC 220; *R v Njobvuyalema*, above at note 21.

105 Above at note 21.

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> merely serving the report on him, the accused becomes aware of an intention to produce the report in evidence."[106]

The high court, without even considering why the accused said he was unable to read its contents or whether it was reasonable for him to say so, concluded that because of the statement in issue the accused could not be said to have consented to the admissibility of the report. It therefore held that section 180(3) was not complied with, and the conviction was quashed in part on this basis. This emphasizes the extent to which the courts strictly apply the consent factor as a condition for admitting expert evidence.

The Supreme Court of Appeal has also held that a medical report should not have been admitted in evidence, even though the appellant had not objected, because he had not specifically consented to its admission, nor had a copy of the report been served on him as required by section 180(3).[107] The court further emphasized that under this section, an accused must specifically consent, and silence on the accused's part does not suffice as consent, especially where they are without legal representation.[108] The court justified such strict enforcement of section 180 on the basis that the admission of expert evidence constitutes an exception to the two general rules of evidence, the rules against hearsay and opinion evidence, making it imperative to be cautious and comply with the section's detail. The Supreme Court has also held that the showing of a medical report to the appellant by the police at the time he was charged was insufficient to amount to his consenting to its admission, and that since the appellant had not been given a copy of the report and no notice of the prosecution's intention to tender it in evidence had been served, the report was not admissible within section 180 and its contents should be disregarded.[109]

It has been argued that the object of the consent condition is to enable the parties to accept the undisputed evidence without calling the maker of the report, mainly because the attendance at trial of experts may not always be procured without delay or expense that the court may consider unreasonable.[110] However, a reading of section 180(4) of the CP&EC indicates that the conditions for admissibility of expert testimony, particularly the consent element, are to be complied with whether the expert is to attend court or not. Interestingly, in all the above cases the courts did not consider or make reference to the question of whether any of the expert reports in issue were reliable or not. Either section 180(3) is complied with, in which case there is consent between the parties and the report is admissible, or it is not complied with and is rendered inadmissible.

It should also be noted that the Malawian criminal justice system has recently delivered several high-profile cases in which technological expert evidence was used. Unfortunately, the courts made no reference to the provisions of section 180(3) of the CP&EC, probably because this was not in dispute. Neither did the courts comprehensively consider the reliability of the expert evidence in issue. For instance, in *Kasambara*, where phone call-log evidence was presented by experts called by the prosecution, one of the questions for the court's consideration was whether a conviction can be secured based on such call-log evidence.[111] Without adequately considering whether call-log evidence is reliable, the court simply made reference to foreign cases and to *Mvula* where similar evidence had been considered (again without reference to section 180 and reliability) and on that basis used the call-log evidence in its final determination.[112] There was also *Lutepo*, where

106 *R v Njobvuyalema*, above at note 21.
107 *R v Jafuli*, above at note 24.
108 Ibid.
109 *R v Mapwesa*, above at note 104.
110 *R v Njobvuyalema*, above at note 21.
111 *R v Macdonald Kumwembe, Pika Manondo & Raphael Kasambara* Criminal Case no 65 of 2013 (unreported).
112 *R v Mzondi Mvula & Two Others* Criminal Case no 65 of 2013 (unreported).

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expert evidence was admitted but questions of reliability or section 180(3) were not in issue and therefore not alluded to.[113] These cases are therefore lost opportunities for our jurisprudence.

Interestingly, section 180(1) talks about the "body of knowledge or experience sufficiently organized or recognized as a *reliable* body of knowledge or experience" (emphasis added). This gives the impression that the issue of the reliability of expert evidence did cross the legislator's mind in enacting this provision, although it was not further elucidated. Recognizing knowledge or experience that is sufficiently organized or recognized as a reliable body of knowledge also seems to align with the *Frye* test for the admissibility of novel science regarding general acceptance by the relevant scientific community. Sufficiency entails general or adequate recognition or acceptance. Thus, to a minimal extent, section 180(1) throws some light on how Malawian courts should deal with novel science or technology in the courtroom. It must first be ascertained that such science or technology is sufficiently organized or recognized as a reliable body of knowledge. However, since the section does not provide any further guidance on the meaning of a reliable body of knowledge or experience, the risk of admitting unreliable expert evidence still exists – especially since, as has been noted with the *Frye* test, the fact that a body of knowledge is sufficiently organized or recognized satisfies quantity but not quality. Section 180 therefore still lacks adequate safeguards to prevent reliance upon unreliable expert evidence.

Further, the lack of emphasis on reliability coupled with overemphasis on the consent of the parties in a way makes the parties the gatekeepers, in as far as admissibility of expert evidence is concerned. Through the consent element the parties decide what evidence is applied by the court and vice versa. This, I argue, is very problematic. Malawi is an adversarial system, and as discussed above the dangers of expert evidence are compounded in adversarial systems. Giving the adversaries a chance to consent and to decide what expert evidence should be admitted can therefore undermine the reliability of the evidence and any verdict based upon it.

To start with, in a case where expert evidence is outcome determinative, it is unreasonable to expect an adversary, for instance the defence, to consent to the production of evidence that is not in their interests. The chances are that the defence may not consent simply to frustrate the admission of evidence that is not in their favour, and by giving them that power, the law is not balancing the interests of justice well. Of course, it can be argued that if they are not consenting they would have to give good reasons for such a stand, and if this justification is unreasonable the court can always reject it, but this remains to be seen; if the *Njobvuyalema* decision is anything to go by, such judicial intervention is not even guaranteed. Additionally, without a framework for evaluating the reliability of such evidence, the consent of the parties cannot help a court faced with contradictory expert opinions or novel expertise. Cases like *R v Cannings*, discussed above, reinforce the need for the adequate judicial assessment of expert evidence for reliability.[114]

The other problem with section 180 of the CP&EC is the granting of so much faith in the competence of lay parties to be able to decide by consent what specialist evidence should inform the outcome of a dispute. This may compound the judge deference problem highlighted above. It is akin to indirectly surrendering responsibility for the outcome of a dispute to the expert providing the evidence, since although the parties consent, they cannot be said to be making true or informed consent because they are ignorant in the area of expertise. Again, as highlighted above, this problem may be compounded in our system because the majority of litigants are unsophisticated, uneducated and unrepresented. Even where a party has legal representation which decides to question the evidence through cross-examination, this does not significantly impact reliability due to the limited power of cross-examination in this respect, as discussed above. The problem is amplified where the case turns solely on the expert testimony. The courts therefore need to stop deferring to expert evidence without scrutiny simply because the parties have consented to the production of such

113 *R v Oswald Flywell Gideon Lutepo* Criminal Case no 2 of 2014 (unreported).

114 [2004] 1 ALL ER 725.

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evidence. Special guarantees of reliability are needed, especially where expert evidence is outcome determinative.

Furthermore, because the parties consent, the already-limited power of cross-examination to highlight inconsistencies or mistakes in the expert evidence is further limited, because it is unlikely that a party will have many qualms with a report which is in issue because they consented to its production in the first place. Additionally, the judge may not intervene or bother with the question of whether the evidence is reliable or not because there is no challenge anyway, so to do otherwise could be seen as interference with the parties' conduct of their case. This is bearing in mind the adversarial nature of the proceedings whereby the parties draw the parameters of issues for adjudication. The disadvantages of our current position on the admissibility of expert evidence and the need for caution and reliability safeguards cannot be overemphasized.

## Conclusions and recommendations

With increased scientific and technological advances, expert evidence has come to play and will continue to play an ever-increasing role in litigation. However, such evidence is of no value unless it is reliable, but without any safeguards, reliability cannot be guaranteed. Failure to take the reliability of expert evidence seriously undermines the integrity and fairness of criminal proceedings and undermines the veracity of outcomes. This article has highlighted that section 180 of the CP&EC, which makes provision for the admissibility of expert evidence on mere production if the parties to the case consent, provides no safeguards for checking the reliability of expert evidence, thereby making the Malawian criminal justice system prone to miscarriages of justice, especially for cases which turn solely or predominantly on expert evidence. The article has further emphasized the dangers of expert evidence and the need to treat such evidence with caution. It is therefore important for Malawian law to introduce some standards for ensuring the reliability of expert evidence. Malawian courts need to pay close attention to the probative value of expert evidence before admitting and applying it.

The best solution for this would be statutory intervention, making reliability a condition for admissibility of expert evidence and outlining how this can be achieved. However, law reform in Malawi can take a considerable amount of time. A good example is the CP&EC, which was re-enacted in 1969 and since then remained largely unchanged until 2010, when it was comprehensively reviewed.[115] In the meantime, it is recommended that judges should assume a gatekeeping role and develop the practice of scrutinizing expert evidence for reliability and rejecting it with reasons if unsatisfied in this regard, despite the fact that the parties to the case may have consented to its admission, and especially in cases that turn solely or predominantly on such evidence. Such cases call for greater caution and scrutiny because the expert evidence becomes outcome determinative.

Firstly, it is proposed that judges should rigorously examine such evidence for dependability or trustworthiness before applying it, even where the parties consent under section 180(3) of the CP&EC. Dependability is in terms of the data, principles and methods upon which the evidence is premised and their application to the facts of a particular case; it further entails that the judge should be satisfied that the expert's reasons for holding a particular opinion are valid and even considering the reasonableness of any assumptions or conclusions made. The impartiality of the expert is another factor for consideration. Such an assessment of reliability must vary according to the type of testimony proffered. While some expert testimony will be more easily verifiable, the more subjective and controversial the expert's testimony, the greater the need for caution. If there is extrinsic material augmenting the expert evidence, the assessment is easier, since the other evidence corroborates the expert's opinions. If there is anything in the expert report which may cast doubt on its reliability, or even where the case turns solely on the expert evidence, judges can make use of section

115 Report of the Law Commission, above at note 98 at 25.

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180(4)(b) of the CP&EC to demand the expert's presence and examination in court in instances where the report was merely tendered without the expert's attendance. In fact, it has been held that an expert report is of little weight if its maker does not testify in court,[116] which makes sense because the reliability problem may be compounded where the expert does not even testify in court.

An initial response to this proposal can be that the judge may not effectively assess such evidence for reliability because s/he does not have the requisite expertise which necessitated the presence of the expert evidence in the first place. However, Malawi is lucky in that we do not have a juror system at the moment, with cases being decided by one sitting magistrate or judge. The Law Commission's Consultation Paper argues that judges are more able than juries to appraise expert evidence: for one thing, criminal trial judges are in a better position than juries to acquire and consider the kind of information that bears on the resolution of disputes about scientific and other expert evidence, and they also have considerable experience of adversarial presentations and so are likely to be better able to understand the substance of expert testimony and its relationships to the issues.[117]

Training judges in understanding and assessing expert evidence for reliability can cement their abilities in this regard. Even in instances where this would not be 100 per cent effective, for instance where the issues are too technical, the mere fact that our judges are scrutinizing expert evidence for reliability can in itself be advantageous in that it will put the parties and any experts in issue on their toes to present the most dependable evidence, knowing that the judge will scrutinize it for blind spots. Even the judge him- or herself will be put on caution and will not just apply evidence because the parties have consented to it, all of which can go a long way towards minimizing errors in expert evidence. As our law stands presently, there is no incentive for parties and judges alike to assess the reliability of expert evidence. It is therefore recommended that until the law intervenes expressly in this respect, it is in the interests of justice for our courts to set a new precedent of checking the probative value of expert evidence.

Secondly, and most importantly, it is recommended that in cases where expert evidence is outcome determinative yet the judge cannot effectively assess the expert evidence for reliability, perhaps due to the technical nature of the matter or for other reasons (which increases the case for querying reliability), the judge should seek corroborating expert evidence just to be doubly sure. Malawi does not have a general corroboration requirement, and generally an expert's opinion does not have to be corroborated.[118] However, it is not unusual in the law of evidence to treat certain witnesses and their evidence with caution and to look for extrinsic evidence supporting the same conclusion, as is the case with the evidence of children or accomplices. From the above discussion, the case for treating expert evidence with caution cannot be overstated. Section 201 of the CP&EC can be very useful in this regard; it provides as follows:

> "(1) Subject to subsection (2), any court may, of its own motion at any stage of any inquiry, trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examined or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.
> (2) The prosecution or the accused or his legal practitioner shall have the right to cross-examine such person, and the court shall adjourn the case for such time, as it thinks necessary to enable such cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of such person as witness.

116 *R v Hassain*, above at note 104.
117 Consultation Paper no 190, above at note 53 at part 4, para 4(80).
118 Raitt *Evidence*, above at note 36 at 18.

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(3) In exercising the powers conferred on it under subsection (1), the court shall be governed by the interests of justice and, in particular shall avoid taking over the prosecution of the case."

I suggest that this provision can be used by judges to summon an additional expert witness to corroborate the expert evidence in issue. Looking for evidence from a different source which points towards the same conclusion and confirms the validity of an expert's methods can add weight to the expert evidence and be important in determining its reliability. In *Lutepo*, the court benefitted from the expert opinions of two psychiatric specialists who came to the same conclusion.[119] Corroborating expert evidence can also help in instances where the parties present expert evidence that is conflicting, and has the added advantage of guaranteeing the reception of expertise that is less biased than that of party-appointed experts. Any concerns about bias or interference by the court in the parties' conduct of the case can be cured by sub-sections (2) and (3), which give the parties a right to cross-examine such court-called witnesses and obliges the court to be driven by the interests of justice. Judges are thus encouraged to take advantage of section 201 to improve the accuracy of expert evidence and with it reliability.

Thirdly, it is also recommended that in all cases where the prosecution is presenting expert evidence, legal aid must be provided to indigent accused persons, at the state's expense. The right to fair trial under the Malawian Constitution includes the right to be provided with legal representation at the expense of the state, where it is required in the interests of justice.[120] The Legal Aid Act indicates that it is in the interests of justice for a person to have legal aid if the nature of the defence is such as to involve the tracing and interviewing of witnesses or to involve expert cross-examination of a witness of the prosecution.[121] All this strengthens the case for ensuring legal representation for the indigent accused in cases involving expert testimony to eliminate the fair trial concerns raised above.

Ultimately, as suggested above, amendment of the law to include reliability requirements for expert evidence and criteria for determining such is strongly recommended. In this regard, criminal law can borrow a leaf from the admissibility of expert evidence in civil proceedings. Most of the challenges with expert evidence discussed in this article may be peculiar to criminal proceedings, because Order 17 of the Courts (High Court) (Civil Procedure) Rules 2017 adequately regulates the admissibility of expert testimony in civil proceedings in Malawi. The order expressly provides that the expert has a duty to assist the court by providing objective, unbiased opinions and that this duty overrides any obligation that the expert owes the instructing party; this is laudable.[122] Other commendable provisions of Order 17 are Rule 22, which allows the court to direct that evidence on an issue should be given by single joint experts, who are desirable for their neutrality; Rule 25, which sets out what should be contained in an expert report, including the details of literature or material relied upon by the expert, the range of opinions on an issue and reasons for the expert's own opinion; and Rule 27, which allows the court in relevant cases to direct a discussion between experts to discuss the issues at hand and to reach an agreed opinion where possible or to state their reasons for disagreement. These rules enhance the reliability of expert evidence, and criminal law could usefully emulate them.

Conflicts of interest. None

119 *R v Oswald Lutepo*, above at note 113.

120 Section 42(2)(f)(v).

121 No 28 of 2010, sec 18.

122 Other countries, such as England and Wales, have even gone further and have enacted a code of conduct outlining the duties and responsibilities of all experts and guiding them to overcome problems of bias, emphasizing that the expert's paramount duty is to assist the court, not the parties.

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