AN EVOLUTIONARY ANALYSIS OF PARTY EXPERT EVIDENCE

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I, David Deller, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis

Abstract

Party experts and their evidence in civil proceedings came under intense judicial scrutiny in the late-1990s and early-2000s. The 'problems' then perceived to be acute by judges included party selection of experts suppresses (and deprives Courts of) counter or neutral opinions; excessive party experts; contradictory party experts; costs; and bias. Lord Woolf found party expert evidence to be one of two major generators of unnecessary costs and party experts to be a weapon used by litigators to take unfair advantage of an opponent's lack of resources or ignorance

This research uses legal evolutionary and institutional theory to analyse the data about the 'problems' and the procedural rules regulating party experts to understand why the judicial distrust of party experts arose, how the 'problems' became so acute, why the procedural rules had failed and whether the 'problems' could have been avoided.

It argues that, though the evolution of the 'problems' and the procedural reforms commenced in England much later than in NSW and Victoria, there are many important evolutionary similarities, including the desuetude of the discretionary powers which had long been available to English, NSW and Victorian judges and which could have been used by them to address the 'problems'. It demonstrates that in all three jurisdictions, the 'problems' and the party expert procedural reforms did not evolve in isolation but rather at least partly coevolved with each jurisdiction's civil justice 'crises'.

The analysis in this research does not support the bulk of the judicial criticisms of party experts and argues that there is no reliable data which persuasively shows that the 'problems' were acute in the late-1990s and early-2000s.

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My five year PhD journey as a part-time international student would simply not have been possible without the flexible, and unwavering, guidance of my supervisors (Professors Choo and Boon) and the stoic encouragement of my family. I can't thank them enough.

Glossary of defined terms

Term	Definition
'Access to Justice' inquiry	The inquiry undertaken by Lord Woolf in 1994-96 including Lord Woolf's *Interim Report*[1] (***Interim Report***) and *Final Report*[2] (***Final Report*).**
Assessor Powers	Powers for Courts to appoint assessors to provide assistance, including to sit with the Court during a trial.
CE Powers	Powers for Courts to appoint a Court Expert.
Concurrent Expert Evidence Powers	Powers for Courts to direct that party experts give concurrent evidence at trial (also known as 'hot tubbing').
Court Expert	An independent expert appointed by a Court.
CP Act 2010 (Vic)	Civil Procedure Act 2010 (Vic).
CPR	The Civil Procedure Rules 1998 (SI 1998/3132).
Directions Powers	Powers for Courts to give directions for the conduct of the proceeding.
Disclosure Powers (Rules)	Powers for Courts to direct the pre-trial disclosure or exchange of written party expert evidence and rules which require that parties disclose or exchange party expert evidence pre-trial.
Expert Assistance Powers	Powers for Courts to obtain assistance from an expert or adviser appointed by the Court (who is not a witness, an assessor or a Court Expert).
Expert Meeting Powers	Powers for Courts to direct that party experts attend a pre-trial meeting and prepare a joint statement detailing areas which are agreed/disagreed by the experts (and why).
Folkes and ***Folkes v Chadd***	*Folkes v Chadd* (1782) 3 Doug 157, 99 ER 589.
GIC and GIC theory	Gradual institutional change theory.
Independence Rules	Rules requiring party experts to provide independent assistance to Courts and not act as partisan advocates.
institutions and **institutions (rules)**	Formal or informal rules (discussed in Chapter 1.5.3).
I&R Powers	Powers for Courts to refer questions to special

[1] Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995).
[2] Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996).

	referees for inquiry and report.
Judicature Acts	Supreme Court of Judicature Acts 1873 to 1925.
LRC	Law Reform Commission
Limited Expert Evidence Rules	Rules requiring party expert evidence to be limited or minimised.
NSW	New South Wales, Australia.
party experts and **party expert witnesses**	Experts who give evidence as witnesses for a party.
Party Expert Procedural Rules	Court powers and/or obligations imposed on Courts, parties and party experts which regulate party expert evidence. The Party Expert Procedural Rules analysed in this research are listed in Tables 1 to 3
Permission Rules	Rules requiring parties to obtain Court permission for party expert evidence.
Permissive Party Expert Rule	The common law convention or practice that permits or allows party expert witnesses to give opinion evidence.
Plaintiff's Expert Report Rules	Rules requiring plaintiffs to serve party expert evidence in support of a plaintiff's claim(s) before or when commencing an action.
Powers to Admit Expert Evidence as Evidence in Chief	Powers for Courts to direct that written party expert evidence be admitted as the evidence in chief of a party expert, with or without attending the trial.
Powers to Direct a Trial without a Jury	Powers for Courts to direct that the trial of an action involving matters of expertise be conducted without a jury.
Powers (Rules) to Limit Party Experts	Powers for Courts to limit the number of party experts that can give evidence at trial or rules which require the Courts/parties to limit the number of party experts.
'problems'	The 'problems' associated with evidence given by party expert witnesses in civil proceedings, as perceived by judges from time to time (listed in Chapter 1.1).
Reference for Trial Powers	Powers for Courts to refer questions or part or the whole of an action to special referees (who are experts) for trial.
RSC 1883	Rules of the Supreme Court 1883.
RSC 1965	Rules of the Supreme Court 1965 (SI 1965/1776).
Rules Committee	A committee of judges and others established pursuant to statute which makes rules of court pursuant to a statutory rule making power.

SCR 1970 (NSW)	Supreme Court Rules 1970 (NSW).
SJE Powers	Powers for Courts to direct that expert evidence be given by a single joint expert engaged by the parties in lieu of party expert evidence.
Specific Disclosure Powers (Rules)	Powers for Courts to direct, and rules requiring, party experts to disclose specific information in party experts' reports.
UCPR 2005 (NSW)	Uniform Civil Procedure Rules 2005 (NSW).

There are three sorts of liar: the liar simple, the damned liar, and the expert witness.[3]

Of one thing I am sure. There is no ''perfect'' way of going about expert evidence.[4]

It is said time and again that the expert's role is to assist the court and not a party. That is a pious hope.[5]

Chapter 1. Premise and approach

1.1 Introduction

This thesis examines the 'problems' associated with evidence given by party expert witnesses in civil proceedings, as perceived by some judges from time to time. This thesis also examines the efficacy of procedural law reforms which have been made in response to those 'problems'.

An interest in the 'problems' first developed in the late-1990s and early-2000s when the Australian extrajudicial discourse about party experts became suddenly highly critical and the need for party expert evidence reform suddenly urgent. That discourse inferred that the 'problems' were new or different (though they have existed since at least the mid-1800s) and the existing party expert procedural rules were ineffective (though they had been in place for decades); and it also starkly demonstrated the dichotomy between judges needing assistance from party experts yet distrusting those same party experts. This research seeks to analyse the data about the 'problems' to understand why the sudden judicial distrust of party experts arose, how the 'problems' had become so acute,[6] why the existing procedural rules were apparently deficient or ineffective and whether the 'problems' could have been avoided by better civil procedure rule design choices.[7] It seeks to delve more deeply into the data on

[3] A saying current in the late 19th century in Lincoln's Inn which has been attributed to Sir George Jessel.
[4] Robin Jacob, 'Court Appointed Experts v Party Experts: Which is Better ?' (2004) 23 CJQ 400, 407.
[5] H D Sperling, 'Commentary on Lord Justice May's paper: "The English High Court and Expert Evidence"' (2004) 6 TJR 383.
[6] 'acute' meaning that judges perceived the 'problems' to be a material cause of unacceptable cost, delay and/or complexity of civil litigation; and/or impeded or undermined access to justice.
[7] Those questions eventually became the research hypothesis (see Chapter 1.4).

'problems' than the crisis rhetoric in much of the extrajudicial literature.

The opinion of a relevantly skilled[8] party expert witness is admissible evidence in a court proceeding when inexperienced people are unlikely to be able to form a correct judgment on a relevant subject without such assistance.[9] The rules of expert evidence, and the Permissive Party Expert Rule (which preceded the rules of expert evidence), are interrelated.

Different types of experts have been involved in court proceedings for hundreds of years,[10] including experts who decide scientific questions or issues as part of a jury; experts who assist courts to determine scientific questions or issues; and party experts who give evidence as witnesses for a party.[11]

The deployment, scope, volume and complexity of party expert evidence dramatically increased in the last part of the 20th century.[12] By that time party expert witnesses had become as much a part of civil litigation as the parties, solicitors and barristers;[13] and party expert witnesses had become a crucial resource which Courts were increasingly dependent on to ascertain legal rights and achieve justice.[14]

Despite the assistance which party experts give Courts,[15] by the late-20th century a number of very senior English and Australian judges[16] had become publicly critical of the quality and reliability of party expert evidence;[17] the comprehensibility of party

[8] Or *peritus* – see *R v Silverlock* [1894] 2 QB 766.
[9] *Clark v Ryan* (1960) 103 CLR 486, 491; *R v Turner* (1975) 61 Cr App Rep 67.
[10] eg *R v Cowper* (1699) 13 St Tr 1106; *R v Earl of Pembroke* (1678) 6 St Tr 1310; *Folkes v Chadd.*
[11] Woolf, *Interim Report* (n 1) Ch 23 [3]; Chief Justice Robert French, 'Judging Science' (13th Greek/Australian International Legal and Medical Conference Kos 30 May 2011), 11-12.
[12] His Honour Judge Shadbolt, 'Expert Evidence in Criminal Cases' (1994) 2 TJR 1; Lord Taylor, 'The Lund Lecture' (1995) 35 Med Sci Law 3; Justice G L Davies, 'The Changing Face of Litigation' (1996) 6 JJA 179, 188; The Hon Justice G L Davies, 'A Blueprint for Reform: Some Proposals of the Litigation Reform Commission and their Rationale' (1996) 5 JJA 201; Justice A R Abadee, 'Professional Negligence Litigation A New Order in Civil Litigation - the Role of Experts In a New Legal World and in a New Millennium' (Australian College of Legal Medicine, Canberra 1999).
[13] Western Australia LRC, *Review of the Criminal and Civil Justice System in Western Australia, Project 92* (1999), [22.1].
[14] Sir Owen Dixon, 'Science and Judicial Proceedings' in Woinarski (ed), *Jesting Pilate* (Law Book Co 1933); Lord Hodge, 'Expert Evidence: use, abuse and boundaries' (Middle Temple Guest Lecture (2017)); Elizabeth Butler-Sloss, 'Expert witnesses, courts and the law' (2002) 95 Journal of the Royal Society of Medicine 431.
[15] John von Doussa, 'Difficulties of Assessing Expert Evidence' (1987) 61 ALJ 615, 617.
[16] Perhaps most notably Lord Woolf, Davies J (a Judge of the Supreme Court of Queensland) and McClellan J (a judge of the Supreme Court of NSW).
[17] Stuart Morris, 'Getting Real About Expert Evidence' (National Environmental Law Association, 13-15 July 2005), 3.

expert evidence; the impact which party expert evidence was having on the adjudicative process; and party experts increasing costs of litigation.[18] Party expert evidence had by that time become necessary, yet was despised by some very senior English and Australian judges.

The literature contains a collection of variously described, multifaceted and protean concerns about, or problems and difficulties with, party expert evidence (and the flow-on negative impacts on the justice system), as subjectively perceived by some senior judges from time to time.[19] In this thesis, those concerns, problems and difficulties, as subjectively perceived by some senior judges, are referred to collectively as the 'problems'. The word *problems* is in quotation marks to emphasise that specific use of the word in this thesis. This research does not posit the 'problems' or their impacts on the justice system as objective problems or impacts; and references in this research to the magnitude of the 'problems' and/or their impacts on the justice system (such as the references to the "**acute** 'problems'" in the research hypothesis and research questions) are not objective references, but rather also adopt and reflect judges' perceptions from time to time. That is appropriate because, for the reasons discussed in more detail in Chapter 2.4, judges have authority to determine that the 'problems' exist; and the appropriate responses to the 'problems', by virtue of their central and unique position in the common law adversary system.

However, the two important issues discussed below must always be kept in mind.

Firstly, not all judges agree on the 'problems' or the impacts which they have on the

[18] Woolf, *Final Report* (n 2) Ch 13 [1]; Steven Rares, 'Using the "Hot Tub" - How Concurrent Expert Evidence Aids Understanding Issues' (New South Wales Bar Association Continuing Professional Development seminar: Views of the "Hot Tub" from the Bar and the Bench, Bar Association Common Room, 23 August 2010); Lord Justice Goldring, 'The Current Thinking of the Judiciary' (Bond Salon Conference on Expert Witnesses 9 November 2012).

[19] eg Tom Bingham, *The Business of Judging: Selected Essays and Speeches: 1985-1999* (OUP 2000), 18 which refers to expert witnesses as often partisan, argumentative and lacking in objectivity (but not dishonest); Robert McDougall, 'Expert Evidence' (Institute of Arbitrators and Mediators Australia, 13 February 2004) lists the (1) increasing use of experts in every form of civil litigation (2) real difficulties that a court has in understanding, let alone examining critically, the reasoning and conclusions of an expert (particularly with recondite or abstruse areas of expertise) and (3) perception that expert witnesses are 'hired guns' who give 'opinions for sale'; Jacob, 'Court Appointed Experts v Party Experts: Which is Better ?' (n 4) 402; *Chamberlain v R (No 2)* (1984) 153 CLR 521 (the High Court agreeing with Jenkinson J's view that the tribunal of fact may not be able to critically evaluate complex expert evidence); *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The "Ikarian Reefer")* [1995] 1 Lloyd's Rep 455, 496 (the Court of Appeal finding that 'the Judge was greatly oppressed by the volume of expert evidence').

justice system. For example, Viscount Alverstone, Sir Anthony Clarke,[20] Foster J,[21] Glass J,[22] Sir Robin Jacob,[23] Heerey J,[24] Downes J,[25] Jackson LJ[26] and von Doussa J[27] are among the small number of judges who have publicly expressed doubts about some of the 'problems'.[28] Examples of judicial disagreements about the 'problems' and the need for procedural rules to address their impact on the civil justice system are listed below:

- Lord Bingham rejected the push, mostly by Lord Woolf, for single joint experts in all cases;[29]
- two senior Australian judges (Kirby and Sperling JJ) disagreed about the existence of 'problems' and the use of court appointed experts in articles published in *The Judicial Review*;[30]
- Heerey J has noted that Queensland's new procedural rules were likely based on unsubstantiated assumptions that differences between experts are due to partisan bias (rather that honest differences of opinion) and also that there is no empirical evidence of any greatly increased frequency of judicial error resulting from judges not understanding expert evidence;[31]

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[20] Sir Anthony Clarke, 'The role of the expert after Woolf' (2008) 14 Clinical Risk 85 argues that experts play a crucial rule in the administration of justice and without expert witnesses deciding very many types of case would be almost impossible for judges.
[21] An American judge.
[22] Mr Justice Glass, 'Expert Evidence' (1987) 3 Aust Bar Rev 43 concludes that the conflict in the expert testimony does not paralyze the decision making process.
[23] Jacob, 'Court Appointed Experts v Party Experts: Which is Better ?' (n 4) considers that most experts are not partisan; do not say whatever they like to support their side's case; and genuinely do try to help the court.
[24] Peter Heerey, 'Recent Australian Developments' (2004) 23 CJQ 386, 393 which does not accept that all differences between experts, in a majority or statistically significant number of cases, is due to partisan bias rather that honest differences of opinion.
[25] *Civil Justice Review Report* (n 42) sets out Downe J's largely positive submission concerning expert evidence, including that party expert witnesses (with very few exceptions) do not deliberately mould their evidence to suit the case of the party retaining them.
[26] Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (2009), 380 (footnote 59) confirms that expert reports in many of the trials conducted by Jackson LJ were 'excellent and concise'.
[27] von Doussa (n 15) which acknowledges the problems but also that expert witnesses give immense assistance courts on matters routinely falling within their fields of expertise; and expert evidence should not be approached from a pre-determined position of cynicism.
[28] Judicial disagreements about the 'problems' are further discussed in the Chapter 2.4 analysis of the extrajudicial literature.
[29] Lord Bingham, 'Forensic Experts: The Past and Future ' (Expert Witness Institute conference). A copy of this address has not been found.
[30] Michael Kirby, 'Expert Evidence: Causation, Proof and Presentation' (2003) 6 TJR 131; H D Sperling, 'Letter to the Editor' (2003) 6 TJR 223.
[31] Davies, 'Current issues -expert evidence' (n 46); Heerey (n 24); Geoffrey L Davies, 'A Response to Peter Heerey' (2004) 23 CJQ 396; Jacob, 'Court Appointed Experts v Party Experts: Which is Better ?' (n 4).

- a 2004 NSW Attorney General's 'Working Party on Civil Procedure' chaired by a Supreme Court judge (Hamilton J) rejected the Permission Rule which had been recommended by a Division of the NSW LRC comprising four different judges;[32] and
- the judges of the Victorian Supreme Court rejected the use of single joint experts.[33]

The second important issue is that other civil justice system participants (ie participants other than judges such as parties and party experts) are unlikely to share the subjective perceptions held by some judges about the 'problems'; and/or perceive there to be other 'problems' associated with party expert evidence. For example, many (if not most) parties in a civil proceeding would not consider their deployment of biased, excessive, costly and/or contradictory party expert evidence to be a 'problem' (as judges may perceive) because each party's objective is victory rather than abstract truth.[34] Also, party experts who are scientists may not consider divergence or disagreement between them on matters of science to be a 'problem' (as judges may perceive) because scientific development depends on divergence and disagreement (for example by scientists revisiting existing theories); and disagreement between scientific experts is not only inevitable, but forms an essential part of scientific progress.[35]

In this thesis, the multifaceted and often protean 'problems', as perceived by judges from time to time, are subcategorised as follows to facilitate analysis:

- the **'problem' of bias:** party experts are biased or partisan and give evidence aimed at advancing their client's cause (rather than providing independent expert assistance);
- the **'problem' of contradictory party experts**: contradictory and argumentative party expert evidence can polarise positions; make compromise less likely; shift the focus from the real issues to the conflicts between the party

[32] NSW Attorney General's Working Party on Civil Procedure, *Reference on Expert Witnesses Report* (2006). Considered in Peter McClellan, 'The New Rules' (Expert Witness Institute of Australia and The University of Sydney Faculty of Law (16 April 2007)).
[33] *Civil Justice Review Report* (n 42) 509 (which quotes from the submission made by the Victorian Supreme Court judges).
[34] See n 39.
[35] Dwyer, *Judicial Assessment* (n 67), 136 and 138.

experts; increase costs; result in the inexperienced tribunal of fact (whether judge or jury), which needs expert assistance, being provided with little (if any) assistance because it has to decide between contradictory and often detailed matters of expertise; and make some cases so complicated as to be beyond the powers of a tribunal of fact to resolve fairly;

- the **'problem' of surprise**: the first disclosure of a party's party expert evidence to an opposing party at trial can surprise the opposing party, leading to expensive adjournments; excessive cross examination (including on issues not really in issue); and other wastes of time and inefficiencies at trial;
- the **'problem' of suppression**: party selection of experts which support the party's case can suppress counter or neutral opinions; and
- the **'problem' of excessive party experts**: too many party experts are called which can increase costs.

The 'problem' most extensively discussed in the literature is bias. Many other 'problems' arise from, or are related to, bias because bias can lead to, or encourage, contradictory and argumentative expert evidence.[36] The interrelated 'problems' of bias and contradictory party experts are pithily demonstrated by Merriman P's observation of 'the spectacle of two eminent [experts], upon precisely the same data, asserting with every possible assurance that these data prove widely differing conclusions'.[37] The possibility that a party expert who is retained by a 'litigant paymaster'[38] will be biased is not surprising because it is well understood that in the adversarial justice system each party's objective is victory rather than abstract truth.[39]

The 'problems' of excessive party experts (also described as the disproportionate volume of expert evidence[40]) and contradictory party experts are sometimes colloquially called the 'battle of the experts'. The 'battle of the experts' involves 'A tangle of competing experts engaged on behalf of individual parties in orchestrated

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[36] Bingham (n 19) 18.
[37] *The Manchester Regiment* [1938] P 117.
[38] Deirdre Dwyer, 'Review: Paul England *'Expert Privilege' in Civil Evidence*' (2011) 15 IJE & P 277 (quoted in Lord Neuberger, 'Keynote Address' (Expert Witness Institute 2011 Annual Conference 5 October 2011), [3]).
[39] Dixon (n 14); The Hon Mr Justice K H Marks, 'The Interventionist Court and Procedure' (1992) 18 Mon LR 1; G L Davies, 'The Reality of Civil Justice Reform: Why We Must Abandon the Essential Elements of Our System' (2003) 12 JJA 155.
[40] *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588, 610 [57]. See also Goldring (n 18) which refers to a concern described as 'the use of too many expert witnesses'.

adversarial combat' and 'adversarial jousting'.[41] The 'battle of the experts' can prolong litigation and lead to higher costs.[42] Excessive party expert evidence occurs when party experts are deployed though none are necessary; more than an adequate number of party experts are deployed; and/or a party leads party expert evidence simply to respond to an opponent's party expert evidence. Excessive party experts are often deployed to persuade the tribunal of fact by the weight of numbers;[43] to take advantage of an opponent's inferior resources;[44] and/or to wear an opponent down.[45] Excessive party experts will often lead to unnecessary duplication;[46] increased complexity; and trials taking longer.[47] Contradictory party experts can shift a trial's focus from the real issues in dispute to the conflict between the experts and their theories.[48]

Rather than assisting the non-expert tribunal of fact to decide the facts, contradictory party experts can make things worse: evidence which is difficult to understand and utilise may confuse the non-expert tribunal of fact;[49] the non-expert tribunal of fact has to decide which of the contradictory expert evidence is to be relied on and accepted;[50] and the non-expert tribunal of fact ends up as badly off as if it had no expert help at all.[51]

Civil procedure, which regulates how court proceedings are conducted (including how admissible party expert evidence is deployed and presented), develops by evolutionary processes and rule makers' conscious design choices.[52]

The justice system, including civil procedure, is primarily the responsibility of judges

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[41] *Wilcox v Wilcox (No 2)* [2014] NSWSC 88, [8] (citing *AMP Capital Investors Limited v Parsons Brinckerhoff Australia Pty Ltd* [2013] NSWSC 1633) and [9].
[42] Stuart Morris, 'Getting Real About Expert Evidence' (National Environmental Law Association, 13-15 July 2005), 3 (cited in Victorian LRC, *Civil Justice Review Report* (2008), 483).
[43] Marks (n 39); J A Jolowicz, *On Civil Procedure* (CUP 2000), 236.
[44] *Graigola Merthyr Co v Swansea Corporation* (1928) 1 Ch 31; Woolf, *Final Report* (n 2) Ch 13 [7]; Law Reform Commission of Western Australia (n 13).
[45] Hodge (n 14).
[46] G L Davies, 'Current issues - expert evidence: court appointed experts' (2004) 23 CJQ 367, 371.
[47] *Murphy v R* (1989) 167 CLR 94, 103-1.
[48] Ibid 130-131 (per Dawson J).
[49] Hon Justice James Allsop, 'The judicial disposition of cases: dealing with complex and specialised factual material' (2009-2010) NSW Bar Assoc News 75, 77.
[50] Learned Hand, 'Historical and Practical Considerations regarding Expert Testimony' (1901) 15 Harvard Law Review 40, 54; *Chamberlain v R (No 2)* (n 19); Allsop (n 49).
[51] Hand (n 50) 56.
[52] Donald Elliott, 'Managerial Judging and the Evolution of Procedure' (1986) 53 The University of Chicago Law Review 306, 308.

because judges are the body most capable of making necessary changes and control the way litigation is conducted; and judicial intervention can address many of the causes of problems with the justice system (including costs and delay).[53]

One way civil procedure rule makers have responded to the 'problems' is by developing the various Party Expert Procedural Rules. Those rules can be broadly categorised into discretionary **powers** given to courts/judges to make orders, or give directions, about party expert evidence; and mandatory **rules** imposing obligations on parties, party experts and courts/judges.

The main types of discretionary powers given to Courts/judges are:

- Assessor Powers;
- CE Powers;
- Concurrent Expert Evidence Powers;
- Directions Powers;
- Disclosure Powers;
- Expert Assistance Powers;
- Expert Meeting Powers;
- I&R Powers;
- Powers to Admit Expert Evidence As Evidence in Chief (with or without also attending the trial);
- Powers to Direct a Trial without a Jury;
- Powers to Limit Party Experts;
- Reference for Trial Powers;
- SJE Powers; and
- Specific Disclosure Powers (Rules).

The main types of rules imposing obligations on parties, party experts and sometimes courts/judges (independent of powers available to courts/judges) are:

- Independence Rules;

[53] G L Davies, 'The Survival of the Civil Trial System: A Judicial Responsibility' (1989) 5 Aust Bar Rev 277, 278 and 288; Sir Gerard Brennan, 'Key Issues In Judicial Administration' (15th Annual Conference The Australian Institute of Judicial Administration 1996), 10; Hon Michael Black, 'The role of the judge in attacking endemic delays: Some lessons from Fast Track' (2009) 19 JJA 88, 90; Justice Lightman, 'Civil litigation in the 21st century ' (1998) 17 CJQ 373, 383.

- Limited Expert Evidence Rules;
- Permission Rules;
- Plaintiff's Expert Report Rules; and
- Specific Disclosure Rules.

1.2 Structure of this thesis and chapter synopsis

Chapter 1.1 (above) provided an introductory outline of party experts, the 'problems' and the Party Expert Procedural Rules. Those concepts are analysed in detail in later Chapters.

Chapter 1.3 will be a semi-systematic literature review which maps out, and synthesises, the academic literature focusing on concepts. It will identify gaps in the literature and locate this research within the literature.

Chapter 1.4 will detail the research hypothesis.

The theoretical frameworks used (and developed) in this research will be discussed in Chapter 1.5, namely the existing legal evolutionary and institutional frameworks; and the evolutionary theory of institutional change developed in this thesis. That chapter will show that institutional and evolutionary theories are interrelated and institutional theory can involve elements of evolutionary theory.

Chapter 1.6 will briefly consider the two research methods used in this thesis: the doctrinal methodology which will determine the law in relation to the 'problems' and the Party Expert Procedural Rules which respond to the 'problems'; and the comparative method which will be used to undertake two separate, but interrelated, multi-jurisdictional comparisons (between England and Australia and between NSW and Victoria).[54]

Chapter 1.7 will identify the data to be analysed in this research; and the research limitations, including explaining why this research does not cover the laws of expert evidence, US literature on the research areas (though the 'problems' exist in the US) or criminal proceedings (though the 'problems' also exist in criminal proceedings).

Chapter 2 will consider the research data and source materials which this research analyses, including the limitations of the some of the categories of data and material.

[54] For a similar multi-jurisdictional comparison see Susan Corby and Ryuichi Yamakawa, 'Judicial regimes for employment rights disputes' (2020) 51 Industrial Relations Journal 374.

Chapter 2.4 will introduce the extrajudicial literature about the 'problems' which is analysed in further detail in Chapter 4.3.4 and Chapter 6.

Chapter 3 will map out the broader temporal (and social) context within which the 'problems' and the Party Expert Procedural Rules developed and evolved, so that the analysis in the later Chapters 4, 5 and 6 can place the 'problems' and the Party Expert Procedural Rules in, and have due regard to, their proper context. Temporal context is important in this type of historical analysis which aims to identify temporal and causal connections because, among other things, the significance of 'variables' can be distorted if disconnected from temporal context.[55] Context is also an important component of legal evolutionary analysis.

The context detailed in Chapter 3 is particularly important because the literature review conducted as part of this research identified two limitations (or gaps) in the existing literature. Firstly, the 'problems' and the Party Expert Procedural Rules tend to be considered as isolated events or topics with little (if any) regard to any broader temporal or evolutionary context. Secondly, as a result, there is no systematic analysis in the literature of the temporal or causal interaction between the evolving 'problems' and the responsive Party Expert Procedural Rules, such as temporal connections. The key contexts detailed in Chapter 3 include changes to civil juries; changes in the adversarial system; the increasing demands and importance of science (mostly in England); the rise of discontent with the civil justice system; and criminal litigation.

Chapter 4 will separately set out, and analyse, the data on the 'problems' in England, NSW and Victoria. Like Chapter 4, Chapter 5 will also separately detail, and analyse, the Party Expert Procedural Rules in England, NSW and Victoria. The Chapter 4 analysis of the 'problems' will identify when they arose in England, NSW and Victoria. The Chapter 5 analysis will identify the scope of each Party Expert Procedural Rule which addressed the 'problems', including when it was implemented; and its temporal and causal connections with the 'problems' which it addressed. Chapter 4 and Chapter 5 will identify any similarities, differences and mismatches between the 'problems' and the Party Expert Procedural Rules and provide the data for the later Chapter 6 analysis.

[55] Paul Pierson, *Politics in Time History, Institutions, and Social Analysis* (Princeton University Press 2004). See also Paul Pierson, 'Not Just What, but When: Timing and Sequence in Political Processes' (2000) 14 Studies in American Political Development 72.

Chapter 4 will answer research question 1.

Chapter 5 will answer research question 2.

Both Chapters 4 and 5 will use a chronological, historical methodology to collate and analyse the data in the source material (having regard to the Chapter 3 context), using the legal evolutionary theoretical framework to identify temporal and other connections. Chapters 4 and 5 will analyse England first; followed by NSW; and lastly Victoria. England will be considered first because it has the longest and most extensive juridical history; and it is expected that the English developments will significantly influence NSW and Victoria. Separately analysing the 'problems' and the Party Expert Procedural Rules in England, then NSW and finally Victoria will allow temporal and causal connections between the evolution of the 'problems' in those jurisdictions to be identified; and also facilitate the Chapter 6 comparative analyses between England, NSW and Victoria.

Chapters 4 and 5 will mostly focus on questions concerning 'what' and 'how'.

Chapter 4 will focus on 'what' the 'problems', as perceived by judges, are and 'how' (and when) they evolved.

Chapter 5 will similarly focus on 'what' the Party Expert Procedural Rules are; and 'how' (and when) they evolved in response to the 'problems'.

Both Chapters will aim to identify and analyse the nature of the legal changes. Chapter 4 will identify and analyse the legal changes in the 'problems'. Chapter 5 will identify and analyse the legal changes in the procedural law responses. Both Chapters will consider the relationship which those changes have with each other and the wider environment, including any interlinked causal processes or historical factors;[56] temporal connections; and similarities and differences. Chapter 6 on the other hand will focus on questions concerning 'why', including 'why' choices were made (or not made) at different times, to answer research question 3 (could the acute 'problems' have been avoided by different, or earlier, procedural rules?).

Chapter 6 will be an overarching and deeper analysis chapter. It will build on the earlier (more factual) Chapters 4 and 5 analyses of the data on the 'problems' and the Party

[56] Lipton (n 127) 74.

Expert Procedural Rules using elements of the existing legal evolutionary and the institutional change theories, and the evolutionary theory of institutional change developed in this thesis; and undertake the comparative analysis of the evolution of the 'problems' and rules which address those 'problems' in England, NSW and Victoria, to answer research question 3.

Each of Chapters 4, 5 and 6 will build on the earlier Chapters. Chapter 4 will identify the 'problems', including their impact on the civil justice system (such as the acuteness of the 'problems'), as perceived by judges from time to time; and answer research question 1. Chapter 4's analysis of what the 'problems' are and how they evolved is a precondition to Chapter 5's analysis of the responsive Party Expert Procedural Rules which evolved to address the 'problems'.

Chapter 5 will build on the analysis in Chapter 4 by answering research question 2.

The analyses in Chapters 4 and 5 are both preconditions to the overarching, deeper analysis in Chapter 6 which will answer research question 3.

Chapter 7 will detail the conclusions which can be drawn from the analysis in this research in relation to the research hypothesis and questions set out in Chapter 1.4. It will also suggest future research areas.

1.3 Literature review

1.3.1 Introduction

There is a vast corpus of expert evidence literature which Hallett LJ has described as 'an embarrassment of riches'.[57] Professor Genn has referred to that literature as vast, often sophisticated and ranging from practical procedural issues to the epistemic expert evidence questions.[58]

This chapter is a semi-systematic literature review which maps out, and synthesises, the academic literature focusing on concepts.[59] It aims to identify gaps in the literature and locate this research within the literature.

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[57] Hon Mrs Justice Heather Hallett, 'Expert witnesses in the courts of England and Wales' (2005) 79 ALJ 288.
[58] Hazel Genn, 'Getting to the truth: experts and judges in the "hot tub"' (2013) 32 CJQ 275, 281.
[59] Focusing on concepts is a hallmark of a high quality literature review: Jane Webster and Richard Watson, 'Analyzing the Past to Prepare for the Future: Writing a Literature Review' (2002) 26 MIS Quarterly xiii. This literature review, like the other Chapters in this research, is also largely chronological.

The literature on the research areas is unusual (perhaps even unique) in that, as shown by Chapters 2.4 and 4.3.4, there is a large volume of extrajudicial literature on the research areas. Though that extrajudicial literature could be considered to be academic literature, particularly the material which is published in respected publications such as *Civil Justice Quarterly*,[60] much of that extrajudicial literature is not scholarly, research per se or peer reviewed. Accordingly, that extrajudicial literature is not covered further in this literature review.

1.3.2 Scholarly literature

Nineteenth century generalist evidence books which cover party expert evidence as one of many evidence topics, such as *Phipson on Evidence*, *Taylor on Evidence* and *Stephen on Evidence*, were updated and republished to transition from the 19th to 20th centuries. So too did the generalist procedural law books like *The Annual Practice*[61] which provide data on the Party Expert Procedural Rules which are in the form of a rule of court.

A large number of legal academics and a smaller number of history academics have authored literature on party expert evidence in the 20th and 21st centuries.

The modern scholarly literature can be categorised loosely into three main groups:

- **Generalist evidence literature** covering party expert evidence as one of many evidence topics such as *Cross on Evidence*,[62] *May on Criminal Evidence*,[63] Andrew Choo's *Evidence*,[64] Roberts and Zuckerman's *Criminal Evidence*[65] and Andrew Roberts and Gans' *Critical Perspectives on the Uniform Evidence Law*;[66]
- **Expert evidence literature** focussing on the law of expert evidence which also covers some Party Expert Procedural Rules. Examples in this category include

[60] For example, Davies, 'Current issues-expert evidence' (n 46); Jacob, 'Court Appointed Experts v Party Experts: Which is Better ?' (n 4).
[61] 83 editions of *The Annual Practice* were published annually until superceded by *The Supreme Court Practice* in 1967.
[62] Sir Rupert Cross, *Evidence* (1958). The 6th and later editions have been published as *Cross on Evidence* (eg J D Heydon and Rupert Cross, *Cross on Evidence* (Eleventh Australian edn, LexisNexis Butterworths 2017).
[63] *May on Criminal Evidence* (6th edn, Sweet & Maxwell 2015).
[64] Andrew L T Choo, *Evidence* (6th edn, OUP 2021).
[65] Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (2nd edn, Oxford 2004).
[66] Andrew Roberts and Jeremy Gans (eds), *Critical Perspectives on the Uniform Evidence Law* (The Federation Press 2017).

Dwyer's *The Judicial Assessment of Expert Evidence*,[67] Hodgkinson's *Expert Evidence: Law and Practice*,[68] Redmayne's *Expert Evidence and Criminal Justice*,[69] Freckelton's *Expert Evidence*[70] and the numerous articles on various expert evidence topics;[71] and

- **Civil procedure literature** covering the Party Expert Procedural Rules as one of many civil procedure topics including *The Annual Practice*, *The Supreme Court Practice*, *The White Book*,[72] *The Civil Court Practice*[73] and the numerous journal articles on civil procedure.[74]

Learned Hand's seminal article titled 'Historical and Practical Considerations regarding Expert Testimony'[75] was among the earliest scholarly articles published in the late-19th and early-20th centuries covering the 'problems' and suggesting reforms.

Moodie's 1934 article in the respected *The Australian Law Journal*[76] straddles the decades between Learned Hand's seminal article and the more modern Australian and English literature. It is not clear what prompted Moodie's article at that time, but it did make clear that by the 1930s a good deal had been lost by allowing experts to be called by opposing parties and party experts had a general reputation characterised by 'their traitorous trueness and their loyal deceit'.

1977 and 1983 articles authored by the Australian academic (John Basten) titled 'The Court Expert in Civil Trials-A Comparative Appraisal'[77] and the Oxford academic (Anthony Kenny) titled 'The Expert in Court' are among the early modern legal literature on expert evidence.[78] Basten and Kenny were among the forerunners to

[67] Deirdre Dwyer, *Judicial Assessment of Expert Evidence* (CUP 2008).
[68] Tristram Hodgkinson, *Expert Evidence: Law and Practice* (5th edn, Sweet & Maxwell Ltd 2020).
[69] Mike Redmayne, *Expert Evidence and Criminal Justice* (OUP 2001).
[70] Ian Freckelton, *Expert Evidence* (Thomson Reuters)
[71] The articles are too numerous to list here though many of them are covered in this research and listed in the bibliography.
[72] *The White Book Service: Civil Procedure*, vol 1 (Sweet & Maxwell).
[73] Also known as *The Green Book* (which is updated annually eg *The Civil Court Practice 2019* (LexisNexis Butterworths 2019)).
[74] The articles are too numerous to list here though many of them are covered in this research and listed in the bibliography.
[75] Hand (n 50). William L Foster, 'Expert Testimony, Prevalent Complaints and Proposed Remedies' (1897) 11 Harvard Law Review 169 is another.
[76] C T Moodie, 'Expert testimony–its past and its future' (1937) 11 ALJ 210, 214.
[77] John Basten, 'The Court Expert in Civil Trials' (1977) MLR 174.
[78] Anthony Kenny, 'The Expert in Court' (1983) 99 LQR 197.

identify many of the 'problems' and call for specific remedies.[79]

From the late-1980s the volume of literature about the 'problems' grew from the trickle it had been before then into the deluge it became. That deluge of literature reflected a renewed interest in party expert evidence largely as a result of high profile miscarriage of justice criminal cases, including the Australian Lindy and Michael Chamberlain murder case, the English 'Maguire Seven' case and the English 'Birmingham Six' case.[80]

Freckelton's *The Trial of the Expert*[81] was an early book focussing largely on the 'problems'.[82] As Freckelton is Australian,[83] *The Trial of the Expert* focussed on the then notorious Australian murder cases of Edward Splatt[84] and Lindy and Michael Chamberlain. *The Trial of the Expert* was among the first pieces of literature to consider and map out a reform agenda to address the 'problems'.[85]

Carol Jones' 1994 monograph *EXPERT WITNESSES Science, Medicine and the Practice of Law*, self-described as 'a book about expert witnesses', was another early key expert evidence monograph.[86] It arose from events in the 1980s and 1990s which problematised expert evidence and made it an object of inquiry.[87]

Golan's 2004 monograph *Laws of Men and Laws of Nature The History of Scientific Expert Testimony in England and America*[88] was different to the literature authored by legal academics because Golan is an historian mostly interested in the history of science.

Deirdre Dwyer was a prominent English expert evidence academic in the 2000s who

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[79] Ibid 214-215.
[80] Discussed in Chapter 3.8.
[81] Ian Freckelton, *The Trial of the Expert. A Study of Expert Evidence and Forensic Experts* (OUP 1987).
[82] See chapter 8 which is titled 'Problems with Expert Testimony'.
[83] In the late 1980s Freckelton was a law reform officer at the Australian LRC: see Ian Freckelton, 'Court Experts, Assessors and the Public Interest' (1986) 8 International Journal of Law and Psychiatry 161.
[84] The Splatt case was a 1970s murder conviction which was reviewed by a Royal Commission in Royal Commission (Carl Reginald Shannon), *Royal Commission of Inquiry in Respect to the Case of Edward Charles Splatt* (1984).
[85] See Ian Freckelton, *The Trial of the Expert. A Study of Expert Evidence and Forensic Experts* (OUP 1987), Ch 10 titled 'Pressure for Reform'.
[86] Carol A G Jones, *EXPERT WITNSESSES Science, Medicine, and the Practice of Law* (Clarendon Press 1994).
[87] Ibid 2-3.
[88] Tal Golan, *Laws of Men and Laws of Nature The History of Scientific Expert Testimony in England and America* (Harvard University Press 2004).

Lord Neuberger described as 'an expert on expert witnesses'.[89] Between 2003 and 2011, Dwyer authored a series of articles and book chapters focussing on expert evidence in civil proceedings.[90] She also authored the seminal 2008 expert evidence monograph *Judicial Assessment of Expert Evidence*[91] and edited the 2009 reflective book *The Civil Procedure Rules Ten Years On*.[92] Dwyer's publications on expert evidence focus extensively on the 'problems'. Dwyer's literature includes the most up to date historical analyses of the development of expert evidence and the 'problems', largely focusing on the 'problem' of bias and the judicial assessment of expert evidence. Dwyer's literature also includes an analysis of the Party Expert Procedural Rules in CPR 35.[93]

Both Edmond[94] and Freckelton's literature also extensively cover the 'problems', though often focussed on forensic expert evidence in criminal proceedings rather than party expert evidence in civil proceedings.

A number of respected English and Australian legal academics have occasionally written specifically on the 'problems' and the Party Expert Procedural Rules.[95]

Other English and Australian academics have written about the 'problems' in their literature on broader topics such as the law of evidence[96] and civil justice/practice/procedure.[97] That literature, though of a more general nature, is useful

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[89] Neuberger, 'Keynote Address' (n 38), [3].
[90] Dwyer's literature is too voluminous to usefully list though much of it is covered by this research.
[91] Dwyer, *Judicial Assessment* (n 67) which is likely to be a product of Dwyer's doctoral thesis (Deirdre Dwyer, 'The judicial assessment of expert evidence ' (D Phil, University of Oxford 2006)).
[92] Deirdre Dwyer (ed), *The Civil Procedure Rules Ten Years On* (OUP 2009).
[93] Deirdre Dwyer, 'The Role of the Expert Under CPR Pt 35' in Deirdre Dwyer (ed), *The Civil Procedure Rules Ten Years On* (2009).
[94] Edmond's literature is also too voluminous to usefully list though much of it is covered by this research.
[95] Usually as part of a wider topic eg admissibility of expert evidence.
[96] eg Andrew L T Choo, *Evidence* (6th edn, OUP 2021), Ch 12; Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (2nd edn, Oxford 2004), Ch 11; Steven Powles, Lydia Waine and Radmila May, *May on Criminal Evidence* (6th edn, Sweet & Maxwell 2015), Ch 6; Andrew Ligertwood, *Australian Evidence* (2nd edn, Butterworths 1993), [7.36-7.37]; Stephen Odgers, *Uniform Evidence Law in Victoria* (Law Book Company 2010); Andrew Roberts and Jeremy Gans (eds), *Critical Perspectives on the Uniform Evidence Law*. Andrew Roberts has also written on expert evidence and procedure in criminal proceedings in journal articles, including in *The Criminal Law Review* and the *International Journal of Evidence and Proof*.
[97] eg Adrian Zuckerman, 'Civil Justice in Crisis: Comparative Perspectives of Civil Procedure' in Adrian Zuckerman (ed), *Civil Justice in Crisis* (OUP 1999); Hazel Genn, *Judging Civil Justice* (CUP 2010); Neil Andrews, 'A new civil procedural code for England party-control going going gone' (2000) 19 CJQ 19; Bernard Cairns, 'Lord Woolf's Report on Access to Justice: an Australian perspective' (1997) 16 CJQ 98; Bernard Cairns, *Australian Civil Procedure* (5th edn, Law Book Company 2002), 458-467.

insofar as it considers aspects of the 'problems' and some of the more modern reforms; and identifies relevant case law, procedural rules and some important secondary sources. Some of that literature is however limited by a student or practitioner focus[98] which considers the 'problems' at a high level of generality and aims to set out the state of the law and other developments at the time of publication (rather than undertaking any type of doctrinal analysis).

The vast scholarly expert evidence literature in its totality covers the history of expert evidence, the history of the 'problems' and many of the procedural law responses to the 'problems'.

Golan and Dwyer's 2000s literature best represents the current knowledge and academic discourse on the English 'problems' and procedural law reforms. Edmond and Freckelton's literature similarly does so with respect to Australia.

There are two dominant and recurrent overarching themes in the literature.

Firstly, the overwhelming majority of the literature is premised on the existence of the 'problems' (in particular bias). Bias is a perennial theme in the literature relating to expert evidence.[99] Edmond is one of a small group of academics who have challenged the existence and seriousness of the 'problem' of bias.[100]

Secondly, the literature repeatedly cites a small number of mostly 19th century English cases (in which English judges criticise party experts) as evidence of the existence of the 'problems'. Those cases include (in chronological order) *The Tracy Peerage*,[101] *In Re Dyce Sombre*,[102] *Lord Abinger v Ashton*,[103] *Thorn v. Worthing Skating Rink Co*,[104] *Kennard v Ashman*[105] and *The Ikarian Reefer.*[106]

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[98] Practitioner focussed publications, which are regularly updated and re-published, include *Blackstone's Civil Practice* and *The Civil Court Practice*.
[99] NSW LRC, *Report 109 Expert Witnesses* (2005), section 5.2.
[100] Gary Edmond, 'Judging Surveys Experts, Empirical Evidence And Law Reform' (2005) 33 Fed L Rev 95. Gary Edmond's 2005 submission to the NSW LRC's expert evidence reference makes the point there is little empirical information on expert evidence, such that 'the extent and seriousness of problems associated with [it] is largely unknown' and much debate 'is predicated upon anecdote and speculation and focussed exclusively on trials' (cited in *Civil Justice Review Report* (n 42) 486).
[101] *The Tracy Peerage* (1843) 10 Cl & F 154.
[102] *In Re Dyce Sombre* (1849) 1 Mac & G 116, 41 ER 1207.
[103] *Lord Abinger v Ashton* (1873) LR 17 Eq.
[104] *Thorn v Worthing Skating Rink Company* [1877] 6 Ch D 415n.
[105] *Kennard v Ashman* (1894) 10 Times LR 213.
[106] *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The "Ikarian Reefer")* [1993]

1.3.3 Gaps in the literature

The following gaps appear in the literature which this research responds to.

The 'problems' and the Party Expert Procedural Rules tend to be considered as isolated events or topics with little (if any) regard to any broader temporal or evolutionary context. As a result there is no systematic analysis in the literature of the interaction between the evolving 'problems' and the responsive Party Expert Procedural Rules.

Though the literature is premised on the 'problems' having existed for hundreds of years, and that the 'problems' were acute problems by the late-20th century, the literature does not consider why those long-lived 'problems' became so acute[107] in the late-20th century or whether those 'problems' could have been avoided.

Though the literature analyses the 'problems' and selected Party Expert Procedural Rules reforms in Australia, it does not systematically analyse how the 'problems', or the Party Expert Procedural Rules reforms, evolved in Australia or why.

The literature does not systematically analyse the extrajudicial literature which is largely authored by senior Australian judges.[108]

The literature does not rigorously analyse the 'problems' or the Party Expert Procedural Rules within any specific theoretical framework (other than Dwyer's *Judicial Assessment*).

There is no comparative analysis of the differences between the evolution of the 'problems', or the Party Expert Procedural Rules reforms, in England and Australia.

1.3.4 Originality and importance

This research seeks to address the gaps in the literature identified in Chapter 1.3.3.

It is original and contributes to research in the field of expert evidence in civil proceedings in the following ways.

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2 Lloyd's Rep 68.

[107] See n 6 concerning the meaning of 'acute'.

[108] Gary Edmond, 'After Objectivity: Expert Evidence and Procedural Reform' (2003) 25 SLR 131 and Gary Edmond, 'Secrets of the 'Hot Tub' Expert Witnesses, Concurrent Evidence and Judge Led Law Reform in Australia' (2008) 27 CJQ 51 cites some of the extrajudicial literature authored by senior Australian judges but does not analyse that literature in any systematic or detailed way.

Firstly, this research analyses both how and why the 'problems' evolved and how the procedural law has responded to the 'problems'. That analysis is undertaken using two theoretical frameworks which have not yet been applied to the research area (the legal evolutionary theoretical framework and the institutional theoretical framework); and the evolutionary theory of institutional change developed in Chapter 1.5.6. Using those frameworks allows the data and the meaning embedded in the data to be considered and analysed through a new and different lens.[109] It also allows a deeper consideration of temporal context and variables because, as the prominent institutionalist Kathleen Thelan has contended, sense can only be made of changes to the form and functions of rules when considered in the context of a larger temporal framework, including sequences of events or processes that have shaped their development.[110] In this respect, this research builds on and extends the earlier research into the historic aspects of expert evidence, including Carol Jones (mid-1990s), Tal Golan (late-1990s to 2008) and Deirdre Dwyer (2000s), by specifically considering the interaction between the 'problems' and the Party Expert Procedural Rules.

Secondly, this research considers the post-'Access to Justice' inquiry data about the 'problems' in the English and Australian extrajudicial literature.[111]

Thirdly, a new and different comparative perspective is used in this research by applying a comparative method to analyse and compare the evolving 'problems', and the Party Expert Procedural Rule responses, in England and Australia; and in NSW and Victoria. This allows a detailed analysis of connections and interactions between the evolving 'problems', and procedural law responses, in those three jurisdictions.

Fourthly, as this research uses a legal evolutionary theoretical framework to analyse the 'problems' which have evolved over hundreds of years, it is unique and adds to the relatively limited existing interdisciplinary analyses of legal concepts from an evolutionary perspective.[112]

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[109] The lens analogy is taken from Charles Kivunja, 'Distinguishing between Theory, Theoretical Framework, and Conceptual Framework: A Systematic Review of Lessons from the Field' (2018) 7 International Journal of Higher Education 44, 48.
[110] Kathleen Thelen, *How Institutions Evolve: The Political Economy of Skills in Germany, Britain, the United States, and Japan* (Cambridge Studies in Comparative Politics, CUP 2004), 296. Institutions are discussed in Chapter 1.5.3.
[111] Considered in Chapters 2.4 and 4.3.4.
[112] Chapter 1.5.2 discusses some of the existing analyses of legal concepts from an evolutionary perspective.

Lastly, this research includes a detailed historical analysis of the procedural law responses to the evolving 'problems' and critically considers whether the 'problems' with party experts in the late-20th and early-21st centuries could have been avoided by better civil procedure rule design choices. It builds on and further develops Dwyer's 2008 analysis of the English procedural rules governing party experts (and expert evidence more generally);[113] and undertakes a new analysis of the NSW and Victorian Party Expert Procedural Rules.

This research into party experts is important for two reasons. Firstly, the history of party experts suggests that party experts will continue to play a major (perhaps even an increasing) role in civil litigation. Secondly, the cases and extrajudicial literature after the implementation of the Party Expert Procedural Rules reforms (in the late-1990s and the early-2000s), in which judges continue to criticise party experts,[114] indicate that some of the 'problems' continue. Understanding how and why the 'problems' have historically evolved, and whether past civil procedure rule design choices were effective (and if not, why), is important to ensuring any past mistakes are not repeated and may inform future procedural law reforms. As Lady Justice Sharpe said in 2016 'No system is ever perfect, and we mustn't be complacent.'[115]

1.4 Research hypothesis and questions

The 'problems' have existed since at least the mid-1800s[116] and a panoply of Party Expert Procedural Rules have been implemented to address them. The judicial criticism of party experts, and the accompanying calls for reform, from the mid to late-1990s[117] indicates that, at that time, the Party Expert Procedural Rules were ineffective and the 'problems' had evolved into acute[118] problems which were having

[113] Dwyer, *Judicial Assessment* (n 67) Ch 5 and 6.
[114] eg Hallett (n 57); Sir Peter Gross, 'Standards' (Bond Salon 15th Annual Expert Witness Conference); The Rt. Hon. Lady Justice Heather Hallet, 'Objectivity in an adversarial system' (2020) 88 Medico-Legal Journal 114.
[115] Lady Justice Sharpe, 'Communicating the Science The Expert Witness Institute Sir Michael Davies Lecture 2016'.
[116] eg *Tracy Peerage* (n 101) 191 in which Lord Campbell pronounced his often quoted criticism that party experts 'come with a bias on their minds to support the cause in which they are embarked' and the 1870s judgments by Sir George Jessel MR which were highly critical of biased party experts - *Abinger v Ashton* (n 103) 373, *Thorn v Worthing Skating Rink Company* [1877] 6 Ch D 415n and *Bottomley v Ambler* (1878) LT 545, 546.
[117] In England, the most prominent judicial critic of party expert in the 1990s was Lord Woolf (see Chapter 4.2.14). In NSW, from 1999 four NSW Supreme Court judges authored a range of extrajudicial literature which was critical of party experts (see Chapter 4.3.4). In Victoria, the 'problems' with party experts in Victoria were first raised by Marks J (a judge in the Commercial List).
[118] See n 6 as to the meaning of 'acute'.

a material impact on access to justice. From this emerges the hypothesis for this research:

> The acute 'problems'[119] with the use and perception of party expert witnesses which had evolved by late-20th century could have been avoided if civil procedure rule makers had made better civil procedure rule design choices.

This research is deliberately explorative in nature and the hypothesis and research questions (detailed below) reflect that approach.

The hypothesis for this research will be tested by analysing the following research questions:

Question 1: when did the 'problems' evolve into acute 'problems' which materially impact on access to justice in England, NSW and Victoria?

Question 2: how and when were Party Expert Procedural Rules made to address the 'problems' before they became acute?

Question 3: could the acute 'problems' have been avoided if different, or earlier, civil procedure rules were put in place (and if not, why not?)?

Question 3 is directed to the factual question rather than whether the various Party Expert Procedural Rules were good or bad per se.

1.5 Theoretical framework

1.5.1 Introduction

The literature review undertaken in the early stage of this research identified two potential theoretical frameworks which could be used in this research: the legal evolutionary theoretical framework;[120] and the institutional theoretical framework.[121]

1.5.2 Legal evolutionary theoretical framework

As far back as the late-19th century Oliver Wendell Holmes made the point that if we want to know why a rule of law exists at all, or has a particular shape, we go to

[119] Ibid.
[120] Discussed below in Chapter 1.5.2.
[121] The theory was developed by sociologists and is discussed below in Chapter 1.5.3.

tradition.[122]

Darwinian evolutionary theory[123] has been described as a theory of change;[124] a theory of history;[125] and a theory for explaining the process of development.[126] It has been applied in many disciplines including the biological sciences, economics, psychology, sociology, technology, anthropology, ecology and law.[127]

Goodenough has described the components or elements of evolutionary theory as descent, variation and selection; and explains how they apply to law.[128]

Generalised Darwinian evolutionary theory is an overarching meta-theoretical framework which is useful at an abstract level[129] and can integrate theory from multiple levels of analysis and across disciplines.[130]

Evolutionary theorists seek to understand the forces and dynamics that have shaped the world and they assume contingency, inconstancy, emergence and change (rather than equilibrium).[131] An aspect of neo-Darwinian evolutionary theory is the punctuated equilibrium theory which is also used by political scientists (though often only at a metaphorical level).[132] Hathaway gives the following examples of legal 'punctuations': higher court decisions overruling/significantly altering an existing legal rule; reconsideration of a legal rule by the court(s) which first established it; new legislation;

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[122] Oliver Wendell Holmes, *The Path of the Law* (1897) (cited in Oona A Hathaway, 'Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System' (2001) 86 Iowa LR 601).
[123] Peter Bowler, 'The Changing Meaning of "Evolution"' (1975) 36 Journal of the History of Ideas 95 provides an interesting analysis of the different meaning which the word 'evolution' has had, particularly in the biological sciences.
[124] 'theory of change' and 'theory of evolutionary jurisprudence' are both terms used in Herbert Hovenkamp, 'Evolutionary Models in Jurisprudence' (1985) 64 Texas L Rev 645.
[125] M B W Sinclair, 'The Use of Evolution Theory in Law' (1987) 64 U Detroit L Rev 451.
[126] Peter Bowler, 'The Changing Meaning of "Evolution"' (1975) 36 Journal of the History of Ideas 95, 62 (footnote 20 citing Herbert Spencer).
[127] Phillip Lipton, 'The Utilisation of Evolutionary Concepts in Legal History: Company Law as a Case Study' (2020) 46 Mon LR 58.
[128] Oliver Goodenough, 'When "Stuff Happens" Isn't Enough: How an Evolutionary Theory of Doctrinal and Legal System Development Can Enrich Comparative Legal Studies' (2011) 7 Review of Law and Economics 805.
[129] Shu-Yun Ma, 'Taking Evolution Seriously, or Metaphorically? A Review of Interactions between Historical Institutionalism and Darwinian Evolutionary Theory' (2016) 14 Political Studies Review 223, 229.
[130] Orion Lewis and Sven Steinmo, 'Taking evolution seriously in political science' (2010) 129 Theory in Biosciences 235, 240.
[131] Ibid 239 and 243.
[132] Shu-Yun Ma (n 129) 225 and 230.

and the introduction of a novel legal issue.[133]

Darwinian evolutionary theory has been used to explain how legal doctrines and principles have developed over time,[134] particularly in the American academic literature[135] (though not exclusively[136]). As Mark Roe has put it – '[t]he classical evolutionary paradigm has a strong grip on [law scholarship]'.[137] Zamboni has however suggested that lawyers treat legal evolutionary theory as only a 'cousin' (rather than a 'sibling' or an 'in-law') of the family of legal thinking and not a legal theory per se;[138] has described the theory of legal evolution as a label for all legal scholarship which aims to understand and explain patterns of continuity and change in the law;[139] and has focused on legal change.[140]

Sinclair[141] and Lipton[142] provide a very useful explanation of evolutionary theory in the context of legal history and how evolutionary theory can be applied to analyse legal change.

Lipton describes in detail four legal evolution typologies: autonomous legal evolution; functionalist legal evolution; Darwinian (legal) evolutionary perspectives; and autopoietic[143] approaches/perspectives.[144] The following broad concepts can be

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[133] Oona A Hathaway, 'Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System' (2001) 86 Iowa LR 601 641.
[134] In this research referred to as 'legal evolutionary theory' which is a phrase which seems to have been first used in 2008 in Mauro Zamboni, 'From "Evolutionary Theory and Law" to a "Legal Evolutionary Theory"' (2008) 9 German Law Journal 515, 516 eg Simon Deakin, 'Evolution for Our Time: A Theory of Legal Memetics' (2002) 55 CLP 1, 3.
[135] eg the literature linking legal principles and evolution cited in Herbert Hovenkamp, 'Evolutionary Models in Jurisprudence' (1985) 64 Texas L Rev 645, 646 (footnote 8) and Mark Roe, 'Chaos and Evolution in Law and Economics' (1996) 109 Harvard Law Review 641, 642 (footnote 2). The website maintained by The Society for Evolutionary Analysis in Law (https://www.vanderbilt.edu/seal/) has a very detailed list of evolutionary theory literature, including the modern legal evolutionary theory literature.
[136] Examples of the non-American literature include Peter Stein, *Legal Evolution: The Story of an Idea* (CUP 2009); Lipton, 'The Utilisation of Evolutionary Concepts in Legal History' (n 127).
[137] Roe (n 135).
[138] Zamboni (n 134) 515 and 537.
[139] Ibid 520-521.
[140] Ibid 525.
[141] M B W Sinclair, 'The Use of Evolution Theory in Law' (1987) 64 U Detroit L Rev 451.
[142] Lipton, 'The Utilisation of Evolutionary Concepts in Legal History' (n 127).
[143] An autopoietic system produces and reproduces its own elements by the interaction of its elements and legal autopoiesis imports the logic of self-referentiality into the legal world: Gunther Teubner, 'Introduction to Autopoietic Law' in Gunther Teubner (ed), *Autopoietic Law - A New Approach to Law and Society* (De Gruyter 1987), 1 and 3.
[144] Lipton, 'The Utilisation of Evolutionary Concepts in Legal History' (n 127) 63-73.

distilled from Lipton's literature which synthesises legal evolutionary theory:[145]

- Darwinian evolutionary concepts and theories can be used to analyse legal change including its relationship to developments in the social, political and economic environments; and
- legal evolutionary theory, approaches and change:
    - enables the identification of broad characteristics of legal change;
    - involve moving away from an earlier (existing) state of development and reject teleological concepts involving legal change progressing towards a functionally pre-determined design;[146]
    - allows for suboptimal outcomes to occur and persist;
    - show 'history matters' when analysing why the law has developed as it has and the current state of the law can be a 'carrier of history';
    - is largely incremental;
    - can involve long periods of stability;
    - is usually confined to variations on existing law;
    - can be coevolutionary;
    - does not result in the inevitable progress towards a pre-determined optimum outcome because complex historical factors could have resulted in significantly different outcomes; and
    - involves history unfolding, with choices about possible alternative paths being made at junctures.[147]

Zamboni discusses how legal evolutionary theory is not solely retrospective but can also be 'predictivist' because an evolved legal concept's evolutionary past can explain or predict its further (future) evolution.[148]

Elliott's historical analysis of legal evolutionary theory[149] shows that Darwinian-based

[145] Phillip Lipton, 'The development of the separate legal entity and limited liability concepts in company law: an evolutionary perspective' (PhD, Monash University 2012)', Ch 3; Lipton, 'The Utilisation of Evolutionary Concepts in Legal History (n 127).
[146] Paul David, 'Why are institutions the 'carriers of history'?: Path dependence and the evolution of conventions, organizations and institutions' (1994) 5 Structural Change and Economic Dynamics 205, 206 explains how genealogical modes/concepts link a present state of arrangements with its originating context or set of circumstances and interpolates a sequence of connecting events that allow the past to exert a continuing influence upon the shape of the present.
[147] Lipton, 'The Utilisation of Evolutionary Concepts in Legal History' (n 127) 60-66.
[148] Zamboni (n 134) 534.
[149] E. Donald Elliott, 'The Evolutionary Tradition in Jurisprudence' (1985) 85 Columbia LR 38.

evolutionary theory has been applied to legal concepts, principles and systems for more than a century, with early examples including Maine's *Ancient Law*,[150] Holmes' *Law in Science and Science in Law*[151] and Wigmore and Kocourek's early-20th century *Evolution of Law*.[152]

After virtually disappearing from the social sciences (including law) for most of the 20th century,[153] evolutionary theory (including legal evolutionary theory) resurged in the late-1970s and early-1980s.[154]

Georg von Wangenheim has explained how legal rules can 'coevolve'.[155] He makes the point that legal evolution takes place in an extremely wide and complex environment so that legal rules from one area can interact, and coevolve, with rules from other legal areas and non-legal areas (such as technology). He also posits that legal evolution need not be confined to one country; and one country's legal rules can coevolve with another country's. Similarly, Lipton's analysis of the evolution of the joint stock company discusses the complex interrelationship between law and society which can operate in two ways: firstly, legal change can affect social and economic outcomes; and secondly legal evolution can be driven by change in the broader social and economic context. Lipton cites Fögen's claims that this 'coevolutionary' model usefully describes the relationship between law and its environment.[156] Deakin and Wilkinson describe 'coevolution' as occurring when systems (in their case, law and the economy) reciprocally influence each other.[157]

Lipton has explained that in a legal evolutionary theoretical framework, historical contingencies, chaotic developments and/or chance accidents can cause legal

[150] H. Maine, *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas* (1861).
[151] Oliver Wendell Holmes, 'Law in Science and Science in Law' (1899) 12 Harvard Law Review 443.
[152] Albert Kocourek and John Henry Wigmore (eds), *Evolution of Law: Select Readings on the Origin and Development of Legal Institutions* (Little, Brown and Company 1915), discussed in E. Donald Elliott, 'The Evolutionary Tradition in Jurisprudence' (1985) 85 Columbia LR 38.
[153] Lipton, 'The Utilisation of Evolutionary Concepts in Legal History' (n 127) 62 and 68.
[154] Sinclair (n 141). Paul H Rubin, 'Why Is the Common Law Efficient?' (1977) 6 The Journal of Legal Studies 51 is an early modern substantial piece of legal evolutionary theory literature.
[155] Georg von Wangenheim, 'Evolutionary Theories in Law and Economics and Their Use for Comparative Legal Theory' (2011) 7 Review of Law and Economics 737, 739.
[156] Phillip Lipton, 'The Evolution of the Joint Stock Company to 1800: A Study of Institutional Change' (Monash University, Workplace and Corporate Law Research Group, Working Paper No 15 (May 2009)), 4.
[157] Simon Deakin and Frank Wilkinson, *The Law of the Labour Market: Industrialization, Employment, and Legal Evolution* (OUP 2005) 32.

change.[158]

The analysis in this Chapter demonstrates that legal evolutionary theory provides a framework for analysing how and why complex legal change occurred, including:

- possible alternatives to a particular legal change;
- why a choice to make a legal change was, or was not, made;
- why a choice to make a legal change was made at a particular time;
- how a choice to make a legal change was influenced by the broader (non-legal) environment, including changes in that environment;
- whether a legal change retained any of the pre-existing characteristics; and
- whether (and how) a legal change was a change from the past.[159]

As Goodenough has put it - 'the continuing power of evolutionary analysis is in the relative simplicity of the questions that it prompts us to ask, which makes it as good an aid for understanding complexity as any in academe'.[160]

1.5.3 Institutional theoretical framework

Introduction

Broadly speaking, 'institutionalists' are scholars[161] who study institutions (rules),[162] including the establishment, creation or origins of institutions;[163] and changes to established institutions (which is referred to as 'institutional change').[164]

Institutional change theory involves two broad schools of thought: institutionalists who consider that occasional puncturing shocks and exogenous events cause institutional change; and institutionalists who consider that institutional change is gradual (or incremental) over time.[165]

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[158] Lipton, 'The Utilisation of Evolutionary Concepts in Legal History' (n 127).
[159] Ibid 60 and 66.
[160] Goodenough (n 128) 819.
[161] Mostly sociologists, political science scholars or economists.
[162] In institutional change theory, institutions are essentially rules (explained further below).
[163] Including why actors choose institutions, a central theme of rational choice theorists being that actors rationally choose institutions because those actors believe that doing so will benefit them and actors rationally construct institutions with specific features because those actors expect that particular features will produce specific intended consequences: Paul Pierson, *Politics in Time History, Institutions, and Social Analysis* (Princeton University Press 2004), 106 and 110.
[164] Sven Steinmo, 'Historical institutionalism' in Donatella della Porta and Michael Keating (eds), *Approaches and Methodologies in the Social Sciences A Pluralist Perspective* (2008), 123.
[165] Jeroen van der Heijden, 'Institutional Layering: A Review of the Use of the Concept ' (2011) 31 Politics 9; Pierson (n 163) 99

There are a variety of institutionalists,[166] including rational choice institutionalists, historical institutionalists and sociological institutionalists.[167]

Historical institutionalism studies history to understand why a choice was made, and/or why an outcome occurred, by understanding variables in their context (including time and place).[168] For example, historical institutionalism may look at how an actor's choices at a particular time had consequences at a later time.[169]

Institutions

Hodgson has posited that the term 'institution' has become widely used, but there remains no unanimity about its definition.[170]

Institutions are formal and informal rules (that generally constrain behavior[171]); monitoring and enforcement mechanisms; and systems of meaning that define the context within which individuals, corporations, labor unions, nation-states, and other organisations operate and interact with each other.[172] They are social order building-blocks reflecting socially sanctioned behavioral expectations;[173] and the rules governing actors' interactions.[174] Similarly North defines institutions as human devised constraints which shape human interaction[175] - they are the 'rules' which define the way the game is played.[176] Hodgson defines institutions as systems of established and prevalent social rules that structure social interactions; and gives the following

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[166] Sven Steinmo, 'Historical institutionalism' (n 164) Ch 7 (in relation to historical institutionalism for example); Kingston and Caballero (n 186); Jeroen van der Heijden, 'Institutional Layering: A Review of the Use of the Concept ' (2011) 31 Politics 9.

[167] Petera Hall and Rosemarcy Taylor, 'Political Science and the Three New Institutionalisms' (1996) XLIV Political Studies 936; Kathleen Thelen, 'Historical Institutionalism in Comparative Politics' (1999) 2 The Annual Review of Political Science 369; Pierson (n 163) Ch 1 page 8; Sven Steinmo, 'Historical institutionalism' (n 164) 125; John Campbell, 'Problems of Institutional Analysis', *Institutional Change and Globalization* (Princeton University Press 2004), 2-3.

[168] Sven Steinmo, 'Historical institutionalism' (n 164) 126 and 134-5 (which also makes the point that historical institutionalism is primarily interested in explanation and the ways in which history itself shapes outcomes).

[169] Ibid 127.

[170] Geoffrey Hodgson, 'What Are Institutions?' (2006) 40 Journal of Economic Issues 1.

[171] John Campbell, *Institutional Change and Globalization* (Princeton University Press 2004), 37.

[172] John Campbell, 'Problems of Institutional Analysis'.

[173] Wolfgang Streeck and Kathleen Thelen, 'Introduction: Institutional Change in Advanced Political Economies' in Wolfgang Streeck and Kathleen Thelen (eds), *Beyond Continuity: Institutional Change in Advanced Political Economies,* (OUP 2005), 9.

[174] Jeffrey Stacey and Berthold Rittberger, 'Dynamics of formal and informal institutional change in the EU' (2003) 10 Journal of European Public Policy 858, 860.

[175] Douglass North, *Institutions, Institutional Change and Economic Performance* (CUP 1990) 4. See also Geoffrey Hodgson, 'What Are Institutions?' (2006) 40 Journal of Economic Issues 1, 2.

[176] North (n 175) 4.

examples of institutions - language, money, law, systems of weights and measures and table manners.[177]

Under all of these definitions of institutions, legal procedural rules which regulate party experts of the types considered in this research are institutions (rules).[178]

Crucially for North (but not Hodgson),[179] institutions must be distinguished from 'organisations'.[180]

Institutions usually constrain interaction, though they can enable if they open up otherwise unavailable possibilities or choices.[181]

Institutions can be created or formed at a point in time or evolve over time. North gives the examples of the United States constitution as an institution created at a point in time and the common law as an institution which has evolved over time.[182]

Campbell posits that institutions can be merely symbolic and gives the example of token gestures affirmative action rules which signal formal compliance with legislative requirements, but without any intended or expected practical impact (such as on hiring or promotion decisions).[183] Mere symbolic institutions are a type of 'symbolic politics';[184] Edelman refers to US antitrust laws and statutes as examples of ineffective laws because their promised values were not realised.[185]

Both exogenous causes (such as large external technological change, economic crises or wars) and endogenous causes[186] can change institutions.

Institutional change can be path dependent.[187] Kingston and Cabellero have explained that path dependency involves initial conditions and historical accidents which have

[177] Hodgson (n 175) 2.
[178] Sven Steinmo, 'Historical institutionalism' (n 164) 123; Hodgson (n 175) 2.
[179] North (n 175). See also Kingston and Caballero (n 186) 154 which defines institutions.
[180] North (n 175) 6 and 73.
[181] Ibid 4.
[182] Ibid 4.
[183] Campbell (n 171) 43.
[184] Symbolic politics is extensively discussed in Murray Edelman, *The symbolic uses of politics* (University of Illinois Press 1964).
[185] Ibid 24.
[186] Endogenous causes are essentially internal causes: Christopher Kingston and Gonzalo Caballero, 'Comparing theories of institutional change' (2009) 5 Journal of Institutional Economics 151, 156.
[187] North (n 175) 100; David (n 146); Kingston and Caballero (n 186) 156. 'Path dependency' is also a concept applicable in evolutionary theory.

lasting impacts; allows inefficiency to arise/persist; and allows initially optimal outcomes to become suboptimal.[188] Eccleston explains that path dependency can result in actors adapting to an established suboptimal system; and/or developing a vested interest in its preservation.[189] Campbell has described path dependency as people sticking to a particular institutional path once on it (rather than moving to another path).[190]

Institutions can be self-enforcing;[191] counter-party enforceable (eg enforcement by a party to a contract of obligations under that contract); or third party enforceable (eg enforceable by a court). However, enforcement of institutions cannot be taken for granted and may be imperfect.[192] Enforcement by punishment for contraventions of an institution is an essential part of the functioning of institutions.[193] Improved institutionalisation may reduce enforcement problems.[194] Alternatively, additional institutions which measure contraventions and enforce compliance may be necessary.[195]

Hodgson considers that in the special case of legal institutions (rules), new laws only become institutions (rules) when enforcement makes the required behavior customary and normative.[196] When there are advantages to contravening an institution, enforcement can be important to ensuring that the institution is not brought into disrepute.[197]

Institutions can be formal or informal. Formal institutions are consciously created by actors and generally strictly enforceable. They can overrule or supersede existing informal institutions[198] and change quickly (eg by a political or judicial decision). Informal institutions are less-formal conventions or codes/norms of conduct or

[188] Douglass North, 'Institutions' (1991) 5 The Journal of Economic Perspectives 97, 109 (footnote 10).
[189] Richard Eccleston, 'The Thirty Year Problem: Political Entrepreneurs, Policy Learning and the Institutional Dynamics of Australian Consumption Tax Reform' (2006) 24 Law in Context: A Socio-Legal Journal 100, 101.
[190] John Campbell, 'Problems of Institutional Analysis', 13.
[191] See Hodgson (n 175) 14 which makes the point that some (but not all) legal rules have a strong self-policing element using the example of largely self-enforced traffic laws.
[192] North (n 175) 33 and 54.
[193] Ibid 4.
[194] Ibid 50.
[195] Ibid 58.
[196] Hodgson (n 175) 6.
[197] Ibid 15.
[198] North (n 175) 88.

behaviour.[199] Informal institutions can modify, supplement or extend formal institutions,[200] but do not change quickly or easily.[201]

When institutional change principles are applied to this research:

- a judiciary or a court is an 'organisation';
- legislatures, judges, parties, lawyers, witnesses (including party experts) and Rules Committees are 'actors';
- judge-made laws or rules,[202] or conventions adopted by party agreement, are informal institutions; and
- formal procedural rules which regulate expert evidence (such as legislation or rules of court) are formal institutions.

Lipton is a legal scholar who has recently applied institutional theory to legal principles, including the evolution of the joint stock company.[203]

1.5.4 Gradual institutional change theoretical framework

Gradual institutional change theory (**GIC)** is a post-establishment[204] institutional change school within the historical institutionalism school.[205] GIC is premised on gradual (or incremental) post-establishment institutional change over time, rather than change which is triggered or caused by exogenous causes.[206] It is a relatively recent theory which seeks to explain post-establishment institutional change or evolution, including the roles played by 'change agents', 'skilled social actors' or 'policy entrepreneurs'.[207] Lewis and Steinmo have posited that GIC was explored because

[199] Stacey & Rittberger (n 174) 861.
[200] North (n 175) 87.
[201] Ibid 6.
[202] Margaret McCown, 'The European Parliament before the bench: ECJ precedent and EP litigation strategies' (2003) 10 Journal of European Public Policy 974 argues that precedents resemble informal institutions.
[203] Phillip Lipton, 'A History of Company Law in Colonial Australia: Legal Evolution and Economic Development' (2007) 31 MULR 805; Phillip Lipton, 'The Evolution of the Joint Stock Company to 1800: A Study of Institutional Change' (Monash University, Workplace and Corporate Law Research Group, Working Paper No 15 (May 2009)); Phillip Lipton, 'The development of the separate legal entity and limited liability concepts in company law: an evolutionary perspective; Phillip Lipton, 'The Utilisation of Evolutionary Concepts in Legal History: Company Law as a Case Study' (2020) 46 Mon LR 58.
[204] ie after the initial establishment of an institution (rule).
[205] Michael Koreh, Ronan Mandelkern and Ilana Shpaizman, 'A dynamic theoretical framework of gradual institutional changes' (2019) 97 Public Admin 605.
[206] Jeroen van der Heijden, 'Institutional Layering: A Review of the Use of the Concept ' (2011) 31 Politics 9; Michael Koreh, Ronan Mandelkern and Ilana Shpaizman, 'A dynamic theoretical framework of gradual institutional changes' (2019) 97 Public Admin 605.
[207] Pierson (n 163) 136; Eccleston (n 189) 107; Michelle Cini, 'Institutional Change and Ethics

traditional 'exogenous' theories of institutional change were thought to be insufficient.[208]

GIC theory, which was founded by Schickler and Thelen,[209] was refined by Mahoney and Thelen in 2010.[210]

Eccleston considers that successful policy entrepreneurs and institutional reformers tend to be powerful leaders at the intersection of important policy networks.[211] Steinmo theorises that institutional change occurs when powerful actors have the will to change institutions by new ideas.[212] Pierson similarly considers that well-situated, creative actors play a crucial role in framing reform proposals, motivating participants and forming coalitions.[213]

GIC can be constrained by path dependency resulting in a self-reinforcing process(es); difficult to reverse lasting legacies;[214] and narrowed choices.[215] Path dependency can inform an understanding of more recent choices.[216]

GIC has been used by both legal scholars and non-legal scholars in a legal context. Shelly Marshall is an example of a legal scholar who considered how GIC overcame the labour law problems of underpayment of, and insecurity for, informal workers.[217] GIC theory has been applied to legal concepts by the following authors (in date order): North (1990) considered the evolution of the common law as a form of institutional change;[218] Margaret McCown (2003) analysed formal rule creation and constitutionalisation by the European Court of Justice;[219] Eccleston (2006) analysed

Management in the EU's College of Commissioners' (2014) 16 BJPIR 479.

[208] Orion Lewis and Sven Steinmo, 'How Institutions Evolve: Evolutionary Theory and Institutional Change' (2012) 44 Polity 314, 324.

[209] van der Heijden (n 206) 14.

[210] James Mahoney and Kathleen Thelen, 'A Theory of Gradual Institutional Change' in James Mahoney and Kathleen Thelen (eds), *Explaining Institutional Change Ambiguity, Agency, and Power* (CUP 2010).

[211] Eccleston (n 189).

[212] Sven Steinmo, 'Historical institutionalism' (n 164) 130.

[213] Pierson (n 163) 136.

[214] Thelan (n 167) 387-8; Pierson (n 163) Ch 1 (10-11).

[215] North (n 175) 98; Thelan (n 167) 387.

[216] North (n 175) 100.

[217] eg Shelley Marshall, 'How does institutional change occur? Two strategies for reforming the scope of labour law' (2014) 43 Industrial Law Journal 286 which is an article by a labour law scholar which considers 2 case studies where gradual institutional change overcame the labour law problems of underpayment of, and insecurity for, informal workers.

[218] North (n 175) 96.

[219] Margaret McCown, 'The European Parliament before the bench: ECJ precedent and EP litigation strategies' (2003) 10 Journal of European Public Policy 974.

tax reform;[220] Roux (2015) analysed Australian constitutional change;[221] and Corby and Yamakawa (2020) considered the judicial regimes for employment rights disputes.[222]

GIC has the potential to assist with understanding how and why institutions (rules) undergo major change over time; and how and why small changes can have a significant cumulative effect over time.[223]

Institutional scholars have categorised the following four or five types (or modes) of GIC:[224]

- **Drift** which occurs when institutions remain the same but their impact changes;
- **Conversion** which involves existing institutions continuing while being interpreted and used in new or different ways;
- **Layering** which also involves existing institutions continuing while new ones attach to, or operate in parallel with, those existing institutions;[225]
- **Displacement/diffusion** which involves 'old' institutions being replaced or bypassed by new institutions;[226] and/or being discredited and pushed aside by new institutions;[227] and
- **Exhaustion** which is when behavior required or allowed under existing institutions undermines the institutions and results in gradual institutional breakdown or collapse.[228]

Importantly in the context of this research, GIC posits that 'actors' who implement, interpret and enforce institutions (which would include the judiciary) play important

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[220] Eccleston (n 189).
[221] Theunis Roux, 'Reinterpreting 'The Mason Court Revolution': An Historical Institutionalist Account of Judge-Driven Constitutional Transformation in Australia' (2015) 43 Fed L Rev 1.
[222] Susan Corby and Ryuichi Yamakawa, 'Judicial regimes for employment rights disputes' (2020) 51 Industrial Relations Journal 374.
[223] Jeroen van der Heijden and Johanna Kuhlmann, 'Studying Incremental Institutional Change: A Systematic and Critical Meta-Review of the Literature from 2005 to 2015' (2017) 45 The Policy Studies Journal 535, 536.
[224] Ibid 538.
[225] Incremental 'layering' was the relevant process discussed in Cini (n 207) (concerning ethics reforms in the European College of Commissioners). See also Pierson (n 163) 137 (citing Schickler).
[226]Michelle Cini, 'Institutional Change and Ethics Management in the EU's College of Commissioners' (2014) 16 BJPIR 479, 482 and 488.
[227] Streeck and Thelen (n 173) 20.
[228] Ibid 19 and 29 (discusses exhaustion). See also Jeroen van der Heijden and Johanna Kuhlmann, 'Studying Incremental Institutional Change: A Systematic and Critical Meta-Review of the Literature from 2005 to 2015' (2017) 45 The Policy Studies Journal 535, 537-8.

roles in shaping institutional evolution.[229]

1.5.5 The intersection between evolutionary and institutional theory

As early as the 1990s, North[230] and Thelan[231] were linking evolutionary and institutional theories. In the early-1990s North opined that institutions evolve incrementally 'connecting the past with the present and the future; [so that] history in consequence is largely a story of institutional evolution'.[232] In 2003 Thelan considered how institutions emerge and evolve over time,[233] though Thelan's reference to 'evolve' invoked the simple concept of change[234] (rather than evolutionary theory per se).[235] In 2004 Campbell noted that some institutionalists argue that institutional change tends to follow evolutionary patterns characterised by gradual, small, incremental changes over long periods of time.[236]

Kingston and Caballero have considered the large body of literature which treats institutional change as 'evolutionary'.[237]

Lewis and Steinmo are political science scholars who have engaged in detail with evolutionary theory and GIC in particular.[238] They posit that GIC can be seen as an evolutionary process; evolutionary theory and the new institutionalist literature on endogenous institutional change overlap; institutionalists have increasingly moved towards evolutionary thinking; and an evolutionary theory of institutional change is possible.[239] In 2010 they concluded that it was time for both modern evolutionary theory and political science to productively cross fertilise and for political scientists to

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[229] James Mahoney and Kathleen Thelen (ed) *Explaining Institutional Change: Ambiguity, Agency, and Power* (CUP 2009), 13-14.
[230] North (n 175) 87.
[231] Thelan (n 167).
[232] North (n 175) 100; North (n 188) 97.
[233] J Mahoney and D Rueschemeyer (eds), *Comparative Historical Analysis in the Social Sciences (Cambridge Studies in Comparative Politic* (CUP 2003).
[234] See Shu-Yun Ma (n 129) 227 citing Lewis and Steinmo, 'Taking evolution seriously in political science' (n 130).
[235] Ian Lustick, 'Taking Evolution Seriously: Historical Institutionalism and Evolutionary Theory' (2011) 43 Polity 179, 205 is critical of Thelan in this regard (while also making the point the most social scientists have failed to engage with the evolutionary theory).
[236] John Campbell, 'Problems of Institutional Analysis', 5.
[237] Kingston and Caballero (n 186) Chapter 3.
[238] Lewis and Steinmo, 'Taking evolution seriously in political science' (n 130); Lewis and Steinmo, 'How Institutions Evolve' (n 208); Roe (n 135) 663 (which considers the interaction between the concepts of evolution and path dependency for example).
[239] Lewis and Steinmo, 'How Institutions Evolve' (n 208) 326.

take evolution seriously.[240]

The literature demonstrates that institutional and (legal) evolutionary theory are interrelated and institutional theory can involve elements of Darwinian evolutionary theory for the following reasons. Firstly, GIC[241] occurs when otherwise stable institutions continuously and incrementally change over time (including at the margin) resulting in greater and more fundamental change over the longer term.[242] In one sense GIC can be contrasted with the alternative 'punctuated equilibrium' model[243] which is premised on institutional change being caused by abrupt exogenous (external) shocks such as war or financial crises.[244] Alternatively, as theorised by Lipton, 'punctuated equilibrium' is an evolutionary concept involving the process of evolution which is characterised by long periods of little change which are punctuated by sudden periods of major change(s).[245] Secondly, North has made the point that explanations for change in informal constraints often heavily rely on evolutionary theory.[246]

Lipton and David have drawn strong connections between institutional and evolutionary theory. Lipton posits that 'The evolution of institutions is of direct relevance to legal evolution because law is itself one form of institution'.[247] David has similarly concluded that institutions 'evolve' in a manner which shares important attributes with biological processes of evolution.[248]

1.5.6 Evolutionary theory of institutional change

Both the legal evolutionary and institutional theoretical frameworks are directly relevant to this research which concerns the history and evolution of two legal concepts ie the 'problems'; and the Party Expert Procedural Rules (which are both legal concepts and institutions (rules)). Both frameworks provide complementary lenses through which to view the research data and the meaning of that data; and serve as external conceptual, normative frameworks which provide useful concepts

[240] See also Lustick (n 235).
[241] GIC is often referred to as incremental change.
[242] North (n 175) 89.
[243] eg Pierson (n 163) 134, which cites Thelan (n 167).
[244] See also Streeck and Thelen (n 173) Ch 1 p 8; van der Heijden (n 206) 10; Sven Steinmo, 'Historical institutionalism' (n 164) 129.
[245] Lipton, 'The Utilisation of Evolutionary Concepts in Legal History' (n 127) 76.
[246] North (n 175) 87.
[247] Lipton, 'The Evolution of the Joint Stock Company' (n 156) 4.
[248] David (n 146) 217.

for the analysis aspect of this research.[249]

This research applies both the legal evolutionary and institutional theoretical frameworks, in their modern forms, as a combined modern evolutionary theory of institutional change framework. The decision to apply that modern combined evolutionary theory of institutional change was made to:

- further develop and apply a modern type of the evolutionary theory of institutional change (which Kingston and Caballero have discussed and trace back to Veblen in 1899;[250] and which Lewis and Steinmo thought possible[251]); and
- allow a deeper analysis than would have been possible by using only the legal evolutionary framework or the institutional theoretical framework.

Applying a combined modern evolutionary theory of institutional change in this research is unique because such a framework has not been applied to party expert evidence to date.

1.6 Research methodology

This doctrinal research is largely a modern study about the historical 'problems' which have existed for centuries and the Party Expert Procedural Rules which have sought to address those 'problems' over many decades. Those historical 'problems' and rules are analysed through a civil procedure lens. Civil procedure is important because it is designed to ensure that evidence is available to judges to find the material facts; it regulates how proceedings (including trials) are conducted; and it is the means by which substantive rights are enforced.[252]

This research is largely qualitative. It is based on observational or factual data about the world ie historical facts about party expert evidence which are recorded in/inferred from the source material in the literature.[253] It also analyses legal actors (including

[249] Which is the third use of theoretical frameworks posited by Sanne Taekema, 'Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice' (2018) 2 Law and Method 1, 5 and 8.
[250] Kingston and Caballero (n 186) Chapter 3; Thornstein Veblen, *The Theory of the Leisure Class: An Economic Study of Institutions* (Macmillan 1899), which is analysed in Chapter 3, considered social classes as a form of institution.
[251] Lewis and Steinmo, 'How Institutions Evolve' (n 208) 326.
[252] Hazel Genn, *Judging Civil Justice* (CUP 2010), 13.
[253] For a discussion on whether or not both qualitative and quantitative legal research is empirical research see Ian Dobinson and Francis Johns, 'Legal Research as Qualitative Research' in Mike

Courts, judges and Rules Committees), institutions, rules and procedures to understand how they operate, their effects and their effectiveness.[254]

No quantitative research method or analysis could have been used or undertaken in this research as the most relevant quantitative data which exists on the 'problems' is the now outdated, and suspect quality, survey based data collected and analysed in the late-1990s by Freckelton et al.[255]

The comparative methodology, which is the study of law by the systematic comparison of two or more legal systems' parts, branches or other aspects,[256] is used in this research to undertake two separate, but interrelated, multi-jurisdictional comparisons:[257] England is compared with Australia; and NSW is compared with Victoria.

England and Australia were selected for a multi-jurisdictional comparison for the following reasons. Firstly, they are both exposed to the 'problems' (but to different degrees and over different timeframes). Secondly, England and Australia are both common law jurisdictions which have very similar fundamental characteristics and legal cultures[258] (including judicial cultures[259]) allowing a direct and meaningful comparison. Thirdly, English and Australian procedural law responses to the 'problems' have been interactive and interdependent. Fourthly, Australia is sometimes considered to be innovative in the field of civil procedure.[260] Lastly, to date, there has been no detailed comparison between the evolution of the 'problems' or the Party Expert Procedural Rules in England and Australia.

McConville and Wing Hong Chui (eds), *Research Methods for Law* (2nd edn, Edinburgh University Press 2017), 19.

[254] Jan Smits, *The Mind and Method of the Legal Academic* (Edward Elgar Publishing Limited 2012), 29.

[255] Dr Ian Freckelton, Dr Prasuna Reddy and Hugh Selby, *Australian Judicial Perspectives on Expert Evidence: An Empirical Study* (Australian Institute of Judicial Administration 1999). Edmond, 'Judging Surveys' (n 100) 124 makes the points about that study that: having privileged the perspective of judges in the study, the authors of the study do not consider why judges might attribute responsibility for apparent problems to others; and the authors take as self-evident that experts and advocates are responsible for most of the problems.

[256] W J Kamba, 'Comparative Law: A Theoretical Framework' (1974) 23 ICLQ 485, 486.

[257] For a similar multi-jurisdiction comparison see Susan Corby and Ryuichi Yamakawa, 'Judicial regimes for employment rights disputes' (2020) 51 Industrial Relations Journal 374.

[258] Legal culture is discussed in David Nelken, 'Using the Concept of Legal Culture' (2004) 29 Aust J Leg Phil 1.

[259] eg English and Australian judges are usually appointed from the ranks of senior barristers.

[260] Lord Justice Jackson, 'Concurrent Expert Evidence - a Gift from Australia' (London Conference of the Commercial Bar Association of Victoria, 29 June 2016).

The two Australian jurisdictions of NSW and Victoria were selected for the second multi-jurisdictional comparative aspect of this research for the following reasons. They are the two largest Australian jurisdictions and 'compete' for the top commercial work.[261] Victoria adopted the late-19th century English Judicature Act reforms at around the same time whereas NSW did not do so until the 1970s. The effective demise of civil jury trials occurred decades earlier in NSW than in Victoria.[262] The major NSW Party Expert Procedural Rules reforms which were made in December 1999 and 2006 by new rules of court to address the 'problems' preceded the later 2012 Victorian procedural reforms which were made in the shadows of, and directly influenced by, the earlier NSW reforms; and by legislation[263] (rather by rules of court as in NSW[264]). Also, to date, there has been no comparison between the evolution of the 'problems' or the Party Expert Procedural Rules in NSW and Victoria.

1.7 Research limitations

1.7.1 Data

This research analyses the primary and secondary source materials to 2020.

It has not involved further, detailed searches of the historical cases. That is considered to be appropriate because the existing literature includes extensive and detailed searches of the historical cases eg Golan's literature includes an extensive, chronological analysis of the history of expert evidence starting from the late-18th century in England[265] and Dwyer has undertaken extensive case law searches, including providing a detailed list the pre-1800 civil cases involving expert evidence.[266]

1.7.2 Assumptions

The overwhelming bulk of the literature is premised on, assumes or accepts that the 'problems', as perceived by some judges from time to time, are legal problems which adversely impact on the civil justice system; and that procedural reform is necessary to address the 'problems'. This research does not seek to directly analyse or challenge

[261] Ibid.
[262] Justice P W Young, 'Abolition of Civil Juries' (2002) 76 ALJ 81; Jacqueline Horan, 'The Law and Lore of the Australian Civil Jury and Civil Justice' (2006) 9 Flinders J L Reform 929; Victorian LRC, *Jury Empanelment* (2014), [2.25].
[263] Civil Procedure Act 2010 (Vic).
[264] Uniform Civil Procedure Rules 2005 (NSW).
[265] Golan, *Laws of Men* (n 88) 3.
[266] Dwyer, *Judicial Assessment* (n 67) Appendix 2.

the correctness of those premises and assumptions.[267]

1.7.3 Laws of expert evidence

The conduct of common law trials, including the leading of party expert evidence at a trial, is regulated by both the laws (or rules) of expert evidence (which determine what expert evidence is admissible[268]); and civil procedure rules, though the boundary between them can be difficult to draw.[269]

Freckelton considers that the three common law rules of expert evidence share the common characteristic of emanating from courts which want to minimise opinion evidence and have a profound and longstanding mistrust of party experts.[270] The procedural rules regulating expert evidence also share that same common characteristic and, as a result, the rules of expert evidence and the procedural rules are interconnected, interrelated and sometimes overlap.

Though the 'problems' are in part addressed by the rules of expert evidence, they are not specifically considered in this research for two main reasons. Firstly, this research specifically focusses on procedural law issues (which are not often focussed on in the literature). Secondly, the rules of expert evidence are a very large, stand-alone topic which has already been extensively analysed in the existing evidence literature;[271] which does not need to be analysed as part of this research because the procedural law rules largely operate independently of the rules of expert evidence; and which is beyond the limits of this thesis.

1.7.4 US literature

The US literature on the 'problems' in US civil litigation reveals that many of the English and Australian 'problems' also arise in the US.[272] Notwithstanding, this research does

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[267] That is however a topic which is worthy of future research. As Edmond notes, if judges are able to recognise expert bias, presumably they can deal with it and it should not therefore be regarded as a serious problem; and in the absence of much empirical information or theorising about 'partisanship' and 'adversarial bias', it is possible that they are not particularly serious problems: Edmond, 'Judging Surveys' (n 100) 105; Edmond, 'Secrets of the Hot Tub' (n 108).

[268] Ian Freckelton, 'Expert Evidence and the Role of the Jury' (1994) 12 Aust Bar Rev 73, 79-80.

[269] ALRC, *Evidence (Report 26 Interim)* (ALRC 26, 1985), [40].

[270] Ian Freckelton, 'Expert Evidence and the Role of the Jury' (1994) 12 Aust Bar Rev 73, 79-80.

[271] Freckelton (n 270); Stephen Odgers and James Richardson, 'Keeping Bad Science Out of the Courtroom' (1995) 18 UNSW Law Journal 108 (which also posits that the rules remain unsettled).

[272] eg Hand (n 50); Freckelton, Reddy and Selby (n 255) which extensively cites the American literature; Gary Edmond, 'The next Step or Moonwalking? Expert Evidence, the Public Understanding of Science and the Case against Imwinkelried's Didactic Trial Procedures' (1998) 2 IJE & P 13 which, at footnote 1, lists some of the American literature to that time; Ronen Avraham and William H.J. Hubbard, 'Civil Procedure as the Regulation of Externalities' (2022) 89 The University of Chicago Law Review 1. The

not seek to analyse the US literature on the 'problems'[273] for the following reasons.

Firstly, that US literature is largely stand-alone and cannot be adequately covered within this research in addition to analysing the literature on the 'problems' as they arise in England and Australia.

Secondly, the dynamics of US civil litigation are markedly different to (and not easily comparable with) English and Australian civil litigation because: civil juries (which are more likely to be duped by "junk science" than judges) are still common in the US; US party experts are regularly paid on contingency fees bases;[274] Americans may have a constitutional right to select their own witnesses;[275] parties have a right to oral discovery by taking pre-trial sworn depositions of opposing witnesses (including opposing party experts) to discover the whole of an opponent's case and evidence; and the US 'problems' are addressed (at least in part) by Rule 702 of the Federal Rules of Evidence and the US Supreme Court's *Daubert* trilogy which in part attempt to alleviate the 'problem' of bias by allowing a party to challenge another party's expert evidence as unreliable.

1.7.5 Criminal proceedings

The literature on criminal procedure and expert evidence in criminal proceedings makes clear that many of the 'problems' also arise in criminal proceedings. The Australian Chamberlain case[276] and the English Maguire Seven case, which were both based almost entirely on problematic scientific witnesses and unsound expert evidence,[277] are good examples of the 'problems' arising in criminal proceedings. This research does not however specifically seek to analyse the 'problems' in criminal

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occurrence of similar 'problems' in American civil proceedings is hardly surprising given the similarities in the Anglo-American legal tradition.

[273] Some US literature however considers the 'problems' as they have historically arisen in England (eg Hand (n 50)) and that US literature is considered in this research.

[274] H D Sperling, 'Expert Evidence: The Problem of Bias and Other Things' (Supreme Court of NSW Annual Conference).

[275] see William L Foster, 'Expert Testimony, Prevalent Complaints and Proposed Remedies' (1897) 11 Harvard Law Review 169; Edward J McDermott, 'Needed Reforms in the Law of Expert Testimony' (1910) 1 J Am Inst Crim L & Criminology 698; J H Beuscher, 'The Use of Experts by the Courts' (1941) 54 Harvard Law Review 1105.

[276] Considered in Chapter 3.8.

[277] Sir John May, *Interim Report on the Maguire Case* (HC 556, 1990) [1.3]; Sir John May, *Second Report on the Maguire Case* (HC 296, 1992). The *Maguire Seven* case was considered in Justice Wood, 'Expert Witnesses: the New Era' (8th Greek Australian International Legal & Medical Conference, Corfu (2001)); Gary Edmond, 'Constructing Miscarriages of Justice: Misunderstanding Scientifice Evidence in High Profile Criminal Appeals' (2002) 22 OJLS 53; J R T Wood, 'Forensic sciences from the judicial perspective' (2003) 23 Aust Bar Rev 137, 155.

proceedings, or reforms to criminal procedural law to address the 'problems', for two reasons.[278]

Firstly, analysing the 'problems' as they arise, and reforms to procedure, in both civil and criminal proceedings is too big a task for this limited research.

Secondly, party expert evidence in criminal[279] and civil proceedings is different (and therefore difficult to usefully compare) for the following reasons:

- there are special safeguards for the accused in criminal trials because the outcome of a criminal trial is of great importance for the accused [280] and to avoid concerns about State power being abused.[281] Accordingly, criminal trials do not proceed on pure adversarial principles;[282]
- Superior court criminal trials continue to be judge and jury trials at which expert evidence may be more readily admitted and less closely scrutinised;[283]
- the prosecution's expert evidence will often be the only expert evidence in a criminal trial[284] or the power imbalance between the State-funded prosecution and an accused may result in an accused being unable to challenge the prosecution's expert evidence effectively or at all due to a lack of funds;[285]
- prosecution experts in, and forensic services used in connection with, criminal proceedings (such as pathologists and police experts) are often government employees or authorities who may be perceived to be dispassionate and impartial.[286] Further, those experts also often undertake investigatory functions

[278] Party expert evidence in criminal proceedings is considered as part of the context in Chapter 3.8.
[279] See generally the discussion about expert evidence in criminal proceedings in Freckelton, Reddy and Selby (n 255), section 4.4; Sir Brian Leveson, *Review of Efficiency in Criminal Proceedings* (2015), [225]; Deirdre Dwyer, '(Why) Are Civil and Criminal Expert Evidence Difference' (2007) 43 Tulsa Law Review 381.
[280] Criminal Law Revision Committee, *Eleventh Report Evidence (General)* (Cmnd 4991, 1972), 7.
[281] Geoffrey Nettle, 'Speech- Ethics - The Adversarial System and Business Practice' (2004) Victorian Judicial Scholarship 17.
[282] Michael Kirby, 'Expert Evidence: Causation, Proof and Presentation' (2003) 6 TJR 131, 145.
[283] eg The Law Commission, *Expert Evidence in Criminal Proceedings in England and Wales* (LAW COM No 325, 2011) [1.2] and [1.17]; Dwyer, '(Why) Are Civil and Criminal Expert Evidence Difference' (n 279) 382
[284] Gary Edmond, 'Forensic Science Evidence and the Conditions for Rational Evaluation' (2015) 39 MULR 77, 82 (footnote 15 citing Freckelton).
[285] Royal Commission of Inquiry into the Chamberlain Convictions, *Report* (1987) 320; House of Commons Science and Technology Committee (n 286) [154].
[286] Dwyer (n 279) 384 posits that this may mean they are seen as dispassionate and impartial state servants. In the UK in the early 2000s, around 85% of forensic services were delivered by the Forensic Science Service (FSS): House of Commons Science and Technology Committee (n 286) 5-6. A good example is the Forensic Science Service which in the early 2000s was part of the Home Office.

before criminal proceedings are commenced;[287]

- much of the discourse about the 'problems' in the context of criminal trials concerns the potential for, or actual, miscarriages of justice which is not a concern in civil proceedings;[288] and
- forensic science in criminal proceedings is often science developed specifically for, and almost exclusively deployed in, the criminal process (eg fingerprint, voice or facial recognition analysis).[289]

[287] For example, the Forensic Science Service laboratories (serving their local police forces in England) and Metropolitan Police Forensic Science Laboratory, which are referred to in Paul Roberts, 'Science in the Criminal Process' (1994) 14 OJLS 469. See also House of Commons Science and Technology Committee (n 286) section 2.

[288] Ibid; Richard Nobles and David Schiff, 'Trials and Miscarriages: an evolutionary socio-historical analysis' (2018) 29 Criminal Law Forum 167; Chester Porter, 'The Evidence of Experts' (1995) 27 Australian Journal of Forensic Sciences 53; David Bell, 'The Expert Misleads. The Court Follows' (1995) 27 Australian Journal of Forensic Sciences 59; Chris Maxwell, 'Preventing miscarriages of justice: The reliability of forensic evidence and the role of the trial judge as gatekeeper' (2019) 93 ALJ 642.

[289] Dwyer, '(Why) Are Civil and Criminal Expert Evidence Difference' (n 279) 390-391.

Chapter 2. Data and source materials

2.1 Introduction

Data about the 'problems' and the procedural law responses is contained in the vast corpus of expert evidence literature.

The raw material used in this research is predominantly contained in the following categories of source material: case reports; law reform reports; legislation and rules of court; scholarly literature;[290] extrajudicial literature; miscellaneous literature and the limited quantitative research into expert evidence.

2.2 Case reports

Case reports are important primary source materials containing data about individual cases, including the types of party experts; the numbers of party experts; the nature and scope of the party expert evidence or assistance given; judicial statements about party experts and expert evidence (including criticisms of party experts and instances of the 'problems'); and whether or not any of the Party Expert Procedural Rules powers were exercised.

Judicial decisions, including cases reported in the law reports, are highly unrepresentative because reported judicial decisions are only a fraction of the cases decided by courts; and cases decided by courts are only a tiny fraction of the disputes resolved in the shadow of legal rules.[291]

Though professionally prepared law reports first emerged in England from around the middle of the 18th century and in NSW[292] and Victoria[293] from the middle of the 19th century, those reports are nevertheless incomplete for the following three reasons.

Firstly, not all cases were reported.

Secondly, very few interlocutory directions or orders (such as those made on the hearing of a summons for directions) were reported unless there was an appeal which

[290] Discussed above in Chapter 1.3.2
[291] Simon Deakin and Frank Wilkinson, *The Law of the Labour Market: Industrialization, Employment, and Legal Evolution* (OUP 2005) 28.
[292] Council of Law Reporting for NSW, 'History of the Council' 2023) <https://nswlr.com.au/about-history> accessed 23 December 2023.
[293] Early Victorian law reports from this time are available at https://www.austlii.edu.au/au/vic/#.

was reported.[294]

Thirdly, those reports did not often cover civil jury trials which conclude by a brief jury verdict (without reasons).[295] The result is that the vast majority of English, NSW and Victorian civil jury trials before the demise of civil jury trials in the 20th century are unlikely to be reported in a law report at all.

2.3 Law reform reports

England (and to a lesser extent Australia) has a long history of government appointed law reform bodies inquiring into, and reporting on, aspects of the civil justice system. Those law reform bodies' reports are important secondary source materials containing reliable data on the research questions for the following reasons.[296] Firstly, they are likely to accurately reflect collective, generally held, judicial views on the 'problems'. Secondly, some law reform bodies have undertaken detailed inquiries spanning long periods and involving significant consultation and investigations.[297] Thirdly, many modern law reform bodies include specialist members and have dedicated research resources,[298] so their reports are likely to be comprehensively researched.[299]

2.4 Extrajudicial literature

There is a large body of extrajudicial literature on the civil justice system, including the 'problems' (and their negative flow-on impacts on aspects of the justice system), as perceived by judges from time to time.[300] The 'problems' with party experts is a large (possibly the largest) topic covered in the late-20th and early-21st century Australian

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[294] One of the few examples is *Naylor v Preston Area Health Authority* [1987] 1 WLR 958 which is a reported decision of the Court of Appeal in relation to interlocutory an order of Master Turner refusing the plaintiff's application from an order for exchange of medical reports.

[295] David Dyzenhaus and Michael Taggart, *Reasoned Decisions and Legal Theory* (2009), 139. *Folkes* is interesting in that the case report records that the jury found for the defendants but also made detailed observations which accompanied the verdict.

[296] Suzanne Burn, 'The Civil Justice Reforms in England and Wales- Will Lord Woolf Succeed Where Others Have Failed?' (1999) 17 Windsor YB Access Just 221, 222 makes the point that in the 20th century, there have been more than 50 enquiries into, and reviews of, the civil justice system, all looking at 'what must be done' to make the system more effective.

[297] Committee on Supreme Court Practice and Procedure, *Final Report* (Cmd 8878, 1953) para 1; A L Goodhart, 'Law Reform in England' (1959) 33 ALJ 126, 128.

[298] eg the Evershed committee included 3 High Court judges and Professor Goodhart (an Oxford Professor of Jurisprudence); and Ian Freckelton (then a senior law reform officer) and a number of academic consultants assisted in the Australian LRC's 1980s inquiry into the laws of evidence: ALRC (n 269).

[299] eg the commissioners who prepared *Report 109* (n 99) had available to them legal research and writing, research assistance and librarian resources: see *Report 109* (n 99) ix.

[300] See Chapter 4.3.4.

extrajudicial literature.

The extrajudicial literature is important for two reasons. Firstly, judges have authority to determine that the 'problems' exist; and the appropriate responses to the 'problems', by virtue of their central and unique position in the common law adversary system.[301] Though judicial statements can be criticised, in the end judicial texts have authority.[302]

Historical researchers appropriately question the trustworthiness (or accuracy) of data sources by considering, among other things, whether data may be affected by author bias or perceptions of a documented event.[303] Assessing the trustworthiness (or accuracy) of data on the 'problems' in the extrajudicial literature, and determining the weight to be given to it in this research, needs to carefully consider the following matters.

Firstly, judges may be influenced by institutional commitments to their courts and legal institutions and/or other sensitivities.[304]

Secondly, much of the extrajudicial literature comprises extrajudicial speeches given, or papers presented, at non-legal forums which are later re-published in the literature.

Thirdly, the absence of extrajudicial literature critical of party experts from a judge (or group of judges) is not evidence that that judge (or group of judges) does not consider that the 'problems' do not exist.

Fourthly, the extrajudicial literature is not research per se and is unlikely to be peer-reviewed (even when published in a scholarly publication).

Fifthly, much of the extrajudicial literature about party experts has been authored by a small number (percentage) of the total college of judges.

Lastly, an individual judge's opinion (even the most senior judge's opinion) may not be shared by other judges or representative of broader judicial opinion. Some judges expressly acknowledge that their opinions and views are personal and not necessarily

[301] Freckelton, Reddy and Selby (n 255), section 2.2 (page 16).
[302] Jan Smits, *The Mind and Method of the Legal Academic* (Edward Elgar Publishing Limited 2012), 4.
[303] Karen Saucier Lundy, 'Historical Research'.
[304] Gary Edmond, 'Whigs in Court: Historiographical Problems with Expert Evidence' (2002) 14 Yale JL & Human 123, 144-146, 152-153. Edmond, 'Judging Surveys' (n 100) 107-108.

shared by other senior member of the judiciary.[305]

2.5 Miscellaneous publications

Contemporaneous data on the 'problems' in the nature of public editorials and letters to the editor about party expert evidence is also contained in reputable publications like *The Times*; legal trade journals like the *Solicitors' Journal and Reporter* and *The Law Times*;[306] and non-legal trade journals like *The Chemical News*.[307] That data includes criticisms of party experts in specific cases[308] and discussion about Court Expert reforms.[309]

2.6 Quantitative research data

There is no literature which objectively measures the prevalence of any of the 'problems' (including the 'problem' of bias),[310] whether as perceived by judges or otherwise; and the actual extent of the 'problems' (including the 'problem' of bias) on the civil justice system is impossible to calculate.[311]

The first (and only) significant English or Australian quantitative research undertaken to date into the 'problems' in civil proceedings is the late-1990s survey based research into Australian trial judges' attitudes towards expert evidence which was undertaken by Freckelton et al; and analysed in the *Australian Judicial Perspectives on Expert Evidence: An Empirical Study.*[312]

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[305] eg the acknowledgment to this effect in Anthony May, 'Keynote Address' (Costs Conference, Cardiff) and Robert McDougall, 'Expert Evidence' (Institute of Arbitrators and Mediators Australia, 13 February 2004), End Note 2.
[306] eg 'Comments on Cases' (1898) 105 LT 73; 'Expense of Litigation' (1930) 169 LT 439; 'Court Expert' (1934) 177 LT 411.
[307] Discussed in James Oldham, 'Law Reporting in the London Newspapers, 1756-1786' (1987) 31 Am J Legal Hist 177, 181; eg 'The Evidence of "Experts"' (1862) 5 Chemical News 1.
[308] eg 'Editorial', *The Times* (London Tuesday 25 March 1862) and 'Expert Witnesses', *The Saturday Review* (11 January 1862) which discuss the Windham case in detail.
[309] 'Court Expert', *The Times* (21 Jun 1934) Law Report.
[310] Deirdre Dwyer, 'The Effective Management of Bias' (2007) 26 CJQ 57, 58 (footnote 6).
[311] *Civil Justice Review Report* (n 42) 10, 21 [26], 54, 99, 257, 278, 280 and 484.
[312] Freckelton, Reddy and Selby (n 255). That study is considered at Chapter 4.3.2.

Chapter 3. Context

3.1 Introduction

The sociologist Paul Pierson explains how temporal context is important in social science research and historic analysis. He discusses how the significance of 'variables' can be distorted if disconnected from temporal context; how systematically locating particular events in their temporal sequence of events and processes can greatly enrich an understanding of complex social dynamics (including identifying patterns); and how political scientists have long stressed that explanation often requires temporal ordering.[313] That echoes Thelan's contention that sense can only be made of changes to the form and functions of institutions (rules) when they are considered in the context of a larger temporal framework which includes the sequences of events and processes that shaped their development.[314]

Carol Jones has also argued that the history of the expert witnesses can only be understood having regard to the context of the competition between the science and law professions for social decision-making power[315] and developments in the English legal system.[316] Similarly, Edmond has emphasised the importance of temporal context when he posited that 'All laws, all rules and all procedures have histories'.[317]

Pierson, Thelan and Jones' explanations, contentions and arguments practically demonstrate why context is important in this research into the complex legal change relating to the 'problems' and the procedural rules which address those 'problems'.

Further, temporal context is particularly relevant in this research because Chapter 1.3.3 identified two gaps in the literature ie that the 'problems' and the Party Expert Procedural Rules tend to be considered as isolated events/topics with little regard to any broad temporal or evolutionary context; and also that there is no systematic analysis of the interaction between the evolving 'problems' and the Party Expert Procedural Rules reforms. To address those gaps, this research seeks to include relevant temporal contexts in the analysis in Chapters 4 to 7 to more deeply analyse

[313] Pierson (n 163) 1. See also Paul Pierson, 'Not Just What, but When: Timing and Sequence in Political Processes' (2000) 14 Studies in American Political Development 72.
[314] Thelan (n 110) 296. Institutions are discussed in Chapter 1.5.3.
[315] Jones (n 86) 11.
[316] Ibid 18-19.
[317] Edmond, 'Secrets of the Hot Tub' (n 108) 52.

the data on the evolution of the 'problems' and the procedural law responses; and move from 'snapshots to moving pictures'.[318] This Chapter 3 sets out the relevant contexts which will be incorporated into the analysis in Chapters 4 to 7.

This Chapter 3 will focus on the temporal juridical context of the broader civil justice system and civil procedure. Context is analysed in this stand-alone Chapter 3, rather than separately as part of other Chapters, because that temporal juridical context is relevant to all the following Chapters.

The structure of this Chapter 3 is as follows.

Chapter 3.2 will commence the contextual analysis by considering the similarities and differences between the English and Australian juridical systems. Similarities and differences are likely to be particularly important in the comparative analysis in Chapter 6.5.

Chapters 3.3 and 3.4 will next detail the context caused by changes to civil juries and the broader adversarial system. Both Chapters will adopt a largely chronological structure, commencing with the English changes (which were the earliest to occur); and then the later Australian changes.

Chapter 3.5 will discuss the juridical and non-juridical context associated with the rise in importance, and increasing demands, of science in England.

Chapters 3.6 to 3.8 will separately consider the English and Australian contexts concerning the discontent with the civil justice system; the changing nature of civil litigation; and criminal litigation and the criminal justice system.

Throughout this Chapter the English context will be considered first because England has the longest and most extensive civil justice system history and English civil justice system developments often heavily influence Australia's. The separate consideration of the English and Australian contexts will also facilitate the comparative analysis in Chapter 6.5.

This Chapter will largely be descriptive. It aims to briefly describe the relevant contexts and introduce how context is relevant to the 'problems' and the procedural rules

[318] Pierson (n 163) 1-2.

reforms.

3.2 English and Australian juridical systems - differences and similarities

The history of Australia (which commenced when the early English colonists arrived in Australia in the 18th century), and its juridical system, is much shorter; and Australia's legal history as a field of scholarship is relatively new.[319]

Though many English common law institutions became Australian institutions,[320] Australia never had the separate court system that existed in England before the English Judicature Act reforms or the complexity that system created.

By the mid-19th century the Supreme Courts of both NSW and Victoria had been established as courts of record with common law, equitable, ecclesiastical and criminal jurisdiction. English Superior Court practice and procedure was initially adopted. For example, early Supreme Court of Victoria rules of practice provided that the practice and manner of proceedings of the English Superior Courts in 1853 were adopted so far as the circumstances and condition of Victoria require and admit.[321]

Throughout the 19th century, Australian States routinely adopted new English legislation through local legislation (though not necessarily in identical terms).[322] For example, Victoria's Common Law Procedure Statute 1865 (Vic) adopted the English system of procedure in the common law courts established by the English Common Law Procedure Act 1854.[323]

Australian Courts closely (if not slavishly) followed superior English Courts' decisions though the High Court of Australia was never technically bound by the doctrine of precedent to follow House of Lords' decisions.[324] That practice of following English decisions continued even after the Commonwealth of Australia and the High Court of

[319] Alex Castles was perhaps the most prominent and authoritative Australian legal historian.
[320] Such as trial by jury as the method of trial for serious criminal offences: *Cheattle v The Queen* (1993) 177 CLR 541, 549.
[321] Rules for Regulating the Pleading and Practice, and Establishing the Amount of Fees, Costs and Charges, to be Paid in the Supreme Court of the Colony of Victoria (Vic), Chapter 3 r1 and chapter 5 r1.
[322] eg Common Law Procedure Act 1853 (NSW) A prominent exception to this was that NSW did not implement the Judicature Acts.
[323] Royal Commission, *Report of Royal Commission for inquiring as to the means of avoiding unnecessary delay and expense, and of making improvements in the administration of justice and in the working of the law* (No 15 9070, 1899-1900), vii.
[324] Zelman Cowen, 'Binding Effect of English Decisions upon Australian Courts' (1944) 60 LQR 678 undertakes a detailed analysis of how the doctrine of precedent operated.

Australia were established in 1900. As the Australian judge (Kirby J) has described it 'The House of Lords, the Privy Council and the English Court of Appeal spoke and we listened' and 'the habits of Empire inculcated in Australian lawyers a high measure of respect for just about everything that came from the Imperial capital'.[325]

Until well into the 20th century Australian judges, lawyers and academics referred to English legal books; closely followed English law developments and English Courts' judgments; and looked to England for law reform initiatives.[326] Decisions such as *Skelton v Collins*[327] strongly encouraged Australian courts, including the High Court of Australia, to follow House of Lords' decisions until well into the 1960s so Australian departures from English judgments were relatively few until well into the 1980s.[328] The standard practice of Australian Courts following the English lead on civil procedure is demonstrated by the Victorian Supreme Court's explanation that when judges make rules of court they consider the English rules of Court; adopt those, with or without modification, which they consider suitable for use in the Victorian Supreme Court; and reject others.[329]

It was not until the second half of the 20th century that Australian courts systematically followed the Australian common law as declared by the High Court of Australia[330] and Australian judges became less deferent to English courts.

As between NSW and Victoria, NSW often takes the lead in civil procedure issues and reforms with Victoria sometimes following NSW's lead. Good examples of that are the NSW Commercial Court which was established more than 70 years earlier than Victoria's; NSW's major civil procedure reforms in UCPR (NSW) which were implemented earlier than Victoria's Civil Procedure Act 2010; and NSW's expert witness code of conduct which was implemented earlier than Victoria's.

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[325] Kirby, 'The Lords, Tom Bingham and Australia' (n 384).
[326] Gary Edmond, 'After Objectivity: Expert Evidence and Procedural Reform' (2003) 25 SLR 131, 161. For practical illustrations see F H Campbell, 'Science and the Law ' (1928) 2 L Inst J 73; 'The Court Expert' (1934) 8 ALJ 157; 'Adoption of "New Procedure" Rules.' (1934) 7 ALJ 401; Moodie (n 76).
[327] *Skelton v Collins* (1966) 115 CLR 94, 134-138.
[328] Michael Kirby, 'Is Legal History Now Ancient History?' (2009) 83 ALJ 31.
[329] *Anglo-Pacific Trading Co Pty Ltd v The Steadfast Insurance Co Ltd* [1955] VLR 424, 429.
[330] See *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520. The right to appeal from an Australian State Supreme Court to the Privy Council in matters governed by State law remained until 1986.

3.3 Changes to civil juries

Until the late-15th or early-16th century, most English juries came from the location where the dispute arose; and trials usually involved no oral evidence from witnesses.[331] Jurors (who were sometimes referred to as 'next Neighbours') knew the parties and the facts and were expected to use their personal knowledge.[332] From around the late-15th or early-16th century juries changed from finding facts from their own first hand personal knowledge to finding facts from evidence given by witnesses.[333]

Some early juries included, or were totally made up of, 'expert' jurors selected because they had relevant knowledge or expertise.[334] That was a type of special jury[335] and is often called an 'expert jury' in the modern literature. Expert juries were unique because the expert jurors' own knowledge formed at least part of the Court's knowledge on matters within the jury's remit.[336] Expert juries drawn from a relevant trade were common in London proceedings concerning trade regulations breaches.[337] The types of expert juries varied according to nature of a proceeding; and included juries of matrons (used since as early as the 13th century in both criminal and civil cases to determine whether or not a woman was pregnant[338]), merchants, attorneys, tradesmen, cooks, fishmongers, booksellers and printers.[339] Expert juries decided entire cases by a verdict or particular matters only (such as whether an accused was pregnant). Expert juries may also have provided advice to the judge.[340]

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[331] Discussed in W S Holdsworth, *A History of English Law*, vol 1 (1903),146-166; James Oldham, 'The Origins of the Special Jury' (1983) 50 Uni Chicago LR 137; The Honourable Mr Justice Wallace, 'Speedier Justice (and Trial by Ambush)' (1961) 35 ALJ 124. Jurors were the witnesses: Jones (n 86) 23.

[332] W S Holdsworth, *A History of English Law*, vol 1 (1903). See also, Stephan Landsman, 'Of witches, madmen, and products liability: An historical survey of the use of expert testimony' (1995) 13 Behav Sci & L 131, 134; Sir Roger Ormrod, 'Evidence and Proof Scientific and Legal ' (1972) 12 Medicine Science and the Law 9 15 (though Ormrod does not indicate how people with prior knowledge were selected for, and included on, a jury).

[333] W S Holdsworth, *A History of English Law*, vol 1 (1903); Lloyd Rosenthal, 'The Development of the Use of Expert Testimony' (1935) Law & Contemp Probs 403, 406-408.

[334] Oldham (n 331) 164.

[335] James Oldham, 'The Origins of the Special Jury' (1983) 50 Uni Chicago LR 137.

[336] H A Hammelmann, 'Expert Evidence' (1947) 10 MLR 32, 35.

[337] Hand (n 50).

[338] James Oldham, 'The Origins of the Special Jury' (1983) 50 Uni Chicago LR 137 171; Ian Barker, *Sorely tried: democracy and trial by jury in New South Wales* (Francis Forbes Lectures, 2002), 221 discusses the small number of Australian cases in which a jury of matrons was summonsed.

[339] Oldham (n 331).

[340] See Dwyer, *Judicial Assessment* (n 67) 262 which refers to the statement in *Pickering v Barkley* (1658) Style 132, 82 ER 587 that 'a certificate of merchants' which was read in court.

Merchant juries were a type of expert jury commonly used in commercial litigation between merchants because the parties and the courts considered that merchant jurors would have better knowledge of the commercial matters in dispute.[341] Lord Mansfield is said to have 'trained a corps of jurors as a permanent liaison between law and commerce'.[342] Merchant juries were likely ordered when all parties consented and the parties' lawyers would sometimes cooperatively select suitable jurors.[343]

Trial by a judge and civil jury was the only available mode of English common law civil trial until the mid-1850s.[344] Civil jury trials commenced declining from the 19th century,[345] with that decline accelerating in the 20th century.[346] That decline was mainly as a result of RSC 1883, O30 (which gave the Court power to order judge only trials); and legislative reforms of the first half of the 20th century[347] (which gave the Court an almost unfettered discretion to order judge only trials).[348] By around the first half of the 20th century, the English civil jury had gone from 'an essential principle' of English law and a 'bulwark of liberty'[349] to effectively non-existent.

Unlike England, expert juries were only infrequently used in Australia.[350] Though civil jury trial was the ordinary mode of trial in both NSW and Victoria, those jurisdictions followed the English civil jury decline in the second half of the 20th century[351] (largely

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[341] *Hill* (1646) 21 Car B r v.
[342] James Oldham, *English Common Law in the Age of Mansfield* (The University of North Carolina Press 2004), 20. *Bremer Handelsgesellschaft m.b.H. v. Vanden Avenne-Izegem P.V.B.A* [1977] 1 Lloyd's Rep 133, 160-1 refers to them as 'Lord Mansfield's juries of commercial men'.
[343] Oldham (n 342) 23. A more recent species of the special merchant jury is the 'City of London jury' which is essentially comprised of businessmen from the City of London. 'City of London juries' were used into the 20th century in actions in the Commercial Court where notice was given for trial with a London special jury until they were abolished by the Courts Act 1971: *Report 109* (n 99) [2.6-27].
[344] Common Law Procedure Act 1854, ss1 and 3 for the first time allowed judge only trials (by consent); and the court to order that matters of mere account be referred to arbitrators appointed by the parties or officers of the court.
[345] Discussed in Conor Hanly, 'The decline of civil jury trial in nineteenth-century England' (2005) 26 JLH 253 (who principally traces the decline of civil jury trials to the Common Law Procedure Act 1854); Oldham (n 331); Oldham (n 342) and Wallace (n 331).
[346] This effective demise of civil jury trials was not uniform across England and Australia and jury trials continue to be an option and do occur for some civil actions (predominantly trials in personal injuries cases).
[347] Administration of Justice Act 1920, s2(1) (considered by the Court of Appeal in *Ford v Blurton* (1922) 38 TLR 805) and Administration of Justice (Miscellaneous Provisions) Act 1933, s6.
[348] Julius Stone, 'The Decline of Jury Trial and the Law of Evidence' (1946) 3 Res Judicatae 144; Ross Cranston and others, *Delays & Inefficiencies in Civil Litigation* (1985).
[349] *Ford v Blurton* (1922) 38 TLR 805 (per Lord Atkin).
[350] Alana Piper, 'The special jury in Australia' (2015) 39 Criminal Law Journal 218 is the most comprehensive analysis of the use of expert juries in Australia. See also Barker (n 338) which discusses NSW juries of matrons.
[351] As to jury trials in Victoria, see *Report of Royal Commission* (n 323) which proposed the abolition of jury trials for most civil proceedings; Young (n 262) 83 makes the point that until 1965, almost all civil

as a result of statutory intervention[352]). By the mid-1960s civil jury trials were effectively abolished for NSW motor accidents actions (then a large proportion of NSW civil actions) to reduce delay and cost; however Victorian civil juries remained entrenched until well into the 1980s.[353]

The practical abolition of civil juries in England, NSW and Victoria allowed changes to civil procedure and trial dynamics[354] which were not possible while jury trial remained the norm;[355] and changed the 'insulated' position of a judge in a judge and jury civil trial.[356] The change in the position of a judge arose because in a judge and jury trial the judge's function is largely limited to deciding disputes about the admissibility of the evidence and summing up for the jury (with the jury deciding the conflicting evidence, including party expert evidence, and delivering an oral unreasoned verdict[357]); whereas in a judge only trial the judge must decide between the conflicting party expert evidence and deliver a public, reasoned judgment (including reasons for how the conflicting party expert evidence was decided).[358] A practical effect of the requirement for the judge to deliver a public, reasoned judgment is that any 'problems' with party experts, as perceived by a judge in a particular case, are more likely to be exposed in judgment; and documented in any written report or other record of the case. Edmond posits the interesting point that there are institutional advantages for judges to maintain concerns about party experts where judges have to regularly decide between experts

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cases at common law in the New South Wales Supreme Court were heard by a judge and a jury of four; Sir Richard Eggleston, 'What is Wrong with the Adversary System' (1975) 49 ALJ 428 makes the point that, by the mid-1970s, only Victoria 'still clings to jury trial for ordinary civil actions'. In NSW until 1965, almost all common law civil cases in the New South Wales Supreme Court were heard by a judge and a jury of four: Young (n 262) 83. Victorian LRC, *Jury Empanelment* (2014), [2.25-2.26] confirms for example that civil jury trials are significantly more common in Victoria than in other Australian jurisdictions but nonetheless make up a very small proportion of Victorian Court cases. Cranston and others (n 348) makes the point that in the 1980s jury trials in personal injuries proceedings in NSW and Victoria (but not elsewhere in Australia) were still common. Evatt, 'The Jury System in Australia' (1936) 10 ALJ 49 which makes the point that, at that time, civil litigation will almost always be tried by a judge sitting alone without a jury.

[352] *Pambula District Hospital v Herriman* (1988) 14 NSWLR 387; *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478, [32-42]

[353] Cranston and others (n 348) [13.14-13.17]; Barker (n 338) Ch 11 (which discusses the demise of the NSW civil jury from the 1960s in detail and how that was opposed by the NSW Bar Association); I R Scott, J R Pullen and A J Robbins, *Civil Justice Project: Preliminary Study* (1982) 120 [3.30].

[354] Gary Edmond, 'After Objectivity: Expert Evidence and Procedural Reform' (2003) 25 SLR 131, 161.

[355] J. A. Jolowicz, 'The Woolf Report and the adversary system' (1996) CJQ 198, 201.

[356] *Simpson v Wilson* (1862) The Chemical News (VII no 161), 54 exemplifies the 'insulated' position of the judge with Cockburn CJ lamenting in that patent case involving contradictory expert evidence that he was 'glad the jury, and not he, had to decide the case'.

[357] *R v Silverlock* [1894] 2 QB 766, 771; *Chamberlain v R (No 2)* (n 19) 558 which both make that point in the criminal jury context.

[358] Ormrod (n 332) 18.

and publicly account for their decision making.[359]

3.4 Development and demise of the adversarial system

From around the 18th century, judges permitted counsel to defend felony defendants which both fuelled the 'adversarial revolution' and allowed the parties, through their lawyers, to control the evidence.[360] Trials evolved into adversarial contests in which the parties (or their lawyers) produced the evidence and juries decided facts on the parties' evidence. In time, adversary procedures came to dominate[361] and contests developed into what is referred to in the modern literature as the 'adversarial system'.

The adversarial system, which is embodied by the civil jury,[362] incorporates two distinct principles. The first principle is party autonomy under which the parties pursue or dispose of their legal rights as they choose; and the parties define their dispute. The second is party prosecution under which the parties choose how their case proceeds and the proof (evidence) they will present; and the judge's role is largely limited to passively evaluating the merits of the case as and when presented to the judge.[363] The associated principle of party control covers elements of both party autonomy and prosecution.[364]

The 'pure' adversarial system shaped, and limited, developments in civil procedure. Jury trials, which were essentially one continuous oral hearing at which all the evidence is adduced (including oral evidence from party expert witnesses), continued.[365] Experts were transformed from part of an expert jury or a Court adviser

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[359] Edmond, 'Secrets of the Hot Tub' (n 108) 63.

[360] Tal Golan, 'The History of Scientific Expert Testimony in the English Courtroom' (1999) 12 Science in Context 7, 9; Deirdre Dwyer, 'Expert Evidence in the English Civil Courts, 1550–1800' (2007) 28 JLH 93, 113 citing Langbein; Richard Nobles and David Schiff, 'Trials and Miscarriages: an evolutionary socio-historical analysis' (2018) 29 Criminal Law Forum 167, 185 and 190-197 (which makes the point that even as late as the early 18th century defendants in criminal trials were not allowed to have lawyers present their defence); Nettle (n 281) which also posits that Counsel was allowed in trials for treason by the statute from 1695.

[361] Stephan Landsman, 'One Hundred Years of Rectitude Medical Witnesses at the Old Bailey' (1998) 16 Law & Hist Rev 445.

[362] J. A. Jolowicz, 'The Woolf Report and the adversary system' (1996) CJQ 198, 210.

[363] ALRC (n 269) [43]; *Doggett v The Queen* (2001) 208 CLR 343, 346; Sir Jack I H Jacob, *The Fabric of English Civil Justice* (Stevens 1987)13-15.

[364] Sir Jack I H Jacob, *The Fabric of English Civil Justice* (Stevens 1987) 13.

[365] John Phillips, 'The calling of expert evidence in chief: a new approach' (1989) 63 ALJ 545 for example describes a jury trial as essentially a continuous oral hearing. See also Review Body on Civil Justice, *Report* (Cm 394, 1988), 14 [76]; Sir Jack I H Jacob, *The Fabric of English Civil Justice* (Stevens 1987) 19-20 and 30; *Butera v Director of Public Prosecutions (Vic)* (1987) 164 CLR 180, [15-17] which explains (1) the basis for the rule of procedure that at a common law jury trial oral evidence from witnesses is adduced and (2) the perceived dangers of written records being provided to jurors

to witnesses retained by a party to advance a party's case.[366] A party was not required, and could not be compelled, to disclose the identity of its witnesses (or their evidence) before trial because that would provide undue advantages.[367] Also, surprise and technicalities were permissible weapons.[368]

The new robust, mandatory and detailed English summons for directions procedure, which was introduced in the 1950s to give the Court some early control over a proceeding, largely failed by the 1970s.[369]

The English adversarial system continued largely unabated, and flourished, well into the 21st century with the 'cards on the table' approach to litigation still embryonic; the pre-trial service of expert reports both uncommon[370] and often resisted by the lawyers;[371] and pre-trial case management virtually non-existent outside the specialist lists. As late as the end of the 1980s the parties were free to slug it out (without interruption and regardless of cost and time); and the trial judge had a largely passive role of judge and referee at a boxing match with the limited function of enforcing the rules and deciding the winner at the end of the bout.[372]

An early public, formal step taken by the English Courts towards adopting modern case management principles[373] was the Lord Chief Justice and the Vice-Chancellor jointly publishing the 1995 titled *Practice Direction (Civil Litigation: Case Management)*.[374] That Practice Direction provided (among other things) that it was necessary for first instance judges to 'assert greater control' over preparation for, and

(including undue weight being given to them by the jury).
[366] Golan, 'The History of Scientific Expert Testimony in the English Courtroom' (n 360).
[367] *In Re H. W. Strachan (An Alleged Lunatic)* [1895] 1 Ch 439, 445; Neil Williams, *Supreme Court Civil Procedure* (Butterworths 1987), [17.33].
[368] Sir Jack I H Jacob, *The Fabric of English Civil Justice* (Stevens 1987) 14-15.
[369] See n 691.
[370] Perhaps other than in personal injuries actions.
[371] A S Diamond, 'The Summons for Directions' (1959) 75 LQR 41 51. Scott, Pullen and Robbins (n 353). Neil Williams, *Supreme Court Civil Procedure* (Butterworths 1987), [17.33] posits that under the adversarial system a party is entitled to first disclose the identity of its witnesses (and the evidence they will give) at trial.
[372] Lightman (n 53) 388; *Jones v National Coal Board* [1957] 2 QB 55; JUSTICE, *GOING TO LAW A Critique of English Civil Procedure* (1974) 16; Joyce Plotnikoff, 'The Quiet Revolution: English Civil Court Reform and the Introduction of Case Management' (1988) 13 The Justice System Journal 202, 202-203 makes the point that judges first became interested in case control following Lord Woolf's Access to Justice inquiry
[373] The English Summons for Directions procedure had long provided a form of case management – see Rules of the Supreme Court (Summons for Directions etc) 1954; A S Diamond, 'The Summons for Directions' (1959) 75 LQR 41.
[374] Practice Direction Civil Litigation: Case Management.

the conduct of, cases to reduce costs and delays.

The English civil justice system 'crisis' encouraged (perhaps drove) the English judiciary to adopt active judicial case management which had been used since the late-19th century by the 'interventionist' Commercial Court judges,[375] since the 1920s by Official Referees[376] and since the 1970s by American judges.[377] In 1991 Lord Donaldson MR reflected on judicial case management in the previous quarter of a century as a sea change in legislative and judicial attitudes towards the conduct of litigation by procedures designed to identify the real issues in dispute; and enable each party to assess the relative strengths and weaknesses of its own, and its opponent's, case well before trial.[378] A complete, Court-wide judicial case management system was achieved by the CPR in the late-1990s.

Genn has described judicial case management as requiring the judiciary to 'be less passive, roll up their sleeves and get stuck into becoming case managers';[379] but also warned that judicial case management increases judicial discretion and judicial power.[380]

Early, active case management undermined the pure adversarial system and facilitated the Party Expert Procedural Rules reforms which depended on two things: Courts having a procedural mechanism to give early pre-trial directions about the preparation of party expert evidence and the conduct of party experts; and parties and party experts being subject to obligations under the Party Expert Procedural Rules, such as the Independence Rules, from an early time.[381]

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[375] Discussed in Stringer (n 452) and Lord Justice Hobhouse, 'The interventionist judge' (1994) 60 Arbitration 86.
[376] Discussed in M P Reynolds, 'Caseflow Management: A Rudimentary Referee Process, 1919-70' (PhD, The London School of Economics and Political Science 2008).
[377] Elliott (n 52) sets out the development of managerial judging in America (and its issues) as at 1986. Bernard Cairns, 'Lord Woolf's Report on Access to Justice: an Australian perspective' (1997) 16 CJQ 98, 100 refers to the related concepts of 'case flow management' and 'managerial judging'. See also Ian Scott, 'Caseflow Management in the Trial Court' in AAS Zuckerman and Ross Cranston (eds), *Reform of Civil Procedure, Essays on 'Access to Justice'* (Clarendon Press 1995) in Adrian Zuckerman and Ross Cranston (eds), *Reform of Civil Procedure. Essays on 'Access to Justice'* (Clarendon Press 1995) and Ian Scott, 'Case management in the trial court' (1995) 14 CJQ 92.
[378] *Mercer v. Chief Constable of Lancashire* [1991] 1 WLR 367, 373. Compare with Sir Jack I H Jacob, *The Fabric of English Civil Justice* (Stevens 1987) 106 which indicates that in the late 1980s there was only a 'growing acceptance' that the Court should play a more active role at the stage before the trial.
[379] Genn, *Judging Civil Justice* (n 252) 126.
[380] Ibid 149.
[381] Edmond, 'Secrets of the Hot Tub' (n 108) 56.

As was the case in England, in Australia the unconstrained 'pure' adversarial system flourished until well in the second half of the 20th century, including minimal judicial case management and trial by ambush.[382] The latter part of the second half of the 20th century saw a gradual, broad-based shift away from the traditional common law adversarial system as a result of what Sir Anthony Mason described as the 'erosion of faith in the virtues of adversarial justice as exemplified in the system of court adjudication.'[383]

A number of senior Australian judges called for active judicial case management in the late-1950s and early-1960s. Sir Garfield Barwick (as Barwick CJ then was) called for the introduction of active judicial case management based on the American model in 1958.[384] In 1961 the Supreme Court of New South Wales judge (Wallace J) similarly called for elements of such a system in the early-1960s.[385] In 1963 and 1965 the Chief Justice of Tasmania published 2 papers setting out detailed parameters for a recommended active judicial case management system (the 1965 paper following his study tour to America).[386]

From the mid-1980s to the 1990s active judicial case management was implemented in the Australian superior courts in large part in response to the evolving civil and criminal justice 'crises'.[387] A NSW Chief Justice described the thrust of case management as the Court accepting increased responsibility for ensuring that matters are made ready for trial and that trials focus on the real issues and are conducted

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[382] John P Hamilton, 'Thirty years of civil procedure reform in Australia: A personal reminiscence' (2005) 26 Aust Bar Review 258; Ruth McColl, 'The Way Forward – An Australian Perspective' (Civil Litigation in Crisis – What Crisis? 2008), [14] (which also makes the point that the adversarial system proper flourished in NSW prior to the introduction of the Supreme Court Act 1970 (NSW))

[383] Anthony Mason, 'The Future of Adversarial Justice' (7th Annual Australian Institute of Judicial Administration Conference & August 1999).

[384] Sir Garfield Barwick, 'Courts, Lawyers, and the Attainment of Justice' (1958) 1 U Tas LR 1.

[385] Wallace (n 331).

[386] S C Burbury, 'The Wind of Change in the Administration of Justice' (1963) 6 U WA LR 163; Sir Stanley Burbury, 'Modern Pre-trial Civil Procedure in the USA' (1965) 2 U Tas LR 111

[387] Ted Wright, 'Australia: A Need for Clarity' (1999) 20 Justice System Journal 131, 140. Judicial case management principles as applied in the NSW Supreme Court were described in Hon Mr Justice J R T Wood, 'Case management in the Common Law Division of the Supreme Court of New South Wales' (1991) 1 JJA 71. See also (in date order) Marks (n 39); The Hon Justice Davies and S A Sheldon, 'Some Proposed Changes in Civil Procedure: Their Practical Benefits and Ethical Rationale' (1993) 3 JJA 111; Hobhouse (n 375); D A Ipp, 'Judicial intervention in the trial process' (1995) 69 ALJ 365; Ted Wright, 'Australia: A Need for Clarity' (1999) 20 Justice System Journal 131,; The Honourable JJ Spigelman, 'Just, Quick and Cheap A Standard for Civil Justice ' (Address for the Opening of the Law Term Sydney, 31 January 2000); Sackville (n 490); J J Spigelman, 'Case Management in New South Wales' (Annual Judges Conference Kuala Lumpur, Malaysia 22 August 2006).

expeditiously.[388]

Australian judicial case management was initially introduced through the specialist, judge-managed Lists which were established by Australian superior courts along the lines of the English Commercial Court from the 1970s. In the 1970s new specialist, judge-managed Building Cases and Commercial Causes Lists were established in the Victorian Supreme Court; and in the 1980s similar Lists were established in the NSW Supreme Court, including a Building and Engineering List.[389] The Judges in Charge of those specialist Lists were early adopters of judicial case management principles which were often detailed in Practice Notes.[390] Extensive case management powers were eventually given to all Divisions of the NSW Supreme Court by rules of court made in December 1999.[391] The NSW Professional Negligence List, which was established in 1999, was specifically founded on hands-on case management.[392]

Initial Australian judicial resistance to case management was based on divided judicial attitudes, including that a judge's only role is an umpire who keeps the ring; a lack of interest in case management; and concerns that the professed benefit of reducing costs has not been conclusively demonstrated.[393] By the late-1990s Australian judges were mostly converts to judicial case management.[394]

In 2002 Sackville J noted that the 'most obvious and frequently noticed change is that Australian courts now actively manage their caseloads'.[395] Hamilton J made the point when reflecting on changes in the NSW Supreme Court in the 30 years to 2005 that case management had progressed from occurring only in specialised areas of the court (such as the Commercial List) to almost all proceedings across the Courts.[396]

3.5 Increasing importance and demands of science

From around the late-18th century when the Industrial Revolution commenced in

[388] Spigelman, *Just, Quick and Cheap* (n 387).
[389] Supreme Court Rules (Amendment No 163) 1985 (NSW), Practice Note 35 1985 (NSW).
[390] For example, Practice Note No 81 1993 (NSW); Practice Note No 5 1993 (Vic).
[391] See the new Pt 26, r3.
[392] The Honourable Justice Abadee, 'The New Professional Negligence List - A Hands-On Approach to Case Management' (1999) 11 (4) Judicial Officers Bulletin 25.
[393] Mason (n 383) 12 and 140 for a discussion on the bases on which case management was resisted.
[394] Ibid 10. Ted Wright, 'Australia: A Need for Clarity' (1999) 20 Justice System Journal 131, 140 makes the point that after 10 years everyone is pretty relaxed about case management.
[395] Sackville (n 490) 6.
[396] Hamilton (n 382) 262.

England,[397] scientists became increasingly prominent and useful within England's increasingly industrialised and urbanised society[398] in what became 'an heroic age for the expansion of science into areas of public affairs, education, and industry where its authority had hitherto carried little weight.'[399] By the late-18th or early-19th century experts were increasingly acting as professionals;[400] experts had become central to England's booming economy; and the legal use of scientific experts had expanded and the courts had become more dependent on them.[401] In this Industrial Revolution era, scientists also increasingly became members of, and participated in, respected learned societies such as the Royal Society, the Society of Arts, the Chemical Society and the Society of Engineers. The two engineer experts in *Folkes* (Smeaton and Mylne) are good examples: both were Fellows of the Royal Society; and Smeaton was also a founder and leader of the Society of Engineers.[402] Membership and participation in learned societies allowed for the better exchange of knowledge and ideas between scientists, including through publications like *Philosophical Transactions*[403] and *The Chemical News*;[404] increased the general status of scientists; and allowed scientists to become better organised.

The late-18th and 19th centuries were a boom time for scientific expert witnesses in at least three respects. Firstly, scientific experts were intrinsically involved in preparing the many patent applications of this period.[405] Secondly, scientific experts often gave expert evidence before parliamentary committees in support of promoters of private bills for infrastructure work (such as water supply, land drainage work and railways).[406]

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[397] Tal Golan, 'Revisiting the History of Scientific Expert Testimony' (2008) 73 Brooklyn Law Review 879.
[398] Golan, 'The History of Scientific Expert Testimony in the English Courtroom' (n 360) 14-15.
[399] Christopher Hamlin, 'Scientific Method and Expert Witnessing Victorian Perspectives on a Modern Problem' (1986) 16 Social Studies of Science 485, 488. Golan, 'The History of Scientific Expert Testimony in the English Courtroom' (n 360) suggests the expansion of science may have occurred earlier than the late 19th century.
[400] David Miller, 'The usefulness of natural philosophy: the Royal Society and the culture of practical utility in the later eighteenth century' (1999) 32 The British journal for the history of science 185, 188 refers to the late 18th century 'newly professionalizing civil engineers'.
[401] Hamlin (n 399) 488-489; Golan, 'The History of Scientific Expert Testimony in the English Courtroom' (n 360) 15; Golan, 'Revisiting the History of Scientific Expert Testimony' (n 397) 886.
[402] David Miller, 'The usefulness of natural philosophy: the Royal Society and the culture of practical utility in the later eighteenth century' (1999) 32 The British journal for the history of science 185, 188-189.
[403] A learned scientific journal published by the Royal Society of London.
[404] Another learned scientific journal of practical chemistry.
[405] Miller (n 400) provides examples of the roles which engineers and scientists had in patents and patent litigation in the late 18th century.
[406] This type of evidence is discussed in Robert Angus Smith, 'Science in our Courts of Law' (1860) 8

These have been described as the 'theatres for trading [scientific] evidence'.[407] Thirdly, the mid to late-19th century was also a boom time for scientists in the role of expert scientific witnesses in civil trials, in part as a result of Industrial Revolution cases involving technology and science issues[408] (such railway construction[409] and increasingly complex patent litigation[410]). In the 1920s Tomlin J made the point that it is open to the parties to introduce a string of experts in almost every case.[411]

Jones argues that there was a real possibility that experts could have usurped the role of judges and displaced the law as the touchstone of social order in the 19th and early 20th centuries.[412]

Scientists themselves also became concerned about their role as party expert witnesses. By the 1860s some scientists were calling for experts to be given independent positions in the courts (rather than witnesses for a party); scientists to not act as advocates; judges to sit with experts/scientists as assessors; and the evidence of scientists to be in writing to ensure they could give full and complete evidence independently of the influence of advocates and parties.[413] An 1860s article in the *Solicitors' Journal and Reporter* referred to expert evidence for some years having been a standing topic of dissension between some scientists and lawyers.[414]

There were also calls by litigants for the role of experts to change from witnesses to independent Court advisers. An early-1930s subcommittee of a Chamber of

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The Journal of the Society of Arts 135, including the 'Discussion' which followed the reading of Smith's paper.

[407] Smith (n 406) (see the discussion by Mr Chadwick following).

[408] Golan, 'Revisiting the History of Scientific Expert Testimony' (n 397) 880.

[409] The Right Hon Lord Justice Lawton, 'The Limitations of Expert Scientific Evidence' (1980) 20 Journal of the Forensic Science Society 237. Lawton described the experts of that time as rapacious and lacking in expertise.

[410] The 1865 Patent Commissioner's Report describes patent litigation, including the role of experts: Patent Commissioners, *Report of the Commissioners Appointed to Inquire into the Working of the Law Relating to Letters Patent for Inventions* (C (1st series) 5974, 1865). Patent litigation practice and procedure was altered by the Patents, Designs, and Trade Marks Act 1883. The prominence of expert witnesses in patent litigation in the 19th century is demonstrated by a search for 'expert witness' in the specialist Reports of Patent, Design and Trade Mark Cases which returns a large number of cases involving expert witnesses. Miller (n 400) includes examples of the roles which engineers and scientists had in patents and patent litigation in the late 18th century and the nature of patent litigation in the late 18th century.

[411] *Graigola Merthyr Co v Swansea Corporation* (1928) 1 Ch 31 .

[412] Jones (n 86) 96.

[413] eg Smith (n 406); 'The Evidence of Experts' (1861) 6 Solic J & Rep 847, 848; 'The Evidence of "Experts"' (1862) 5 Chemical News 1.

[414] 'The Evidence of Experts' (1861) 6 Solic J & Rep 847.

Commerce proposed that, in commercial cases, assessors should sit with the judge as adviser (like Trinity House Elder Brethren in Admiralty cases); and no party expert evidence should be given in ordinary cases.[415]

In the post-World War 2 period manpower shortages were an issue so the impacts of inefficiencies on medical and other experts had a flow on effect on the general community.[416]

By the 1940s experts were reluctant to get involved in civil cases and charging high fees to keep themselves free to go to court at short notice because there was no fixed trial dates system for King's Bench witness actions in London.[417] Doctors were reluctance to get involved in civil cases because of the need to attend court to give evidence; and there were concerns about obtaining the help of doctors.[418]

Medical experts told the mid-1990s 'Access to Justice' inquiry that acting as experts in civil proceedings had a 'devastating effect' on their clinical responsibilities; and the treatment which many received when they gave evidence resulted in many of them 'refusing to do so in future.'[419]

Unlike England, Australia had no late 18th century Industrial Revolution nor 18th and 19th centuries boom for scientists. There is some evidence of Australian scientists calling for changes in how they assisted courts from party experts giving evidence as witnesses to advisers to the Court (though not to the extent experienced in England). For example, a Victorian scientist in a late-1920s article in the *Victorian Law Institute Journal* wrote that 'it is the opinion of those scientists whose business takes them to the courts that they could better serve justice, if called by the Crown to act in an advisory capacity, than they can under existing conditions.'[420]

Medical experts became an increasingly important feature of Australian civil litigation, particularly personal injuries cases which almost always involve expert evidence about medical causation.[421]

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[415] 'Expense of Litigation' (1930) 169 LT 439.
[416] Committee on Supreme Court Practice and Procedure, *Interim Report* (Cmd 7764, 1949).
[417] Ibid [61], [88] and [107].
[418] Committee on Personal Injuries Litigation, *Report* (Cmnd 3691, 1968), [300].
[419] Woolf, *Interim Report* (n 1) 184-185.
[420] F H Campbell, 'Science and the Law (Part 2)' (1928) 2 L Inst J 92.
[421] Mr Justice Glass, 'Expert Evidence' (1987) 3 Aust Bar Rev 43, 45 and 47.

In 1963 the *Medical Journal of Australia* welcomed the recently introduced NSW procedural reforms[422] which allowed written medical expert evidence; and reduced the need for 'busy doctors' to give evidence in court.[423] The inconvenience to medical experts of having to personally attend a jury trial was considered in *Nankervis v Ulan Coal Mines Ltd* [1999] NSWSC 899 to be a factor in favour of an order for a judge only trial.

The extraordinary 1980s Chamberlain litigation led to calls by scientists for conflicts of expert evidence to be removed from juries and given to expert panels.[424] Medical practitioners also pressed for juries or panels of experts to decide specialist matters.[425]

In the early 2000s the Australian Medical Association (which represents Australian doctors), in the shadows of the 2002 Australian insurance crisis, published a policy which:

- called for doctors to directly advise judges;
- advised that there was then wide concern in the medical community about the adversarial process, including that 'maverick opinions from those who were considered to be hired guns, seemed to be the favoured evidence';
- advised that many medical practitioners will not provide expert medical evidence because of concerns with the adversarial process; and
- advised plaintiff lawyers were having difficulty finding doctors willing to give evidence in Court.[426]

3.6 Discontent with the civil justice system

England

By the 19th century widespread discontent with the civil justice system had developed both among the broader English public and litigants (and their lawyers).

The broader public's discontent, including the role and costs of party expert witnesses in that system, was sometimes reflected in newspaper reporting of high profile cases

[422] NSW Power to Admit an Expert Report as Evidence in Chief (1963 personal injuries actions)
[423] Discussed in 'Practice Notes Medical Evidence on Affidavit' (1963) 37 ALJ 159.
[424] Hon Sir Richard Blackburn, *The Courts and the Community* (1986).
[425] Freckelton, Reddy and Selby (n 255) 17.
[426] Dr Martin Nothling, *Expert Medical Evidence: The Australian Medical Association's Position* (2006) (cited extensively by McClellan J).

such as articles in *The Times*[427] and *The Saturday Review*[428] about the Windham inquiry. That discontent was also expressed in politics, as is illustrated by Henry Brougham's famous six hour 1828 speech in parliament about the state of the courts of common law and the need for law reform,[429] which led to reforms to procedure.[430]

The discontent of litigants and their lawyers (in particular with civil jury trials) was also regularly covered in trade journals such as *The Solicitors' Journal and Reporter*;[431] and often resulted in litigants avoiding the Courts.[432]

The widespread discontent with the civil justice system precipitated an era of government initiated law reform inquiries into English courts and the English civil justice system from the first half of the 19th century.[433] Those inquiries in turn led to a raft of legislative reforms to English civil procedure and evidence laws eg the Civil Procedure Act 1833[434] which implemented some of the recommendations of the Second Report of the Common Law Commissioners[435] (who inquired into the English Superior Courts Common Law[436]); and the Common Law Procedure Acts which implemented other recommendations made by the Common Law Commissioners.[437]

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[427] *Re Windham* The Times (17 December 1861); 'Editorial', *The Times* (London Tuesday 25 March 1862).
[428] 'Expert Witnesses', *The Saturday Review* (11 January 1862).
[429] HC Deb 7 February 1828, vol 18 col 127 (which is discussed in Sir Jack I H Jacob, *The Fabric of English Civil Justice* (Stevens 1987), page 1 and footnote 1).
[430] *AON Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, 184.
[431] eg 'Evidence of Experts' (1863) 7 Sol J & Rep 856 which (1) called for evidence of experts to be by written affidavit to reduce costs (as was then already the practice in Court of Chancery patent cases) and (2) referred to 'already extravagant costs of trials involving scientific evidence'.
[432] Judicature Commission, *First Report of the Commissioners* (1869) 5-6 and 12-13.
[433] eg the Second Common Law Commissioners who prepared Second Common Law Commission, *First Report of Her Majesty's Commissioners for Inquiring into the Process, Practice and System of Pleading in the Superior Courts of Common Law* (1851); Second Common Law Commission, *Second Report of Her Majesty's Commissioners for Inquiring into the Process, Practice and System of Pleading in the Superior Courts of Common Law* (1853). See also the Chancery Commission which prepared Chancery Commission, *First Report of Her Majesty's Commissioners Appointed to Inquire into the Process, Practice and System of Pleading in the Court of Chancery* (1852), Chancery Commission, *Second Report of Her Majesty's Commissioners Appointed to Inquire into the Process, Practice and System of Pleading in the Court of Chancery* (1854); Chancery Commission, *Third Report of Her Majesty's Commissioners Appointed to Inquire into the Process, Practice and System of Pleading in the Court of Chancery* (1856).
[434] Civil Procedure Act 1833.
[435] First Common Law Commission, *Second Report Made to His Majesty by the Commissioners Appointed to Inquire into the Practice and Proceedings Of the Superior Courts of Common Law* (123, 1830).
[436] See the full scope of the commission which is set out in First Common Law Commission, *First Report Made to His Majesty by the Commissioners Appointed to Inquire into the Practice and Proceedings Of the Superior Courts of Common Law* (1829).
[437] Common Law Procedure Act 1852; Common Law Procedure Act 1854.

Lord Denman's Act 1843[438] and the Evidence Amendment Act 1853[439] are examples of mid-19th century reforming English evidence legislation which addressed defects in the law of evidence.

The discontent with the civil justice system was a catalyst for the Judicature Commission's inquiry[440] which resulted in, among other things, the Judicature Acts reforms which remodelled the English judicial system (and in time the Australian judicial system).[441] Those reforms included RSC 1883 which was a simplified code of procedure for the entire Supreme Court.[442] The Judicature Acts and RSC 1883 codified the results of years of struggle for reform and gave the administration of the law a new status.[443] The anonymous judge who authored an 1892 editorial in *The Times*[444] made the point that the new Supreme Court and RSC 1883 had very significant impacts on common law litigation.

Clarke has described the Judicature Acts reforms as replacing the old common law and chancery courts with a shiny new Supreme Court and its accompanying Rules of the Supreme Court; and the high point of 19th century reform.[445]

An important element of the Judicature Acts reforms was the mandatory 'Council of the Judges' procedure which required that the Supreme Court judges meet annually as a 'Council of the Judges' to consider the operation of the rules of court; inquire into any defects in the system of procedure or the administration of the law in the Court; and report to government on recommended changes.[446] That was a potentially very powerful procedure for Courts to achieve reform to civil procedure, particularly reform which would be ultra vires the Rules Committee's rules making powers. That 'Council

[438] Criminal Procedure Act 1865.
[439] Evidence Amendment Act 1853.
[440] Judicature Commission, *First Report of the Commissioners* (1869); Judicature Commission, *Second Report of the Commissioners* (C 631, 1872); Judicature Commission, *Third Report of the Commissioners* (C 957, 1874).
[441] Victoria initially, and at later times the other Australian States, adopted the English judicature reforms: see *AON* (n 430) 184 [11-12].
[442] The Rules of the Supreme Court 1883. Discussed in A T Carter, *A History of English Legal Institutions* (3rd edn, Butterworth & Co 1906), 185; Holdsworth, 416.
[443] Edson Sunderland, 'The English Struggle for Procedural Reform' (1926) 39 Harv L Rev 725, 737-738
[444] 'The Judges Reforms', *The Times* (9 Aug 1892).
[445] Anthony Clarke, 'The Woolf Reforms: A Singular Event Or An Ongoing Process?' in Deirdre Dwyer (ed), *The Civil Procedure Rules Ten Years On* (OUP 2009).
[446] Supreme Court of Judicature Act 1873, s75 and Supreme Court of Judicature (Consolidation) Act 1925, s125.

of the Judges' procedure, which largely failed,[447] continued until it was quietly discontinued by the Supreme Court Act 1981.[448]

Though Lord Bowen famously described RSC 1883 as '[a] complete body of rules - which possesses the great merit of elasticity, and which (subject to the veto of Parliament) is altered from time to time by the judges to meet defects as they appear',[449] the implementation of RSC 1883 was far from smooth: RSC1883 failed to address delays and costs;[450] delays and costs continued in the King's Bench in particular;[451] the long established discontent and grievances of London merchants and businessmen continued until the specialist Commercial Court was established in 1895;[452] and RSC 1883 actually made some things worse,[453] including generating increased procedural complexity (despite the avowed intent to the contrary)[454] and a 20% increase in the volume of litigation within a matter of years.[455] That problematic post-Judicature Acts reforms state of affairs (which probably amounted to a civil justice 'crisis') is reflected in a bleak assessment of commercial litigation in the 20 years after which had added a large percentage of cost to the expenses of an ordinary action;[456] and resulted in delay and expense becoming 'the subject of very wide complaint' (and an early 20th century civil justice 'crisis').[457] This resulted in numerous civil justice

[447] See n 656 (below).
[448] Discussed in Lord Justice Thomas, 'The Judges Council' (2005) PL 608, 619 and I R Scott, 'The Council of Judges in the Supreme Court of England and Wales' (1989) PL 279, 385-387 (which considers the possible motive for ceasing the requirement for a 'Council of the Judges' at that time).
[449] Lord Bowen, 'Progress in the Administration of Justice During the Victorian Period', *Select Essays In Anglo-American Legal History* (Little, Brown and Co 1887) in Thomas Humphry Ward (ed) *The Reign of Queen Victoria A Survey of Fifty Years of Progress*, vol 1 (1887).
[450] Charles Bowen, 'The Law Courts under the Judicature Act' (1886) 2 LQR 1 (which discusses the implementation problems in detail).
[451] eg Royal Commission on Delay in the King's Bench Division, *First Report of the Commissioners* (Cd 6761, 1913) and Royal Commission on Delay in the King's Bench Division, *Second and Final Report of the Commissioners* (Cd 7177, 1913). Charles Bowen, 'The Law Courts under the Judicature Act' (1886) 2 LQR 1 8 says that the weaponry of the Judicature Act reforms increased the cost of an ordinary common law action by something like 20 per cent and led to an 'enormous increase of appeals'.
[452] Judges of the Queen's Bench Division, *Commercial Causes Notice* (1895); Francis Stringer, 'Our Commercial Court' (1895) 39 Solic J & Rep 275; Ernest Todd, 'Commercial Causes and Costs' (1895) 39 Solic J & Rep 823. The events leading to the establishment of the Commercial Court are described in Theobold Matthew, *The Practice of the Commercial Court* (Butterworth and Co 1902).
[453] Clarke (n 445) 36.
[454] W S Holdsworth, 'The New Rules of Pleading of the Hilary Term, 1834' (2009) 1 CLJ 261 (cited by Clarke (n 445) 36). See also Bowen (n 450) 8 which refers to the introduction of a mode of pleading so confused and inartistic as to be in many instances only a source of embarrassment and expense.
[455] Bowen (n 450) 8 (cited by Clarke (n 445) 36).
[456] Matthew (n 452) 7.
[457] Francis Newbolt, 'Expedition and Economy in Litigation' (1923) 39 LQR 427. See also Chapter 4.2.10 (below) which refers to data making clear that there was a civil justice 'crisis' by the 1930s.

inquiries often concentrating on the 'twin perceived evils of cost and delay',[458] including:[459] the Royal Commission on Delay in the King's Bench Division (1913),[460] the Business of Courts Committee (1930s),[461] a Royal Commission on the Despatch of Business at Common Law (1936);[462] and the Evershed Committee on Supreme Court Practice and Procedure (which was established in the late-1940s but continued in the 1950s).

During the second half of the 20th century, the English civil justice system developed (another) state of 'crisis'[463] due to a range of inter-related factors, including increases in litigation;[464] delays;[465] inefficiency; increasing costs; and the decline of the legal aid budget caused in large part by the ballooning criminal justice system.[466] The development of that English civil justice 'crisis' is documented and recorded in contemporaneous reports of law reform inquiries,[467] including (in date order): the Evershed Committee on Supreme Court Practice and Procedure (late-1940s/early1950s);[468] the Winn Committee on Personal Injuries Litigation (1968);[469] JUSTICE's *Going to Law* (1974);[470] the Cantley Committee's *Report of the Personal Injuries Litigation Procedure Working Party* (1979);[471] the Practitioner Members of the Commercial Court Committee's report (1986);[472] the Roskill Fraud Trials committee

[458] J A Jolowicz, 'General Ideas and the Reform of Civil Procedure' (1983) 3 LS 295, 297.
[459] See the list of committees and reports in Clarke (n 445) 39 and Jolowicz (n 458) 296 and footnote 11.
[460] Royal Commission on Delay in the King's Bench Division, *First Report* (n 451); Royal Commission on Delay in the King's Bench Division, *Second Report* (n 451).
[461] Business of Courts Committee, *Interim Report* (Cmd 4265, 1933); Business of Courts Committee, *Second Interim Report* (Cmd 4471, 1933); Business of Courts Committee, *Third and Final Report of the Business of Courts Committee* (Cmd 5066, 1936).
[462] Royal Commission on the Despatch of Business at Common Law, *Report* (Cmd 5065, 1936).
[463] Clarke (n 445) (which cites Cyril Glasser's 1994 conclusion that English civil justice was 'in a state of crisis': C Glasser, 'Solving the Litigation Crisis' (1994) The Litigator 1); Zuckerman (n 97).
[464] *Ketteman v Hansel Properties Ltd* [1987] AC 189, 220 (per Lord Griffiths) held that judges must weigh in the balance when exercising discretion the pressure on the courts caused by the great increase in litigation.
[465] 'Delay' and the conventional remedies to address 'delay' are considered in Geoffrey Hazard, 'Court delay: toward new premises' (1986) 5 CJQ 236.
[466] See Genn, *Judging Civil Justice* (n 252) 43; see also Clarke (n 445).
[467] Burn (n 296) 222 makes the point that in the 20th century, there have been more than 50 enquiries into, and reviews of, the civil justice system, all looking at 'what must be done' to make the system more effective.
[468] Committee on Supreme Court Practice and Procedure, *Final Report* (n 297).
[469] Committee on Personal Injuries Litigation, *Report* (Cmnd 3691, 1968).
[470] JUSTICE.
[471] Personal Injuries Litigation Procedure Working Party, *Report* (Cmnd 7476, 1979).
[472] Commercial Court Committee, *Report of the practitioner members of the Commercial Court Committee approved and adopted by the Commercial Court Committee* (1986).

report (1986);[473] the Review Body on Civil Justice (1988);[474] the independent working party's *Civil Justice on Trial -The Case for a Change* report (1993);[475] and Lord Woolf's seminal 'Access to Justice' inquiry (mid-1990s).

Australia

There were no Australian civil justice problems (or 'crisis') equivalent those in England in the post-Judicature Act reform period.

However, in the second half of the 20th century, an Australian civil justice system 'crisis' also developed largely as a result of delay, inefficiencies and costs.[476] An early indication of the emergence of the Australian civil justice 'crisis' is a 1961 article authored by Wallace J (a justice of the Supreme Court of NSW)[477] which was principally concerned with the 20 month 'time lag' between commencement of a NSW civil action and the date for the hearing. Wallace J considered that a cause of the delay (and cost) was NSW's retention of the civil jury system, prompting him to call for reforms (including to expert evidence).[478] Justice Blackburn further confirmed the existence of the green shoots of the Australian civil justice 'crisis' in 1975 when he referred the 'adversary system' as then a derogatory phrase.[479]

By the 1970s and 1980s there were considerable delays in civil litigation in the NSW and Victorian Supreme Courts[480] which had the flow on effect of increasing costs.[481] For example, in the early-1980s, there was a 12 month delay between Victorian

[473] Lord Roskill, *Report of the Committee on Fraud Trials* (LCO 36/95, 1986).
[474] Whose terms of reference were to improve the machinery of civil justice in England and Wales by means of reforms in jurisdiction, procedure and court administration and in particular to reduce delay, cost and complexity, see-Review Body on Civil Justice, *Report* (Cm 394, 1988). The controversial background to the appointment of the Review Body, and the Report of the Review Body itself, are discussed in detail in Plotnikoff (n 372).
[475] Hilary Heilbron (Chairperson), *Civil Justice on Trial - The Case for Change* (1993).
[476] There had been an earlier 19th century civil justice crisis in Victoria: *Report of Royal Commission* (n 323).
[477] Wallace (n 331) (which is cited in Cranston and others (n 348) [13.22]).
[478] Wallace (n 331) 134.
[479] Mr Justice R A Blackburn, 'Updating Civil Court Procedures for the 1980s' (1975) 49 ALJ 374.
[480] As to Victoria, see Victorian Law Reform Commissioner, *Report No 4 Delays in Supreme Court Actions* (1976); Peter Haynes, Julia Pullen and Ian Scott, 'Judicial Administration: Civil Case Progress in the Supreme Court of Victoria' (1984) 1 CJQ 25 which extensively analyses delays to the various types of Victorian cases and Cranston and others (n 348) which covers both NSW and Victoria.
[481] Daryl Davies, 'Updating Civil Court Procedures for the 1980s' (1975) 49 ALJ 380; Eggleston (n 351); Blackburn (n 479); Cranston and others (n 348). Cf J J Spigelman, 'Commercial Litigation and Arbitration-New Challenges' (2007) 117 Australian Construction Law Newsletter 6 in which the Chief Justice of NSW makes the point that in NSW generally speaking delay is no longer a significant issue for commercial litigation and considerably less significant than a decade or two earlier.

Supreme Court cases being certified ready for trial and a trial date.[482]

In the 1980s the NSW Court of Appeal in *Pambula*[483] noted that in NSW at that time there was a very great congestion in the jury lists; it would take about 34 years to finish the jury list at the then present rate of filings and disposals; the delay in hearing from setting down was between four years (in non-jury trials) and more than six years (in jury trials); and those delays were most unsatisfactory and had reached 'intolerable proportions'.[484]

The modern Australian civil justice 'crisis' is documented in a series of inquiries and reports, including:

- a 1976 Victorian LRC report on delays in the Victorian Supreme Court[485] which concluded that delays were bringing 'the profession and the law into disrepute' and deterring people from asserting and defending their rights in court;
- a 1982 Victorian 'Civil Justice Project';[486]
- a 1985 research project undertaken by Ross Cranston and others which analysed the problems with civil procedure (including in NSW and Victoria) and culminated in the *Delays & Efficiency in Civil Litigation* report;[487]
- the establishment of a NSW Supreme Court 'Delay Reduction Committee'[488] in 1988 to reduce delays in NSW civil proceedings;
- a 1989 Coopers & Lybrand report on the NSW Court system;[489]
- a 1994 report titled *Access to justice: an action plan* prepared by the Access to Justice Advisory Committee chaired by Sackville J;[490] and

[482] *Allan Robinson Textiles Pty Ltd v Pappas* [1983] 1 VR 345
[483] *Pambula* (n 352) 406.
[484] Ibid (which is discussed in Barker (n 338) Ch 11).
[485] VLRC, *Report No 4* (n 480).
[486] This project is discussed in I R Scott, J R Pullen and A J Robbins, *Civil Justice Project: Preliminary Study* (1982) and Haynes, Pullen and Scott (n 480).
[487] Cranston and others (n 348) [16.2] estimated the average time from commencement to disposition of civil proceedings to be in the order of 625 days (in the specialist lists such as the NSW Commercial List).
[488] NSW Delay Reduction Committee, *Report of the NSW Delay Reduction Committee* (1988) which is referred to in Wood, 'Case management in the Common Law Division' (n 387) (with Wood citing the Committee's finding that the NSW justice system was 'verging on breakdown'); see also Practice Note No 81 1993 (NSW).
[489] Coopers & Lybrand WD Scott, *Report on a Review of the New South Wales Court System* (1989).
[490] Access to Justice Advisory Committee, *Access to justice: an action plan* (1994) which is discussed in Ronald Sackville, 'From Access to Justice to Managing Justice The Transformation of the Judicial Role' (2002) 12 JJA 5.

- Figgis's 1996 analysis of delays in NSW civil and criminal proceedings.[491]

There is little doubt that the modern Australian civil justice 'crisis' was well established by the late-1980s/early-1990s, most acutely in NSW, as demonstrated by:

- a 1988 report on the NSW Supreme Court Common Law Division which indicated that, if nothing was done, delay in that Division would soon be in the order of 10-12 years;[492]
- Wood J referring to the civil justice system in NSW as 'verging on breakdown' in 1991;[493]
- the Australian federal government in the early-1990s establishing an Access to Justice Advisory Committee in response to a 'crisis of confidence' in the institutions, including the courts;[494]
- Figgis's 1996 conclusion that excessive delays in NSW civil and criminal proceedings had caused a great deal of public concern 'in the last few decades';[495] and
- the Chief Justice of Australia's 1996 pronouncement[496] that '[i]t is not an overstatement to say that the system of administering justice is in crisis'.[497]

In 1995-7 the Queensland judge Davies J (then the Chairman of the Litigation Reform Commission of Queensland) authored a series of articles[498] which were heavily influenced by Lord Woolf's 'Access to Justice' inquiry and the Commission's 1993 recommendation that Court Experts be used in lieu of party experts;[499] referred to the

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[491] Honor Figgis, *Dealing with Court Delay in New South Wales (Briefing Paper No 31/96)* (1996).
[492] NSW Delay Reduction Committee, *Report of the NSW Delay Reduction Committee* (1988).
[493] Wood, 'Case management in the Common Law Division' (n 387).
[494] Access to Justice Advisory Committee (n 490). Sackville (n 490) 6.
[495] Figgis (n 491).
[496] This speech was clearly influenced by Lord Woolf's 'Access to Justice' inquiry which is mentioned three times in the speech.
[497] Brennan (n 53). See also The Hon Justice Michael Kirby, 'The Crisis in the Law-Continued' (1996) Bar News Summer 1996 32.
[498] G L Davies and S Leiboff, 'Reforming the Civil Litigation System: Streamlining the Adversarial Framework' (1995) 25 Queensland Law Society Journal 111; Justice G L Davies, 'The Changing Face of Litigation' (1996) 6 JJA 179; The Hon Justice G L Davies, 'A Blueprint for Reform: Some Proposals of the Litigation Reform Commission and their Rationale' (1996) 5 JJA 201; G L Davies, 'Justice Reform: A Personal Perspective' (1996-97) 15 Aust Bar Rev 109.
[499] Queensland Litigation Reform Commission, *Annual Report of the Litigation Reform Commission 1993-1994* (1994), 8. Discussed in The Hon Justice Davies and S A Sheldon, 'Some Proposed Changes in Civil Procedure: Their Practical Benefits and Ethical Rationale' (1993) 3 JJA 111, Keith W Wylie, 'Queensland's single expert UCPR provisions: Dead-letter law or underutilised opportunity?' (2012) 32 Qld Lawyer 215, 216. The specific draft rules, as circulated to Queensland barristers and solicitors in 1996, are set out in David Alcorn, 'Independent Expert Evidence in Civil Litigation' (1996) 16 Qld Lawyer

'current crisis in civil litigation'; and called for 'a radical rethinking and restructuring of the process of [adversarial] dispute resolution'.[500]

The NSW civil justice 'crisis' further developed through the bevy of extrajudicial speeches given by four senior NSW Supreme Court judges from the late-1990s which are discussed in Chapter 4.3.4.

3.7 Changing nature of civil litigation

England

In the first half of the 20th century the types of civil cases also changed. Firstly, in the early part of the 20th century, the County Courts' jurisdiction was expanded (effectively transferring some work from the High Court to the County Courts).[501] Secondly, by the mid-20th century the great bulk of English civil cases were about two types of negligence: employer towards workers; and motorist towards other road users.[502] Ian Scott discusses the interesting example of more than 8,000 industrial deafness claims being made against the British Railways in a 15 or so year period.[503]

By the late-1940s the cost of civil litigation had also become a sufficiently large problem to necessitate the appointment of a committee headed by the Master of the Rolls to inquire into Supreme Court practice and procedure to reduce the cost of litigation and improve efficiency and expedition.[504]

Between the 1940s/1950s and the late-1980s, the length of legal proceedings also hugely increased.[505] Diamond has estimated that the length of trials increased by four or five times between the mid-19th and mid-20th centuries.[506]

By the second half of the 20th century only around 4% of civil cases (which Diamond described as 'freaks'[507]) proceeded to formal court adjudication following a trial;[508] and

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[500] Justice G L Davies, 'The Changing Face of Litigation' (1996) 6 JJA 179.

[501] The increased and expanded jurisdiction of the County Courts is summarised in Committee on Supreme Court Practice and Procedure, *Interim Report* (Cmd 7764, 1949), para [13] and following.

[502] Patrick Devlin, *Trial By Jury*, vol 8th series. (The Hamlyn Lectures, 3rd impression with addendum. edn, Stevens 1966).

[503] Ian Scott, 'Reports of Experts as Particulars of Claim' (1984) 3 CJQ 101 107.

[504] Committee on Supreme Court Practice and Procedure, *Final Report* (n 297), 4.

[505] Lord Devlin, 'Trial by Jury for Fraud' (1986) 6 OJLS 311, 317.

[506] A S Diamond, 'The Summons for Directions' (1959) 75 LQR 41, 47.

[507] Ibid (Cited with approval in VLRC, *Report No 4* (n 480) 7).

[508] Ibid. See also Personal Injuries Litigation Procedure Working Party, *Report* (Cmnd 7476, 1979), APPENDIX G (which provides a breakdown of the method of disposal of personal injuries litigation

the great majority of civil cases were discontinued, resolved by default judgment or settled.[509]

In the last three decades of the 20th century there was 'an enormous expansion in civil litigation'.[510] This is reflected in 1986 High Court statistics showing that approximately 250,000 cases were commenced and 3,000 trials were conducted.[511] By the late-20th century the time taken to dispose of proceedings by trial was problematic as broadly evidenced by the average three year time from commencement of a High Court proceeding to trial;[512] and delay between setting down for trial and trial being approximately 20 months in the Queen's Bench Division in London and 24 to 36 months in the Commercial Court.[513]

The business of English solicitors also changed markedly during this period. In the 1960s approximately 40% of the income of English solicitors came from property conveyancing work. By the 1990s, almost half of English solicitors' firms carried out civil litigation work and that work was the main source of income for over 20% of English solicitors.[514]

The second half of the 20th century also saw the establishment of English legal aid funding in 1949; English legal aid funding developing fiscal and political problems by the 1980s/90s (caused in part by increasing demand for legal aid in criminal cases); and legal aid funding for English civil cases effectively ceasing by the end of the 20th century.[515] A 1985 speech given by Woolf J (as Lord Woolf was then) blamed legal aid funding as one of two reasons for the 'dissatisfaction with the present system'.[516]

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confirming that great majority of personal injuries cases were withdrawn before hearing) and Sir Jack I H Jacob, *The Fabric of English Civil Justice* (Stevens 1987) 107.

[509] Cranston and others (n 348); Ross Cranston, 'What do courts do?' (1986) 5 CJQ 123, 132.

[510] Burn (n 296).

[511] Review Body on Civil Justice, *Report* (Cm 394, 1988), table 1 and table 2.

[512] Burn (n 296). See also Personal Injuries Litigation Procedure Working Party, *Report* (Cmnd 7476, 1979), Appendix B (which shows that in 1970s personal injuries litigation the interval between issue of a writ and disposal was in the range of 25 -30 months).

[513] Plotnikoff (n 372) 207 citing a General Issues paper published by the Lord Chancellor's Department in 1987.

[514] Burn (n 296).

[515] Heilbron (n 475) [1.4-1.5] and [1.7 iv]; 'MacKay gives ground over legal aid cuts', *The Times* (3 March 1994) 2; Genn, *Judging Civil Justice* (n 252) 38-39; Justice Lightman, 'Access to Justice' (The Law Society 5 December 2007), [8]- [9]

[516] Justice Woolf and Sir Max Williams, 'Case Management' (Justice for a Generation, London 17 July 1985), 232.

Australia

Unlike England, Australia has never had a centrally funded and organised legal aid system providing broad-based legal aid funding for civil proceedings; and Australian concerns about legal aid funding being reduced (or transferred) from civil proceedings to fund criminal proceedings have never reached the heights of the concerns in England.[517]

By the 1980s few Australian civil cases in the State Supreme Courts proceeded to formal court judgment following a hearing and most cases were resolved pre-trial by discontinuance, default judgment or settlement.[518]

In the 100 years or so before the 1980s, there was an enormous increase in the proportion of Court time taken by personal injury claims in Victoria, though that was partly ameliorated by the introduction of 'no fault' schemes.[519] In Victoria by the early-1980s personal injuries cases constituted a considerable proportion of both the total proceedings commenced and the majority of cases set down for hearing.[520]

3.8 Criminal litigation and the criminal justice system

England

From the 1970s the criminal courts floundered in what Alldridge has described as 'a sea of uncertainty surrounding criminal evidence';[521] and an English criminal justice system 'crisis' developed (but for reasons which were different to the English civil justice 'crisis'). Speaking extrajudicially in 1985 about the problems of increased litigation and the pressure on judicial resources, Woolf J (as he then was) posited that there had been greater problems in the criminal courts than the civil courts.[522] That criminal justice system 'crisis' was at least in part driven by public concern about increased criminal activity and high rates of acquittals;[523] and the increased length and

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[517] The Hon Justice Michael Kirby, 'The Crisis in the Law-Continued' (1996) Bar News Summer 1996 32 discusses Australia's legal aid system and the concerns about legal aid reductions in Australia in the mid-1990s.
[518] Cranston and others (n 348); Ross Cranston, 'What do courts do?' (1986) 5 CJQ 123, 132.
[519] Scott, Pullen and Robbins (n 353) 68.
[520] Ibid 117-119.
[521] Peter Alldridge, 'Forensic Science and Expert Evidence' (1994) 21 Journal of Law and Society 136, 137.
[522] Woolf and Williams (n 516) 229.
[523] These concerns were raised as early as 1972 -see Criminal Law Revision Committee (n 280) [22]. Public concern about increased criminal activity was a key reason for the government proceeding with the Philips Royal Commission on Criminal Procedure (see Royal Commission on Criminal Procedure, *Report* (Cmnd 8092, 1981)). See also Lord Roskill (n 473) 1 which states that the public no longer

complexity of criminal trials.[524] From the late-1980s and in the 1990s, the criminal justice 'crisis' expanded as a result of a series of wrongful convictions (many of which directly concerned party expert evidence). The English criminal justice system 'crisis' is documented and recorded in:

- Lord Roskill's report;[525]
- Sir John May's reports;[526]
- the reports of the Runciman Royal Commission on Criminal Justice;[527]
- Auld LJ's review of the criminal courts;[528]
- decisions of the Court of Appeal which overturned wrongful convictions;[529]
- the House of Commons Science and Technology Committee's report on forensic evidence;[530] and
- Leveson LJ's *Review of Efficiency in Criminal Proceedings* report.[531]

Sir John May's 1989 judicial inquiry was into the circumstances leading to, among other things, the convictions of the Guildford Four and the Maguire Seven based almost entirely on scientific party expert evidence. Sir John produced two reports setting out why the convictions were unsound in large part as a result of the Crown's scientific party expert evidence and scientific party expert witnesses.[532] In 1991 the Court of Appeal quashed the Maguire convictions.[533]

In the early-1990s a Royal Commission on Criminal Justice, which was chaired by Viscount Runciman, took place in the shadows of mounting public concern about high

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believes that the legal system in England and Wales is capable of bringing the perpetrators of serious frauds expeditiously and effectively to book (cited in Mark Aronson, *Managing Complex Criminal Trials: Reform of the Rules of Evidence and Procedure* (The Australian Institute of Judicial Administration Inc 1992)).

[524] eg Lawton LJ's comments in *R v Turner* (1975) 61 Cr App Rep 67 about the long criminal trial which preceded that appeal and the need to keep trials as short as is consistent with the proper administration of justice. There was a similar problem in Australia as demonstrated by Aronson (n 523).

[525] Lord Roskill (n 473).

[526] May, *Interim Report* (n 277); May, *Second Report* (n 277).

[527] Runciman (n 80).

[528] Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (2001).

[529] For example, *R. v Maguire* [1992] QB 936 (CA); *R v Ward* [1993] 1 WLR 619, 96 Cr App R 1; *R v Clark* [2003] EWCA Crim 1020, [2003] 2 FCR 447 (CA); *R v Cannings* [2004] EWCA Crim 1, [2004] 2 Cr App R 7

[530] House of Commons Science and Technology Committee (n 286).

[531] Leveson (n 279) .

[532] May, *Interim Report* (n 277); May, *Second Report* (n 277).

[533] *R. v Maguire* [1992] QB 936 (CA). Sir John May's reports and the Court of Appeal's judgment are discussed and contrasted in Christopher Oddie (Chairman), *Science and the Administration of Justice* (1991), [4.12] and [4.20].

profile miscarriages of justice.[534] The Runciman Royal Commission's reference included examining, and considering whether changes are needed in, 'the role of experts in criminal proceedings'.[535]

In the 2000s much of the discourse on the 'problems' shifted from civil proceedings towards criminal proceedings.[536]

Australia

High profile 1970s/1980s miscarriages of justice in the notorious Australian murder cases of Edward Splatt[537] and Lindy and Michael Chamberlain[538] identified clear problems with criminal party expert evidence and shone a very public spotlight on party expert evidence in criminal proceedings.

The Chamberlain litigation had an enormous impact on the entire Australian legal landscape as it was an extremely high profile 'miscarriage of justice' case.[539] The Chamberlain litigation was extraordinary in many respects. The litigation attracted extensive public attention and comment[540] which continued well into the 1990s.[541] For probably the first time in Australia, the Chamberlain litigation led to calls by some scientists for conflicts of expert evidence to be removed from juries and given to panels of experts.[542] Also, the contradictory party expert evidence at the criminal trial of the Chamberlains for murder was considered in detail by the High Court of Australia[543] and a Royal Commission into the conviction of the Chamberlains (which concluded that there was doubt about the reliability of the Crown's expert evidence at the criminal

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[534] Leveson (n 279) [205].
[535] Runciman (n 80) i.
[536] eg *R v Clark* [2003] EWCA Crim 1020, [2003] 2 FCR 447 (CA); *R v Cannings* [2004] EWCA Crim 1, [2004] 2 Cr App R 7; House of Commons Science and Technology Committee (n 286); Leveson (n 279); The Law Commission, *Expert Evidence* (n 283); Leveson (n 279).
[537] The Splatt case was a 1970s murder conviction which was reviewed by a Royal Commission in Royal Commission (Carl Reginald Shannon), *Royal Commission of Inquiry in Respect to the Case of Edward Charles Splatt* (1984).
[538] Considered in Chapter 4.3.
[539] Gary Edmond, 'Azaria's accessories: the social (legal-scientific) construction of the Chamberlains' guilt and innocence' (1998) 22 MULR 396, 400 (which makes the point that most accounts portrayed the Chamberlain case as a miscarriage of justice); *Chamberlain & Reference under Criminal Code s 433A* [1988] NTCCA 3, 93 FLR 239 (which finds that the Chamberlains' convictions constituted a miscarriage of justice and accordingly must be quashed).
[540] *Chamberlain & Reference under Criminal Code s 433A* [1988] NTCCA 3, 93 FLR 239 (which notes that 'much publicly' surrounded the Royal Commission); Hon Sir Richard Blackburn, *The Courts and the Community* (1986).
[541] eg 'Justice with blood on its hands', *The Australian* (14 December 1995).
[542] Hon Sir Richard Blackburn, *The Courts and the Community* (1986).
[543] *Chamberlain v R (No 2)* (n 19).

trial in many respects).[544] Even though the Chamberlain litigation involved the 'problems' in a criminal proceeding, it precipitated a (re)consideration of Australian party experts which changed the landscape for party experts in all proceedings.

A 1980s survey of NSW judges indicated they thought scientific and technical expert evidence was a major cause of complexity for criminal juries and some criminal trials were too complex for juries.[545]

In the late-1980s the NSW State Government commissioned the consulting firm Coopers & Lybrand to investigate NSW's court system as a result of tremendous public concern, particularly in relation to criminal proceedings.[546] Its 1989 *Report on a Review of the New South Wales Court System* identified excessive delays in several jurisdictions of the NSW courts, including in criminal proceedings.[547] The problem of excessive delays in NSW criminal proceedings was further considered by a 1999 NSW Audit Office report which found that NSW had Australia's longest finalisation times for criminal matters.[548]

In 1985-6 the NSW LRC investigated, and reported on, issues relating to criminal jury trials.[549] The inquiry considered various alternative modes of trial, including trial by a judge and lay assessors; trial by a judge and a panel of laypeople assisted by qualified experts; and trial by a judge and special jury of qualified people. Its *Report 48* rejected each of those alternative modes of trial; and recommended that the 'problems' in criminal jury trials be dealt with by legislation providing that the evidence of an expert witness may be given by the witness reading a document; a party tendering the document (provided that the witness is available to give oral evidence if required); or in any other manner or form approved by the judge which is not already permitted by the laws of evidence. That recommendation was partly implemented by the *Criminal Procedure Amendment (Pre-trial Disclosure) Act 2001* (NSW).

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[544] Morling (n 285) 328. The deficiencies in the expert evidence in the Chamberlain litigation have been considered in detail in in the literature eg Gary Edmond, 'Azaria's accessories: the social (legal-scientific) construction of the Chamberlains' guilt and innocence' (1998) 22 MULR 396.
[545] This small survey is discussed in NSW LRC (n 99) 89 and cited in Aronson (n 523) [6.28], but no other details are provided in the literature.
[546] G Samuels, 'The Economics of Justice' (1991) 1 JJA 114.
[547] Coopers & Lybrand WD Scott (n 489) (which is discussed in Rachel Callinan, *Court Delays in NSW: Issues and Developments* (Briefing Paper No 1/02, 2002)).
[548] Audit Office of NSW, *Performance Audit Report: Management of Court Waiting Times* (1999).
[549] NSW LRC (n 99).

In 1992 Aronson concluded that there was a crisis of confidence in the criminal justice system's ability to investigate, charge and try those suspected of committing major crimes where the prosecution evidence is long and complex.[550]

Though the Australian criminal justice 'crisis' clearly attracted the attention of the public, the Courts and law reform bodies, it never reached the heights of the English criminal justice 'crisis'.

3.9 Conclusion

This Chapter 3 has described the relevant temporal contexts so that the detailed analysis of the complex dynamics concerning the 'problems' and the procedural rules reforms in the later Chapters is enhanced and enriched by systematically situating them in their temporal sequence of events and processes.

This Chapter has been largely descriptive. It described the relevant temporal contexts and introduced how context is likely to be temporally and causally important in the evolution of the 'problems' and the procedural rules reforms. Later Chapters 4 to 6 will more deeply consider how the contexts discussed in this Chapter provided a temporal framework for legal change.

The following examples show how this Chapter's context analysis will be important in the deeper analysis in the later Chapters.

Chapter 3.2 indicated that the evolution of Australia's 'problems' and procedural rules reforms is likely to follow English developments.

Chapter 3.3 demonstrated how the practical abolition of civil juries allowed changes to civil procedure and trial dynamics and changed the position of the judge. A practical effect of that change in position is that the 'problems', as perceived by judges in more recent times, are more likely to be exposed in a judge's public and reasoned judgment.

Chapter 3.4 explained how early, active case management both undermined the pure adversarial system (which in part encouraged all of the 'problems'); and facilitated the Party Expert Procedural Rules reforms, many of which were practically dependent on case management procedures which allowed early pre-trial expert evidence

[550] Aronson (n 523) Ch 1.

directions.

Chapter 4. The 'problems'

4.1 Introduction

Chapter 1.1 provided an introductory outline of the multifaceted and often protean 'problems' (subcategorised to facilitate analysis as listed below):

- the 'problem' of surprise;
- the 'problem' of suppression;
- the 'problem' of excessive party experts;
- the 'problem' of bias; and
- the 'problem' of contradictory party experts.

Chapter 1.1 made clear that this research examines the 'problems' solely from the perspective of judges and does not advance the 'problems' as objective problems.

Chapter 1.5 set out the theoretical frameworks which will provide the conceptual basis for the analysis of the 'problems' in this Chapter.

Chapter 3 detailed the important broad civil justice system contexts which will be incorporated into this Chapter's analysis of the 'problems', including the contexts associated with changes to civil juries (Chapter 3.3); the development and demise of the adversarial system (Chapter 3.4); the importance and demands of science in England (Chapter 3.5); and importantly the discontent with the civil justice system, including the civil justice 'crises' (Chapter 3.6).

The aim of this Chapter 4 is to use a chronological, historical methodology to collate the data in the source material literature about the 'problems', including their impact on the civil justice system (such as the acuteness of the 'problems'), as perceived by judges from time to time; and analyse that data (having regard to the Chapter 3 context), using the legal evolutionary theoretical framework, to answer research question 1 - when did the 'problems' evolve into acute 'problems' which materially impact on access to justice in England, NSW and Victoria?

Understanding the timing, and nature, of the evolution of the 'problems', including their impact on the civil justice system (such as the acuteness of the 'problems') through the analysis in Chapter 4, is a precondition to the analysis in Chapter 5 (which analyses the procedural rules which address the 'problems', including the temporal connections

between the ‘problems’ and the Party Expert Procedural Rules which were made to address the ‘problems’);[551] and the overarching, deeper analysis in Chapter 6.

The structure of this Chapter is as follows.

The ‘problems’, as perceived by English judges from time to time, will be considered first (in Chapter 4.2); followed by the ‘problems’, as perceived by NSW judges (in Chapter 4.3); and lastly the ‘problems’, as perceived by Victorian judges (in Chapter 4.4).

The English ‘problems’ are considered first because they have the longest and most extensive history; and as explained in Chapter 3.2 English developments generally heavily influenced NSW and Victoria. As the Australian judge (Kirby J) pithily described it ‘The House of Lords, the Privy Council and the English Court of Appeal spoke and [Australia] listened’ and ‘the habits of Empire inculcated in Australian lawyers a high measure of respect for just about everything that came from the Imperial capital’.[552] The NSW ‘problems’ are considered before the Victorian ‘problems’ because, as also explained in Chapter 3.2, NSW often took the lead in civil procedure matters.

Separately analysing the English ‘problems’, then NSW and finally Victoria’s ‘problems’, will allow temporal and causal connections between the evolution of the ‘problems’ in those jurisdictions to be identified and considered; allow temporal connections between the evolution of the ‘problems’ and the Party Expert Procedural Rules to be identified in Chapter 5; and allow the Chapter 6 comparative analysis.

4.2 England

This Chapter 4.2 will use answer research question 1 (as it relates to England) ie when did the English ‘problems’ evolve into acute ‘problems’ which materially impact on access to justice in England?

A chronological, historical methodology will be used to collate the data about the English ‘problems’ (including their impact on the English civil justice system), as perceived by English judges from time to time; and analyse that data having regard to

[551] Thomas Kearney, 'The Unresolved Problem of Expert Evidence' (2018) 92 ALJ 127, 127 (which makes the point that only by understanding the history of the role of expert evidence can the ways in which the legislature and the courts attempt to obtain useful expert evidence be understood).
[552] Kirby, ‘The Lords, Tom Bingham and Australia’ (n 384).

the Chapter 3 context, to identify temporal connections between the 'problems' as they evolved in England; and allow the later comparative analyses in Chapter 6 (between England, NSW and Victoria).

The analysis in this Chapter 4.2 will cover the period from the 17th century (by which time the Permissive Party Expert Rule was established in England) to 2020.

4.2.1 Pre-*Folkes v Chadd*

Party expert witnesses have given evidence since at least, and the Permissive Party Expert Rule was established by, 17th century ie before the rules of expert evidence.[553]

Early party expert witnesses were often medical experts[554] who gave expert evidence in criminal proceedings.[555] Accounts and reports of some early 17th century criminal trials (particularly for murder) are published in *The Proceedings of the Old Bailey*[556] and the *Reports of State Trials*. The accounts of the 1689 murder trials of Charles Walsingham[557] and Almond Marsman[558] record that 'surgeons' gave opinion evidence about the cause of death. The 1699 murder trial of Spencer Cowper and others before Baron Hatsell and a jury at the Hertford Assizes was one of the few reported trials of the day and it was also covered in a contemporaneous book.[559] That trial involved the prosecution calling five doctors to give expert evidence and Cowper calling seven 'physicians of note and eminence to confront the learning on the other side'[560] (evidencing the 'problems' of excessive party experts and contradictory party experts). That expert evidence for both the prosecution and defendant was very clearly partisan (evidencing the 'problem' of bias) and numerous experts were called at the trial by

[553] *Alsop v Bowtrell* (1619) Cro Jac 541, 79 ER 464 (though there is some doubt about whether the experts were party experts); *Fearon v Bowers* (1753) 1 H Blackstone 364, 126 ER 214; *R v Pembroke* (n 10); *R v Cowper* (n 10); *Folkes*. Landsman (n 332) 137 shows that physicians, surgeons and similar medical experts appeared in more than 20 criminal cases in the Old Bailey in the calendar year 1722.
[554] Such as surgeons, doctors and midwives eg *Alsop v Bowtrell* (1619) Cro Jac 541, 79 ER 464 (which refers to Chamberlaine who was a physician and in the nature of a midwife).
[555] Hamlin (n 399) 489; Landsman (n 361); Katherine Watson, 'Medical and Chemical Expertise in English Trials for Criminal Poisoning, 1750–1914' (2012) 50 Medical History 373
[556] Those accounts and records are published online at https://www.oldbaileyonline.org/ and in the *Old Bailey Sessions Papers* (eg Dwyer, *Judicial Assessment* (n 67) Chapter 5). For a discussion about the *Proceedings of the Old Bailey*, including the debate about the accuracy and completeness, see Robert B. Shoemaker, 'The Old Bailey Proceedings and the Representation of Crime and Criminal Justice in Eighteenth-Century London' (2012) 47 J Brit Stud 559 and Latham Skaggs, 'The Proceedings of the Old Bailey, London 1674 to1834' (2006) 20 Reference Reviews 27.
[557] *R v Walsington* (1689) Old Bailey Proceedings Online.
[558] *R v Marsman* (1689) Old Bailey Proceedings Online.
[559] *R v Cowper* (n 10); *The Trial of Spencer Cowper, Esq; John Marson, Ellis Steven and William Rogers Upon An Indictment for the Murder of Mrs Sarah Stout, a Quaker* (Booksellers of London 1699).
[560] *R v Cowper* (n 10) 1155.

both the prosecution and defendant to give expert evidence about a single issue. Cowper's experts in particular had no direct knowledge of the facts, had not seen the victim's body and were called solely to rebut the prosecution's expert evidence they heard in court[561] (further showing the 'problem' of contradictory party experts). Notwithstanding, the literature does not indicate Baron Hatsell was in any way concerned about the expert evidence in Cowper's trial.

The accounts of the 1732 murder trial of Corbet Vezey,[562] and the 1742 murder trial of William Bird,[563] similarly show that multiple, corroborating medical experts were deployed in those criminal trials.

Those criminal cases demonstrate that some late-17th and early-18th century English criminal trials involved the 'problems' of bias, contradictory party expert evidence and excessive party experts.

4.2.2 *Folkes v Chadd*

Folkes v Chadd is among the earliest reported cases which considered the role of skilled party expert witnesses in a civil proceeding. The Court's opinion in *Folkes v Chadd* was delivered by the Chief Justice of the Court of King's Bench (Lord Mansfield). The positive reference in *Folkes* to the evidence provided by the engineer expert (Mr Smeaton) in an earlier case heard by Lord Mansfield, and Lord Mansfield's positive assessment of the party expert evidence in *Folkes* itself, indicates that Lord Mansfield generally supported skilled party experts (or 'men of science' as they were referred to) providing assistance to the Courts and was not concerned about any of the 'problems' which arose in later English civil cases.

Folkes indicates that though the 'problems' of bias, excessive party experts and contradictory party experts had already commenced evolving in some English criminal cases (as early as the late 17th century) they had not commenced developing and evolving in English 18th century civil cases.

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[561] Dwyer, *Judicial Assessment* (n 67) 259 (fn 91) (which notes that the prosecution witnesses (local medical witnesses) and the defence witnesses (eminent London witnesses) vigorously disagreed).
[562] *R v Vezey* (1732) Old Bailey Proceedings Online.
[563] *R v Bird* (1742) Old Bailey Proceedings Online (9th September 1742). See also the discussion about *R v Bird* in Landsman (n 361) 468.

4.2.3 Problems arise from the 1820/30s

Thornton v Royal Exchange[564] and *Goodtitle*[565] are 1790s cases which post-dated *Folkes* by less than a decade. *Goodtitle* is interesting because Buller J cited *Folkes* (which he referred to as the 'Wells Harbour' case) as a case where skilled persons were allowed to give opinion evidence; and he was the common thread between *Folkes* and *Goodtitle* as he was a judge in both cases.[566] In both cases Erskine of Counsel unsuccessfully objected to the party expert evidence. In *Thornton* the defendant was allowed to call a skilled shipbuilder and in *Goodtitle* the plaintiff was allowed to call two skilled post office clerks. There is nothing in either case indicating that the Court was concerned about party experts at that time.

The 1820s *Severn* litigation[567] in the Court of Common Pleas shows how the role of party experts in civil proceedings had changed in the relatively short period of approximately 40 years since *Folkes* was decided (at least in that litigation). Dwyer cites the *Severn* litigation as authority for the proposition that by 1820, judges were expressing serious concern that experts were being used as weapons of combat rather than sources of information.[568]

The *Severn* litigation comprised three Court of Common Pleas insurance cases heard by Chief Justice Dallas and a jury following a fire which destroyed the plaintiff's buildings. The trials generated considerable public interest in London and were reported in detail in *The Times.*

The party expert evidence in the *Severn* litigation is summarised in *Severn and Others v Olive and Others*[569] and also discussed by Tal Golan[570] and June Fullmer.[571]

There were two significant issues in dispute at the first *Severn* trial: the cause of the

[564] *Thornton v The Royal Exchange Assurance Comp* (1790) Peake 37, 170 ER 70.
[565] *Goodtitle on the demise of Revett against Braham* (1792) 4 T R 497, 100 ER 1139.
[566] It isn't clear if Buller J was part of the Court which decided *Folkes* but he was part of the Court which decided the next part of the *Folkes* litigation in *Folkes v Chad* (1783) 3 Doug 340.
[567] *Severn v The Imperial Insurance Company* The Times, 12 April 1820 (CP); *Severn v The Imperial Insurance Company* The Times, 14 April 1820 (CP); *Severn v The Phoenix Insurance Company* The Times, 13-20 December 1820 (CP); *Severn and Others v Olive and Others* (1821) 6 Moore CP 235
[568] Dwyer (n 360) 118.
[569] *Severn and Others v Olive and Others* (1821) 6 Moore CP 235.
[570] Golan, 'Revisiting the History of Scientific Expert Testimony' (n 397) 905.
[571] June Fullmer, 'Technology, Chemistry, and the Law in Early 19th-Century England' (1980) 21 Technology and Culture 1. Fullmer, like Golan, was an American history professor.

fire; and whether the plaintiff's new industrial process increased the risk of fire.[572] A large amount of scientific party expert evidence was given at the trial about those two issues, including evidence by a number of scientists who had conducted experiments intended to mimic or model both the plaintiff's previously used, and new, industrial processes. During the first day of evidence from the plaintiff's experts at the first *Severn* trial, Chief Justice Dallas castigated the plaintiff, observing that it was useless to call any more witnesses; they (presumably he and the jury) had heard the evidence of three experts and several other witnesses well versed in science and mechanics; and calling others to the same points, though it might swell the number of witnesses, would not add to the weight of testimony.[573] That castigation of the plaintiff clearly indicates Dallas CJ was concerned about the 'problem' of excessive party experts. In summing up to the jury, Chief Justice Dallas was further critical about the party experts because they had left the Court in a state of utter uncertainty; the two days during which the results of their experiments had been compared were days of humiliation to science; and it was a matter of general regret to find respectable witnesses in marshal and hostile array against each other.[574] That summing up indicates the 'problems' of bias and contradictory party experts had arisen and commenced evolving. Those criticisms by Chief Justice Dallas are early (perhaps even the earliest) direct and public criticisms of party experts in a civil proceeding by an English superior court judge which are recorded in the literature. Those criticisms do not explain how the 'problems' of bias and contradictory party experts in English criminal cases had expanded into civil cases.

The second *Severn* trial was also before Chief Justice Dallas and a special jury in December 1820. It related to a different building damaged by the same fire. There was again much party expert evidence arising from experiments undertaken by the experts from both parties. Counsel for the defendant insurer's opening address to the jury highlighted the plaintiff's partisan expert evidence by pointing out that the plaintiff's experts had declined the defendants' experts' invitation to observe their experiments.[575] Declining the invitation to observe opposing experts' experiments is an instance of the 'problem' of bias. Chief Justice Dallas's summing up to the jury

[572] Ibid 14.
[573] *Severn v The Imperial Insurance Company* The Times, 12 April 1820 (CP).
[574] *Severn v The Imperial Insurance Company* The Times, 14 April 1820 (CP).
[575] Fullmer (n 571) 21.

made the point that though a vast body of expert evidence had been laid before the jury, the lamentable result was they heard opinion opposed to opinion, judgement to judgement, theory to theory, and the same experiments producing opposite results (a clear reference to the 'problem' of bias).[576] This was a further, very public criticism of party expert witnesses by one of the most senior English judges of the day.

Professor Amos's 1833 'Law Lecture No 2'[577] discussed an 1830s medical negligence case on the Midland Circuit in which 'all the eminent surgeons [in the local area] were called, on one side or the other, and they flatly contradicted each other', which he ascribed to their friendly feelings and their professional character being staked on the success or failure of the cause.[578] That lecture shows that the 1830s 'problems' of bias, contradictory party expert and excessive party experts were not just limited to high-value, high-profile London trials like the *Severn* litigation.

4.2.4 Nineteenth century judicial criticism of party experts by senior English judges

The 1843 *Tracy Peerage* case[579] was heard by the House of Lords Committee for Privileges and involved expert handwriting evidence about the timing of entries in a prayer book. The hearing was conducted as an adversarial trial: Lord Campbell noted that in Peerage cases the Lords 'are here as a jury'; the parties were represented by eminent counsel; numerous witnesses were cross examined by counsel for the opposing party (some at great length, including about character); and the Lords made rulings on the admissibility of contested evidence.

One of the claimant's handwriting experts (Sir Frederick Madden) gave expert handwriting opinion evidence on the age of the disputed document. He was the keeper of the department of manuscripts at the British Museum. He said that he had knowledge of handwriting through experience and could give an opinion on the age of any writing. The Lords were openly critical of Madden's expert evidence. Lord Brougham described Madden was 'very zealous'. Lord Campbell said that witnesses like Madden 'are witnesses on one side, and I am very sorry to say that respectable

[576] *Severn v The Phoenix Insurance Company* The Times, 19 December 1820 (CP).
[577] Prof Andrew Amos, 'Law Lecture No 2' (1833) 1 Legal Examiner & L Chron 169.
[578] Unfortunately no other details about the case are provided.
[579] *Tracy Peerage* (n 101).

witnesses are apt to form a strong bias' and (referring to Madden) that:

> hardly any weight is to be given to the evidence of what are called scientific witnesses; they come with a bias on their minds to support the cause in which they are embarked; and it appears to me that [Madden], if he had been a witness in a cause and had been asked on a different occasion what he thought of this handwriting, would have given a totally different account of it.

Other senior English judges of the time would likely have been aware of Lord Campbell's criticisms about party experts because *The Tracy Peerage* was decided by three very senior English Lords (the Lord Chancellor, Lord Brougham and Lord Campbell); was reported in the respected and authoritative Clark and Finnelly's law report series; and was discussed in the respected mid-19th century text *Taylor on Evidence* (which quotes Lord Campbell's comments).[580] *The Tracy Peerage* went on to become very influential in the 19th century discourse about the 'problems';[581] and is often cited in the 20th century literature by both judges and academics as an early example of the 'problem' of bias.

The extraordinary 1856 Central Criminal Court trial of William Palmer for murder was presided over by Lord Chief Justice Campbell, Baron Alderson and Justice Cresswell. The trial attracted great public attention. Though it was not reported in any of the law reports, there is a detailed report of it[582] and *The Times* set out Lord Campbell's charge to the jury in detail.[583] Lord Campbell described the trial as 'protracted'.[584] It took 12 days and included party expert evidence from more than ten scientific or medical experts called for the accused (that large number of experts evidencing the 'problem' of excessive party experts and that length of the trial indicative of the 'problem' of contradictory party experts). Stephen described the trial as involving a profusion of conflicting scientific evidence being offered to the jury about the cause of death.[585]

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[580] John Pitt Taylor, *A Treatise on the Law of Evidence as Administered in England and Ireland*, vol 1 (A Maxwell & Son, Law Booksellers and Publishers 1848), 55.
[581] It was cited in the 19th century literature discussing the 'problem' of bias eg 'On the Proof of Handwriting' (1845) 2 L Rev & QJ Brit & Foreign Jurisprudence 285, 298; Taylor (n 580) 54; 'Skilled Witnesses' (1894) 97 LT 381, 383; 'Comments on Cases' (1898) 105 LT 73.
[582] Angelo Bennett, *Verbatim Report of the Trial of William Palmer* (1865).
[583] *R v Palmer* The Times (28 May 1856).
[584] Ibid.
[585] see James Fitzjames Stephen, 'Trial By Jury and Evidence of Experts' (1859) 2 Papers Read before the Juridical Society (1858-1863) 236, 244.

Lord Campbell's charge to the jury made two criticisms about Palmer's party experts arising from the 'problem' of bias in the case: that the jury may be of the opinion that some of them came with the object of procuring an acquittal; and in the due administration of justice a witness should not be turned into an advocate any more than an advocate should be turned into a witness.[586] Those criticisms are consistent with his 1843 criticisms in *The Tracy Peerage*; and are also often quoted in, and have also been influential on, later analysis of the 'problems'.

In the 1849 *Re Dyce Sombre* case in the Court of Chancery[587] the Lord Chancellor had to determine the weight to be given to a letter signed by five physicians in support of a petition. In deciding that question the Lord Chancellor commented that he had seen enough of professional opinions to be aware that in matters of doubt there is no difficulty in procuring professional opinions on either side.[588] Those comments are a strong indication that the Lord Chancellor generally viewed party expert witnesses to be biased (not just the experts in that particular case). Like *The Tracy Peerage*, *Re Dyce Sombre* was to become an influential and often cited example of the 'problem' of bias associated with party experts.

The highly critical 1870s observations about party expert evidence by Sir George Jessel MR in *Abinger v Ashton*[589] and *Thorn v Worthing*[590] are well known and also often cited as examples of the 'problems'.[591] In *Thorn v Worthing* (a patent case) Jessel MR lamented that there is evidence of experts on the one side and on the other; the experts do not agree in their opinion (an example of the 'problems' of bias and possibly contradictory party expert evidence); and the mode in which expert evidence is obtained does not give the fair result of scientific opinion to the Court. This is an early (if not the earliest) direct reference to the 'problem' of suppression. His criticisms of party expert evidence went as far as referring to a case he had been told about when 68 experts were consulted before one was found who would give the evidence

[586] *R v Palmer* The Times (28 May 1856).
[587] *Re Dyce Sombre* (n 102).
[588] Ibid [128].
[589] *Abinger v Ashton* (n 103) 373-374.
[590] (1876) LR 6 Ch D 415n, 418.
[591] ALRC (n 269) [735]; J J Doyle, 'Admissibility of Opinion Evidence' (1987) 67 ALJ 688, 689 and 694; Ian Freckelton, 'Novel Scientific Evidence: The Challenge of Tomorrow' (1997) 3 Aust Bar Rev 243, 244; Deirdre Dwyer, 'The Causes and Manifestations of Bias in Civil Expert Evidence' (2007) 26 CJQ 395, 432; Edmond, 'Secrets of the Hot Tub' (n 108) 75; *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588, 610; *Caason Investments Pty Limited v Cao (No 2)* [2018] FCA 527, [113].

the party wanted. He concluded firstly that he has 'always the greatest possible distrust of scientific evidence of this kind' because it is universally contradictory and obtained by a litigant searching for experts who will give the evidence the litigant wants. He also concluded that 'the Court does not get that assistance from the experts which, if they were unbiassed and fairly chosen, it would have a right to expect.' Those criticisms and conclusions are another direct reference to the 'problem' of suppression which are repeated with approval in the modern literature.[592]

Bottomley v Ambler[593] was an 1878 Court of Appeal judgment in which Thesiger LJ (with James and Baggallay LJJ agreeing) commented that he had often been told by arbitrators that in many cases enormous expense was wasted calling expert witnesses because as soon as the arbitrators saw the property they knew what needed to be done, which was not surprising for 'skilled witnesses, though no doubt they give their evidence honestly, are nothing but partisans in the particular matter in which they are giving evidence'.

These criticisms in specific cases are early, but clear, indications that the Permissive Party Expert Rule, which *Folkes* indicated was optimal in the late 18th century, had by the 19th century become suboptimal.

4.2.5 Early scholarly literature

John Pitt Taylor's 1848 edition of *Taylor on Evidence* was a very early piece of scholarly literature which included the following statement about party experts:

> it is often quite surprising to see with what facility, and to what an extent, their views can be made to correspond with the wishes or the interests of the parties who call them…. their judgments become so warped by regarding the subject in one point of view, that, even when conscientiously disposed, they are incapable of expressing a candid opinion.
>
> To adopt the language of Lord Campbell, they come with such a bias on their minds to support the cause in which they are embarked, that hardly any weight

[592] Gordon Samuels, 'Problems Relating to the Expert Witness in Personal Injury Cases' in Harold H Glass (ed), *Seminars on Evidence* (Law Book Company 1970); Robin Jacob, 'Court Appointed Experts v Party Experts: Which is Better ?' (2004) 23 CJQ 400.
[593] *Bottomley v Ambler* (1878) 38 LT 1, 545.

should be given to their evidence.[594]

The 1885 edition of *Taylor on Evidence*, published when Taylor was a County Court judge, repeated those 1848 observations about the 'problem' of party expert bias and further added that:

> Being zealous partisans, their Belief becomes synonymous with Faith as defined by the Apostle, and it too often is but "the substance of things hoped for, the evidence of things not seen".[595]

Taylor's points about the 'problem' of bias were quoted more than a century later in the 20th and 21st century literature on the 'problems', including by Windeyer J (a judge of the High Court of Australia) who described Taylor's remarks as 'acrid';[596] and the NSW LRC's 2005 *Report 109 Expert Witnesses*.[597]

In the 1849 first edition of *Best on Evidence*, the English barrister William Best[598] observed that:

> there can be no doubt that testimony is daily received in our courts as 'scientific' testimony to which it is almost profanation to apply the term, as being revolting to common sense, and wholly inconsistent with the commonest honesty on the part of those by whom it is given. The truth is that witnesses of this kind are apt to presume largely on the ignorance of their hearers with respect to the peculiar subject of examination, and little dread prosecution for perjury[599]

Best's observations about the 'problem' of bias were repeated in the second[600] and third editions[601] of *Best on Evidence*.

James Fitzjames Stephen was a prominent evidence and criminal law author and

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[594] Taylor (n 580).
[595] John Pitt Taylor, *A Treatise on the Law of Evidence as Administered in England and Ireland* (8th edn, Maxwell and Son 1885).
[596] *Clark v Ryan* (1960) 103 CLR 486, 509-510.
[597] *Report 109* (n 99) [2.26].
[598] Best was a Gray's Inn barrister at the time.
[599] W. M. Best, *A Treatise on the Principles of Evidence and Practice as to Proofs in Courts of Common Law* (S. Sweet 1849) 389 in the section titled 'opinion evidence'. Best's comments were quoted almost 150 years later in Freckelton (n 270) 82.
[600] W M Best, *A Treatise on the Principles of Evidence and Practice as to Proofs in Courts of Common Law* (2nd edn, S Sweet 1854), 593 (para [496]).
[601] W M Best, *A treatise on the principles of the law of evidence : with elementary rules for conducting the examination and cross-examination of witnesses* (3rd edn, Sweet 1860), 633 [516].

scholar in the second half of the 19th century.[602] His 1859 paper *Trial By Jury and Evidence of Experts*, which was read before the Juridical Society of London[603] and in 2004 was described by Lord Justice Jacob as 'remarkable',[604] is among the earliest scholarly literature to specifically discuss the 'problems' in detail.[605] That 1859 paper, which was written in the shadows of the 1856 trial of Palmer for the murder of Cook (which Stephen attended[606]) bluntly referred to what Stephen described as the absurd and incongruous spectacle of a jury who, without any previous scientific knowledge or training, are suddenly called upon to decide controversies in which the most eminent experts flatly contradict each other. Further to that description of the 'problem' of contradictory party experts and its impact on juries, the paper also went on to consider whether scientific evidence had evolved to become so suboptimal (at least in criminal proceedings) that it should be taken from the jury and given to some other tribunal such as a jury of experts.[607]

Interestingly, the 1882 edition of Stephen's *History of the Criminal Law of England*, which was published when Stephen was a Queen's Bench judge, indicated there had been some improvements in criminal proceedings.[608] Those remarks however contrast starkly with the observation about the 'problem' of bias in the 1890 edition of Stephen's *A General View of the Criminal Law of England* which stated:

> [n]o one expects an expert, except in the rarest possible cases, to be quite candid. Most of them-for there are few exceptions-are all but avowedly advocates, and speak for the side which calls them.[609]

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[602] Stephen was a barrister, judge and scholar. In the early 1870s Stephen drafted the Indian Evidence Act and was later employed by the Attorney General (Lord Coleridge) to draft a similar code for England. Stephen was lecturer on evidence at the Inns of Court and Professor of Common Law at the Inns of Court from December 1875 until appointed to the bench in 1879: see Dyson Heydon, 'Reflections on James Fitzjames Stephen' (2010) 29 UQLJ 41.

[603] Stephen (n 585) (described as 'learned publications on legal questions' in Heydon (n 602) 48).

[604] Jacob, 'Court Appointed Experts v Party Experts: Which is Better ?' (n 4) 404.

[605] James Fitzjames Stephen, *A Digest of the Law of Evidence* (2nd edn, Macmillan 1876), v.

[606] Stephen's attendance at 'the greater part of this celebrated trial' and the impression it made on him are confirmed in James Fitzjames Stephen, *A General View of the Criminal Law of England* (2nd edn, MacMillan and Co 1890) 269. Stephen gives a detailed summary of Palmer's trial at pp 231-272 (including a detailed discussion about the contradictory party expert evidence at pp 255-269).

[607] Stephen concluded that traditional juries were the best judges of complicated questions of fact even those involving delicate scientific question: p241. The idea in Stephen's 1859 paper that there could be a jury of experts was further developed in a chapter titled 'The Evidence of Experts' in Stephen (n 606) 209-219 (p217 referred to the disgraceful spectacle of the contradictions and rash oaths of professional witnesses).

[608] Underlining emphasis added.

[609] Stephen (n 606) 199. Cited in *Report 109* (n 99) [2.25] (though attributed to Golan, 'The History of

Phipson on Evidence,[610] first published in 1892, built on the earlier evidence literature including *Best on Evidence*, *Stephen on Evidence* and *Taylor on Evidence*. *Phipson on Evidence* specifically aimed to take a middle place between what it described as the 'extremely condensed' *Stephen on Evidence* and the 'great repository of evidentiary law' known as *Taylor on Evidence*.[611] Though the first edition of *Phipson on Evidence* included no critical comments about party experts, the second edition (published in 1902) referred to the testimony of party experts usually being of slight value because experts are biased in favour of the side which calls them; and support or opposition to any given hypothesis can be 'multiplied at will'.[612] Those critical comments about the 'problems' of bias and excessive party experts appeared in the later editions until well into the late-20th century.[613]

The references to the 'problems' in this Chapter 4.2.5 are important because they appear to be observations by the authors of the text; and accordingly, corroborate the 'problems', as perceived by English judges.

4.2.6 Patent and other monopolies actions

The Patent Law Commission, which included the Chief Justice of the Court of Common Pleas, a Vice Chancellor and two barristers, inquired into patent actions in the 1860s. The Commission's 1865 report[614] makes clear that protracted and expensive patent actions were then a problem. The report referred to a case heard by a Vice Chancellor which lasted 30 days; and noted that the principal faults of patent trials include that the jury does not have sufficient scientific knowledge to understand the evidence; and the introduction of a 'cloud of scientific evidence' perplexes, rather than explains, the true points at issue.[615] The Patent Law Commission advised that the judge and civil jury mode of trying patent actions was not satisfactory; and it recommended that patent trials take place before a judge sitting with scientific assessors and without a jury (unless both parties desire a jury).[616] The 1865 report

Scientific Expert Testimony in the English Courtroom' (n 360)).
[610] First published as Sidney Phipson, *The Law of Evidence* (Stevens and Haynes 1892) with later 21st century editions (up to the current 20th edition) titled 'Phipson on Evidence'.
[611] Ibid v (preface).
[612] Sidney Phipson, *The Law of Evidence* (3rd edn, Stevens and Haynes 1902), 357.
[613] eg John Buzzard, Roy Amlot and Stephen Mitchell (eds), *Phipson on Evidence* (11th edn, Sweet & Maxwell 1970), 1284 [1286].
[614] Patent Commissioners (n 410).
[615] Ibid xi.
[616] Ibid recommendation 3.

was the first time party expert evidence was directly criticised in a law reform inquiry report. It documents the 'problems' of excessive party experts and contradictory party experts in patent actions at the time and indicates those suboptimal 'problems' were having such a material impact in patent actions at the time as to necessitate a significant change in entrenched English civil procedure through a move away from the well-established jury mode of civil trial.

The 1862 *Simpson v Wilson* patent litigation,[617] tried before Cockburn CJ and a jury, was another case involving biased and contradictory expert evidence which led to adverse judicial criticism of party experts. In his summing up to the jury Cockburn CJ lamented that 'Scientific men have been called for the plaintiff' and 'On the other side, scientific men have said directly the reverse'; and concluded that he was glad the jury, and not he, had to decide the case. *Simpson v Wilson* is also revealing because it shows how the 'problems' impacted on juries rather than judges.

Curtis v Platt[618] was an 1866 appeal to the House of Lords from a Chancery patent action.[619] The Lord Chancellor made a general observation that in patent actions the tribunal of fact 'is sure to be perplexed with the contradictory opinions which the skilled witnesses on both sides invariably oppose to each other'.[620] That observation makes clear that by this time another very senior English judge (the Lord Chancellor) was openly concerned about the 'problem' of contradictory party expert opinion.

The 1880s *Moore v Bennett* patent infringement litigation[621] is further illustrative of the evolution of 'problems' of contradictory party expert evidence (and possibly bias) in patent cases. When the appeal in that litigation came on for hearing, the Court of Appeal was unable to dispose of it because the party expert evidence was so insufficient; and it ordered an independent expert (a mechanical engineer-Robert Munro who was selected by the parties and not the Court of Appeal) to test the defendant's machine and report to the Court of Appeal.[622] Lindley LJ noted the trial judge found the defendant's witnesses were not altogether trustworthy and concluded

[617] *Simpson v Wilson* (1862) The Chemical News (VII no 161).
[618] *Curtis v Platt* (1866) LR 1 HL 337, [1866] 8 WLUK 7.
[619] seeking orders restraining the respondents from infringing a patent.
[620] *Curtis* (n 618) (Lord Chelmsford).
[621] *Moore v Bennett* (1884) RPC 129.
[622] Ibid 133.

the evidence before him was very conflicting and embarrassing.[623] *Moore v Bennett* is important because the 'problems' of contradictory party experts (and possibly bias) in that litigation caused the Court of Appeal to take proactive action by obtaining its own independent expert's report.

Joseph Crosfield v Techno-Chemical[624] was a fourteen day 1913 patent action trial involving highly technical evidence in which the trial judge lambasted party expert evidence in patent actions generally. He first commented that in almost all patent cases expert evidence was devoted to eliciting inadmissible evidence on the issues in the case or the construction of documents; and the plaintiff's expert witnesses almost invariably take a strong view in favour of the plaintiff on all issues and the defendant's expert witnesses are equally confident the other way. This case was a very direct example of the evolution of the 'problems' of bias, contradictory party experts and excessive party experts increasing the length of the trial (particularly in patent litigation).

Though the 'problems' in patent litigation were not described as 'acute' by any judge, that description likely reflects judicial perception by the mid-19th century. The broad characteristics of the legal change relating to the 'problems' in at least this type of civil proceeding were largely incremental (and possibly most acute in patent litigation); and well established and known by the mid-19th century.

4.2.7 Nineteenth century criticisms by solicitors, scientists and in the broader public media

An interesting 1863 article in the *Solicitors' Journal and Reporter* titled 'Evidence of Experts'[625] shows that expert evidence was a topic discussed among solicitors in the 1860s. It supported earlier calls for expert evidence to be by written affidavit to reduce costs (as was then already the practice in Court of Chancery patent cases); and referred to the 'already extravagant costs of trials involving scientific evidence'. Though it is not clear from the article, the 'extravagant costs' it refers to likely arose from, or were exacerbated by, the 'problems' of bias, excessive party experts, contradictory party experts and surprise.

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[623] Ibid 139.
[624] *Joseph Crosfield & Sons v Techno-Chemical Laboratories* (1913) 30 RPC 297, 310.
[625] 'Evidence of Experts' (1863) 7 Sol J & Rep 856.

Scientists also, by the 1860s, became concerned about their role as party expert witnesses; and the influence of the adversarial system on their evidence. Some scientists called for experts to have independent positions in the courts (rather than witnesses for a party); for scientists to not act as advocates; for judges to sit with experts/scientists as assessors to assist the Court; and for scientists' evidence to be in writing to ensure a full and complete statement of opinion can be given independent of the lawyers and the parties.[626] One scientist went as far as drafting a bill regulating scientific evidence which provided that the government would appoint skilled 'assessors' who could be called on by the Courts to act as 'Scientific Assessors'.[627]

In the 1860s an inquiry in the nature of a common law jury trial was conducted in the Court of Exchequer by a Master in Lunacy and a jury to determine whether William Windham was of sound mind and able to govern himself and his estates. The Windham inquiry was extensively covered in *The Times* which reported that the court room was crowded and the case astonished its readers and shocked English lawyers.[628] The inquiry was very long with about 50 witnesses called for the Petitioners and 90 for Windham. The reports about the expert evidence in *The Times* show that the evidence of the medical experts was classically affected by the 'problems' of bias, excessive party experts and contradictory party experts. For example, an expert called by the Petitioners gave evidence mostly, if not totally, based on his observations of Windham 20 years beforehand when he was a child, including the size and formation of his head.[629]

The Windham inquiry prompted, or contributed to, a very public debate about expert witness. *The Saturday Review* published an 1862 editorial titled 'Expert Witnesses'[630] while the Windham inquiry was still underway. The author's detailed knowledge of both expert evidence generally, and in the Windham inquiry specifically, indicates the author may have been a lawyer. The article's stated purpose was to bring the public to the conclusion, which lawyers were rapidly approaching, that expert evidence needs

[626] eg Smith (n 406) (cited and summarised in (1860) 1 Chemical News 91)); 'The Evidence of "Experts"' (1862) 5 Chemical News 1.
[627] A copy of the draft bill is included in Smith (n 406). The status of that draft is not otherwise discussed in the literature.
[628] *Re Windham* The Times (17 December 1861); 'Editorial', *The Times* (London Tuesday 25 March 1862).
[629] Comments were made to this effect in House of Lords Committee debate.
[630] 'Expert Witnesses', *The Saturday Review* (11 January 1862) 32-33.

to be received with caution. The article was scathing about expert evidence. It expressed concern about the 'problems' of bias and contradictory party experts (including experts flatly contradicting one another).

The Windham inquiry also prompted political action through the enactment of the Lunacy Regulation Act 1862[631] which effectively limited all evidence about an alleged lunatic to the time of the lunacy inquisition and prohibited all evidence arising more than two years before the inquisition. In the House of Lords committee debate about the Lunacy Regulation Bill,[632] Lord Chelmsford noted that the Lords were legislating under pressure from a recent lunacy proceeding; and that the extraordinary length of the Windham trial, the nature of the evidence given and the contradictory medical testimony had caused the public to feel that the law was defective and required amendment. Lord Cranworth acknowledged '[m]edical men might sometimes indulge in wild speculations'. The Lord Chancellor was highly critical of the speculative views of medical men in Lunacy cases; said that his attention had been thoroughly arrested by the enormities that took place on a recent trial;[633] and he wished that evidence of speculation, fancy, and idle theory be excluded.

An interesting 1862 editorial in *The Times*,[634] which referred to the Windham case and the House of Lords committee debate, was critical of both the senior judiciary and experts. It criticised Lords Cranworth and Chelmsford because they must have been in hundreds of cases involving conflicting party experts when at the Bar and must know that experts consider themselves to be advocates. In relation to expert evidence the editorial concluded that '[o]ne of the most unsatisfactory parts of our law of evidence is that which relates to the admission of the testimony of "experts"'; and 'there is nothing which brings more discredit upon the administration of justice'. Ultimately, the editorial called for experts to be chosen either by both parties or the Court and appointed as assessors rather than witnesses.

Like the references to the 'problems' in the early scholarly literature in Chapter 4.2.5

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631 Lunacy Regulation Act 1862 s3. The text of s3 is set out in *Re Danby* (1885) 30 Ch D 320. In that case Bowen LJ also referred to the Windham case as an example of the hardship that might arise from carrying a lunacy inquiry back.
632 House of Lords Committee, *Lunacy Regulation Bill (27 February 1862)* (1862).
633 Though he did not specifically mention any trial by name he was likely referring to the Windham inquiry.
634 'Editorial', *The Times* (London Tuesday 25 March 1862).

which are important because they appear to be observations by the authors of the texts who were not English judges (and accordingly corroborate the 'problems', as perceived by English judges), the references in the non-judicial material considered in this Chapter further corroborate the 'problems', as perceived by English judges.

This Chapter also indicates that the incremental legal change associated with the 'problems', as perceived by English judges, had extended to 'problems' as perceived by English scientists, lawyers and newspapers.

4.2.8 Courts appoint experts to resolve conflicting party expert evidence

In the 1894 Queen's Bench Division building action of *Kennard v Ashman,*[635] which was tried by a judge (without a jury), the party expert evidence at trial was so contradictory that the trial judge adjourned the trial; and ordered that an independent expert report to the Court on the state of the building.

In the 1910-1912 *Birmingham Tame and Rea District Drainage Board* injunction litigation,[636] when appeal again came on for hearing, it was apparent to the Court of Appeal that 'there was a conflict of expert evidence' (another direct reference to the 'problems' of bias and contradictory party experts). That conflict led the Court of Appeal to famously order an independent expert's report to enable it to decide the conflicting affidavit expert evidence which was before it.[637] In the subsequent appeal to the House of Lords, Lord Gorell explained that the independent expert's report enabled the Court of Appeal to dispose of the appeal with convenience; and without the delay and expense attendant on a long trial with conflicting expert evidence.[638] That injunction litigation, and the earlier cases of *Moore v Bennett* and *Kennard v Ashman*,[639] are important in the evolution of the 'problems' because they demonstrate the further incremental evolutionary change relating to the 'problems' of bias and contradictory party expert evidence had, by the late-19th/early-20th centuries, reached a point that Courts (including the Court of Appeal) needed to take action by appointing

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[635] *Kennard v Ashman* (n 105).
[636] *Attorney General v Birmingham Tame and Rea District Drainage Board* [1908] 2 Ch 551; *Attorney General v Birmingham Tame and Rea District Drainage Board* [1910] 1 Ch 48; *Attorney General v Birmingham Tame and Rea District Drainage Board* [1912] AC 788. This litigation concerned a sewage farm which was polluting the river Tame.
[637] See *Attorney General v Birmingham Tame and Rea District Drainage Board* [1912] AC 788, 811 (per Lord Robson).
[638] Ibid 803.
[639] Discussed above.

independent experts to overcome those 'problems'.

4.2.9 Key pre-'Access to Justice' inquiry civil justice inquiries

Introduction

This Chapter considers (in chronological order) the data in the key pre-'Access to Justice' inquiry civil justice inquiry reports to ascertain if the 'problems' were evolving in other types of civil proceedings. Those reports provide a potentially important source of data about the existence of the 'problems', and the magnitude of their impact on the justice system, which is different to the judicial statements about the 'problems' in particular English cases or by particular English judges.

The Patent Law Commission's 1860s report[640] and the 'Access to Justice' inquiry are separately considered in Chapters 4.2.6 (above) and 4.2.14 (below) respectively.

Common Law, Chancery and Chancery Evidence Commissions

In the late 1820s-1830s the First Common Law Commissioners inquired into the practice and proceedings of the Superior Common Law Courts and in the 1850s the Second Common Law Commissioners similarly inquired into the process, practice and system of pleading in the Superior Common Law Courts. Though the Second Common Law Commissioners 1853 *Second Report*[641] extensively covered trial process and evidence in the section headed 'The Law of Evidence',[642] neither the First nor the Second Common Law Commissioners' reports raised any concerns about party expert evidence or recommend any reforms.

In the 1850s the Chancery Commission inquired into the Court of Chancery's process, practice and system of pleading. The Chancery Commission, which included Romilly MR, Turner VC and two non-lawyers, prepared three reports.[643] Though expert evidence in Chancery cases was considered in the *First Report*,[644] which recommended a new power be given to make references to merchants, accountants, engineers, actuaries, and other scientific or professional persons,[645] expert evidence

[640] Patent Commissioners (n 410).
[641] Second Common Law Commission, *Second Report* (n 433).
[642] Ibid 10-27.
[643] Chancery Commission, *Report* (n 433); Chancery Commission, *Second Report* (n 433); Chancery Commission, *Third Report* (n 433).
[644] This report considered the modes by which evidence was taken in Chancery but contained no criticism about expert evidence in Chancery Cases.
[645] Chancery Commission, *Report* (n 433), 35 and 43.

was not otherwise discussed in any of the Chancery Commission's reports.

From 1859 the Chancery Evidence Commissioners, which included Lord Campbell and Romilly MR, inquired into the mode of taking evidence in Chancery and its effects. The evidence given to the Commissioners by a Court of Chancery barrister[646] is interesting because it gives an indication of how important party expert evidence had become in some Chancery cases; and it identified the 'problem' of bias in Chancery cases. That barrister's evidence was that the largest and most important class of Chancery cases were for injunctions which involve questions of engineering, chemical and other scientific evidence; there is no class of evidence in which witnesses of the most respectable character are so liable to 'party and other feelings, influencing the mind and tainting evidence'; and affidavit evidence on scientific opinions does not always tell any truth and never tells the whole truth. The Chancery Evidence Commissioners' 1860 report, though finding that the system of taking evidence in Chancery cases was open to grave objections, did not even mention party expert evidence which indicated they had little (if any) concerns about party expert evidence in Chancery cases.

The inquiries of the First Common Law Commission, Second Common Law Commission, Chancery Commission and Chancery Evidence Commission, which did not raise any concerns about party expert evidence, indicate that there were not any significant 'problems' with party expert witnesses in the English Chancery and Common Law courts in the mid-19th century.

Judicature Commission

In the 1870s the Judicature Commission inquired into, among other things, the operation of the English Courts. Though the Commissioners changed from time to time, the Judicature Commission was always dominated by senior English judges. As is well known and documented in the literature, the Judicature Commission's focus was on the 'evils of [the] double system of Judicature' in which the English Courts were differently organised; administered justice on different and sometimes opposite principles; had different methods of procedure; and applied different remedies.

The first phase of the Judicature Commission's inquiry built on the earlier inquiries

[646] Chancery Evidence Commission, *Report of her Majesty's Commissioners Appointed to Inquire into the Mode of Taking Evidence in Chancery and It's Effects* (1860), 17.

discussed above.

The Judicature Commission's *First Report*[647] noted that there are classes of cases in the Common Law Courts[648] which were not suited to trial by jury and compelled the parties to resort to arbitration (often by a barrister or expert) after incurring the expense of a trial. The *First Report*[649] referred to the Patent Law Commission's finding that the present mode of trying patent actions is not satisfactory and its recommendation that trials should take place before a judge sitting with scientific assessors; and concluded that a judge sitting with scientific assessors could 'with advantage' be applied to any case involving scientific or technical questions. Though the Judicature Commission did not go as far as repeating, or directly adopting or agreeing with, the Patent Law Commission's damning assessment of expert evidence, its *First Report* is a clear indication that those very senior English judges who made up the Judicature Commission both agreed with the Patent Law Commission's assessment of the 'problems' of excessive party experts and contradictory party expert evidence and considered that reform to the mode of obtaining expert assistance in all scientific and technical cases (not just patent cases) was at least desirable.

Scientific assessors was a topic further considered in the *Third Report*. The evidence of skilled witnesses in commercial cases was described as 'a scandal to the administration of justice' and the Judicature Commission recommended skilled assessors should be used because their mere presence would deter the biased skilled witness.[650] The *Third Report* is important in the evolution of the 'problems' because the Commissioners who prepared it[651] represented the full spectrum of the senior English judiciary of the time. The Judicature Commission's direct and unambiguous acknowledgement of the 'problem' of bias (at least in commercial proceedings where it was a scandal) is arguably the best available data on the evolution of magnitude of 'problem' of bias as at the late-1800s, and suggests that that 'problem' may have incrementally extended into, and become acute in, commercial proceedings.

[647] Judicature Commission, *First Report* (n 440).
[648] though unfortunately the Judicature Commissioners did not identify those "classes" of cases.
[649] Judicature Commission, *First Report* (n 440) 14.
[650] Judicature Commission, *Third Report* (n 440) 8.
[651] Some Commissioners refused to sign the *Third Report*.

St. Aldwyn Royal Commission

The St. Aldwyn Royal Commission was established in 1912 to enquire into delay in the King's Bench Division. Unlike later Commissions, this Commission was not an inquiry into the costs of litigation. The Commission's Chairman, Viscount St. Aldwyn (a layman and politician), examined most of the witnesses who gave evidence (including 13 judges[652]) in private. The Commission's *First Report*[653] and *Second and Final Report*[654] largely cover 'business of the Court' issues such as the number of judges, the inefficiency of Judges' work on circuit, the distribution of work between the King's Bench and other Divisions (such as the Chancery Division), Court sitting hours and Court vacations. The *First Report* at para [27] concluded that the primary cause of delay is the struggle for judges' time between London and the provinces. A small number of practice and procedure issues were covered in the *Second and Final Report*,[655] though none related to party expert evidence. None of the Commission's recommendations concerned party expert evidence which suggests that the Commission had little (if any) concern that party expert evidence was a material cause of delay in King's Bench litigation at the time.

Interestingly, the *Second and Final Report*[656] suggested the delays which have been so long complained of could, and should, have been remedied through the 'Council of the Judges' procedure without the need for the Royal Commission. It also made the point that only three meetings of the 'Council of the Judges' had been convened in 37 years largely due to the ambivalence of successive Lords Chancellor towards such meetings.[657]

Hanworth Royal Commission

The early 1930s Hanworth Royal Commission was appointed to consider the state of business in the Supreme Court, including delays. The Commission was chaired by Lord Hanworth and included six other justices. The Commission produced an *Interim Report* (1933), a *Second Interim Report* (1933) and a *Third and Final Report* (1936).[658]

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[652] Sunderland (n 443).
[653] Royal Commission on Delay in the King's Bench Division, *First Report* (n 451).
[654] Royal Commission on Delay in the King's Bench Division, *Second and Final Report* (n 451).
[655] Ibid 45 (recommendations 28 and following).
[656] Ibid 42.
[657] See also Sunderland (n 443) 742; I R Scott, 'The Council of Judges in the Supreme Court of England and Wales' (1989) PL 279; Lord Justice Thomas, 'The Judges Council' (2005) PL 608 which discuss the failure of the 'Council of the Judges' procedure.
[658] See n 461.

Expert evidence was considered briefly in the *Third and Final Report*. Paragraph 38 recommended that expert evidence in patent actions be by affidavits exchanged before trial (and that RSC 1883 be amended to provide for that) because of the complexity of scientific facts in many heavy cases and to avoid the 'problem' of surprise. Paragraph 43 discussed trials with assessors and with Court Experts; and set out the finding that the machinery for trials with assessors and Court Experts is amply available in the existing rules of court but that machinery is in practice not employed. Those limited recommendations indicate that the 'problems' with party expert evidence were not significant and limited to, or most prevalent in, patent actions.

Peel Committee

In 1934 the Peel Royal Commission was appointed to inquire into the King's Bench Division, though its terms of reference did not require it to considers costs which were mainly outside its province. The Peel Commission prepared a 1936 report.[659] At the time the major problem with the King's Bench Division were the very large delays in the non-preferred special jury, common jury and non-jury Lists;[660] and the public's unwillingness to use the courts due to delays and overloaded lists which made arbitration a popular alternative.[661] Essentially, the successful 'highly favoured' Lists in London (ie the Commercial List and the New Procedure List) had undermined the other non-preferred Lists.[662]

The Peel Royal Commission consulted widely, including taking evidence from many justices of the Court,[663] representatives of the Official Referees and Masters[664] and the legal profession.[665]

The Peel Commission was the first law reform inquiry to specifically consider whether delays were caused by the rules of procedure and/or rules of evidence. It had no doubt that they were and that delays had been increasing in recent years. The Peel Commission considered specific rules of evidence should be relaxed,[666] with the main

[659] *Report on the Royal Commission* (n 462) 12.
[660] [36].
[661] [67] and [69].
[662] [37], [59] and [140].
[663] [4].
[664] [5].
[665] [7] and [9].
[666] [228-233].

focus being the delay and expense of needing to call witnesses (when written evidence would be adequate). The Commission recommended that a judge should have discretion to admit affidavit evidence and unsworn evidence.[667] To the extent that recommendation applied to party expert evidence, it was an early (if not the earliest) recommendation for a Power to Admit an Expert Report As Evidence In Chief. That recommendation was picked up by the later Evershed Committee which was anxious to implement what the Peel Commission had recommended and, if possible, to carry it forward to the second step.[668]

No specific concerns were raised by the Peel Commission about party expert evidence nor were any recommendations made specifically about party expert evidence. The Peel Commission however recommended that certain New Procedure Rules (O38A) should be generally applied in the King's Bench Division so the benefits of those rules were available in all Lists.

Evershed Committee

The late 1940-50s Evershed Committee on Supreme Court Practice and Procedure was chaired by the Master of the Rolls and included more than 20 members, including three High Court justices, two King's Bench and Chancery masters and Professor Goodhart (Master of University College, Oxford and editor of the *Law Quarterly Review*).[669] Its Terms of Reference required it to enquire into Supreme Court practice and procedure (excluding patents and matrimonial proceedings); consider reforms which would reduce litigation costs; and consider the earlier Hanworth and Peel Committee's reports.

The Evershed Committee understood that its prime task was to address the problem of costs and concluded that the most effective way to save costs was to limit and confine, as early as possible, the facts to be proven at trial.[670]

The work of the Evershed Committee was vast and extended over six years. The full Committee met approximately 40 times and its 21 subcommittees met approximately

[667] 105.
[668] Committee on Supreme Court Practice and Procedure, *Final Report* (n 297) [257].
[669] Charles Clarke, 'The Evershed Report and English Procedural Reform' (1954) 29 New York University Law Review 1046, 1047; (1959) A L Goodhart, 'Law Reform in England' (1959) 33 ALJ 126.
[670] see Committee on Supreme Court Practice and Procedure, *Final Report* (n 297) [23].

400 times. The full Committee prepared four reports.

At the time of the Evershed Committee's inquiry more than 40% of King's Bench Division civil trials were personal injuries actions arising from workplace or traffic accidents.[671] Unsurprisingly, an entire section of the Evershed Committee's 1953 *Final Report* was specifically devoted to those types of actions.[672]

The Evershed Committee was struck by the past failures to use the many opportunities already provided by RSC 1883 to save costs;[673] and it sought to introduce a 'new approach' to civil litigation.[674] The *Interim Report* indicated that the best way to reduce the cost of litigation was to fix trial dates (which at that time only occurred in commercial and Official Referees' cases).[675]

Para [59] of the *Final Report* noted that some of the Committee's recommendations were 'designed to avoid or at least greatly limit conflicts of expert (particularly medical) evidence'. Expert evidence was addressed principally in Section IV of the *Final Report* titled 'Evidence and trial'[676] which detailed the waste of time caused by the 'problem' of surprise; and referred to the 'problems' of bias and contradictory party expert evidence in the many cases which very largely depend on expert evidence on which there should be no room for divergence, and in which expert evidence is coloured 'by a not unnatural desire to be an advocate of his employer's cause'.

Those parts of the *Final Report* are clear references to the 'problems' of bias and contradictory party expert and an indication those 'problems' had incrementally extended into personal injuries actions (which were increasing in the King's Bench)

On the whole however, though the Evershed Committee discussed some of the 'problems' with, and made some recommendations to reform, party expert evidence, the Evershed Committee's reports do not indicate there were any major 'problems' with party expert evidence at the time; or that party expert evidence was a significant cause of the unacceptable cost of litigation at the time. The 'problems' with party expert

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[671] Committee on Supreme Court Practice and Procedure, *Final Report* (n 297) [58].
[672] Ibid section V.
[673] Ibid para 13.
[674] Ibid paras 14-15 and Section I (commencing at para 77).
[675] Committee on Supreme Court Practice and Procedure, *Interim Report* (Cmd 7764, 1949), [60-61] and [168]. Discussed in L C B Gower, 'Reports of Committees. Interim Report of the Committee on Supreme Court Practice and Procedure' (1949) 12 MLR 483.
[676] commencing at [286].

evidence at the time of the Committee's inquiry did lead the Evershed Committee to ultimately make two recommendations concerning expert evidence:

- Recommendation 14 was for an English Disclosure Rule (to address the 'problem' of surprise); and
- Recommendation 15 was that the English CE Power (1934-1998) should be both used more often and be exercisable by the Court on its own motion (to address the 'problem' of contradictory party experts).

Professor Gower remarked in 1954 that the legal profession's reaction to the Evershed Committee's *Final Report* was a mixture of disappointment and relief because the recommendations were less far reaching than needed and expected.[677]

Winn Committee

In 1966 the ad hoc Winn Committee was appointed to inquire into the jurisdiction and procedure of the court in personal injuries actions. That committee was chaired by Lord Justice Winn and included Master Jacob (the pre-eminent procedural law specialist). The Winn Committee's inquiry was particularly important because personal injuries actions at the time made up 70-80% of the High Court's business (with industrial accidents often involving expert evidence);[678] and were a cause of public disquiet because of the expense and general difficulty experienced by injured persons.[679]

The Winn Committee's 1968 report[680] recommended a Disclosure Rule for medical party experts[681] (as another attempt to address the 'problem' of surprise in personal injuries actions) which in effect, re-recommended the Evershed Committee's Recommendation 14. Interestingly, the Winn Committee's recommendation was influenced by a 1967 Australian Disclosure Rule[682] requiring the pre-trial disclosure of medical expert reports in actions in a statutory tribunal.[683] That influence of an Australian rule is an example of English and Australian legal evolutionary change

[677] L C B Gower, 'The Cost of Litigation' (1954) 17 MLR 1, 2.
[678] Committee on Personal Injuries Litigation, *Report* (Cmnd 3691, 1968), para 41.
[679] Ibid 159 (report by Robin Thompson).
[680] Ibid.
[681] Ibid 282.
[682] Rules of the Third Party Claims Tribunal 1967 (WA).
[683] Committee on Personal Injuries Litigation, *Report* (Cmnd 3691, 1968), 282.

being coevolutionary.

The Winn Committee considered, but rejected, a proposal that personal injuries cases be heard by a court sitting with assessors or experts.[684] Interestingly, one reason the Committee rejected that proposal was that it thought, in practice, trial judges understood the technical or scientific matters by the end of trials, indicating that any 'problems' of bias and contradictory party experts were not 'acute' because they did not have any practical impact on judicial decision making in personal injuries cases.

There is nothing in the Winn Committee's report indicating that party expert evidence was a significant 'problem' in 1960s personal injuries actions.

Law Reform Committee's 'Seventeenth Report'

The Law Reform Committee which prepared the 1970 *Seventeenth Report (Evidence of Opinion and Expert Evidence)*[685] comprised very senior members of the English judiciary. The authority of that report was however undermined by a seven page Note of Dissent (published at Annex 3 to the report) by three non-judicial members of the Committee who supported the opposition from both the Bar and the Law Society to the disclosure and exchange of expert reports; and considered the proposal both impracticable and likely to increase the costs.[686] Interestingly, para [14] of the Note of Dissent refers to the absence of any evidence given to the Committee of time being wasted on non-controversial expert matters or ill-prepared expert matters truly in issue.

The Committee noted that little use has been made of the English CE Power (1934-1998) in its 34 year existence.[687]

The key issues considered by the Law Reform Committee included whether expert evidence should be admitted, except as provided in a Court's order for directions; and whether experts reports should be exchanged pre-trial.

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[684] Ibid para 405 and following.
[685] Law Reform Committee, *Seventeenth Report (Evidence of Opinion and Expert Evidence)* (Cmd 4489, 1970).
[686] see also Anthony Dickey, 'Evidence of Opinion and Expert Evidence: The Seventeenth Report of the Law Reform Committee' (1971) 34 MLR 172, 174-5. Anthony Dickey was critical of both (1) the narrowness of the Committee's inquiry and (2) the Committee's consideration of assessors and court witnesses which he thought was cursory, superficial and myopic.
[687] Law Reform Committee (n 685) 8 [13]

Para 22 recommended an English Permission Rule and para 24 recommended an English Power to Admit an Expert Report As Evidence In Chief. Para 52 concluded that non-medical expert reports should be subject to compulsory disclosure and exchange in the same way as had been recommended by both the Winn Committee and the Law Reform Committee for medical reports to avoid the 'problem' of surprise.

On the whole, though the Law Reform Committee recommended changes to improve party expert evidence (mostly concerning the pre-trial disclosure/exchange of party expert reports), the Seventeenth Report does not indicate that the Committee considered there to be any significant 'problems' with party expert evidence at the time.

JUSTICE Report

The 1974 JUSTICE report[688] was critical of the then existing defects in the English civil justice system[689] and proposed extensive reforms. Though it referred to the 'problem' of contradictory party experts and supported the use of Court Experts, the JUSTICE report did not indicate party experts were among the most problematic defects in the English civil justice system at the time.

Cantley Committee

The Cantley Committee's late-1970s inquiry into personal injuries litigation[690] followed up from the Winn Committee's 1960s inquiry into personal injuries actions. The Cantley Committee's report included the following 1977 London personal injuries actions statistics which clearly show that the overwhelming majority of personal injuries actions settle either before being set down for trial or before judgment:

- 9,001 writs were issued;
- 2,345 cases were set down for trial; and
- 317 judgments after a full hearing were delivered.

The Cantley Committee, having concluded that the robust summons for directions recommended by the Evershed Committee had failed because it was impracticable,[691]

[688] JUSTICE, *GOING TO LAW A Critique of English Civil Procedure* (1974).
[689] Particularly at Chapter 4.
[690] Personal Injuries Litigation Procedure Working Party, *Report* (Cmnd 7476, 1979). Cantley had been a High Court judge since the 1960s.
[691] Ibid para [32].

was mainly interested in the problem of Court control, including how the Court could take control over the litigation process.[692] A key recommendation for Court control was the proposed power to issue a Court Summons if a case had not been set down within 18 months so that directions could be given.[693] A similar Court Summons procedure had been unsuccessfully introduced in Victoria earlier in the 1977[694] and the Cantley Committee's recommendation was never implemented.[695]

Though the Cantley Committee did find that the unavailability of party expert witnesses was a common cause for vacating 'fixed' trial dates,[696] it did not raise any significant 'problems' with party expert evidence.

Review Body on Civil Justice

In 1985 the Review Body on Civil Justice was appointed to improve the machinery of civil justice. Though its *Civil Justice Review* report[697] recommended a Disclosure Power/Rule in personal injury cases, there is no indication in the report that party experts were a material cause of delay or cost. That was confirmed in Lord Woolf's *Interim Report* which noted that the scale of the problem he identified concerning expert evidence in the mid-1990s appears to have increased since the time of the Civil Justice Review because experts were not the subject of specific recommendations in the Civil Justice Review's report.[698]

Heilbron/Hodge Independent working party of the English Bar and Law Society

In 1992 the English Bar and Law Society set up an independent working party to consider the English system of civil justice. Many senior judges were involved in or contributed to the working party's work, including the Lord Chief Justice, the Master of the Rolls and many other Lords Justices and Judges of the High Court. Though the working party's 1993 *Civil Justice on Trial -The Case for Change* report[699] considered that reform was necessary to address the deficiencies in the civil justice system, it did

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[692] Ibid para [18].
[693] Ibid Section IV.
[694] Supreme Court (Interlocutory Proceeding) Rules 1977 (Vic). The Court Summons procedure was later confined to personal injuries actions and later abolished: Haynes, Pullen and Scott (n 480).
[695] Michael Zander, 'Why Lord Woolf's Proposed Reforms of Civil Litigation should be Rejected' in AAS Zuckerman and Ross Cranston (eds), *Reform of Civil Procedure Essays on 'Access to Justice"* (Clarendon Press 1995), 83.
[696] Personal Injuries Litigation Procedure Working Party, *Report* (Cmnd 7476, 1979) para [60(c)].
[697] Review Body on Civil Justice, *Report* (Cm 394, 1988).
[698] Woolf, *Interim Report* (n 1) Ch 23 [2].
[699] Heilbron (n 475).

not attribute blame for those deficiencies to any 'problems' with party experts. That too was confirmed in Lord Woolf's *Interim Report* which noted that the scale of the problem he identified appears to have increased since the time of the working party's work because experts were not the subject of specific recommendations in the working party's 1993 report.[700]

Conclusion

This Chapter has considered the data in the key pre-'Access to Justice' inquiry civil justice inquiry reports in the period during which the 'problems' were likely to be evolving, in chronological order. Those reports have been demonstrated to be an important source of data about the existence, and incremental expansion, of the 'problems'. Interestingly, they substantially differ from the much more critical judicial perception about many of the 'problems' in particular cases or by particular judges. On the whole, though some of the reports refer to the expansion of 'problems' of bias and surprise (and recommend reforms to address those 'problems'), the reports do not indicate those 'problems' were 'acute' per se or in the broader context of the other civil justice problems covered by the reports; or that the author judges perceived those 'problems' to be 'acute'.

4.2.10 Rules Committee action in the 1930s

The Rules Committee made the 1932 New Procedure Rules[701] in response to the Lord Chancellor's request that the Rules Committee consider what could be done to address the problem of civil litigation cost. The New Procedure Rules included the English Power to Limit Party Experts (1932 New Procedure list only),[702] which was the first English Power to Limit Party Experts included in RSC 1883. The New Procedure Rules were accompanied by a memorandum which explained the history of the then existing problems of High Court delays and costs which the New Procedure Rules aimed to address.[703] Though that memorandum does not specifically refer to any 'problems' with party experts, the inclusion of the English Power to Limit Party Experts (1932 New Procedure list only) in the New Procedure Rules infers that the high costs and delays may at least have been partly contributed to by the 'problems' of excessive

[700] Woolf, *Interim Report* (n 1) Ch 23 [2].
[701] The Rules of the Supreme Court (New Procedure) 1932.
[702] RSC 1883, O38A r8(2)(h).
[703] Copy published at (1932) 76 Solicitor's Journal 321.

party experts.

The Rules Committee took further action when it implemented the English CE Power (1934-1998) in non-jury cases.[704] An editorial in *The Law Times* noted that the unnecessary expenditure of time and money involved in summoning several expert witnesses on each side in technical cases had been a problem.[705] Similarly, the author of the 1934 *Annual Survey of English Law*[706] posited that the object of English CE Power (1934-1998) was to reduce the costs of litigation by confining expert evidence.

The English Power to Limit Party Experts (1932 New Procedure list only) and English CE Power (1934-1998) reforms of the 1930s strongly indicate that the 'problems' of bias and excessive party experts existed in the 1930s.

The reforming rules from the 1930s decade will be considered in more detail in Chapter 5.2.7.

4.2.11 Key twentieth century cases about the 'problems'

In the late-1920s Chancery Division *Graigola* litigation,[707] the plaintiff colliery company which sought an injunction to restrain the defendant from filling a reservoir near its mine, called two experts as part of its case. At the end of the plaintiff's case the Court was called on to decide whether the defendant could call the five or six experts it wanted to call.[708] In deciding that question, Tomlin J explained that cases of this kind (involving complex party expert evidence) had become serious obstructions to the Court's work; cause hardship to other litigants who cannot get their cases heard; and leaving parties free to call all possible evidence places a weapon in the hands of parties with large resources. Tomlin J also pointed out that expert evidence in civil cases was ballooning by the 1920s because in almost every case it is open to the parties to introduce a string of experts. The reforming rules arising from *Graigola* will be considered in more detail in Chapter 5.2.6.

The Manchester Regiment[709] was a 1930s damages action arising from a ship

[704] *Abbey National Mortgages Plc v Key Surveyors Nationwide Ltd* [1996] 1 WLR 1534.
[705] 'Court Expert' (1934) 177 LT 411.
[706] *Annual Survey of English Law* (1934), 241.
[707] *Graigola Merthyr Co Ltd v Swansea Corporation* (1927) WN 30, 71 Solic J Wkly Report 129, 163 LT 116, *Graigola Merthyr Co v Swansea Corporation* (1928) 1 Ch 31.
[708] Unfortunately, the brief case reports do not explain why the Court was called on to decide how many experts the defendant could call.
[709] *The Manchester Regiment* [1938] P 117.

collision. In delivering judgment, Merriman P lambasted the party experts for bias and contradictory party expert evidence. He referred to 'rival surveyors called on either side'; and 'the spectacle of two eminent surveyors, upon precisely the same data, asserting with every possible assurance that these data prove widely differing conclusions in respect of speed'. He concluded that 'the much too familiar spectacle is not very edifying'; that the Court may need to consider using its 'power of invoking the assistance of a Court expert'; and that he was not assisted by the expert evidence.

The *Whitehouse v Jordan* medical negligence litigation involved 'a great deal of evidence [being] given by the expert witnesses on both sides'.[710] Lord Denning MR[711] was critical of a joint report prepared by two medical experts which he famously described as the result of long conferences between the experts and counsel; having been settled by counsel; and wearing the colour of a special pleading rather than an impartial report. Lawton LJ agreed with what he described as Lord Denning's 'comment[s] on their evidence'.[712] Though Denning MR did not expressly describe the plaintiff's experts as biased, it seems clear that that is what he thought. In the House of Lords[713] Lord Wilberforce (with Lord Fraser in agreement) referred to Lord Denning's comments on the joint report and expressed their own 'concern as to the manner in which [that joint report] came to be organised'. As is often cited in the literature, Lord Wilberforce then went on to explain that expert evidence 'should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of the litigation'[714] (which was an early call for expert independence).

Lord Denning's criticisms of party experts in *Whitehouse v Jordan* are in stark contrast to his earlier positive comments about medical party experts who he thought gave their reports honestly and impartially (whichever side they are instructed by).[715] An objective consideration of the *Whitehouse v Jordan* judgments which has regard to those earlier positive comments indicates that Lord Denning's criticisms of party experts in *Whitehouse v Jordan* were likely limited to the unusual facts of that case

[710] *Whitehouse v Jordan* [1981] 1 WLR 246, 271 (per Lord Bridge).
[711] *Whitehouse v Jordan* (1980) 1 All ER 652, 655.
[712] Ibid 661.
[713] *Whitehouse v Jordan* [1981] 1 WLR 246.
[714] Ibid 256 (per Lord Wilberforce) and 268 (per Lord Fraser).
[715] *Causton v Mann Egerton (Johnsons)* [1974] 1 WLR 162.

rather than party experts generally.

Polivitte[716] is a late-1980s case in which the trial judge criticised a party expert for partisanship (because that expert had included 'a considerable amount of argument and comment on facts outside his expertise' in his expert report which the trial judge said is 'to be deplored'); and misleading evidence. Interestingly, though the trial judge stated that party 'expert evidence is (or should be) independent and, of course, based on experience and expertise', he thought that it was a legitimate role for a party expert to advance the case of the party calling him on the basis of information available to the expert and within the professional exercise of his skill and experience.[717]

4.2.12 Extrajudicial literature

Recollections of Bar and Bench[718] was Lord Alverstone's reflective 1915 autobiography which was published shortly after he retired from the Bench after 13 years as Lord Chief Justice. Lord Alverstone referred to the then recent 'fashion' of discrediting experts (in cases not involving handwriting). He gave examples of what he described as unbiased experts whose evidence 'was of the greatest assistance'; and biased party surveyor experts in land valuation cases.[719] Interestingly, though Lord Alverstone acknowledged the 'problem' of bias, he **'**found no difficulty in exposing the views of the mere [advocate expert]'.

A 1923 *Law Quarterly Review* article authored by the King's Bench Official Referee (Francis Newbolt)[720] referred to the 'traditional fight between partisan experts'; and recommended 'independent expert witnesses' to get rid of the 'problems' of bias and save costs.[721]

Sir Roger Ormrod's 1968 article titled 'Scientific Evidence in Court' [722] is important in the evolution of the 'problems' in four respects. Firstly, it was an early (if not the earliest) extrajudicial analysis by a senior English judge of the 'difficulties of expert

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[716] *Polivitte Ltd v Commercial Union Assurance Co Plc* [1987] 1 Lloyd's Rep 379, 387 (which is cited in *The Ikarian Reefer* (per Cresswell J) (n 106) 81-82).
[717] Ibid 368
[718] Richard Alverstone, *Recollections of Bar and Bench* (New York: Longmans, Green and Co.; London, Edward Arnold 1915).
[719] Ibid 281-283.
[720] Newbolt (n 457). See also Reynolds, *Caseflow Management* (n 376); M P Reynolds, ' Of civil procedure and settlement' (2010) 29 CJQ 194.
[721] Newbolt (n 457) 436.
[722] Sir Roger Ormrod, 'Scientific Evidence in Court' (1968) Crim LR 240.

evidence in court [which] are inherent in the adversary system of trial'.[723] Secondly, it covered expert evidence in all aspects of the adversary system, including criminal proceedings. Thirdly, it posited that experts have duties.[724] Finally, it was an authoritative call for reform to address some of the 'problems'.[725]

Lawton LJ's 1980 speech to the Forensic Science Society on party experts[726] was highly critical of experts, including referring to 'quacks and charlatans .. to be found testifying in the borderlands'. Though Lawton LJ was a very senior judge at the time of that speech, that speech's weight is questionable because it was given at a non-legal symposium to an audience of mostly non-legal, forensic experts; it was not published in an authoritative legal journal; it has been cited only a handful of times; and its highly critical commentary about experts has not been adopted or endorsed by an authoritative author in the literature.

In 1985 Woolf J (as Lord Woolf was then) gave a speech at an international conference on case management in which he posited that there could be considerable advantages to the parties in ordinary cases being required to appoint a Court Expert.[727] However, interestingly, Woolf J's speech raised only two reasons for what he described as the 'dissatisfaction with the present system': legal aid funding; and the limited number of High Court judges.[728]

The Lund Lecture is an annual lecture given to the British Academy of Forensic Sciences, often by a senior English judge. The 1994 Lund Lecture was given by the Lord Chief Justice[729] in the shadows of the 1993 Runciman Royal Commission on Criminal Justice[730] and while Lord Woolf's 'Access to Justice' inquiry was underway. That Lecture was critical of party experts; made clear that expert evidence 'needs a drastic re-evaluation'; and further made clear that the Lord Chief Justice supported the

[723] The difficulties covered by Ormrod mostly arose in criminal cases where Ormrod concluded the adversary system exists in a pure form.
[724] Ormrod (n 722) 246 posited the duties included exchanging expert reports before trial, consulting together, giving the court the limits of accuracy of their evidence and indicating the inferences that cannot properly be drawn.
[725] As Sir Roger Ormrod labelled the problems.
[726] Which was later published as an article – see Lawton (n 409) (which is likely to be a transcript of a speech given by Lawton LJ).
[727] Woolf and Williams (n 516) (Max Williams was a senior English solicitor).
[728] Ibid 228-229.
[729] Taylor (n 12).
[730] Runciman (n 80).

Runciman Royal Commission's recommendations about expert evidence and Lord Woolf's proposed reforms to expert evidence. That lecture however seems to contradict the 1995 *Practice Direction (Civil Litigation: Case Management)*[731] which Lord Taylor jointly published with Sir Richard Scott to reduce costs and delays and hold lawyers accountable (but which did not even mention party expert evidence).

4.2.13 Discretionary powers available to the Courts had fallen into desuetude before the 'Access to Justice' inquiry

At the time of Lord Woolf's mid-1990s 'Access to Justice' inquiry, English judges had the discretionary powers listed below which allowed them to obtain expert assistance from assessors, special referees, expert assistants and Court Experts as alternatives to party experts and/or to address the 'problems':[732]

- English CE Power (1934-1998);
- English Assessor Power (1873-1998);
- English I&R Power (1873-1998);
- English Reference for Trial Power (1873-1998); and
- English Expert Assistance Power (1949-onging patent actions).

The data discussed in more detail in Chapter 5.5 shows that those discretionary powers had fallen into desuetude before the 'Access to Justice' inquiry.[733] That desuetude of those discretionary powers (which could have been used by judges to address the 'problems', including by avoiding party experts altogether) is strong evidence that the 'problems' were not objectively serious or acute; and shows that the judges' 'actions speak louder than words'.

4.2.14 Lord Woolf's 'Access to Justice' inquiry

The mid-1990s 'Access to Justice' inquiry and reports[734] were a paradigm shift in English civil justice, including the 'problems' and the Party Expert Procedural Rules reforms which address the 'problems'.

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[731] Practice Direction Civil Litigation: Case Management (discussed in Scott (n 377) and 'Time-wasting lawyers are told to pay for delays', *Independent* (25 January 1995)).
[732] That list does not include the English Expert Assistance Power (1852-1998 Chancery chambers matters only) because there is no data about the use of the power.
[733] There are some clear exceptions: Assessors have always been used extensively in the specialist admiralty jurisdiction; Official Referees successfully used Court Experts in the 1930s.
[734] Woolf, *Interim Report* (n 1); Woolf, *Final Report* (n 2).

The *Interim Report*[735] (but not the *Final Report*) included criticisms published in the journal *Counsel* about party experts being hired guns who craft reports concealing anything that might be disadvantageous to their clients.[736] Those comments are sometimes erroneously attributed to Lord Woolf himself,[737] though given Lord Woolf included those comments in his report it is likely that he endorsed them.

Chapter 23 of the *Interim Report* (which covers expert evidence) said delay is caused by parties unreasonably insisting on going to unduly eminent members of the profession; and expert evidence is undermined by the partisan pressure. As noted above, the *Interim Report* conceded that the scale of the problems with expert evidence appears to have increased since the Civil Justice Review's 1988 report[738] and the 1993 Heilbron/Hodge report[739] because neither report made specific recommendations about experts.[740] Any substantial increase in the 'problems' since the 1993 Heilbron/Hodge report seems unlikely because that report pre-dated Lord Woolf's 'Access to Justice' inquiry by only a year or two. Chapter 23 concluded with Lord Woolf confirming his position that party expert witnesses in an unmanaged adversarial litigation environment cause both excessive costs and avoidable delay;[741] and made 13 recommendations in relation to expert evidence.

Expert evidence was covered as a separate topic in Chapter 13 of the *Final Report* which clarified that expert evidence in personal injury actions was the main focus of attention in the *Interim Report*.[742] Chapter 13 commenced by confirming that no one has seriously challenged Lord Woolf's basic contention that expert evidence was one of two major generators of unnecessary cost in civil litigation.[743] Chapter 13 also notes that resistance to the proposed single experts remained particularly strong.[744] Lord Woolf's *Final Report* famously criticised party experts, including that party expert evidence is one of two major generators of unnecessary costs; party experts are

[735] Woolf, *Interim Report* (n 1).
[736] 'Editorial: A Bonfire of the Paper Mountain' (1994) Counsel (November/December 1994) 4; Woolf, *Interim Report* (n 1) 183.
[737] eg Administrative Appeals Tribunal, *An Evaluation of the Use of Concurrent Evidence in the Administrative Appeals Tribunal* (2005), 6.
[738] Review Body on Civil Justice, *Report* (Cm 394, 1988).
[739] Heilbron (n 475).
[740] Woolf, *Interim Report* (n 1) Ch 23 [2].
[741] Ibid Ch 13 [38].
[742] see Woolf, *Final Report* (n 2) Ch 13 [4]
[743] Ibid Ch 13 [1].
[744] Ibid Ch 13 [16].

partisan advocates; and party experts are one of the principal weapons used by litigators to take unfair advantage of an opponent's lack of resources or ignorance.[745]

Lord Woolf's 'Access to Justice' inquiry criticisms of party experts are in stark contrast to Woolf J's 1985 speech which did not identify party expert evidence as a reason for the 'dissatisfaction with the present system' (which Woolf J said were the state of legal aid funding and the limited number of High Court judges).[746]

The recommendations in the *Final Report*[747] and CPR 35 have been the subject of substantial analysis and commentary in the literature by academics, law reform bodies and senior English and Australian judges.[748]

Lord Woolf's high judicial status inevitably resulted in great weight being given to his 'Access to Justice' inquiry recommendations and history shows they were acted on through CPR 35. The literature indicates that only Zander and Genn[749] consistently pushed back against the tide of Lord Woolf's 'Access to Justice' inquiry. Genn found it difficult to see why there was a sense of impending crisis at the time of the 'Access to Justice' inquiry, noting that Lord Chancellor's department civil servants involved in pre-'Access to Justice' inquiry discussions remember no crisis at that time (but rather that Britain lagged behind other jurisdictions which had already undertaken reviews and the department needed to look at justice system expenditure, particularly legal aid).[750] Genn also posits that though Lord Woolf did not raise the pressure on civil justice system resources, it is clear that those pressures were a principal reason why the Lord Chancellor's Department commissioned the 'Access to Justice' inquiry'.[751]

In 2010 Lord Neuberger MR acknowledged that Lord Woolf's proposals lacked evidence-based analysis (as pointed out by Hazel Genn).[752]

The reforming rules arising from the 'Access to Justice' inquiry and reports will be

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[745] Ibid Ch 13.
[746] Woolf and Williams (n 516), 228-229.
[747] Woolf, *Final Report* (n 2).
[748] The analysis and commentary on Lord Woolf's 'Access to Justice' inquiry and reports are too voluminous to list.
[749] Genn, *Judging Civil Justice* (n 252) 52 and onwards.
[750] Ibid 52.
[751] Ibid 58. Lord Woolf briefly mentioned concerns about the 'vast' bill for legal aid in 'Cutting the price of British justice', *The Times* (23 June 1994) 16 .
[752] Lord Neuberger, 'Costs, Management Proportionality and Insurance' (Personal Injuries Bar Association Conference, Oxford 26 March 2010), [5].

considered in more detail in Chapter 5.2.11. However the data already makes clear that the 'problems' (and to an extent the reforming rules which addressed the 'problems') did not evolve in a contextual vacuum in the mid-1990s; rather the data indicates the evolution of the 'problems' was influenced by the context of the English mid-1990s civil justice 'crisis' which provided Lord Woolf, then a clearly powerful actor in evolutionary terms, with a unique opportunity to implement significant change to address the 'problems', as they were perceived by him.

4.2.15 Post-'Access to Justice' inquiry

In 1996 the Court of Appeal in *Abbey National*[753] caustically observed that the experience over many years has been that party experts tend to expouse the cause of those instructing them; and on occasion become more partisan than the parties.

In the 2000s much of the focus on the 'problems' shifted towards criminal proceedings.[754] In 2005 Hallett J pointed out that two very high profile criminal cases have brought the role of experts in the trial process into the headlines.[755]

Also in the late-1990s and 2000s, a small number of very senior English judges gave extrajudicial speeches about party experts in civil proceedings.[756] Justice Lightman, an avowed supporter of Lord Woolf's reforms, gave three speeches deprecating the adversarial system and criticising party experts.[757] Hallett J's 2005 article continued the extrajudicial criticism of party experts, including advising that cases continue to plague the appellate courts in which expert evidence is found to have been unreliable, partisan, or not even worthy of the description 'expert evidence'. [758] Hallett LJ's and Sir Peter Gross' recent extrajudicial literature, and the cases referred to in that

[753] *Abbey* (n 704).
[754] eg *R v Clark* [2003] EWCA Crim 1020, [2003] 2 FCR 447 (CA); *R v Cannings* [2004] EWCA Crim 1, [2004] 2 Cr App R 7; House of Commons Science and Technology Committee (n 286); Leveson (n 279); The Law Commission *Expert Evidence* (n 283).
[755] Hallett (n 57)
[756] Goldring (n 18); Hodge (n 45); Jackson (n 260); John Leslie, 'Refining the System of Expert Evidence in English Civil Procedure' (2014) 25 Eur Bus L Rev 539; Lord Justice Leveson, 'Speech to Bond Solon Annual Expert Witness Conference' (Bond Solon Annual Expert Witness Conference 6 November 2009); Leveson (n 279); Neuberger, 'Keynote Address' (n 38); Lord Neuberger, 'Address to the Bond Solon Expert Witness Conference 7 November 2014' (2014) ; Sharpe (n 115); Lord Thomas, 'Expert Evidence The Future of Forensic Science in Criminal Trials' (The 2014 Criminal Bar Association Kalisher Lecture 14 October 2014).
[757] Lightman (n 53); Justice Lightman, 'The civil justice system and legal profession: The challenges ahead' (The 6th Edward Bramley Memorial Lecture 4 April 2003); Justice Lightman, 'Access to Justice' (The Law Society 5 December 2007).
[758] Hallett (n 57).

literature in which English Courts continue to criticise party experts, indicate that the 'problems' continue to a degree in civil proceedings.[759]

The partial success of Lord Woolf's reforms in reducing costs necessitated Lord Justice Jackson's 2009 *Review of Civil Litigation Costs*.[760] Chapter 38, which covered expert evidence, recommended that the English Permission Rule (CPR) be extended to require that a party seeking permission to adduce expert evidence provide an estimate of the costs of the proposed expert evidence; and that the Australian procedure known as 'concurrent evidence' should be piloted.[761] In contrast to the extrajudicial literature discussed above, there is nothing in Chapter 38 indicating any significant 'problems' existed in 2009.

4.2.16 Conclusion

This Chapter 4.2 investigated the English 'problems', including their impact on the English civil justice system, as perceived by English judges from time to time. It used a chronological, historical methodology to analyse the data having regard to the Chapter 3 context, to answer research question 1 (as it relates to England) - when did the English 'problems' evolve into acute 'problems' which materially impact on access to justice in England?

It has demonstrated that in England the 'problems' of bias, excessive party experts and contradictory party experts, which had been a feature of criminal proceedings since at least the late 17th century, moved incrementally into civil proceedings (commencing within a short period of approximately 40 years after Lord Mansfield was strongly supportive of skilled party experts providing assistance to the Courts in *Folkes*). By the mid-19th century very senior English judges were concerned mainly about the 'problem' of bias and those criticisms continued into the 20th century, though to a lesser extent.

The English 'problems' of bias, excessive party experts and contradictory party experts (including substantial costs) made the Permissive Party Expert Rule suboptimal,

[759] Ibid; Gross (n 114); The Rt. Hon. Lady Justice Heather Hallet, 'Objectivity in an adversarial system' (2020) 88 Medico-Legal Journal 114. See also Robin Jacob, 'Court Appointed Experts v Party Experts: Which is Better ?' (2004) 23 CJQ 400 which repeats with apparent approval Sir George Jessel's reference to the 'problem' of suppression in *Thorne*.
[760] Jackson (n 26).
[761] Ibid 385 [4.3].

probably most starkly in mid to late-19th century patent and other monopolies actions. Further, by the late-19th and early-20th centuries the 'problem' of contradictory party expert evidence was so suboptimal as to cause a small number of judges to take direct action to address it by appointing independent experts.[762]

Nineteenth century criticisms by solicitors, scientists and in the broader public media corroborated the judicial perceptions about the 'problems'; and indicated that the 'problems' of bias, excessive party experts and contradictory party experts were also perceived by scientists, lawyers and the media.

The early 1930s Hanworth Royal Commission was the first law reform body to recommend that expert evidence be by affidavits exchanged before trial (and that RSC 1883 be amended to provide for that), but only in patent actions, because of the complexity of scientific facts in many heavy cases and to avoid the 'problem' of surprise.

The implementation of the first English Power to Limit Party Experts and the English CE Power (1934-1998) in the 1930s, in response to the Lord Chancellor's request that the Rules Committee consider what could be done to address the problem of civil litigation cost, infers that the 'problems' of bias and excessive party experts may have at least partly contributed to the high costs and delays then of concern.

The English 'problems' of bias, surprise and contradictory party expert evidence had incrementally expanded into personal injuries litigation (though were probably not acute) at the time of the 1940-50s Evershed Committee inquiry, which recommended:

- an English Disclosure Rule (to address the 'problem' of surprise); and
- that the English CE Power (1934-1998) (which addressed the 'problem' of bias) should be both used more often and be exercisable by the Court on its own motion.

The English 'problem' of surprise continued during the Winn Committee's late 1960s inquiry and the 1985 Review Body on Civil Justice, which both also recommended a Disclosure Power in personal injury cases to address that 'problem'. The 'problem' had ceased by the time of Lord Woolf's mid-1990s 'Access to Justice' inquiry.

[762] *Kennard v Ashman* (n 105); *Attorney General v Birmingham Tame* (n 636).

The key pre-'Access to Justice' inquiry civil justice inquiries, though documenting the existence of the 'problems' of surprise and contradictory party experts in particular, indicate that in the context of the broader problems with the civil justice system, none of the 'problems' associated with party experts were material or significant.

Lord Woolf's famous criticisms of party experts in his *Final Report*, including the unnecessary costs of party experts; that party experts are partisan advocates; and that party experts are one of the principal weapons used by litigators to take unfair advantage of an opponent's lack of resources or ignorance, indicated that the 'problems' of bias, contradictory party expert evidence and excessive party experts (and perhaps party selection of experts suppressing counter or neutral opinions) were acute in the mid-1990s in England.

4.3 NSW

4.3.1 Introduction

The previous Chapter 4.2 analysed the 'problems', as perceived by senior English judges from time to time. It showed that a number of English judges have criticised party experts as a result of the 'problems' of bias and contradictory party experts in cases since as early as the 1820s. It also showed that in some English cases the 'problems' of bias and contradictory party experts have caused English judges to appoint their own independent expert; and the only English law reform bodies which have raised significant 'problems' are the Patent Law Commission and the Judicature Commission.

This Chapter 4.3 and the following Chapter 4.4 will undertake a similar analysis of the data about the 'problems' in NSW and Victoria. That will show the history, and evolution of the 'problems', in NSW and Victoria which will both identify temporal and causal connections between the 'problems' in England, NSW and Victoria; and allow the later comparative analyses in Chapter 6. It is expected that the historical English 'problems' (from as early as the 1820s) will heavily influence the evolution of the 'problems' in NSW and Victoria because, for the reasons explained in Chapter 3.2, Australia generally closely followed developments in England.

This Chapter 4.3 will answer research question 1 (as it relates to NSW), namely when did the NSW 'problems' evolve into acute 'problems' which materially impact on access to justice in NSW?

A chronological, historical methodology will be used to collate the data about the NSW 'problems', including their impact on the NSW civil justice system (such as the acuteness of the 'problems'), as perceived by NSW judges from time to time; and analyse that data having regard to the Chapter 3 context, to identify temporal connections.

The analysis in this Chapter 4.3 will cover the period from the 19th century (when the data shows the Permissive Party Expert Rule existed in NSW) to 2020.

4.3.2 Nineteenth and twentieth centuries

The historic NSW cases demonstrate that the Permissive Party Expert Rule existed in NSW from at least the 1880s.[763] The Permissive Party Expert Rule likely came to apply in NSW because of the close connections which NSW had with England from the early-19th century as discussed in Chapter 3.2. None of those historic NSW cases indicate any 'problems' existed in NSW in the late-19th century.

In 1933 the High Court of Australia delivered its landmark judgment in the *Australian Knitting Mills* personal injuries case.[764] The trial in the Supreme Court of South Australia was at the time one of South Australia's (and likely one of Australia's) longest civil cases.[765] Starke J described that trial as 'most exhaustive' with 'distinguished medical and chemical experts called on both sides' who 'differed considerably in opinion'.[766] Dixon J specifically referred to conflicting expert evidence given by the dermatologist experts. Evatt J described the trial as lasting no less than twenty days and involving a great deal of scientific evidence.[767] The *Australian Knitting Mills* case indicates that by the 1930s the 'problems' of contradictory party experts and excessive

[763] When party experts started being used in NSW is impossible to determine from the literature. *Carter v Cox* [1880] NSWLawRp 26, (1880) 1 LR (NSW) 95; *Lucas v Lackey* (1883) 7 NSWR 28; *Deane v Railway Commissioners* (1897) 18 LR (NSW) 294 are examples of late 19th century NSW cases involving party experts. Examples of the relatively small number of specific references to *Folkes* in the NSW (or broader) Australian literature include: *Bode v Wollongong Gas-Light Co Ltd* (1910) 10 SR (NSW) 566; Moodie (n 76) 212; *Clark v Ryan* (1960) 103 CLR 486, 502; Samuels (n 19) 140; Basten (n 77).

[764] *Australian Knitting Mills v Grant* (1933) 50 CLR 387. Discussed in Mark Lunney, 'Causation, Science, and Sir Owen Dixon' (2005) 9 Aust J Leg Hist 205; Chief Justice Robert French, 'Science and judicial proceedings: Seventy six years on' (2010) 84 ALJ 244.

[765] French (n 764) Chief Justice Robert French, 'Science and judicial proceedings: Seventy six years on' (2010) 84 ALJ 244notes that the first instance hearing in the Supreme Court of South Australia was at the time one of the longest civil cases heard in South Australia and involved much conflicting expert evidence about the cause of the plaintiff's dermatitis.

[766] The defendants for example called 3 skin specialists and multiple chemists.

[767] *Australian Knitting Mills v Grant* (1933) 50 CLR 387, 429.

party experts existed in at least some Australian personal injuries actions (though *Australian Knitting Mills* was not a NSW or Victorian case), which may have coevolved with the similar 'problems' of contradictory party experts and excessive party experts which then existed in England in personal injuries actions.

Dixon J's[768] seminal 1933 address to the Medico Legal Society of Victoria titled 'Science and Judicial Proceedings'[769] was given approximately one month after the *Australian Knitting Mills* decision[770] so is likely to have been influenced by that case.[771] Dixon J posited in that address that even the most scientific of witnesses are liable to 'be infected with … partisanship'. He also expressly supported Courts more frequently using their Reference for Trial Power to send the whole case to a referee when a cause or matter requires a scientific investigation.[772]

Moodie's 1937 article titled 'Expert testimony–its past and its future'[773] was the first Australian academic article published in the authoritative *Australian Law Journal* about party expert evidence. It is not clear what prompted Moodie's article at that time. Moodie's article extensively cited the English literature and referred to only one Australian case.[774] Though Moodie's article focussed on the admissibility of expert evidence, it referred to some of the 'problems':[775] firstly, that a good deal has been lost by allowing experts to be called by opposing sides whereby naturally their views are coloured by the fact that they are witnesses called and paid for one party; secondly, experts having a general reputation of 'traitorous trueness' and 'loyal deceit'; and thirdly, jurors have to 'listen to the clash of experts'. Unfortunately Moodie's article does not indicate whether he was referring to those 'problems' of bias as they then existed in England, Australia or both.[776]

The *Hocking v Bell*[777] NSW medical negligence litigation is an example of the 'problems' in NSW personal injuries litigation in the 1940s. *Hocking v Bell*

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[768] then a justice of the High Court of Australia.
[769] Dixon (n 14).
[770] Dixon J was a member of the High Court of Australia which decided that case.
[771] French (n 764); Lunney (n 764).
[772] Dixon (n 14) 19.
[773] Moodie (n 76).
[774] *Wise v Musolino* (1936) SASR 447 (which concerned the admissibility of party expert evidence).
[775] Moodie (n 76) 214-215
[776] Hammelmann (n 336) is cut from the same cloth as Moodie's 1934 article though with a more international analysis.
[777] *Hocking v Bell* (1945) 71 CLR 430 (HCA); *Hocking v Bell* (1947) 75 CLR 125 (PC).

demonstrates four important points about the 'problems'. Firstly, there was a serious 'problem' of contradictory party expert evidence (and possibly bias) as demonstrated by the defendant's expert evidence being 'a refutation' of the plaintiff's expert evidence[778] and the 'direct conflict of evidence' which was 'extensive and vigorous'. The Privy Council referred to the conflict of party expert evidence 'on nearly all the material issues in the case'.[779] Secondly, there was a 'problem' of excessive party experts (the plaintiff called two medical experts and the defendant called four on the same causation issue). Thirdly, the litigation had a 'regrettably long history'[780] involving four separate judge and jury trials as well as appeals to the full court of the Supreme Court of NSW, the High Court of Australia and the Privy Council.[781] The fourth judge and jury trial alone lasted for 36 days and generated about 1,400 pages of transcript. Finally, Rich J concluded that a great part of the trial has been taken up with highly technical medical evidence; that no jury could proper appreciate specious arguments addressed to them on the proper inferences to be drawn from such evidence; and no judge could prevent improper prejudice being imported into the case. Rich J's conclusions further indicate a serious 'problem' of contradictory party expert evidence existed in NSW personal injuries litigation.

The first significant Australian judicial criticism of party experts in the literature occurred in the 1950s/1960s accident case of *Clark v Ryan.*[782] In the appeal from the NSW Supreme Court to the High Court of Australia, Dixon CJ clearly identified the 'problem' of bias when he criticised the plaintiff's expert who argued the plaintiff's case and presented the plaintiff's case more vividly and cogently before the jury.[783] So too did Windeyer J who also criticised the plaintiff for calling his expert thinking that by describing him as an expert 'he could enlist the expert as an advocate'.[784]

Miller Steamship Co v Overseas Tankship[785] was a 1960s NSW Supreme Court Commercial Causes case. It is the first NSW Supreme Court reported judgment which expressly recognised that what was described as 'unconscious bias' was then a well-

[778] *Hocking v Bell* (1945) 71 CLR 430 (HCA).
[779] *Hocking v Bell* (1947) 75 CLR 125 (PC), 132.
[780] Ibid 125.
[781] Ibid.
[782] *Clark v Ryan* (1960) 103 CLR 486.
[783] Ibid 491.
[784] Ibid 507.
[785] *Miller Steamship Co v Overseas Tankship* [1963] SR (NSW) 948, 963 (Walsh J).

known characteristic of party expert evidence.

A 1971 editorial in the *Australian Law Journal* titled 'Expert Assistance'[786] was written in the shadows of the 1970 English Law Reform Committee's *Seventeenth Report*.[787] That editorial, like Gordon Samuels's article,[788] suggested that the criticisms of party experts should be directed to the lawyers and the adversary system because experts do not choose to be partisan and expert partisanship is a consequence of the adversary system. That editorial, again like Gordon Samuels' article, also referred to only one Australian case involving judicial criticism of party experts (*Miller Steamship*[789]).

In 1977 John Basten (a University of NSW law lecturer) authored an article titled 'The Court Expert in Civil Trials'.[790] That article focused on the history of the English Court Expert. The literature cited in that article is mostly English authorities about the 'problems' with party experts and Court Experts. Section D of the article suggested further consideration be given to four reforms, including a NSW CE Power which allowed a Court Expert to be appointed on the court's motion. Basten's article does not cite any data about the 'problems' in NSW.

The problematic delays in NSW civil proceedings in the 1980s were considered by Ross Cranston and the NSW Court of Appeal in *Pambula*[791]. Ross Cranston's 1985 *Delays and Efficiency in Civil Litigation* report confirmed, largely by an analysis of court statistics, that personal injuries cases are only a relatively small proportion of cases commenced; but comprise a substantial number of the cases which get to a trial.[792] In *Pambula* Kirby P referred to the 'very great congestion in the jury list' (the disposal of which would take 34 years to finish) and the 'most unsatisfactory' delays then being experienced. Samuels JA noted that 'delays in the trial lists have reached intolerable proportions'. Neither Ross Cranston nor the Court of Appeal in *Pambula* indicated that party experts were a cause of those NSW delays.

By 1982 there was sufficient interest among Australian Supreme Court judges in

[786] 'Expert Assistance' (1971) 45 ALJ 1.
[787] Law Reform Committee (n 685).
[788] Samuels (n 19) 154.
[789] *Miller Steamship* (n 785).
[790] Basten (n 77).
[791] *Pambula* (n 352).
[792] Cranston and others (n 348) 12.2].

medical expert evidence that a medical expert (a pathologist) addressed a Supreme Court Judges' Conference in Sydney on the topic 'Legal Dilemmas in the Use of Expert Medical Evidence'.[793] Interestingly, and perhaps unsurprisingly, that expert cited Lawton LJ's extreme criticisms of party experts and the 'problem' of bias in Lawton LJ's 1980 speech (discussed above). That expert conceded that some medical experts may be unintentionally biased; and that there was a particular 'problem' of bias with those experts who earn considerable income from frequent party expert appointments. Otherwise no data was cited about the 'problems' in NSW. Those concessions are interesting as they tend to corroborate the 'problems', as perceived by NSW judges.

4.3.3 Freckelton's empirical study

In April 1999 the Australian Institute of Judicial Administration published Freckelton et al's seminal *Australian judicial perspectives on expert evidence: An empirical study*.[794] That study remains the first (and only) significant piece of quantitative research into the 'problems' in Australia and England. It was clearly undertaken in the shadow of, and no doubt was in part prompted and influenced by, Lord Woolf's mid-1990s 'Access to Justice' inquiry.

The study was a survey based research study into the subjective attitudes of Australian trial judges towards expert evidence. More than one third of the respondent judges from across all Australian jurisdictions ranked the 'problem' of bias as the most serious problem.[795] Though the study is clear evidence that the 'problem' of bias which existed throughout Australia at the end of the 1990s was serious, the study could not, and does not, conclude that the 'problem' of bias was acute.[796]

The study is important as it was overseen by an Advisory Committee convened by Smith J of the Victorian Supreme Court; was endorsed, and published, by the Australian Institute of Judicial Administration;[797] and is regularly cited with approval in

[793] V Plueckhahn, 'Legal Dilemmas Part I Discussion Paper' (1982) Australian Journal of Forensic Sciences 40; V Plueckhahn, 'Legal Dilemmas in the Use of Expert Medical Evidence Part II ' (1982) 14 Australian Journal of Forensic Sciences 168. Presumably Plueckhahn was invited to present his paper to the Judges Conference.
[794] Freckelton, Reddy and Selby (n 255).
[795] Ibid 37.
[796] ie the 'problems' were a material cause of the unacceptable cost, delay and complexity of civil litigation and impeded or undermined access to justice.
[797] Though the Australian Institute of Judicial Administration (AIJA) is not a judicial body and does not represent the judiciary, many of its members are judges and the AIJA is a respected body.

the later Australian literature and some of the English literature.[798] However, its weight is diminished because its assumptions, methodology, claims and conclusions were flawed for the reasons explained by Edmond.[799]

4.3.4 Extrajudicial literature

In 1958 Sir Garfield Barwick (then a Queen's Counsel and from 1964 Chief Justice of the High Court of Australia) called for the pre-trial disclosure of party expert reports because of the 'problem' of surprise and time wastage at trial caused by the sudden production of an expert for the first time at trial.[800]

In 1961 the senior NSW Supreme Court judge (Wallace J) authored an article which was published in the authoritative *Australian Law Journal*.[801] Wallace J gave the example of a case he had recently heard, which involved seven medical specialist experts, as an example of the 'problem' of excessive party experts in judge and civil jury trials. Wallace J called for a range of reforms to achieve 'expedition', including that there should be a NSW Power to Limit Party Experts (available at a pre-trial conference convened by the court) to address the 'problem' of excessive party experts; and a NSW Disclosure Power for expert medical witnesses to address the 'problem' of surprise.

In the 1960s the Chief Justice of Tasmania called for pre-trial disclosure of party expert reports as part of an active judicial case management system to avoid the 'problem' of surprise which caused time wastage at trial on evidence which is not ultimately contested.[802]

Between May 1999 and 2010 four NSW Supreme Court judges (Abadee, Sperling, Wood and McClellan JJ[803]) delivered speeches or authored articles about the 'problems' in NSW. That group of four judges comprised about 10% of the total number

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[798] Dwyer, *Judicial Assessment* (n 67) Ch 16.
[799] Edmond, 'Judging Surveys' (n 100) 124 which makes the points that having privileged the perspective of judges in the study, the study does not consider why judges might attribute responsibility for apparent problems to others; and the study takes as self-evident that experts and advocates are responsible for most of the problems.
[800] Sir Garfield Barwick, 'Courts, Lawyers, and the Attainment of Justice' (1958) 1 U Tas LR 1, 11.
[801] Wallace (n 331).
[802] S C Burbury, 'The Wind of Change in the Administration of Justice' (1963) 6 U WA LR 163 ; Sir Stanley Burbury, 'Modern Pre-trial Civil Procedure in the USA' (1965) 2 U Tas LR 111
[803] McClellan J was Chief Judge of the Common Law Division whose title is Chief Judge at Common Law.

of NSW Supreme Court judges at that time.[804]

Abadee J's literature included:

- a May 1999 article published in the *Judicial Officers Bulletin*;[805] and
- four speeches about the new Professional Negligence List, including how the 'problems' were to be addressed in that List.[806]

Abadee J's literature largely concerned the new judge managed, specialist Professional Negligence List which Abadee and Sperling JJ managed. Abadee J's speeches and articles are highly critical of party expert evidence, including adopting Lord Woolf's critical comments about party experts and referring to party experts as 'hired guns'. Interestingly, on his retirement from the NSW Supreme Court in 2000 Abadee J became the inaugural chairman of the Australian Expert Witness Institute which represents and advances the interests of party appointed experts.

Sperling J also gave speeches and authored papers about party experts in the post-'Access to Justice' inquiry period from 1999-2004, including speeches to a State Legal Conference in August 1999 and to the NSW Judges Annual Conference in September 1999; and articles in *The Judicial Review.*[807] Sperling J's September 1999 speech covered almost all of the Party Expert Procedural Rules in detail and made the points that nothing has changed in the century since Sir George Jessel's criticisms about party experts in *Thorn v Worthing*; party experts continue to be partisan and biased; and party experts are 'part of the team' and 'front line soldier[s]' at the trial. That speech advocated for, and recommended, extensive reforms to the procedural rules regulating party experts mostly, it would seem, to address the 'problem' of bias.

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[804] On 1 January 1999 there were approximately 40 NSW Supreme Court judges and approximately 30 Victorian Supreme Court judges.

[805] *Judicial Officers Bulletin* is the publication of the NSW Judicial Commission.

[806] Justice A R Abadee, 'Professional Negligence Litigation A New Order in Civil Litigation - the Role of Experts In a New Legal World and in a New Millennium' (Australian College of Legal Medicine, Canberra 1999); Justice A R Abadee, 'Commentary: The Professional Negligence List in the Common Law Division of the Supreme Court 13 May 1999'; The Honourable Justice Abadee, 'The New Professional Negligence List - A Hands-On Approach to Case Management' (1999) 11 (4) Judicial Officers Bulletin 25; Justice A R Abadee, 'The Expert Witness in the New Millennium' (General Surgeons Australia, 2nd Annual Scientific Meeting, Sydney 2 September 2000).

[807] H D Sperling, 'Expert Evidence: The Problem of Bias and Other Things' (Supreme Court of NSW Annual Conference); H D Sperling, 'The Supreme Court Professional Negligence List' (State Legal Conference 24 August 1999); H D Sperling, 'Letter to the Editor' (2003) 6 TJR 223; H D Sperling, 'Commentary on Lord Justice May's paper: "The English High Court and Expert Evidence"' (2004) 6 TJR 383.

Wood J's 2001-2003 articles specifically cover expert evidence as one of many topics.[808] Wood J's 2001 article, which included a section headed 'The problems with expert evidence', covered what he described as the 'well recognised' 'problems' of bias and increased costs; and cited (with approval as also applicable in NSW) Lord Woolf's 'Access to Justice' inquiry criticisms.

The speeches and articles about the 'problems' authored by McClellan J were extensive and influential on the discourse about 'problems', including inquires undertaken by the NSW and Victorian LRCs (which both extensively cited that extrajudicial literature).[809] McClellan J's extensive speeches and literature on the 'problems' and expert evidence generally in the six years between 2004 and 2010 perhaps most starkly demonstrate the evolution of the 'problems' in NSW, including McClellan J's conclusions that the effective and fair use of party expert evidence is one of the most significant issues which the courts face; and unless responses to the problems are found community acceptance of the role which courts have traditionally performed in the resolution of disputes will be eroded.[810]

The extrajudicial literature authored by Abadee, Sperling, McClellan and Woods JJ, which sets out their highly critical views about party experts, prima facie, demonstrates that by the late-1990s/early-2000s those judges considered that the 'problem' of bias in particular had evolved into an acute problem in NSW at least. Their extrajudicial literature, which extensively refers to the English 'problems', also demonstrates some NSW coevolution with the evolution of the 'problems' in England.

In 2006 and 2007 the Chief Justice of Australia made two speeches covering, among other things, expert evidence. The 2006 speech noted that '[t]he effective and fair use of expert evidence is an issue currently facing the court system'.[811] The 2007 speech to the Judicial Conference of Australia[812] recognised that the use of expert witnesses affects both the economy and fairness in the trial process; and there has been a

[808] Wood (n 277) 151.
[809] A search of *Civil Justice Review Report* (n 42) and *Report 109* (n 99) for the word 'McClellan' identifies the numerous references to McClellan J's extrajudicial literature.
[810] Peter McClellan, 'The New Rules' (Expert Witness Institute of Australia and The University of Sydney Faculty of Law (16 April 2007))
[811] Murray Gleeson, 'Outcome, Process and the Rule of Law ' (30th Anniversary of the Administrative Appeals Tribunal Canberra 2 August 2006).
[812] Murray Gleeson, 'Some Legal Scenery' (Judicial Conference of Australia, 5 October 2007), 13.

marked increase in the use of experts for advocacy.[813] Those references to the 'problems', though brief and not specifically related to NSW, are important for two reasons. Firstly, they were made by the Chief Justice of Australia who was the most senior judge in Australia. Secondly, they do not adopt the four NSW judges' criticisms of party experts (discussed above). Those stark differences in judicial attitudes invite a consideration of the trustworthiness (or accuracy) of the NSW extrajudicial criticisms of party experts and the weight to be given to those criticisms. An objective analysis of the four NSW judges' criticisms of party experts (taking into account the matters listed in Chapter 2.4) demonstrates that they are not highly trustworthy (or accurate), and should be given diminished weight, for the following reasons.

Firstly, it is likely that those NSW judges had strong institutional commitments to their court and/or other sensitivities which encouraged them to blame others involved in civil proceedings for the 'problems'.[814]

Secondly, almost all the critical NSW extrajudicial literature comprises extrajudicial speeches or papers given at non-legal forums (and later re-published in the literature).

Thirdly, none of the extrajudicial literature is research per se, or peer reviewed.

Fourthly, each NSW judge's motivation when authoring the extrajudicial literature was largely to advance the further reform of party expert evidence and the implementation of case management procedures.[815] For example, McClellan J's extrajudicial literature makes clear that it was prepared to advance his advocacy for the greater use of concurrent expert evidence.[816] Gary Edmond has referred to some of the NSW judges' extrajudicial literature as 'a promotional campaign dominated by senior members of the Australian judiciary' which accompanied the institutionalisation of concurrent evidence.[817]

Fifthly, the critical NSW extrajudicial literature about party experts was authored by a

[813] That reference was subsequently referred to in McClellan J.
[814] Edmond, 'Judging Surveys' (n 100) 107-108.
[815] Mike Metcalfe, 'Author(ity): The Literature Review as Expert Witnesses' (2003) 4 Forum: Qualitative Social Research , [5.3].
[816] Perhaps the best example is McClellan J's literature, much of which is prepared to advance McClellan's calls for the greater use of concurrent evidence in lieu of party experts. Much of Davies J's literature also advances the use of court appointed experts as an alternative to expert.
[817] Edmond, 'Secrets of the Hot Tub' (n 108) 59.

small percentage of the total college of NSW Supreme Court judges[818] (though it is also relevant that there is no data indicating other NSW judges at the time disagreed with the critical NSW extrajudicial literature).

Sixthly, as posited by Edmond, the four NSW judges had vested interests in the reforms because they are beneficiaries of the procedural reforms which lighten their judicial workload, including by moving party expert interactions away from judicial hearings to pre-trial conferences and shifting burdens onto experts, lawyers and parties.[819]

Seventhly, none of the NSW extrajudicial literature is based on any empirical analysis, nor includes any data about the 'problems' in NSW. Rather the NSW extrajudicial literature is almost all subjective.

4.3.5 *Report 109 Expert Witnesses*

On 6 September 2004, *The Sydney Morning Herald* published an article titled 'Mouths for Hire' which clearly raised the 'problem' of bias when it was highly critical of NSW party experts, including the 'experts for hire' market/industry which had developed in NSW. Particular concerns included direct evidence of biased NSW party experts and experts working on 'no win no fee' and contingency retainers.[820] Ten days after that article was published, the NSW Attorney General referred the operation and effectiveness of the NSW rules and procedures governing expert evidence to the NSW LRC for inquiry.[821] The Division of the NSW LRC which undertook that inquiry included four Supreme Court judges (Michael Adams, David Kirby, Gordon Samuels and Hal Sperling JJ). The inclusion of Sperling J is notable as he had previously been very critical of party experts because of the 'problem' of bias.[822]

It is interesting that the NSW Attorney General referred the 'problems' to the NSW LRC (rather than the NSW Rules Committee) for inquiry.

The NSW LRC's 2005 *Report 109 Expert Witnesses*[823] is the most comprehensive law

[818] On 1 January 1999 there were approximately 40 NSW Supreme Court judges.
[819] Edmond, 'Secrets of the Hot Tub' (n 108) 79.
[820] 'Mouths for Hire', *Sydney Morning Herald* (6 Sep 2004).
[821] The short period of time between *The Sydney Morning Herald* article and the reference to the NSW LRC infers that the reference was prompted by the article.
[822] See n 807.
[823] *Report 109* (n 99).

reform report undertaken into expert evidence, including the 'problems'. However, no empirical research into the NSW 'problems' was undertaken and *Report 109* refers to only a few actual instances of the 'problems' in NSW.

A key recommendation in *Report 109* (Recommendation 6.1) was that NSW implement a Permission Rule. Controversially, a 'Working Party on Civil Procedure' appointed by the NSW Attorney General to consider the *Report 109* recommendations, which was chaired by another Supreme Court judge (Hamilton J),[824] rejected that recommendation.[825] Most of *Report 109*'s other recommendations for reform of the procedural law regulating expert evidence were implemented in 2006 by extensive amendment to the procedural rules in the UCPR 2005 (NSW).[826]

4.3.6 Conclusions

The aim of this Chapter 4.3 (in relation to NSW), was, like Chapter 4.2 (in relation to England), to analyse the data about the 'problems', as perceived by NSW judges. It was expected that the historical English 'problems' (from as early as the 1820s) will heavily influence the 'problems' in NSW because, for the reasons explained in Chapter 3.2, Australia closely followed developments in England.

This Chapter shows that the 'problems', as perceived by NSW judges, evolved incrementally (though over a much shorter period of time than England); and evolved largely independently of the English 'problems', until the late 1990s. From the late 1990s Abadee, Sperling, McClellan and Woods JJ authored their unique extrajudicial literature detailing their highly critical views about party experts, and the NSW LRC's *Report 109* was published,[827] which both drew extensively on Lord Woolf's *Final Report* and the earlier Australian literature (including Freckelton's empirical study[828]).

The data demonstrates the first 'problem' of bias arose in NSW in the 1930s/40s; there were significant 'problems' of surprise and contradictory party expert evidence in NSW personal injuries actions from as early as the 1940s (similar to England); and by the late-1990s/early-2000s the 'problem' of bias had evolved into an acute problem, as

[824] Hamilton J was a member of the NSW Rules Committee and from 2003 a member of the Attorney General's Department's 'Civil Procedure Working Party' which prepared UCPR 2005 (NSW): NSW LRC, *Report 109 Expert Witnesses* (2005) [3.6].
[825] NSW Attorney General's Working Party on Civil Procedure.
[826] Uniform Civil Procedure Rules (Amendment No 12) 2006 (NSW).
[827] *Report 109* (n 99).
[828] Freckelton, Reddy and Selby (n 255).

perceived by some NSW judges.

Interestingly, there is very little (if any) evidence of any NSW 'problem' of suppression.

4.4 Victoria

4.4.1 Introduction

Like Chapters 4.2 (in relation to England) and 4.3 (in relation to NSW) above, this Chapter 4.4 will undertake a similar analysis of the data about the 'problems' in Victoria. That will show the history, and evolution of the 'problems', in Victoria which will identify temporal and causal connections between the 'problems'; and temporal connections which Victoria has with the evolution of the 'problems' in both England and NSW. It will also facilitate the later comparative analyses in Chapter 6. It is expected that the historical English 'problems' (from as early as the 1820s) will also heavily influence the 'problems' in Victoria because, for the reasons explained in Chapter 3.2, Australia closely followed developments in England.

This Chapter 4.4 will use answer research question 1 (as it relates to Victoria), namely when did the Victorian 'problems' evolve into acute 'problems' which materially impact on access to justice in Victoria?

A chronological, historical methodology will be used to collate the data about the Victorian 'problems', including their impact on the civil justice system (such as the acuteness of the 'problems'), as perceived by Victoria judges from time to time; and analyse that data having regard to the Chapter 3 context, to identify temporal and causal connections.

The analysis in this Chapter 4.4 will cover the period from the 19th century (when the data shows the Permissive Party Expert Rule existed in Victoria) to 2020.

4.4.2 Nineteenth and twentieth centuries

Historic Victorian cases such as *Black and Wife v The Board of Land and Works,*[829] *Mulligan (Falsely Called Boyce) v Boyce*[830] and *Geach v The Board of Land and Works*,[831] which each involved evidence from medical witnesses, demonstrate that the Permissive Party Expert Rule also existed in Victoria from at least the 1870/80s. Like

[829] *Black and Wife v The Board of Land and Works* [1875] VicLawRp 15, (1875) 1 VLR (L) 12.
[830] *Mulligan (Falsely Called Boyce) v Boyce* [1877] VicLawRp 154, (1877) 3 VLR (I) 69.
[831] *Geach v The Board of Land and Works* [1882] VicLawRp 25, (1882) 8 VLR (L) 29.

NSW, the Permissive Party Expert Rule likely came to apply in Victoria because of the close connections which Victoria had with England from the early-19th century as discussed in Chapter 3.2. None of those historical Victorian cases indicate any 'problems' existed in Victoria in the late-19th century.

In 1899-1900 a wide ranging Victorian royal commission considered the civil justice system in Victoria which at that time was suffering from unacceptable delays and costs. It extensively considered whether the English civil justice procedure and reforms already in place in Victora (Victoria having adopted the English Judicature Acts reforms in the late-19th century) should be retained; and/or further English reforms should be adopted in Victoria. The Royal Commission's report made a number of relevant recommendations including the abolition of civil juries; and the further use of skilled expert/technical assessors to assist the judge and to supply 'technical knowledge', including in marine, building, engineering, injury to land, medical and patent cases.[832] There was nothing in the Royal Commission's report indicating that there was any significant 'problems' with party experts in Victoria in the late-19th century or that party experts were contributing to the unacceptable delays and costs.

Two 1928 articles titled 'Science and the Law' published in the *Victorian Law Institute Journal* by the self-described scientific man (Mr Campbell)[833] indicate that in Victoria at that time scientific evidence was not often deployed in courts; many technical disputes were resolved by arbitration (rather than court litigation); and there was discontent among scientific/medical experts about the use of expert evidence in the courts. No detail was otherwise provided.

In contrast to NSW, it was the experience of at least one prominent Victorian Queen's Counsel in the 1960s that it was rare for more than one medical expert witness to be called in Victorian personal injuries actions.[834]

The previous two paragraphs indicate that, in the first half of the 20th century, party experts may have been deployed less frequently in Victoria than in England and NSW.

In the 1960s a subcommittee of the Victorian Chief Justice's Law Reform

[832] *Report of Royal Commission* (n 323) xxvii [92].
[833] Campbell (n 326); F H Campbell, 'Science and the Law (Part 2)' (1928) 2 L Inst J 92.
[834] Comments by Gillard QC on a paper presented by Wallace J: Wallace (n 331) 140.

Committee,[835] the Victorian Bar and the Law Institute called for a Victorian Disclosure Power for medical reports in personal injuries actions;[836] and the Victorian Disclosure Rule (1968 personal injuries actions) was briefly implemented. That infers that the 'problem' of surprise was of concern in 1960s Victorian personal injuries actions. Interestingly, though the subcommittee which recommended a Victorian Disclosure Power included a Supreme Court judge (Justice Starke) and a Victorian Queen's Counsel, the recommendation was not adopted by the Chief Justice's Law Reform Committee (though the literature does not explain why).[837]

By the 1970s Victorian building actions had become notorious: trials (which often involved complex technical issues and party experts) had become long and expensive; and the real issues often emerged only during the trial.[838]

In the 1970s, in response to the Victorian Attorney General referring the reform of the procedural law (both civil and criminal) to the Victorian LRC for investigation and report, the LRC published its 1976 report[839] which focused on delay. That report, though scathing of Victorian Supreme Court delays, did not attribute any blame for the delays to party expert evidence.

Dahl v Grice[840] is an example of a 1980s Victorian personal injuries jury trial which involved the 'problems' of excessive party experts and contradictory experts, as demonstrated by five neurosurgeons giving contradictory medical expert evidence about causation at the trial.

A 1984 Victorian Civil Justice Committee report[841] again considered delays in the Victorian Supreme Court but again did not raise any significant issues about party expert evidence.

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[835] The Victorian Chief Justice's Law Reform Committee, which operated between 1940 and 1971, was one of the oldest law reform bodies in Australia and was essentially a standing committee of people invited by the Chief Justice which regularly made recommendations in the form of reforming legislation: F C O'Brien, 'The Victorian Chief Justice's Law Reform Committee' (1972) 8 MULR 440

[836] 'Supreme Court (Readiness for Trial) Rules 1968' (1969) 43 L Inst J 208, 209-210

[837] Scott, Pullen and Robbins (n 353) 125 cites these calls for reform but provides no details. See also 'Supreme Court (Readiness for Trial) Rules 1968' (n 836) 209-210.

[838] *CW Norris and Co Pty Ltd v World Services and Constructions Pty Ltd* [1973] VR 753; David Byrne, 'The future of litigation of construction law disputes' (2007) 23 BCL 398 (which discusses the difficulties with building actions, but does not mention expert evidence specifically).

[839] VLRC, *Report No 4* (n 480).

[840] *Dahl v Grice* [1981] VR 513.

[841] Scott, Pullen and Robbins (n 353).

Cranston's 1985 *Delays and Efficiencies in Civil Litigation* report,[842] by an analysis of Victorian court statistics, identified the scope of delays as at the 1980s but also did not attribute any delays to party experts.

By the early-1990s, the 'problem' of bias with party experts in Victoria led one Supreme Court of Victoria judge (Marks J, a judge in the Commercial List) to declare in a speech that the Court should 'forsake the hired expert witness' and 'Experts should be witnesses of the court'.[843]

4.4.3 21st century

In a revealing 2005 speech the then recently appointed judge in charge of the Victorian Building Cases List (Habersberger J) lamented that little had changed since the 1960/70s when construction litigation was notorious because building cases were still 'bedevilled by complexity and detail' and trials were still 'long and expensive'.[844] That speech did not refer to any 'problems' associated with party experts. In another speech about the Victorian Building Cases List, Byrne J concluded that 'Expert witnesses are no longer mere hired guns',[845] indicating that the 'problem' of bias may have been quelled (by 2008 at least in the Building Cases List).

The 2008 Victorian LRC's *Civil Justice Review Report*[846] is the most recent Australian law reform report to analyse the 'problems' in detail, and the only law reform report which analyses the 'problems' in Victoria. That analysis, like the NSW LRC's *Report 109*,[847] drew on Lord Woolf's *Final Report* (demonstrating a degree of coevolution with England and NSW), the earlier Australian literature (including Freckelton's empirical study[848]); and it also drew on consultations with a number of Victorian Supreme Court judges. A number of Victorian judges told the Victorian LRC that the 'problem' of bias remained a problem, despite the 2003 expert witness code of conduct which had been introduced the address that 'problem'.[849] Ultimately, the Victorian LRC recommended

[842] Cranston and others (n 348) [12.2].
[843] Marks (n 39).
[844] David Habersberger, 'The Building Cases List of the Supreme Court of Victoria (Address to the Building Dispute Practitioners' Society Inc 16 November 2005)'.
[845] David Byrne, 'Building Cases – A New Approach Practical Role of the Barrister Under Practice Note No 1 of 2008' (Victorian Bar 9 April 2008).
[846] *Civil Justice Review Report* (n 42).
[847] *Report 109* (n 99).
[848] Freckelton, Reddy and Selby (n 255).
[849] *Civil Justice Review Report* (n 42) 485. The code of conduct is an element of the Victorian Independence Rule (2003-ongoing).

(in effect) that Victoria adopt reforms based on the then recently introduced 2006 NSW expert evidence provisions. Those recommendations were largely implemented by the 2012 amendments to the CP Act 2010 (Vic)[850] and demonstrate a strong degree of coevolution with NSW.

4.4.4 Conclusions

The aim of this Chapter 4.4 was, like Chapter 4.2 (in relation to England) and Chapter 4.3 (in relation to NSW), to collate and analyse the data about the 'problems' in Victoria using a chronological, historical methodology.

As was expected for NSW, it was expected that the historical English 'problems' (from as early as the 1820s) will heavily influence the 'problems' in Victoria because, for the reasons explained in Chapter 3.2, Australia closely followed developments in England. This Chapter 4.4 also aimed to consider if, and to what extent, the evolution of the 'problems' in NSW influenced Victoria.

This Chapter has demonstrated that the Victorian 'problems' evolved largely independently of the English and NSW 'problems', until the 2000s. In 2008, the Victorian LRC's *Civil Justice Review Report,*[851] like the NSW LRC's *Report 109*[852] drew on Lord Woolf's *Final Report* and the earlier Australian literature (including Freckelton's empirical study[853]). The Victorian LRC's *Civil Justice Review Report* also drew heavily on the NSW LRC's *Report 109*.

The data on the Victorian 'problems' demonstrates the following. Firstly, there may have been a Victorian 'problem' of surprise in 1960s Victorian personal injuries actions. Secondly, there was a lingering 'problem' of bias (which remained a concern despite the 2003 expert witness code of conduct). Thirdly, the Victorian 'problems' (individually and collectively) never reached the magnitude of the English 'problems' and were never perceived to be 'acute' by Victorian Supreme Court judges. Fourthly, Victoria never experienced any judicial criticism of party experts like that experienced in NSW in the last years of the 20th century and the first decade of the 21st century (as considered in Chapter 4.3.4). Fifthly, like NSW, there is very little (if any) evidence

[850] Civil Procedure Amendment Act 2012 (Vic).
[851] *Civil Justice Review Report* (n 42).
[852] *Report 109* (n 99).
[853] Freckelton, Reddy and Selby (n 255).

of any Victorian 'problem' of suppression. Lastly, on the whole, the 'problems', as perceived by senior Victorian judges, were largely limited to a 'problem' of surprise in 1960s Victorian personal injuries actions; and the lingering 'problem' of bias (which remained a concern in the first decade of the 21st century) despite the 2003 expert witness code of conduct.

Victorian judges had a comparatively relaxed attitude towards party expert (including the lingering 'problem' of bias) compared with English and NSW judges.

4.5 Desuetude of the powers available to the NSW and Victorian Courts to obtain expert assistance other than from party experts

As discussed in Chapter 4.2.13 in relation to the English 'problems', the Party Expert Procedural Rules listed below are important discretionary powers available to NSW and Victorian judges to obtain expert assistance from assessors, special referees, expert assistants and Court Experts as an alternative to party experts and to address the 'problems':

- CE Powers;
- Assessor Powers;
- I&R Powers;
- Reference for Trial Powers; and
- Expert Assistance Powers.

Like England, Chapter 5.5 shows that in NSW and Victoria those discretionary powers were hardly ever used and fell into desuetude. That is strong evidence that the 'problems' were not serious in NSW and Victoria.

4.6 Conclusion

The aim of this Chapter was to answer research question 1 using a chronological, historical methodology to collate the data in the source material about the 'problems', including their impact on the civil justice system, as perceived by judges from time to time; and analyse that data (having regard to the Chapter 3 context) within the legal evolutionary theoretical framework.

This Chapter has answered research question 1 by showing when the 'problems' evolved into acute 'problems', as perceived by some English and NSW judges; and by

showing that the ‘problems’ never evolved into acute ‘problems’, as perceived by Victorian judges.

The following broad conclusions can be drawn from the analysis in this Chapter in relation to the English ‘problems’:

Firstly, the ‘problems’ of bias, excessive party experts and contradictory party experts arose in England in specific cases from the 1820s ie within about 40 years after *Folkes*.

Secondly, by the mid-19th century very senior English judges were criticising party experts generally, mostly as a result of the ‘problem’ of bias. Those criticisms continued into the 20th century, though to a lesser extent.

Thirdly, by the mid-19th century English solicitors were concerned about the high costs of party experts and English scientists were calling for changes to the way they assisted Courts.

Fourthly, the English ‘problems’ of bias, excessive party experts and contradictory party experts (including substantial costs) may have been more (perhaps most) suboptimal and stark in patent and other monopolies actions by the mid to late-19th century before expanding into commercial actions.

Fifthly, by the late-19th and early-20th centuries a small number of judges were appointing independent experts because of the ‘problem’ of contradictory party expert evidence.[854]

Sixthly, though the ‘problem’ of suppression arises from time to time (and Jessel MR’s references to that ‘problem’ of suppression are repeated with approval in the modern literature), that ‘problem’ never reached the magnitude of the ‘problems’ of bias, excessive party experts and contradictory party experts.

Lastly, English judicial criticisms of party experts reached a crescendo in Lord Woolf’s mid-1990s ‘Access to Justice’ inquiry which particularly focussed on the ‘problems’ of bias, excessive party experts and contradictory party experts (which generated substantial costs).

Though this research accepts the acute ‘problems’, as perceived by judges in the late

[854] *Kennard v Ashman* (n 105); *Attorney General v Birmingham Tame* (n 636).

20th and early 21st centuries, an objective analysis of all the English pre-'Access to Justice' inquiry data, and the 'Access to Justice' inquiry data itself, about the 'problems' paints the following different picture:

- most of the data about the 'problems' in the 20th century data (prior to the 'Access to Justice' inquiry) indicates the 20th century 'problems' were not new and existed well before that mid-1990s inquiry;
- there is significant 20th century data indicating that the 'problems' in the 20th century were not acute or a material cause of the English civil justice 'crisis', including the various 20th century law reform inquiries;[855] Lord Woolf's own 1985 extrajudicial speech;[856] and the data showing the long history of desuetude of many of the existing powers which could have been used by English judges to avoid, or address, the 'problems' associated with party experts;[857]
- Lord Woolf's criticisms of English party experts, and his conclusion that party experts caused unnecessary cost, delay and complexity and unfairness, are not supported by any empirical data or analysis;[858] and
- the late-20th century English civil justice 'crisis' was not materially caused or contributed to by any 'problems' with party experts.

Chapters 4.3 and 4.4 demonstrate that the 'problems' in NSW and Victoria generally arose in the 20th century (ie much later than the 'problems' in England which arose as early as the 1820s); evolved over a shorter time than the English 'problems'; and arose independently of the English 'problems' (until the late-20th/early-21st centuries).

Chapter 4.3 shows that the 'problem' of bias, as perceived by at least four NSW judges in the late-1990s/early-2000s, had reached a similar magnitude to the English 'problems' of the mid-1990s and was perceived by those NSW judges to be acute. However, if the unique NSW extrajudicial criticism by the four NSW judges is given

[855] See Chapter 4.2.9. None of the 20th century law reform inquiries were particularly critical of party experts and all of the 20th century law reform inquiries found other causes for the various problems then plaguing the English civil justice system.
[856] See Chapter 4.2.12.
[857] See Chapter 5.5 for an analysis of that desuetude.
[858] Hazel Genn's scepticism about the motivation underpinning, and the absence of empirical evidence or research behind, various access to justice reviews (including the 'Access to Justice' inquiry) is detailed in Genn, *Judging Civil Justice* (n 252) 52-61. The data in this Chapter 4 supports that scepticism.

minimal weight (for the reasons explained in Chapter 4.3.4), the ‘problem’ of bias may have never reached the magnitude of the English ‘problems’ and was never ‘acute’.

Chapter 4.4 indicates that in Victoria none of the ‘problems’ (including the lingering ‘problem’ of bias) were ever acute. That is potentially important because it indicates that earlier Victorian Party Expert Procedural Rules successfully addressed the Victorian ‘problems’ before they could become acute. It also indicates that Victoria’s procedural rules reforms should be different to England and NSW’s reforms.

The understanding of the timing, and nature, of the evolution of the ‘problems’, including their impact on the civil justice system (such as the acuteness of the ‘problems’) developed through this Chapter 4 is a precondition to Chapter 5’s analysis of the procedural rules which address the ‘problems’ identified in this Chapter. Chapter 5 will use, and build on, Chapter 4 to identify the temporal and causal connections between the ‘problems’ (identified in Chapter 4) and the procedural rules which were made to address the ‘problems’ (to be identified in Chapter 5).

Chapter 5. Party Expert Procedural Rules which address the 'problems'

5.1 Introduction

Chapter 1.1 provided an introductory outline of how civil procedure rule makers have responded to the 'problems', as perceived by senior English and Australian judges, by developing the various Party Expert Procedural Rules (set out below), which give discretionary powers to Courts/judges or impose obligations on parties, party experts and sometimes Courts/judges.

The main types of discretionary powers given to Courts/judges are:

- Assessor Powers;
- CE Powers;
- Concurrent Expert Evidence Powers;
- Directions Powers;
- Disclosure Powers;
- Expert Assistance Powers;
- Expert Meeting Powers;
- I&R Powers;
- Powers to Admit Expert Evidence As Evidence in Chief (with or without also attending the trial);
- Powers to Direct a Trial without a Jury;
- Powers to Limit Party Experts;
- Reference for Trial Powers;
- SJE Powers; and
- Specific Disclosure Powers (Rules).

The main types of rules imposing obligations on parties, party experts and sometimes Courts/judges (independent of powers available to courts/judges) are:

- Independence Rules;
- Limited Expert Evidence Rules;
- Permission Rules;
- Plaintiff's Expert Report Rules; and

- Specific Disclosure Rules.

Chapter 1.5 set out the legal evolutionary and institutional theoretical frameworks which give context, and provide the conceptual basis, for the analysis of the Party Expert Procedural Rules in this Chapter.

Similar to Chapter 4.1 above (which analysed the 'problems'), this Chapter's analysis of the responsive procedural rules will incorporate the important broad contexts detailed in Chapter 3, including changes to civil juries (Chapter 3.3); the development and demise of the adversarial system (Chapter 3.4); the importance and demands of science in England (Chapter 3.5); and importantly the discontent with the civil justice system, including the civil justice crises (Chapter 3.6).

The aim of this Chapter is to answer research question 2 using a chronological, historical methodology to collate and analyse the data in the source material about the responsive procedural rules (having regard to the Chapter 3 contexts), using the legal evolutionary theoretical and institutional frameworks.

The analysis in this Chapter 5 will build on Chapter 4's analysis of how and when the 'problems', as perceived by senior judges, arose to become acute in England and NSW, but not in Victoria. It will build on Chapter 4 by identifying the temporal connections between the 'problems' (identified in Chapter 4) and the procedural rules which were made to address the 'problems' (to be identified in this Chapter 5); and by identifying similarities and differences between the responsive procedural rules in England, NSW and Victoria.

This Chapter 5's analysis of how and when the responsive Party Expert Procedural Rules evolved is a precondition to the deeper analysis in Chapter 6 which will answer research question 3.

The structure of this Chapter is as follows.

Similar to Chapter 4.1 (in relation to the analysis of the 'problems'), the English procedural rules which were made to address the 'problems' will be considered first (in Chapter 5.2) because they have the longest and most extensive history; and as explained in Chapter 3.2 English developments are likely to have heavily influenced NSW and Victoria. The responsive NSW procedural rules will be considered next (in

Chapter 5.3) followed lastly by the Victorian procedural rules (in Chapter 5.4). Victoria will be considered after NSW because the NSW 'problems' arose before the Victorian 'problems' and Victoria in part adopted the NSW procedural rules reforms.

Separately analysing the procedural rules in England, then NSW and finally Victoria will allow temporal connections between the evolution of the rules in those jurisdictions to be identified; allow temporal connections between the evolution of the 'problems' and the Party Expert Procedural Rules in each jurisdiction to be identified; and finally allow the Chapter 6 comparative analysis between England, NSW and Victoria.

The analysis in this Chapter 5 considers the important broader context within which the Party Expert Procedural Rules evolved (as they did not evolve in a vacuum or in isolation of other rules of court and/or procedural rules). It also necessarily descends into the detailed analysis of individual rules of court so as to identify temporal and causal connections between the 'problems' and the responsive Party Expert Procedural Rules; and similarities, differences and temporal connections between the various Party Expert Procedural Rules developed by each jurisdiction.

5.2 England

5.2.1 Introduction

This Chapter 5.2 will, like the analysis in earlier Chapters 3 and 4, adopt a largely chronological, historical approach.

Chapter 5.2.2 will commence with the analysis of the first English Party Expert Procedural Rule and Chapter 5.2.3 will consider the next tranche of rules which were implemented via the Judicature Acts reforms.

Chapter 5.2.4 will consider the rules in patent and monopolies actions, which Chapter 4.2.6 above shows were acutely impacted by the 'problems' of excessive party experts and contradictory party experts in the mid-19th century.

Chapter 5.2.5 will consider the English Commercial Court.[859] It was set up to address the English business community's dissatisfaction with the delay and expense of commercial litigation and had its own procedural rules (of sorts).[860] The English

[859] Though generally called the 'Commercial Court', that description was incorrect until the enactment of the Administration of Justice Act 1970: Hobhouse (n 375).
[860] *Commercial Causes Notice* (n 452).

Commercial Court is important in this research because it developed innovative and flexible practices and procedures which were later adopted by other Divisions of the English High Court;[861] and the Supreme Courts of NSW and Victoria which both established their own Commercial Court and other judge-managed, specialist Lists and Divisions modelled on the English Commercial Court.

Chapter 5.2.6 will cover the important 1920s *Graigola* litigation which addressed the 'problem' of excessive party experts and laid down the first English Limited Expert Evidence Rule and Independence Rule to address the 'problem' of contradictory party experts.

Chapter 5.2.7 will detail the important reforming rules implemented in the unique circumstances of the 1930s English civil justice 'crisis'.

Chapter 5.2.8 will consider in a single Chapter the history of the long-lived 'problem' of surprise and the Disclosure Powers which were difficult to implement but evolved over time to address that 'problem'.

Chapter 5.2.9 will analyse the unique Expert Meeting Power which developed in the more modern era of the 1980s.

Chapters 5.2.10 and 5.2.11 will consider the seminal modern reforming procedural rules established by, or as a result of, *The 'Ikarian Reefer'* and Lord Woolf's 'Access to Justice' inquiry.

5.2.2 1852 Expert Assistance Power

The English Parliament began extensively reforming civil procedure law by statute in about the 1830s.[862] Many of those reforms addressed the then existing problem of the high costs of Court litigation. Those civil procedure law reforms also included the commencement of the statutory codification of judges' powers to make practice and procedural rules[863] (which rules were previously made by each Court as part of its own inherent jurisdiction or power to control its own procedure and to make rules regulating its practice and the proceedings of the court). When Parliament codified the

[861] eg The Rules of the Supreme Court (New Procedure) 1932, which included a Power to Limit Party Experts, were modelled on the Commercial Court's practice and procedure.
[862] eg Civil Procedure Act 1833; Court of Chancery Act 1850.
[863] eg Law Terms Act 1830; Civil Procedure Act 1833; Court of Chancery Act 1850; Court of Chancery Procedure Act 1852. Powers outside these statues remained part of a court's inherent power.

established custom of judges making rules regulating practice and procedure in their Courts, those rules were given the status of statute law.[864]

An early (if not the earliest) formal English Party Expert Procedural Rule was the English Expert Assistance Power (1852-1998 Chancery chambers matters only).[865] It implemented the Chancery Commissioners' 1852 recommendation that power be provided to the Court of Chancery to appoint various types of experts as officers of the court because their practical experience and knowledge would be of great utility in many cases.[866]

Stockton and Darlington Railway Company v Brown[867] is a good example of the English Expert Assistance Power (1852-1998 Chancery chambers matters only) being used to obtain the assistance of an engineer who was described by Lord Campbell as 'the expert appointed by the Lords Justices'.[868] That engineer was appointed (with the consent of the parties) and instructed by the Court in writing to inquire into specific matters and report to the Court.

Attorney General v Colney Hatch Lunatic Asylum[869] is another good example in which the Court of Chancery, that time in a nuisance case, directed an engineer to report on work which needed to be undertaken. Lord Hatherley LC described that engineer's report as 'extremely intelligible and sensible'.[870]

As early as the 1860s, solicitors thought it 'unquestionably desirable that every common law judge should have the same power of consulting scientific persons as chancery judges now have [under s42]'.[871]

There is nothing in the literature which suggests that the English Expert Assistance Power (1852-1998 Chancery chambers matters only) was implemented in response to any 'problem' per se, though the cases establish that it was a useful discretionary

[864] Samuel Rosenbaum, 'Rule Making in the Courts of the Empire' (1915) 15 J Soc Comp Legis 128, 154; eg Law Terms Act 1830, s11.
[865] Master in Chancery Abolition Act 1852, s42 (and extended by RSC 1883, O55 r19; RSC 1965, O32 r16)
[866] Chancery Commission, *Report* (n 433).
[867] *The Directors of the Stockton and Darlington Railway v Brown* (1860) IX HLC 246.
[868] Ibid 254.
[869] *Attorney-General v Colney Hatch Lunatic Asylum* (1868-69) LR 4 Ch App 146.
[870] Ibid 156.
[871] 'The Evidence of Experts' (1861) 6 Solic J & Rep 847, 849.

power used on occasion to appoint an independent expert.

5.2.3 Judicature Acts and Rules of the Supreme Court

Official Referees

A recommendation in the Judicature Commission's *First Report* was that officers to be called Official Referees (**ORs**) be attached to the Supreme Court to whom a cause or any matter arising in a cause could be referred.[872] Accordingly, ORs were an invention of the Judicature Commission.[873]

ORs came to be extensively used in the England in the 20th century; for example, by the late-1940s approximately 400 matters were heard by ORs per year[874] and in 1952 there were 730 referrals to ORs.[875] Relatively little is now known about early ORs' decisions as they were not generally reported, possibly because ORs lacked the status of judges;[876] and/or most decisions on practice and procedure issues were made in chambers on a pre-trial summons for directions, or during a trial. The available literature[877] does however indicate that ORs developed practices and procedures regulating party experts (discussed below). Those practices and procedures are important in this analysis of how the English Party Expert Procedural Rules respond to the 'problems' because they were not expressly sanctioned by any rule of court or practice direction; and some of those practices, procedures and techniques were the precursors to Party Expert Procedural Rules developed later to address the 'problems' (such as the Disclosure Power).[878]

The practices and procedures regulating party experts which were developed ORs include the following.

Firstly, from the 19th century ORs required the exchange of party experts' reports, most likely to address the 'problem' of surprise (and possibly the 'problem' of

[872] Roland Burrows, 'Official Referees' (1940) 56 LQR 504.
[873] Reynolds, *Caseflow Management* (n 376) 65.
[874] Committee on Supreme Court Practice and Procedure, *Second Interim Report* (Cmd 8176, 1951), [102].
[875] Reynolds, *Caseflow Management* (n 376) 145.
[876] Newey (n 985).
[877] In particular the literature authored by ORs eg Newbolt (n 457); A S Diamond, 'The Summons for Directions' (1959) 75 LQR 41; Newey (n 985). See also Reynolds, *Caseflow Management* (n 376) which extensively analyses the notes kept of proceedings conducted by ORs.
[878] Ian Scott, 'NOTES Official Referees' Business' (1984) 3 CJQ 97,99; Dyson (n 985) 337.

contradictory party experts).[879]

Secondly, Francis Newbolt[880] developed the English SJE Power (1920s informal ORs by consent) in the 1920s[881] when parties (or he) nominated a single independent expert often after a discussion in chambers on a pre-trial summons for directions.[882] Newbolt also advocated for the use of SJEs in a Letter to the Editor of *The Times* in September 1930 titled 'The Independent Witness' (which described that type of witness as an independent witness appointed by consent[883]); and in his 1920 report to the Lord Chancellor.[884] Reynolds credits Newbolt with inventing the Court Expert to expedite the process and save money and notes. Newbolt himself estimated that using single independent experts saved litigants four-fifths of the time normally spent on matters.[885] Though the English SJE Power (1920s informal ORs by consent) was informal, not a rule of court and only used by ORs by consent, that power is important because at that time RSC 1883 did not include any Power to Limit Party Experts or appoint an independent single joint expert (or Court Expert); and it demonstrates the resolve of some judges to make Party Expert Procedural Rules to address the 'problems' of bias and/or contradictory party experts as they arise in cases before them.

Thirdly, by the 1960s, at least one OR (Sir Walker Carter QC) had developed the English Concurrent Expert Evidence Power (1960s ORs only by consent) when he put opposing party experts into the witness box facing each other and questioned each in turn.[886] That was a procedure very similar to the modern procedure known as 'hot tubbing' or concurrent expert evidence and appears to be the first English Concurrent Expert Evidence Power. Though that power is only briefly referred to in the literature, it may have been exercised by consent only and was likely a power aimed at

[879] Newey (n 985) though unfortunately Newey provides no details in support of this statement so it is not known whether ORs directed the pre-trial disclosure/exchange only by consent or on an OR's own motion.
[880] Who was appointed as an OR in 1920.
[881] Well before the English Court Expert Power (1934-1998).
[882] see Newbolt (n 457); Reynolds, *Caseflow Management* (n 376) 76; M P Reynolds, ' Of civil procedure and settlement' (2010) 29 CJQ 194.
[883] 'The Independent Witness', *The Times* (London 4 September 1930).
[884] Francis Newbolt, *Confidential Report* (1920), a copy of which is in Reynolds, *Caseflow Management* (n 376) 76-80.
[885] Reynolds, *Caseflow Management* (n 376) 76.
[886] Dyson (n 985) 337.

ameliorating the 'problems' of bias and contradictory party experts.

Lastly, from the early-1980s, some ORs pioneered a pre-trial experts meetings (by consent) procedure to narrow the issues in dispute.[887]

Reference for Trial Power

Like ORs, special referees were an invention of the Judicature Commission.[888] They are a type of ad hoc referee not formally attached to the Court like ORs.

The Judicature Acts provided the first English Reference for Trial Power (1873-1998).[889] That statutory procedural power allowed the Court to order, among other things, that specific types of matters be tried by a special referee, including matters requiring any scientific or local investigation which cannot conveniently be made before a jury or conducted by the Court through its other ordinary officers.

The English Reference for Trial Power (1873-1998) has always been limited because a special referee must be 'agreed on [by/between] the parties' so can only be appointed by consent; and a special referee's costs are borne by the parties (which may have made special referees less attractive than a 'free' judge).

I&R Power

The Judicature Acts also first provided the English I&R Power (1873-1998).[890] That statutory procedural power allowed the Court to order any question arising in any cause or matter (other than a criminal proceeding by the Crown) be referred to a special referee for inquiry and report**.** That power aimed to provide information for the assistance of the court and a judge could entirely disregard a report prepared by a special referee.[891]

The English I&R Power (1873-1998) reflected, but expanded, the pre-Judicature Acts practice in the Court of Chancery where the Court would direct a reference to an expert or scientist to report to the Court on a question which required scientific or other special knowledge or where the evidence was conflicting.[892] The power was new to the

[887] Further discussed in Chapter 5.2.9,
[888] Judicature Commission, *First Report* (n 440) 14.
[889] Judicature Act 1873, s57; Arbitration Act 1889, s14.
[890] Judicature Act 1873, s56; Arbitration Act 1889, s13.
[891] *AG v Birmingham Tame* (n 637) 804; *Nicholls v. Stamer* [1980] VR 479, 487.
[892] *Longman v East* (1877) 3 CPD 142, 159 (per Cotton LJ). Many of those references were likely to have been made under the Master in Chancery Abolition Act 1852, s42; see also *Mellin v Monico* (1877)

Common Law Divisions as the earlier Common Law Courts had no power to refer matters in a cause for investigation and report.

Importantly, the English I&R Power (1873-1998) could be exercised without the consent of the parties (but was usually excised with consent).[893] The literature shows that the power has been used for references to a range of different types of experts, including an architect who reported on buildings affected by noise,[894] a surveyor who inspected and reported to the Court on the condition of a building[895] and a chemist who conducted experiments on dyes.[896] *Attorney-General v Birmingham, Tame, and Rea District Drainage Board*[897] is probably the most famous case in which the Court of Appeal used the English I&R Power (1873-1998) to obtain a report to enable it to decide on the conflicting party expert evidence.[898]

The English I&R Power (1873-1998) and the English Reference for Trial Power (1873-1998) addressed the 'problems' of bias and contradictory party experts by providing an alternative to party expert evidence in three ways. Firstly, both powers allowed a special referee to be selected because the referee is independent and/or has necessary technical or scientific skills. Secondly, a special referee conducting a reference for inquiry and report could undertake an inspection, view, testing or the whole inquiry himself (and did not need to conduct a trial on the evidence). Thirdly, the special referee's report was addressed to the Court or judge who referred the matter which emphasised the need for experts to be independent to address or ameliorate the 'problem' of bias.[899]

Assessor Power

The Judicature Commission's *First Report* was recommended that scientific assessors could 'with advantage' be used in all cases involving scientific or technical questions

3 CPD 142. Examples include *Mildmay v Lord Methuen* (1852) 1 Drewry 216, 61 ER 434; *Stockton and Darlington Railway* (n 867); *Raphael v Thames Valley Railway Company* (1866) LR 2 Eq 37; *Attorney-General v Colney Hatch Lunatic Asylum* (1868-69) LR 4 Ch App 146.

[893] *Badische Anilin und Soda Fabrik AG v Levinstein* (1883) 24 Ch D 156, 167; *The Annual Practice 1892*, vol 1 (10th edn, Sweet & Maxwell 1892), 150.

[894] *Broder v Saillard* (1876) 2 Ch 692.

[895] *Mackley v Chillingworth* (1877) 2 CPD 273.

[896] *Badiche* (n 893). *Nicholls v Stamer* (n 891) 487 which lists a number of English cases.

[897] *AG v Birmingham Tame* (n 637).

[898] See *AG v Birmingham Tame* (n 637) 811 per Lord Robson.

[899] *The Annual Practice 1892*, 147.

(not just patent cases).[900] The Judicature Commission's 1874 *Third Report*[901] considered that skilled assessors should be used to address the 'problem' of bias because their mere presence would deter biased skilled witnesses.[902]

A similar type of technical assessors had however been recommended at least 15 years beforehand by the British Association (with the support of solicitors) in the 1860s.[903]

The English Assessor Power (1873-1998)[904] implemented the Judicature Commission's recommendation for scientific assessors. It was a statutory discretionary power allowing the High Court and the Court of Appeal to call in the aid of one or more 'specially qualified' assessors; and try and hear the cause or matter wholly or partially with the assessor's assistance. The power was based on the Court of Admiralty's practice of Admiralty judges sitting with Trinity House Masters as assessors. The mode of trial with assessors was further developed in RSC 1875, O36 r2 which provided that non-jury actions could be tried and heard before a Judge, OR or special referee with assessors.

The English Assessor Power (1873-1998) also responded to the 'problem' of bias associated with party experts by providing an alternative to party experts by appointing an assessor who is independent and/or with the required technical or scientific skills.

In *Richardson*[905] the House of Lords explained the true functions of an assessor. Firstly, an assessor is an expert who is available for the judge to consult if the judge requires assistance to understand the effect and meaning of technical evidence. Secondly, an assessor can suggest questions for the judge to ask a party expert witness. Thirdly, an assessor may be consulted by the judge about the proper technical inferences to be drawn from proved facts or contradictory party expert evidence. However, an assessor's function does not include conducting a personal examination or reporting to the judge.

Richardson indicates the Assessor Power may also address the 'problem' of

[900] Judicature Commission, *First Report* (n 440) 14.
[901] Judicature Commission, *Third Report* (n 440).
[902] Ibid 8.
[903] 'The Evidence of Experts' (1861) 6 Solic J & Rep 847.
[904] See n 890.
[905] *Richardson v Redpath Brown & Co Ltd* [1944] AC 62.

suppression because an Assessor is not necessarily selected by one (or perhaps any) party.

RSC 1883

The Judicature Acts reforms included common rules of procedure for the then newly created, single, Supreme Court.[906] Those rules of procedure were not drafted from scratch; rather, the authors had, among other things, the rules of practice then in place in the Common Law and Chancery Courts and in the end approximately half of the rules came from those or other earlier statutes and court rules.[907]

The Rules of the Supreme Court were initially the 58 rules set out in the Schedule to the Judicature Act 1873[908] though that version of the rules was replaced by RSC 1875[909] before coming into operation. RSC 1875 was the rules approved by the judges under the Schedule of the Judicature Act 1873 with a few changes.[910] RSC 1875 was a new mandatory code of procedure, though not complete or exhaustive because compatible existing powers, procedures and forms were preserved.[911]

RSC 1883, for the first time titled the 'Rules of the Supreme Court', were prepared by a Rules Committee of eight judges. RSC 1883 were prepared approximately 8 years after RSC 1875 had been in operation; and after, and implemented some of, the recommendations made by the 1881 Lord Chancellor's Legal Procedure Committee report.[912] RSC 1883 continued for approximately 80 years, though amended and added to extensively over that time.

The only new powers in RSC 1883 (as originally made in 1883) which related directly to party expert evidence were the English Power to Direct a Trial without a Jury (1883) which was likely addressed primarily to the 'problem' of contradictory party experts (in jury trials in particular);[913] and the English Expert Assistance Power (1852-1998

[906] Committee on Supreme Court Practice and Procedure, *Final Report* (n 297) 7.
[907] Samuel Rosenbaum, 'Studies in English Civil Procedure. II. The Rule-Making Authority' (1915) 63 Uni Pen Law Rev 273, 274.
[908] Supreme Court of Judicature Act 1873. At that time the rules were titled 'Rules of Procedure' rather than the 'The Rules of the Supreme Court'.
[909] Which was the version in the Schedule to the Supreme Court of Judicature Act 1875. See also Clarke (n 445) footnote 17.
[910] Rosenbaum (n 907) 181 and onwards.
[911] M S Dockray, 'The inherent jurisdiction to regulate civil proceedings' (1997) 113 LQR 120, 123; Supreme Court of Judicature Act 1873, ss 16 and 23; Supreme Court of Judicature Act 1875, s21.
[912] Lord Chancellor's Legal Procedure Committee, *Report of the Legal Procedure Committee* (1881).
[913] RSC 1883, O36 r5; RSC 1883, O36 r2 (extended in RSC 1965, O33 r2).

Chancery Chambers matters only).

5.2.4 Patent and other monopolies actions

As indicated in Chapter 4.2.6 above, there were 'problems' of excessive party experts and contradictory party experts in mid-19th century patent actions which were sufficiently suboptimal to necessitate a move away from jury trials.

English patents legislation from 1883 to 1942 implemented two statutory procedural law reforms for patent actions only. The first reform was the English Assessor Power (1883-1949 patent actions)[914] which provided that, on the request of either parties, the Court must call in a specially qualified assessor and try and hear the case wholly or partially with the assessor's assistance. Unlike the English Assessor Power (1873-1998) which was discretionary in non-patent actions, the English Assessor Power (1883-1949 patent actions) was effectively mandatory if one party requested an assessor in a patent action. The second reform was the English Power to Direct a Trial without a Jury (1883-1949 patent actions) which provided that patent actions must be tried without a jury unless the court otherwise directs.[915] Unlike the English Power to Direct a Trial without a Jury (1883) which applied to non-patent actions, the exercise of the English Power to Direct a Trial without a Jury (1883-1942 patent actions) was practically mandatory 'unless the court otherwise directs'. Those 2 reforms were made to address the 'problems' of excessive party experts and contradictory party experts in patent actions which had been identified by the Patent Law Commissioners in the 1860s.[916] Those reforms are important in this analysis because they demonstrate the ease with which legislation can address the 'problems' where a will for reform exists.

In the mid-1940s the Swann Departmental Committee was appointed to consider and report on, among other things, desirable changes in patent actions. That Committee's report noted that little use had been made of the English Assessor Power (1883-1949 patent actions) because patent litigants' lawyers were often opposed to having patent cases tried with an assessor(s) because of concerns that assessors will decide important issues without any input from the lawyers. Parties' lawyers, and perhaps

[914] That power was available until the Patents Act 1949 and rules of court made shortly afterwards introduced the new English Expert Assistance Power (1949-ongoing patent actions) in lieu of the English Assessor Power (1883-1949 patent actions).
[915] Patents, Designs, and Trade Marks Act 1883; Patents and Designs Act 1907-1942, s31; Patents Act 1949, s84(4).
[916] Patent Commissioners (n 410).

patent judges, preferred to maintain the 'pure' adversarial system. The Committee recommended lower ranking 'scientific advisers' in lieu of assessors to elucidate the technical issues rather than assist in the trial.[917] That recommendation was implemented by providing a new statutory rule making power for the appointment of scientific advisers. That new rule making power was unique in that it made rules of court for the appointment of scientific advisers mandatory whereas other rule making powers were merely discretionary. That rule making power was continued by s70(3) of the Senior Courts Act 1981.[918] The new rule making power was quickly used to make the new English Expert Assistance Power (1949-ongoing patent actions) in lieu of the hardly ever used English Assessor Power (1883-1949 patent actions).

The new English Expert Assistance Power (1949-ongoing patent actions)[919] was unique. Firstly, it allowed a 'scientific adviser' to be appointed as a Court assistant; or to inquire and report to the Court (similar to a special referee or Court Expert). Secondly, it allowed for the appointment on the court's own motion and at any time. Thirdly, the costs of a 'scientific adviser' were to be paid from public funds rather than by the parties. That power, which was discretionary, fell short of the Departmental Committee's recommendation 'that a scientific assistant should sit on **all** occasions with [the Judge] appointed to try patent actions unless, upon the summons for directions in any particular case, the Judge, after hearing the parties, decides that such assistance is unnecessary.' (bold emphasis added).

Those reforms are another important demonstration of the ease with which legislation and rules of court can address the 'problems' where a will for reform exists.

The first use of that new power was not until 1971.[920]

The English Expert Assistance Power (1949-ongoing patent actions) was amended slightly by a new O104 r11[921] in 1978 to expressly allow a 'scientific adviser' to sit with the judge at the trial or hearing of the proceedings (like an assessor) and inquire and report on any question of fact or of opinion not involving a question of law or

[917] Board of Trade Departmental Committee, *Second Interim Report* (Cmd 6789, 1946).
[918] Senior Courts Act 1981.
[919] Patents Act 1949, s84(2); RSC 1883, O37A r12; RSC 1965, O104 r11; Senior Courts Act 1981, s70(3).
[920] *The Supreme Court Practice 1973* (Sweet & Maxwell 1973), 1433.
[921] Rules of the Supreme Court (Amendment No 3) 1978.

construction (like a special referee or Court Expert).

In the 1899 Chancery Division *Field v Wagel* trade mark infringement action[922] Byrne J made a pre-trial order that 'Expert witnesses of mere opinion not to exceed three on either side'. Unfortunately, it is not now possible to know whether that order was made by consent and/or to avoid the 'problem' of excessive party experts and contradictory party experts (as it likely did) because neither the reason, nor basis, for that order is explained in the case report or elsewhere in the literature. That order is however important for two reasons. There was no express power to limit the number of party experts at the time in RSC 1883 (that order pre-dated the first English Powers to Limit Party Experts in the 1930s by around 30 years). Also, that order demonstrates the resolve of at least one judge to make Party Expert Procedural Rules to address the 'problems' (in that case the 'problems' of excessive party experts and/or contradictory party experts) as they arise.

5.2.5 Commercial Court

The Commercial Court[923] was set up to address the dissatisfaction of business people with the delay and expense of commercial litigation.[924]

The Commercial Court had initially been recommended by the 1892 Council of Judges,[925] but was shelved due to opposition from Lord Coleridge.[926] Lord Russell[927] supported the proposed Commercial Court which was to be established through amendments to RSC 1883, though that approach was abandoned because of the Rules Committee's concerns.[928]

Though none of the resolutions establishing the Commercial Court in the 1895 *Commercial Causes Notice*[929] were Party Expert Procedural Rules per se, the establishment of the Commercial Court is important in this research because the Commercial Court developed innovative and flexible practices and procedures which

[922] *Field v Wagel Syndicate* [1900] 1 Ch 651.
[923] Though generally called the 'Commercial Court', that description was incorrect until the enactment of the Administration of Justice Act 1970: Hobhouse (n 375).
[924] Judicature Commission, *Third Report* (n 440); D J Llewelyn Davies, 'The English New Procedure' (1933) 42 Yale LJ 377, footnote 8.
[925] Council of the Judges, *Report of the Council of the Judges* (1892).
[926] Matthew (n 452).
[927] Who became Chief Justice on the death of Lord Coleridge.
[928] Matthew (n 452) 14 explains that a concern was what is and what is not a 'commercial cause'; and another concern may have been that only Parliament could create a special tribunal.
[929] *Commercial Causes Notice* (n 452).

were later adopted by other Divisions of the English High Court[930] and Australian superior courts. Those innovative practices and procedures included a single judge controlling each commercial cause from commencement (saving time and reducing complication); fixed trial dates; the judge intervening to encourage settlement; and possibly limited party experts.

Rule 8 in the *Commercial Causes Notice* provided the new and important English Directions Power (1895 Commercial Causes). However, the inclusion of the words 'in accordance with existing rules' in that power makes clear that it was not intended to provide new powers.[931] It is likely that the judges were concerned not to act in any way which was ultra vires RSC 1883.

The Commercial Court operated successfully, with little formality and little regulation under RSC 1883 until 1964 when a new O72 was included which regulated 'commercial actions' for the first time by the rules of court. Interestingly, O72 did not include the English Directions Power (1895 Commercial Causes). The literature does not explain why the Rules Committee thought it necessary to bring commercial actions specifically within RSC 1883 in the 1960s, particularly as the Commercial Court had by then successfully operated for around 70 years largely outside RSC 1883; or why many of the unique practices and procedures of the Commercial Court were not included in O72.

The minimalist regulation of the successful Commercial Court is important because it demonstrates that the judges' and parties' approach to innovation is important; and judges can be reforming without any rules of court.

5.2.6 *Graigola* litigation

As discussed in Chapter 4.2.11, in the 1920s Chancery Division *Graigola* litigation the Court had to address the 'problem' of excessive party experts when called on to decide whether the defendant could call the five or six experts it wanted to call. It is interesting that the number of experts was a question for the Court at all because at that time RSC 1883 did not include a Power to Limit Party Experts. In deciding that question,

[930] eg The Rules of the Supreme Court (New Procedure) 1932, which included a Power to Limit Party Experts, were modelled on the Commercial Court's practice and procedure.
[931] *Baerlein v Chartered Mercantile Bank* [1895] 2 Ch 488 (which made clear that there were no special rules applicable to the Commercial Court which was, like all other Divisions of the High Court, governed by RSC 1883).

Tomlin J made the points that cases of that kind had become serious obstructions to the work of the court; cause hardship to other litigants who cannot get their cases heard; and leaving parties free to call all possible evidence places a weapon in the hands of those with large resources.

Tomlin J for the first time laid down the English Limited Expert Evidence Rule (1927) that in cases of this kind (until corrected) only two experts will be heard unless there are special circumstances that justice cannot be done without having further expert evidence. That rule was considered and approved in 1931 by the Court of Appeal with Lord Hanworth MR holding that, though *Graigola* did not lay down a rigid and iron rule, 'there is a determination on the part of the Courts that the number of expert witnesses should be limited as far as possible'; and Lawrence LJ describing that rule as an admirable working rule which he was glad to hear had been adopted by the other Chancery judges.[932]

The English Limited Expert Evidence Rule (1927) and the Court of Appeal's endorsement of it in *Frankenburg* is important because it preceded the first formal Power to Limit Party Experts in RSC 1883 which was not granted until 1932;[933] and it further demonstrates the resolve of some judges to make Party Expert Procedural Rules to address the 'problems' as they arise in cases before them.

The *Graigola* litigation is also important for another reason. Tomlin J was critical of the party experts on both sides because they had failed to meet to see if some agreement could be reached; or to take other steps to reduce the issues for trial. The result was that the trial became unmanageable before it began and lasted too long because many days were occupied on points which the experts should have agreed. That 'problem' of contradictory party experts caused Tomlin J to develop the English Independence Rule (1928) making scientific advisers subject to a 'special duty' to the Court to limit the contentious matters of fact to be dealt with at the hearing.

The English Independence Rule (1928) was an early (if not the earliest) English Independence Rule. In laying down that rule, Tomlin J demonstrated himself to be an early institutional entrepreneur.[934]Its importance is demonstrated by the Court of

[932] *Frankenburg v Famous Lasky Film Service Ltd* [1931] 1 Ch 428, 437 and 441.
[933] The English Power to Limit Party Experts (1932 New Procedure list only).
[934] The important role of institutional entrepreneurs in institutional change theory is discussed in Pierson

Appeal holding in *Anglo Group* that it is the starting point in considering the duties of experts.[935]

The English Independence Rule (1928) was however never further developed, or applied, in any meaningful way by the Courts per se or in the literature. Further, the status of the 'rule' is also vague; it appears to have been posited by Tomlin J only as 'principle of law' to be taken into account rather than a procedural rule or other type of 'legal rule'.[936]

5.2.7 1930s party expert rules made by the Rules Committee

The unique context of the 1930s, and the unique action taken by the Rules Committee in that decade, was discussed in Chapter 4.2.10's consideration of the 'problems' at that time.

This Chapter 5.2.7 will consider the reforming rules made in the 1930s in more detail.

1932 New Procedure Rules

The 1932 New Procedure Rules, which were 'framed on the analogy of the Commercial Court',[937] included the English Power to Limit Party Experts (1932 New Procedure list only) though that power was only in non-jury King's Bench actions. That power may have been influenced by the earlier approach taken by parliament to limit the number of party experts in some types of civil cases by legislation.[938]

1934 CE Power (1934-1998)

The new English CE Power (1934-1998) was initially granted in 1934 and continued largely unchanged in RSC 1965[939] until it was omitted from the CPR in 1998. The power allowed the Court to appoint a Court Expert to inquire and report so was very similar to the English I&R Power (1873-1998) which also allowed special referees to inquire and report to the Court; and nothing particularly new.[940] However, unlike a

(n 163) 136; Eccleston (n 189) 107; Cini (n 207).

[935] *Anglo Group plc v. Winter Brown & Co Ltd* [2000] EWHC Technology 127, [106].

[936] See the differentiation between a legal 'principle' and a legal 'rule' made in Ronald Dworkin, *Taking rights seriously* (Duckworth 1977), 40-43.

[937] *Memorandum as to the New Procedure Rules* (1932).

[938] Acquisition of Land (Assessment of Compensation) Act 1919; Places of Worship (Enfranchisement) Act 1920. The former Act was mentioned in *Frankenburg* (n 932) 436, but is not otherwise discussed in the literature.

[939] RSC 1883, O37A; RSC 1965, O40.

[940] *Nicholls v Stamer* (n 891) 487 lists a number of English cases where in effect a Court Expert was appointed. See also *AG v Birmingham Tame* (n 637).

special referee, a Court Expert could be cross examined (like any witness called by a party) and could only be appointed on the application of a party.

The English CE Power (1934-1998) was not available in jury trials.

The literature does not explain why the power was granted in 1934 or which 'rule making' power was used. The literature does however show that the similar English SJE Power (1920s informal ORs by consent) had already existed for about a decade; Francis Newbolt had advocated for the use of a type of Court Expert in 1930;[941] and a subcommittee of the London Chamber of Commerce in 1930 had called for independent Court Experts in lieu of party experts.[942]

Importantly, the Law Society (unsuccessfully) opposed the English CE Power (1934-1998).[943]

Sir Thomas Bingham MR has explained that the principal advantage of a Court Expert is that such an expert, with no axe to grind but a clear obligation to make a careful and objective evaluation, may prove a reliable source of expert opinion [944] ie a Court Expert would not be susceptible to the 'problem' of bias.

Curiously, the power provided that a Court Expert's report is to be 'treated as information furnished to the Court' (rather than evidence); and can be given 'such weight as the Court may think fit'.

The power was clearly limited because a Court Expert could only be appointed on an application by a party. Accordingly, the Court had no power to appoint a Court Expert on its own motion and may be reluctant to direct that a Court Expert be appointed if a party did not consent. Limiting the English CE Power (1934-1998) in that way may have been a deliberate decision by the Rules Committee to avoid *In Re Enoch*[945] in which the Court of Appeal made clear that a judge had no power to call any witness other than by consent.

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941 'The Independent Witness', *The Times* (London 4 September 1930).
942 'Expense of Litigation' (1930) 169 LT 439.
943 'Court Expert', *The Times* (21 Jun 1934) Law Report. The basis for that opposition is not detailed in the literature.
944 *Abbey* (n 704).
945 *In Re Enoch and Zaretzky, Bock & Co.'s Arbitration* [1910] 1 KB 327.

Interestingly, the 1996 *Abbey National* case[946] referred to a note in *The Supreme Court Practice 1995* referring to the object of the power as 'presumably to enable the parties to save costs and expenses'. The Court of Appeal itself strongly suspected that the draftsman of the power intended it would be used to resolve scientific or technical questions; and that it would be used to resolve subsidiary questions (rather than major issues in the case). Basten thought the power was an attempt to codify the common law power of a court to appoint own expert.[947]

Sir Boyd Merriman's 1938 comments in *The Manchester Regiment*[948] indicate the English CE Power (1934-1998) sought to address the 'problem' of bias. Sir Boyd is likely to be correct because he was a member of the Rules Committee which made the English CE Power (1934-1998).

Reynolds posits that the ORs' practice of encouraging parties to agree to a single independent expert witness may have prompted the power.[949]

In 1934 *The Law Times* ridiculed the new Court Expert because of its uncertain and confused nature.[950] An editorial in the *Australian Law Journal*[951] also ridiculed the new English CE Power (1934-1998) as the 'latest product of the present English zeal for procedural reform' and noted that the Law Society did not approve of the Court Expert.

Interestingly, though the Evershed report recommended that the English CE Power (1934-1998) be amended to give power to the Court to appoint a Court Expert on the Court's own motion,[952] that amendment was never made and the literature does not explain why.

1936 Power to Limit Party Experts and Disclosure Power (patent actions)

In 1936 a new O53A r21A was made for <u>patent actions only</u> which provided both the English Power to Limit Party Experts (1936 patent actions only) to address the 'problem' of excessive party experts in patent actions; and the English Disclosure Power (1936 patent actions only) which allowed the Court to direct the taking of

[946] *Abbey* (n 704).
[947] Basten (n 77).
[948] *The Manchester Regiment* [1938] P 117.
[949] Reynolds, *Caseflow Management* (n 376) 92.
[950] (1934) 177 Law Times 447, 451.
[951] 'The Court Expert' (1934) 8 ALJ 157.
[952] Committee on Supreme Court Practice and Procedure, *Final Report* (n 297) [293].

evidence ‘relating to matters requiring expert knowledge’ by affidavit and for the filing and delivery of such affidavit evidence to the other parties (to address the ‘problem’ of surprise).[953]

The English Disclosure Power (1936 patent actions only) had been recommended by the Hanworth Committee because of the complexity of the scientific facts in many heavy cases[954] and was the first express Disclosure Power included in RSC 1883. That Disclosure Power, like others, sought to address the ‘problem’ of surprise. Such a power had already been used, including in Court of Chancery actions in which experts reports were in affidavit form and served on opposing parties;[955] some common law actions;[956] and when Official Referees required the exchange of party experts' reports.[957]

It is interesting that at the time those new powers were granted, neither the English patents legislation or the Judicature Acts provided a rule making power for the compulsory pre-trial exchange of evidence (such a power was first expressly provided in 1972[958]); or for the number of party experts to be limited by the Court.

1937 Power to Limit Party Experts

In 1937 O30 was further amended[959] to implement some of the recommendations in the 1936 Royal Commission report.[960] The amended O30 provided the English Power to Limit Party Experts (1937 summons for directions) which extended the English Power to Limit Party Experts (1932 New Procedure list only) to all actions covered by the O30 summons for directions procedure. The English Power to Limit Party Experts (1937 summons for directions) is very similar to the English Power to Limit Party Experts (1936 patent actions only) and plainly sought to address the ‘problem’ of excessive party experts in a broader range of actions. It is a good example of

[953] RSC 1883, O53A r21A(2).
[954] Business of Courts Committee (n 461) [38-39].
[955] 'Evidence of Experts' (1863) 7 Sol J & Rep 856 (which records that expert witnesses put their report or opinion ‘in the shape of an affidavit’ every day in the Court of Chancery in patent causes).
[956] eg *Folkes* records that ‘the parties were directed to print and deliver to the opposite side the opinions and reasonings of the engineers whom they meant to produce on the next trial, so that both sides might be prepared to answer them’.
[957] Newey (n 985) (unfortunately Newey provides no details in support of this statement so it is not known whether ORs directed the pre-trial Disclosure only by consent or on an OR’s own motion).
[958] Civil Evidence Act 1972.
[959] Rules of the Supreme Court (No 3) 1937.
[960] *Report on the Royal Commission* (n 462).

incremental legal change. However, the power was still limited in that it could only be exercised on the hearing of any summons for directions, so was not available at any other time in an action (eg at trial).

The 1937 power was extended by English Power to Limit Party Experts (1954-1998)[961] which allowed an order limiting party experts at any time, even at the trial.

5.2.8 Pre-trial disclosure of expert reports

This Chapter 5.2.8 maps out the unique, and extensive, evolution of the English Disclosure Powers and Rules over a period of about 50 years to address the long-standing 'problem' of surprise, and to a lesser extent, the 'problem' of contradictory party expert evidence by encouraging party expert agreement through the pre-trial exchange of reports.

From the 1930s solicitors were calling for the compulsory exchange of medical expert reports in personal injuries actions to address the 'problem' of surprise.[962] The 'problem' of surprise was not just perceived by judges, but also perceived by lawyers.

English law reform inquiries from the 1930s Hanworth Royal Commission to the 1985 Review Body on Civil Justice's inquiry also called for reforming Disclosure Rules to address the 'problems' of surprise and contradictory party experts in personal injuries actions in particular, as discussed in Chapter 4.2.9 above.

From at least the 1940s, Masters had developed the English Disclosure Power (1940s informal by Masters in personal injuries actions) when they gave directions in personal injuries actions (probably by consent) that medical party expert reports be agreed between the parties if possible and failing agreement the medical expert evidence be limited to a specified number of witnesses on each side.[963] Though RSC 1883 contained no express Disclosure Power,[964] it had become normal practice for the parties in personal injuries actions to disclose their expert medical reports (by consent)

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[961] RSC 1965, O38 r4.
[962] eg Manchester Law Society, *Report of the Manchester Law Society on The Cost of Litigation* (1931).
[963] *The Annual Practice 1949* (Sweet and Maxwell 1949) 517-518. *Harrison v Liverpool Corporation* (1943) 2 All ER 449, 450 (Lord Green MR) is an example of a case in which that type of direction was made.
[964] And could not have included such a power because experts reports were privileged and could not be ordered to be disclosed (except by consent): *Worrall v Reich* [1955] 1 QB 296; *In re Saxton* [1962] 1 WLR 968; *Causton v Mann Egerton (Johnsons)* [1974] 1 WLR 162.

to attempt to reach agreement on the medical expert reports where possible.[965] Lord Denning gave some indication that that normal practice may have extended to other (perhaps all) cases involving party expert evidence including patent cases, Factory Act cases (where engineers are employed) and personal injury cases.[966]

More than 20 years after the first English law reform inquiry calls by the 1930s Hanworth Royal Commission for reforming Disclosure Rules to address the 'problems' of surprise and contradictory party experts in personal injuries actions in particular (as discussed in Chapter 4.2.9 above), the 1954 amendments to O30[967] implemented many of the Evershed Committee's recommendations. The objectives of the new O30 were to ensure the summons for directions was compulsory in most actions (the main exceptions being the specialist commercial list, actions referred to a referee and patent infringement actions); and to give Masters hearing a summons for directions additional powers to save expense and delay at trial. O30 rr2 and 3 made it mandatory for the Court when hearing a summons for directions to be proactive (rather than adjourning the summons); and 'for the purpose of saving costs' to consider the mode in which evidence may be given at trial and the limitation of party expert evidence (as provided for in the new O37 rr1A-G – discussed below). This was radical shift which replaced the discretionary power to deal with matters when hearing a summons for directions with a duty to deal with matters, as had been recommended by the Evershed Committee.[968]

The Rules of the Supreme Court (Summons for Directions etc) 1954 also put in place the new English Power to Admit an Expert Report As Evidence In Chief (1954 affidavit evidence) and English Disclosure Power (1954 affidavit evidence) by giving the Court power, at or before the trial of an action, to direct that:

- all or any evidence shall be given by affidavit and that affidavits be filed and served on an opposing party pre-trial; and
- a deponent shall not be cross examined and need not attend the trial.[969]

[965] Law Reform Committee (n 685) [32].
[966] *In re Saxton* [1962] 1 WLR 968, 972. See also *Causton v Mann Egerton (Johnsons)* [1974] 1 WLR 162, 169.
[967] Rules of the Supreme Court (Summons for Directions etc) 1954.
[968] Committee on Supreme Court Practice and Procedure, *Final Report* (n 297) [226].
[969] RSC 1883, O37 r1A.

The scope of the English Disclosure Power (1954 affidavit evidence) to order the compulsory exchange of expert reports to address the 'problems' of surprise and contradictory party expert evidence was totally undermined by the Court of Appeal in *Worrall*[970] which held, though it is helpful and desirable that medical expert reports should be exchanged, they are privileged documents and therefore cannot be ordered to be disclosed. *Worrall* came to have a profound, undermining impact on the evolution of the English Disclosure Power.

The Rules of the Supreme Court (Summons for Directions etc) 1954 also put in place a new combined English Disclosure Rule (1954 collisions actions only) and English Permission Rule (1954 collisions actions only) for expert engineer evidence in collision actions only.[971] However, as O37 r1E was limited to collision actions only, it fell well short of the Evershed Committee's recommendation 14[972] that expert evidence should not be receivable unless a copy of the expert's report has been made available for inspection before trial (to reduce the 'problem' of surprise and lead to agreement between experts). The literature does not explain why recommendation 14 was not fully implemented.

In 1967-8 the English Disclosure Rules (1967 disclosure encouraged only) were made for the Official Referees, divorce and admiralty jurisdictions by less-formal practice directions requiring parties to exchange written expert evidence pre-trial 'for agreement' in those non-personal injuries jurisdictions, failing which adverse costs orders may be made. The practice directions are not discussed in the literature though they were likely intended to work around the English Disclosure Powers at that time being limited to collisions actions and patent actions; and issued as practice directions because the Rules Committee could not, or would not, make rules of court requiring the parties to exchange written expert evidence pre-trial.

In 1974 a new O38 rr35-44 was added[973] which for the first time set out a detailed Party Expert Procedural Rules regime (other than in specialist commercial actions, OR actions and patent actions). Those new rules were made pursuant to s2(3) of the Civil Evidence Act 1972 which significantly expanded the rule making power to expressly

[970] *Worrall* (n 964).
[971] RSC 1883, O37 r1E(1)(b) (extended in RSC 1965, O38 r6(1))
[972] Committee on Supreme Court Practice and Procedure, *Final Report* (n 297) [320].
[973] The Rules of the Supreme Court (Amendment) 1974.

allow rules requiring the disclosure of expert evidence (as recommended by the Law Reform Committee's 1970 *Seventeenth Report (Evidence of Opinion and Expert Evidence)*.[974] Interestingly Steyn LJ has held that the s2(3) rule making power was not necessary because rules requiring the disclosure of witness statements do not override privilege but merely regulate the practice and procedure of the court relating to the way in which oral evidence may be given.[975]

The new O38 r36 laid down the new English Permission Rule (1974) which provided that (except with the leave of the Court or where all parties agree) no expert evidence may be adduced at trial unless the party seeking to adduce the evidence has both applied to the Court to determine whether a direction should be given under rr37, 38 or 41 (whichever is appropriate); and complied with any direction.

The new O38 r37 English Disclosure Power (1974 mandatory for medical evidence in personal injuries actions) effectively made the disclosure of medical evidence compulsory in personal injuries actions not involving any alleged medical negligence (unless the Court considers there to be sufficient reason for not directing the pre-trial disclosure of expert evidence). The new complementary O38 rr37 and 38 English Disclosure Power (1974 discretionary) provided a power to direct disclosure of all other expert evidence (in personal and non-personal injuries actions) 'if satisfied that it is desirable to do so'. The new rr37 and 38 party expert regime addressed the then existing 'problem' of surprise (caused by parties keeping their expert's reports to themselves); and the Court's limited power to order the disclosure of expert reports before the trial (unless by agreement).[976] The purpose of the new Disclosure Powers was to give the Court power to order disclosure sufficiently in advance of the trial to enable differences between experts to be settled; and to avoid the 'problem' of surprise, including expensive adjournments.[977] The two different 1974 English Disclosure Powers arose because of concerns that directing the disclosure of a defendant's expert evidence in personal injuries actions involving any alleged medical negligence would also unfairly require the disclosure of the non-expert evidence which

[974] Law Reform Committee (n 685).
[975] *Reg. v. Secretary of State for the Home Department, Ex parte Leech* [1994] QB 198, 211-212.
[976] *In re Saxton [1962]* 1 WLR 968 per Denning MR referring to *Worrall* (n 964); per Russell LJ holding that reports of potential expert witnesses are privileged from production and it is contrary to the interests of justice to compel the disclosure of evidence such as expert reports.
[977] *Winchester Cigarette Machinery Ltd v Payne* 1993 Court of Appeal (Civil Division) (per Hoffman LJ).

defendant's experts are briefed with.[978]

In 1980 a new O25 r8 established the English Disclosure Rule (1980 automatic directions) which provided automatic directions on the close of pleadings in personal injuries actions requiring the disclosure of written expert reports;[979] and the English Limited Expert Evidence Rule (1980 automatic directions) which also automatically limited the experts to two medical experts and one other expert. Both rules only applied in personal injuries actions not involving any alleged medical negligence. Those new rules partly implemented the Cantley Committee's recommendation that standard orders should be made automatically in personal injury actions.[980] Those automatic directions had the advantage that court directions were not required. That automatic directions pathway was not mandatory because parties could apply for alternative directions about expert evidence under the rr36-38 alternative pathway.[981] The rr36-38 alternative pathway dealt differently with expert evidence depending on the type of action. Personal injuries actions (not involving any alleged medical negligence) were covered by r37 (with medical expert evidence and non-medical expert evidence further dealt with differently). Personal injuries actions (involving alleged medical negligence), and non-personal injuries actions, were covered by r38.

In 1987, O38 rr37 and 38 were replaced with simple English Disclosure Power (1987 harmonised all actions) which effectively harmonised, and mandated, directions for the pre-trial disclosure of expert evidence in all types of actions (except where 'there are special reasons for not doing so'). For the first time, the English rules of court comprehensively addressed the 'problems' of surprise and contradictory party expert evidence (by facilitating pre-trial agreement between experts). The accompanying Explanatory Note[982] made clear that the presumption is that experts' reports should be disclosed in all High Court proceedings. That type of harmonised English Disclosure Power for all actions (including personal injuries actions involving medical negligence) had been called for by the Court of Appeal in *Wilsher v Essex Area Health Authority*[983] which explained the practical difficulties that can arise from the 'problem'

[978] *Rahman v Kirklees AHA* [1980] 1 WLR 1244.
[979] O25 r8(1)(2)).
[980] Personal Injuries Litigation Procedure Working Party, *Report* (Cmnd 7476, 1979), [34-35], 35 (recommendation 3) and Appendix H.
[981] O25 r8(3).
[982] The Rules of the Supreme Court (Amendment) 1987 14 (para (g)).
[983] *Wilsher v Essex Area Health Authority* [1987] QB 730.

of surprise when pre-trial disclosure of expert evidence is not directed/undertaken.

These reforms had taken nearly 60 years to be implemented after the 1930s Hanworth Royal Commission first called for reforming Disclosure Powers or Rules to address the 'problems' of surprise and contradictory party experts in personal injuries actions in particular, as discussed in Chapter 4.2.9 above. The evolution of the reforming Disclosure Rules to address the 'problem' of surprise (and contradictory party experts) demonstrates how evolutionary reforms are incremental as well as the difficulties with implementing reforming procedural rules which undermine the adversarial system.

In 1989 a new O18 r12(1A) –(1B) provided the English Plaintiff's Expert Report Rule (1989 personal injuries actions only). That rule mandated the service of party expert evidence with the plaintiff's statement of claim in personal injuries actions 'substantiating all the personal injuries alleged in the statement of claim which the plaintiff proposes to adduce in evidence as part of his case at the trial'. That rule was likely introduced at least in part to address the problem identified by Ian Scott that the pleadings in personal injuries actions frequently fail to give parties adequate notice of the case they face ie the 'problem' of surprise.[984]

5.2.9 English Expert Meeting Power

By the early-1980s, some ORs were directing pre-trial expert meetings (by consent).[985] This was a procedure pioneered by the ORs to narrow the issues in dispute[986] to address the 'problem' of contradictory party expert evidence. In 1996 Lord Woolf recognised the exercise of this power was the 'usual practice' in ORs' business.[987]

In 1986 the English Expert Meeting Power (1986 non-personal injuries actions) was provided.[988] That power allowed the Court to direct 'without prejudice' expert meeting to identify those parts of the expert evidence which are in issue; and also direct that

[984] Scott (n 503) 108.
[985] Woolf and Williams (n 516) 232; John Newey, 'The Official Referees courts today and tomorrow' (1994) 10 Const L J 20; Justice Dyson, 'The future of civil litigation: the new Technology and Construction Courts post-Woolf or "the Official Referees in sheep's clothing"' (1999) 15 Const LJ 335, 343; *The Supreme Court Practice 1999* (Sweet & Maxwell 1999), 678.
[986] Ian Scott, 'NOTES Official Referees' Business' (1984) 3 CJQ 97, 99; Woolf and Williams (n 516) 232; Newey (n 985); Dyson (n 985) 343.
[987] Woolf, *Final Report* (n 2) Chapter 13 [42].
[988] RSC 1965, O38 r38(3) which applied in the non-jury lists ie the Chancery Division, the Commercial Court, the Admiralty Court and as official referees' business.

the experts prepare a joint statement indicating where they are, and are not, agreed.[989] That power was an incremental expansion of the earlier power exercised by ORs when direct pre-trial meetings of experts by consent, though did not apply in personal injuries actions.[990] Expert meetings have three main advantages and address the 'problem' of contradictory party experts in three ways:[991] firstly, they aim to produce maximum consensus between the party experts ie address the 'problem' of contradictory party expert evidence so the parties (and the party experts) know the nature and extent of the expert agreement/disagreement before the trial (which may promote settlement and has time and cost benefits, including addressing the 'problem' of surprise); secondly, wasteful effort, preparatory work and costs and expenses are avoided; and thirdly, any trial should be smoother and shorter.

In 1986 the English Expert Meeting Power (1986 patent actions only) for patent actions only provided a power on a summons for directions to make directions for expert meetings to produce a joint report on the state of the relevant art.[992] That power did not materially differ from the English Expert Meeting Power (1986 non-personal injuries actions).

In 1987 a new O38 r38 provided an extended English Expert Meeting Power (1987 harmonised all actions) which effectively harmonised the power in both personal injuries and non-personal injuries actions. This is another good example of incremental legal change.

5.2.10 The 'Ikarian Reefer'

Though Cresswell J's 1993 summary of the duties of party experts in *The 'Ikarian Reefer'*[993] was neither the ratio decidendi of the judgment nor a statement of the law concerning expert evidence at common law, it has become the seminal authority on party experts' duties and established the English Independence Rule (1993) to address the 'problem' of bias. The authority of the English Independence Rule (1993) was bolstered when Stuart-Smith LJ unhesitatingly endorsed Cresswell J's 'admirable

[989] These amendments are discussed in Jack Jacob, 'Meeting of experts without prejudice' (1986) 5 CJQ 279.
[990] Ibid.
[991] Ibid 280; *The Supreme Court Practice 1999*, 724-5; *Hubbard v Lambeth Southwark and Lewisham* [2001] EWCA Civ 1455, [17] (discussing the successor power in CPR 35.12).
[992] RSC 1965, O104 rr13 and 14.
[993] *The Ikarian Reefer* (per Cresswell J) (n 106) 81-82.

resumé of the duties and responsibilities of expert witnesses.'[994]

Cresswell J's summary of a party expert's duties has been almost universally endorsed and applied, including by the Court of Appeal, the Supreme Court and law reform bodies including Lord Woolf's *Final Report*.[995] The Australian judge Heydon JA has said that Cresswell J's summary has been influential in causing rules of court to be devised to control expert evidence; and in later judicial pronouncements.[996] Cresswell J's summary clearly seeks to address the 'problem' of bias. Interestingly, in 2003 the Victorian Court of Appeal undermined Cresswell J's summary of an expert's duties which it said should be treated 'as essentially precepts or ideals towards which expert witnesses should strive rather than the basis of any new exclusionary rules'.[997]

Though the English Independence Rule (1928) and the English Independence Rule (1993) are similar, they are not linked to each other in the literature; and the later English Independence Rule (1993) seems to have developed independently of the earlier English Independence Rule (1928).

5.2.11 'Access to Justice' inquiry and CPR 35

The 'Access to Justice' inquiry is discussed in Chapter 4.2.14 above.

Lord Woolf's recommendations in relation to expert evidence were implemented through CPR 35.[998] Sorabji has described Lord Woolf's new approach as a radical break from the past and predicated on proportionate justice in many cases rather than the achievement of substantive justice in individual cases.[999] Dwyer has described the CPR as the single greatest change to the civil procedure rules in England since RSC 1883.[1000] Lord Hope has described the expert evidence principles in CPR 35 and the Practice Direction as of universal application.[1001]

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[994] *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The "Ikarian Reefer")* [1995] 1 Lloyd's Rep 455, 496.
[995] For ex *Stevens v Gullis* [2001] CP Rep 3; *Jones v Kaney* [2011] 2 AC 398, 435 (Lord Dyson) and 446 (Lord Hope); Woolf, *Final Report* (n 2) Ch 13 [29].
[996] *Makita v Sprowles* (2001) 52 NSWLR 705, 739-740 [79] (Heydon JA).
[997] *FGT Custodians Pty Ltd (formerly Feingold Partners Pty Ltd) v Fagenblat* [2003] VSCA 33, [17-18] (Ormiston JA).
[998] The Civil Procedure Rules 1998, Pt 35.
[999] John Sorabji, 'Late amendment and Jackson's commitment to Woolf: another attempt to implement a new approach to civil justice' (2012) 31 CJQ 393, 400.
[1000] Deirdre Dwyer, 'Introduction' in Deirdre Dwyer (ed), *The Civil Procedure Rules Ten Years On* (OUP 2009), 5.
[1001] *Jones v Kaney* [2011] 2 AC 398, 446.

Civil litigation conducted pursuant to the CPR is in many respects not adversarial.[1002] That is particularly the case in relation to experts because the Court (not the parties) controls the number of experts; their speciality and their identity.[1003]

CPR 1.2-1.4 make clear that the CPR obligations are imposed on the Court, not just the parties. Enforcement of the obligations imposed on the Court is not possible.

CPR 35 covers experts and assessors. As is well known, CPR 35 extensively reformed expert evidence and rewrote the English Party Expert Procedural Rules.

The English Limited Expert Evidence Rule (CPR) provides that expert evidence is restricted to what is reasonably required to resolve the proceeding.[1004] That self-operating rule is an extension of the various earlier English powers to limit party experts to address the 'problem' of excessive party experts**;** covers both the number of party experts and scope of party expert evidence; is a mandatory duty which applies to both the parties and the Court; and does not need a Court order.

The English Independence Rule (1993) is encapsulated by the overriding duty to help the Court in the English Independence Rule (CPR).[1005]

Court permission is required to call a party expert or put a party expert's report into evidence in all cases under the English Permission Rule (CPR).[1006]

The Court has power to direct that the evidence on an issue be given by one expert only under the English SJE Power (CPR).[1007] Self-evidently, that power aims to address the 'problems' of bias, contradictory party experts and excessive party experts.

Expert reports must comply with specific requirements under the English Specific Disclosure Rule (CPR),[1008] including that expert reports must include a statement that the expert understands and has complied with their duty to the court; and include the substance of material instructions (another mechanism to address the 'problem' of

[1002] *Three Rivers DC v Governor and Co of the Bank of England (No.6)* [2005] 1 AC 610, [29] (Lord Scott).
[1003] Andrew Edis, 'Privilege and Immunity Problems of Expert Evidence' (2007) 26 CJQ 40, 47.
[1004] CPR 35.1.
[1005] CPR 35.3.
[1006] CPR 35.4.
[1007] CPR 35.7.
[1008] CPR 35.5 and 35.10

bias). Again, under this self-operating rule, no Court order is required.

The Court may at any stage direct a discussion or meeting between party experts to identify the issues and reach agreement on an issue (where possible) under the English Expert Meeting Power (CPR).[1009]

Under the English Assessor Power (CPR) the Court may obtain assistance from an assessor who has skill and experience, including obtaining a report from an assessor.[1010]

Though the English SJE Power (CPR) covers much of the same ground as the English CE Power (1934-1998),[1011] the CPR have never included a CE Power (which had fallen into desuetude).

The Privy Council has said the CPR 32 and 35, read in conjunction with the Court's and the parties' general duty to limit expert evidence, were intended to work a sea-change in the approach to expert evidence by subjecting the entire deployment of expert evidence to active judicial control by judicial case management.[1012]

The English Permission Rule (2013) was implemented following Lord Justice Jackson's 2009 Costs Review[1013] to extend the English Permission Rule (CPR) by requiring that when applying for permission parties must provide an estimate of the costs of the proposed expert evidence and identify the issues which the expert evidence will address (the former being to reduce costs by a budget being set and the latter by identifying, and limiting, the issues which experts may address at an early stage).[1014] That extended English Permission Rule (2013) is another unique example of incremental change which further addresses the 'problem' of excessive party experts. Interestingly, there has never been an equivalent Permission Rule in NSW or Victoria which demonstrates that England, NSW and Victoria were not always coevolutionary.

The English Concurrent Expert Evidence Power (2013) was provided following a

[1009] CPR 35.12.
[1010] CPR 35.15.
[1011] Lord Justice May, 'The English High Court and Expert Evidence' (2004) 6 TJR 353, 382.
[1012] *Bergan v Evans* [2019] UKPC 33, [41].
[1013] Jackson (n 26).
[1014] Lord Justice Jackson, 'Focussing Expert Evidence and Controlling Costs Fourth Lecture in the Implementation Program' (Bond Salon Annual Expert Witness Conference, 11 November 2011).

successful trial of concurrent evidence in 2012.[1015]

5.3 NSW

5.3.1 Introduction

This Chapter 5.3 will largely consider the issues and topics analysed in Chapter 5.2 (in relation to England) from the NSW perspective. The aim is to analyse the NSW procedural rules per se; and in doing so also identify any temporal and causal connections between England and NSW on common issues and topics.

Like Chapter 5.2 above (in relation to England), this Chapter will adopt a largely chronological approach to the NSW analysis.

Chapters 5.3.2 to 5.3.4 will commence the analysis by considering the first NSW Party Expert Procedural Rules.

Like Chapter 5.2.4 above (in relation to England), Chapter 5.3.6 will consider the procedural rules in NSW patent and monopolies actions.

Again, like Chapter 5.2.5 above (in relation to the English Commercial Court), Chapter 5.3.5 will consider the NSW Commercial Court.

Chapter 5.3.7 will analyse the important reforming rules implemented through the 1970s NSW Judicature Act reforms (and contrast those with the English Judicature Act reforms from the 19th century).

Chapter 5.3.8 will cover personal injuries actions to mirror the analysis in Chapter 5.2.8 (in relation to England).

Chapters 5.3.9 and 5.3.10 will consider the reforms made in the unique specialist, judge-managed (and party expert heavy) Building and Commercial List and Professional Negligence List.

Chapters 5.3.11 and 5.3.12 will analyse the major, seminal modern reforming procedural rules in NSW which were implemented in the shadows of Lord Woolf's 'Access to Justice' inquiry (which is covered in Chapter 5.2.10).

[1015] Professor Dame Hazel Genn, *Manchester Concurrent Evidence Pilot Interim Report* (2012); Genn, 'Getting to the truth' (n 58); Civil Justice Council, *Concurrent Expert Evidence and 'Hot Tubbing' in English Litigation since the Jackson Reforms. A Legal and Empirical Study* (2016); Jackson (n 260)

5.3.2 1880 Expert Assistance Power

The NSW Supreme Court was established in the early-19th century with both a common law and equitable jurisdiction.[1016] The mode of trial differed little from that of the English Courts at the time,[1017] though the initial mode of common law trial was by judge and assessors (rather than judge and jury).

The first NSW Party Expert Procedural Rule was the NSW Expert Assistance Power (1880 to 1999 Equity proceedings) which allowed a NSW Supreme Court equity judge to obtain assistance from conveyancing counsel, accountants, merchants, engineers, actuaries or other scientific persons the better to enable the judge to determine any matter at issue; and to act upon the certificate of any such person, in equity proceedings only. That NSW power was self-evidently based on the very similar English Expert Assistance Power (1852-1998 Chancery chambers matters only).[1018] It demonstrates a degree of coevolution between NSW and England which involves NSW adopting a reform which had earlier evolved in England, though the literature does not explain why the NSW power was provided decades after the English power. From 1901, unlike the English power, the NSW power was not expressly limited to chambers matters.[1019]

5.3.3 1890s NSW Reference for Trial Power

Under the NSW Reference for Trial Power (1892-ongoing) the Court could order (without consent) that the cause, any question or any issue of fact be tried before a special referee appointed by the court where, inter alia, any prolonged examination of documents or scientific or local investigation is required (and cannot conveniently be made before a jury or conducted by the court through its ordinary officers). That NSW power is directly descended from the English Reference for Trial Power (1873-1998),[1020] but unlike that English power was not subject to the parties' consent.

Interestingly, NSW had no power equivalent to the English I&R Power (1873-1998)

[1016] Letters patent establishing the Supreme Court of NSW (Second Charter of Justice) (known as the Second Charter of Justice 1814) and subsequent legislation. Discussed in Enid Campbell, *Rules of Court A Study of the Rule-Making Powers and Procedure* (1985) 21.
[1017] *Report of the Commissioner of Inquiry on the judicial establishments of New South Wales, and Van Diemen's Land* (1823), 6.
[1018] Master in Chancery Abolition Act 1852.
[1019] Equity Act 1901 (NSW), s7.
[1020] *Buckley v Bennell Design & Constructions* (1977-1978) 140 CLR 2, 16. The ss57 -59 powers were superceded by the powers in ss13 and 14 of the Arbitration Act 1889.

before 1985; and the reason why is not disclosed in the literature.[1021]

5.3.4 Regulae Generales (NSW) and General Rules of the Court 1952 (NSW)

The Regulae Generales 1902 (NSW) were the first comprehensive rules of court regulating Supreme Court of NSW common law proceedings. They did not incorporate, and were not based on, the English RSC 1883 because NSW did not adopt the English Judicature Act reforms. They were amended and added to from time to time[1022] and continued until repealed by General Rules of the Court 1952 (NSW). The Regulae Generales (NSW) contained no Party Expert Procedural Rules.

At the time that the Regulae Generales (NSW) were replaced by the General Rules of the Court 1952 (NSW), the NSW Supreme Court's civil business was mostly motor vehicle and industrial accident action trials, which were mainly heard by a judge and civil jury.[1023] The General Rules of the Court 1952 (NSW) also contained no Party Expert Procedural Rules.

Interestingly, NSW did not adopt a power similar to the English CE Power (1934-1998) nor rules of court similar to the English New Procedure Rules (though a 1934 editorial called for the adoption of the English New Procedure Rules which were described as 'definitely beneficial and worthy of adoption'[1024]). There is nothing in the literature explaining why NSW did not adopt similar powers and rules.

In 1954 the NSW rule making power was amended to provide power to make rules:

> for orders being made at any stage of any action at law directing that specified facts may be proved at the trial by affidavit with or without the attendance of the deponent at the trial for cross-examination.[1025]

That NSW rule making power was broader than the corresponding 1925 English power[1026] because the NSW power allowed the rules of court which dispensed with attendance at trial.

[1021] Justice Beaumont, 'References to a Special Referee' (1989) 5 BCL 235 discussed the lack of a NSW I&R Power.
[1022] eg the amendments made by the Regulae Generales 1910 (NSW).
[1023] Wallace (n 331) 130.
[1024] 'Adoption of "New Procedure" Rules.' (1934) 7 ALJ 401.
[1025] That rule making power was included in the Evidence Act by the Evidence (Amendment) Act 1954 (NSW), s43B.
[1026] Supreme Court of Judicature (Consolidation) Act 1925, s99(1).

5.3.5 Commercial Causes

The NSW Supreme Court 'commercial causes list' was established by statute in 1903 with its own statutory rules of court,[1027] though no express Party Expert Procedural Rules were provided. Unlike the English Commercial Court (which it was based on) and the rules in the 1895 *Commercial Causes Notice*,[1028] the NSW commercial causes list and its rules had a clear statutory basis.

The statutory NSW Directions Power (1903 -1989 Commercial List) provided that:

> [a judge] shall give such directions as in his opinion are expedient for the speedy determination of the questions in the action really at issue between the parties.[1029]

That power is clearly based on the English Directions Power (1895 Commercial Causes), though unlike that English power was not limited to directions 'in accordance with existing rules'; and the exercise of the power was mandatory (rather than discretionary). This demonstrates a degree of coevolution between NSW and England, though NSW appears to have cherry-picked only what it liked about the English Commercial Court reform and also to have worked around limits in the English reform.

5.3.6 Patent and other monopolies actions

Commonwealth legislation based on English patents statutes provided the NSW Assessor Power (1903 patent actions only) which mirrored the English Assessor Power (1883-1947 patent actions). Interestingly, a power equivalent to the English Power to Direct a Trial without a Jury (1883-1949 patent actions) was not provided in NSW (presumably because NSW did not share the English concerns about juries deciding expert-heavy, patent cases as discussed in Chapters 4.2.6 and 5.2.4).

In the *Cement Linings Ltd v Rocla Ltd* patent infringement action,[1030] the NSW Chief Justice in Equity controversially appointed assessors to undertake experiments and report to the Court both without consent; and without disclosing the assessor's report

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[1027] Commercial Causes Act 1903 (NSW); Rules of Court (Commercial Causes Act) 1904 (NSW). That Act continued and those Rules until superceded by s56 the Supreme Court Act 1970 (NSW) and Part 14 of the SCR 1970 (NSW) which created a commercial list in the newly established Common Law Division of the NSW Supreme Court.
[1028] *Commercial Causes Notice* (n 452).
[1029] Commercial Causes Act 1903 (NSW), s5.
[1030] *Cement Linings Ltd v. Rocla Ltd* (1939) 40 SR (NSW) 491. See also Rogers J in Andrew Rogers, 'Dispute resolution in Australia in the year 2000' (1984) 58 ALJ 608 (which discusses that case)

to the parties.

5.3.7 1970s Judicature Reforms

In 1961 the NSW Chief Justice's Law Reform Committee took up then most recent work to prepare a NSW Supreme Court Bill and rules of court based on the English Judicature Acts after earlier unsuccessful attempts.[1031] In the late-1960s the NSW Attorney General made a reference to the NSW LRC to prepare a draft Bill and rules of court to modernise Court procedures to, among other things, bring about a fusion of law and equity in NSW's procedures.[1032] The NSW LRC's *Report on Supreme Court Procedure LRC 7*[1033] recommended the adoption of a judicature system based on the English Supreme Court of Judicature (Consolidation) Act 1925 and RSC 1965. The Commission's work was expressly conservative, with the *LRC 7* report noting that but for assurances given to proceed along orthodox lines and not consider any radical changes, the NSW LRC would have considered other more far-reaching changes.

The only reference in the *LRC 7* to expert evidence was to the proposed Pt 39 concerning Court Experts, which stated that '[t]he corresponding English Order has had little use but it has seemed worthwhile to include this Part for the occasional use which it may receive'.[1034]

The Supreme Court Act 1970 (NSW) and SCR 1970 (NSW) completely altered NSW Supreme Court civil procedure, including for the first time in NSW achieving the fusion of law and equity. SCR 1970 (NSW) was influenced by, and adopted many rules in, RSC 1965.

Though SCR 1970 (NSW) adopted many of the corresponding rules in RSC 1965, not all were adopted; and those that were adopted were not necessarily identical. Interestingly, the English Power to Limit Party Experts (1954-1998) was not adopted at all. Neither *LRC 7*, nor the other literature, explains why.

NSW Directions Powers

Section 56(3) of the Supreme Court Act 1970 (NSW) continued the NSW Directions

[1031] NSW LRC, *Report of the Law Reform Commission on Supreme Court Procedure* (LRC 7, 1969) 7-8.
[1032] NSW LRC (n 1031) 7.
[1033] Ibid.
[1034] Ibid 24.

Power (1903-1989 Commercial List) in commercial list matters only, but extended the power to directions which were not consistent with SCR 1970 (NSW) where necessary for the speedy determination of the real questions between the parties. There is nothing in the literature explaining what types of directions were made under the NSW Directions Power (1903 -1989 Commercial List) or how often the power was used. In 1989 the NSW Directions Power (1989 harmonised) extended the NSW Directions Power (1903-1989 Commercial List) to all civil proceedings. These are interesting examples of incremental legal change and evolutionary change involving long periods of stability.

Those NSW Directions Powers are unique and extraordinarily powerful. There has never been an English Directions Power which expressly permits directions which are not consistent with the rules of court. At least one NSW Supreme Court judge (Rogers J) considered that this power could be used to limit the number of party experts.[1035]

Party Expert Procedural Rules

SCR 1970 (NSW) included only two Party Expert Procedural Rules.

The NSW Disclosure Power (1970 personal injuries actions) provided that when an order for the examination of a plaintiff was made the defendant's examining doctor shall make a written report of the examination and the defendant must serve the report on the plaintiff. That power was another NSW Disclosure Power which evolved incrementally, though it was limited to the disclosure of the defendant's medical expert reports.

The NSW CE Power (1970) was based on, but not identical to, the corresponding English CE Power (1934-1998).[1036] Unlike the English power which provided that any part of a Court Expert's report which is not accepted by all the parties shall be treated as information furnished to the Court and be given such weight as the Court thinks fit, the NSW power provided that the Court Expert's report shall, unless the Court otherwise orders, be admissible in evidence on the question on which it is made, but shall not be binding on any party (except to the extent a party agrees to be bound).

[1035] Andrew Rogers, 'The Conduct of Lengthy and Complex Matters in the Commercial List' (1982) 56 ALJ 570, 573 in the context of the equivalent power applicable to the Commercial List.
[1036] Then set out in O40 of RSC 1965.

The NSW power, like the English power, did not apply to jury trials;[1037] and could only be exercised 'on application by a party'.[1038] Like the NSW commercial causes list (discussed above), this reform also demonstrates a degree of coevolution between NSW and England, though again NSW appears to have cherry-picked only what it liked about the English reform while also working around limits in the English reform.

5.3.8 Personal injuries actions

The extended NSW rule making power[1039] was used to provide a new combined NSW Disclosure Power (1963 personal injuries actions) and NSW Power to Admit an Expert Report As Evidence in Chief (1963 personal injuries actions), which were NSW firsts but only available in personal injuries actions only.[1040]

The NSW Disclosure Power (1963 personal injuries actions) provided that a judge may order that any matters of 'opinion' may be proved at the trial by affidavit;[1041] and that experts' affidavits shall be served on the other parties not less than 14 days before the hearing.[1042]

The new NSW Power to Admit an Expert Report As Evidence in Chief (1963 personal injuries actions) allowed a judge to order that an expert's affidavit shall be proof of the matters deposed to (without the attendance of the expert at the trial).

There is nothing in the literature explaining what (if anything) specifically prompted those 1963 reforms at that time or how often the new powers were used, though it is likely that these reforms were at least in part because expert evidence was then frequently, and closely, considered in personal injuries actions, including in relation to medical causation which almost always required expert evidence.[1043]

Interestingly, the NSW Rules Committee implemented the NSW Disclosure Power (1963 personal injuries actions) notwithstanding that the English Court of Appeal in *Worrall*[1044] held that the similar English Disclosure Power (1954 affidavit evidence) did

[1037] Part 39 r1.
[1038] Part 39 r2(1).
[1039] Evidence (Amendment) Act 1954 (NSW).
[1040] Western Australia LRC, *Final Report on Production of Medical and Technical Reports in Court Proceedings* (WALRC 40, 1975), [27] explains that Tasmania had a Disclosure Power since 1958.
[1041] r14(1)(f).
[1042] r14(2)(2)) unless a judge orders otherwise.
[1043] Mr Justice Glass, 'Expert Evidence' (1987) 3 Aust Bar Rev 43, 45 and 47.
[1044] *Worrall* (n 964).

not extend to the compulsory exchange of expert reports.

The 1963 reforms were 'warmly greeted' by the (powerful) medical profession,[1045] which is unsurprising as they were the main beneficiary.

The NSW Disclosure Rule (1972 mandatory in personal injuries actions) was made pursuant to the rule making power in the Supreme Court Act 1970 (NSW), as extended in 1972. It applied in personal injuries actions but not medical negligence actions. It mandated the pre-trial disclosure of evidential medical reports to address the 'problem' of surprise, failing which the evidence in chief of any medical expert is not admissible.[1046] Unlike the previous NSW Disclosure Power (1963 personal injuries actions), the 1972 rule was incrementally improved ie it was mandatory; and it did not require a Court direction for the pre-trial exchange of evidence; however it did not extend to medical negligence actions; and it did not include a corresponding Power to Admit an Expert Report As Evidence in Chief. Kirby P has directly explained causal and temporal connection when explaining that the purpose of the 1972 rule was to cut down 'trial by ambush' (ie the 'problem' of surprise); permit the parties to obtain pre-hearing instructions from their own experts based upon the opinions of their adversaries (ie to further avoid the 'problem'); prepare well targeted cross examination; and allow for the proof of facts relevant to the experts' opinions.[1047] The 1972 rule may also have also been introduced to facilitate pre-trial settlements.[1048]

NSW did not adopt a power similar to the English Disclosure Power (1974 discretionary) so mandatory disclosure was limited to personal injuries actions (other than medical negligence actions).

A 1974 Practice Note,[1049] which provided for an early form of judicial case management through judicial supervision of personal injuries actions by early directions hearings, required the disclosure of medical evidence before the date fixed for the directions hearing (which was much earlier than the 14 days before trial required by the NSW Disclosure Rule (1972 mandatory in personal injuries actions)).

[1045] 'Practice Notes Medical Evidence on Affidavit' (1963) 37 ALJ 159.
[1046] Except by leave of the Court or the consent of the parties.
[1047] *Fajka v Aquila Steel Co Ltd* (unreported, Supreme Court of NSW, 13 December 1990); Wood, 'Case management in the Common Law Division' (n 387) 85.
[1048] Western Australia LRC, *Final Report on Production of Medical and Technical Reports in Court Proceedings* (WALRC 40, 1975), [24].
[1049] Practice Note Common Law Division 1974 (NSW).

That reform was however abandoned after only ten months, likely because lawyers opposed it.[1050]

A new NSW Power to Admit an Expert Report As Evidence in Chief (1979 personal injuries actions) provided that a medical expert report served under r13A is admissible without the expert attending Court, unless the medical expert fails to attend Court for cross-examination if required by a notice to do so.[1051] That power also did not apply in medical negligence actions but did effectively restore the NSW Power to Admit an Expert Report As Evidence in Chief (1963 personal injuries actions) in other types of personal injuries actions.

5.3.9 Building and Commercial List reforms

In 1974 a new Pt 14 covering the Commercial List was made,[1052] but it contained no express Party Expert Procedural Rules.

A new 1974 Practice Note for the Commercial List[1053] was premised on the existence of the NSW Disclosure Power (1974 Commercial List) ie it contemplated orders being made at a mention after a date for trial is fixed for 'the exchange of proofs of evidence of expert and other witnesses'. It is possible that orders/directions for the disclosure in the Commercial List were made under the NSW Directions Power (1903 -1989 Commercial List).

In 1985 a new Pt 14A established a new specialist NSW Building and Engineering List.[1054] Pt 14A r6 facilitated early judicial case management by mandating an early directions hearing. Pt 14A r14 provided the NSW Expert Assistance Power (1985 Building and Engineering List) by extending the NSW Expert Assistance Power (1880 to 1999 Equity proceedings)[1055] to the Building and Engineering List. The NSW Expert Assistance Power (1985 Building and Engineering List), unlike the NSW Expert Assistance Power (1880 to 1999 Equity proceedings), was subject to limitations which effectively allowed the parties to veto the appointment of an adviser. The power was opposed by the NSW Bar on the basis that the judge was not required to tell the parties

[1050] Cranston and others (n 348) 166. Practice Note 1975 (NSW)
[1051] Supreme Court Rules (Amendment No 96) 1979 (NSW).
[1052] Supreme Court Rules (Amendment No 38) 1974 (NSW).
[1053] Practice Note Commercial List 1974 (NSW).
[1054] Supreme Court Rules (Amendment No 163) 1985 (NSW).
[1055] Then in Part 39 r7.

about communications with any expert appointed to assist the judge.[1056]

A new 1985 Practice Note 35[1057] also applied to the new Building and Engineering List. Clause 7 provided a NSW Disclosure Power (1985 Building and Engineering List) to give directions 'in relation to exchange of proofs of expert[s]'. Clause 11 prompted the parties to consider whether 'to suggest to the Court' that the NSW Expert Assistance Power (1985 Building and Engineering List) should be used and if so 'the person or persons suggested for appointment', indicating that the Court considered that power would be only exercised on the initiative of the parties.

In 1985 a NSW I&R Power (1985-ongoing) was provided. That power, which was a NSW first, demonstrates how England (which had an I&R Power since the 19th century) and NSW were not always coevolutionary. It provided the widest possible discretion for the Court to refer the whole of a proceeding, or any question arising in a proceeding, to a special referee, including on the Court's motion and over the objection of the parties[1058] (though not in jury trials). The purpose of the power was to enable the Court to obtain a referee's report by the most efficient, expeditious and least expensive method available.[1059] The NSW I&R Power (1985) allowed the Court to give directions for the conduct of a reference, including allowing the referee to determine the reference in such manner as the referee thinks fit and providing that the referee is not bound by rules of evidence but may inform himself or herself in relation to any matter in such manner as the referee thinks fit.

The reference out powers were beneficial and far-reaching in NSW.[1060] The NSW reference out regime was similar to, and modelled on, the English I&R Power (1873-1998). That new NSW reference out regime was possible because of the expanded rule making power provided by s124(2) of the Supreme Court Act 1970 (NSW).[1061]

The NSW I&R Power (1985-ongoing) was also opposed by the legal profession and a

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[1056] 'Supreme Court building and engineering list' (1985) Journal of the NSW Bar Association 4.
[1057] Practice Note 35 1985 (NSW) which was published in (1985) 1 NSWLR 400.
[1058] *Super Pty Ltd v SJP Formwork (Aust) Pty Ltd* (1992) 29 NSWLR 549, 556. In Victoria the discretion to appoint a special referee over the objection of the parties only occurs in cases of an exceptional nature: *A.T. and N.R. Taylor and Sons Pty. Limited v. Brival Pty. Limited* [1982] VR 762.
[1059] P A Bergin, 'Methodology of the management of construction disputes in the Supreme Court of New South Wales' (Construction and Infrastructure Seminar, Law Council of Australia, 2004).
[1060] *Triden Properties Ltd v Capita Financial Group Ltd* (1993) 30 NSWLR 403, 406.
[1061] Supreme Court (Commercial Arbitration) Amendment 1984; Bergin (n 1059).

motion of disallowance was moved in the NSW Parliament.[1062] The NSW Bar Council opposed the power because consent to a reference was not required; and citizens were entitled to have disputes determined by, or in, the Court.[1063]

In *Beveridge & Anor v Dontan Pty Ltd*[1064] Rogers J observed that one of the difficulties at the time (1991) was the high costs caused in part by the need to educate the non-expert tribunal in technical cases; and generally speaking, references are confined to matters of technical expertise or manifold detail.

References out in NSW Supreme Court building cases became common. *Super Pty Ltd v SJP Formwork (aust) Pty Ltd*[1065] is an example of a reference out for report of the whole of the proceedings to a special referee (an architect). In practice, the parties often selected their own referee, many of whom were technical experts (including architects and engineers) who could bring their personal knowledge and experience to the reference.

NSW referees would often meet with party expert witnesses during the reference.[1066]

Giles J made the point in 1996 that references out were most frequently ordered in the Construction List and cases were resolved more expeditiously by referees than would be possible if the few Construction List judges had to conduct a full trial of the questions referred.[1067] Giles J's comments indicate that the NSW I&R Power (1985-ongoing) was implemented to address a lack of judges rather than any 'problems' with party experts. Bergin J notes that by 2004 a consulting industry had developed around these references with retired judges conducting many references though they had no specific technical expertise.[1068]

In 1985 a new s53(3E) was included in the Supreme Court Act 1970 (NSW)[1069] which established a new Commercial Division (though there had since 1903 been a commercial list). Practice and procedure in the new Commercial Division were

[1062] Discussed in Roger Giles, 'The Supreme Court Reference Out System ' (1996) 12 Building and Construction Law 85, 91 -92; Bergin (n 1059).
[1063] 'Arbitration Rules' (1985) Journal of the NSW Bar Association (1985 Summer).
[1064] (1991) 23 NSWLR 13.
[1065] *Super Pty Ltd v SJP Formwork (Aust) Pty Ltd* (1992) 29 NSWLR 549.
[1066] *Triden Properties Ltd v Capita Financial Group Ltd* (1993) 30 NSWLR 403.
[1067] Roger Giles, 'The Supreme Court Reference Out System ' (1996) 12 Building and Construction Law 85, 93-94.
[1068] Bergin (n 1059).
[1069] Supreme Court (Commercial Division) Amendment Act 1985 (NSW).

regulated by a new Pt 14 in the SCR 1970 (NSW)[1070] and a new November 1986 Practice Note No 39.[1071] The new Pt 14 did not include any Party Expert Procedural Rules; however Practice Note No 39 extensively reformed expert evidence (in the Commercial Division at least) by providing three new powers which largely mirrored the corresponding 1986 English rules for the non-personal injuries divisions.[1072] Firstly, the NSW Disclosure Power (1985 Commercial Division) effectively prohibited parties from adducing expert evidence unless disclosed in a pre-trial expert report. Secondly, the NSW Power to Admit an Expert Report As Evidence in Chief (1985 Commercial Division) allowed directions that an expert's report served as required by the practice note stands as the evidence in chief of the expert. Thirdly, the NSW Expert Meeting Power (1985 Commercial Division) was the first NSW power to direct a without prejudice experts meeting which largely mirrored the English Expert Meeting Power (1986 non-personal injuries actions). This is a further example of coevolution with England.

It is interesting that those three new powers were provided in a Practice Note rather than in the new Pt 14 rules of court which were published at around the same time.

The explanatory commentary section at the end of Practice Note No 39 makes clear that it provides for a fundamental change in the approach for pre-trial procedures; it mirrors the philosophy of the English Commercial Court; and expert evidence should be approached in 'a flexible and pragmatic spirit', including expert evidence being called after all evidence of fact has been adduced.[1073]

Practice Note 58[1074] extensively covered expert evidence and Pt 72 references in the Construction List. Clause 13 provided a new NSW Expert Assistance Power (1990 Construction List). It is not clear why that additional power was provided. It might have been to overcome the same problem that the English Expert Assistance Power (1949-onging patent actions) sought to address, namely lawyers' concerns about the role of

[1070] Supreme Court Rules (Amendment No 180) 1986 (NSW).
[1071] Practice Note No 39 1986 (NSW). Practice and procedure in the new Commercial Division of the NSW Supreme Court were discussed in Justice Andrew Rogers, 'The New Practice and Procedure in the Commercial Division of the Supreme Court of New South Wales ' (Young Lawyers Section of the Law Society of New South Wales, 10 December 1986).
[1072] The English Expert Meeting Power (1986 non-personal injuries actions); English Disclosure Power (1986 discretionary in non-personal injuries actions).
[1073] See p123.
[1074] Practice Note No 58 1990 (NSW). This Practice Note superseded Practice Note 35 1985 (NSW).

assessors. Clause 22 provided the NSW Expert Meeting Power (1990 Construction List) which extended the NSW Expert Meeting Power (1985 Commercial Division) to the Construction List. Practice Note 58 for the first time provided a standard form 'usual order for hearing' in the form set out in Annexure 2, which included the NSW Power to Admit an Expert Report As Evidence in Chief (1990 Construction List) and the NSW Disclosure Power (1990 Construction List).

1996 and 1998 Practice Notes[1075] covering the Commercial Division and the Construction List provided the following expanded powers:

- NSW Disclosure Power (1996 and 1998 Commercial Division and the Construction List);
- NSW Expert Meeting Power (1996 and 1998 Commercial Division and the Construction List);
- NSW CE Power (1996 and 1998 Commercial Division and the Construction List);
- NSW Expert Assistance Power (1996 and 1998 Commercial Division and the Construction List); and
- NSW Power to Admit an Expert Report As Evidence in Chief (1996 and 1998 Commercial Division and the Construction List).

5.3.10 Professional Negligence List reforms

In 1998 a new Pt 14C established the new Professional Negligence List.[1076] Key objectives of that specialist judge-managed List, which was set up in consultation with the legal profession and had the support of many professional associations, were to reduce delay and costs and increase the number of settlements.[1077]

The NSW Plaintiff's Expert Report Rule (1998 Professional Negligence List) required that the party commencing a professional negligence claim (other than a claim against a barrister or a solicitor) must file and serve an expert's report with its statement of claim or cross-claim. That rule was unique to the Professional Negligence List; forced claimants to provide party expert evidence with an initiating claim; was broader than

[1075] Practice Note No 89 1996 (NSW); Practice Note No 100 1998 (NSW) (which replaced Practice Note 89).
[1076] Supreme Court Rules (Amendment No 325) 1998 (NSW).
[1077] Abadee, 'The New Professional Negligence List' (n 392).

the English Plaintiff's Expert Report Rule (1989 personal injuries actions only); and included the further, extraordinary power for the Court to strike out a proceeding if a party fails to comply with the rule. Abadee J explained at the time that that NSW rule aimed to promptly address issues raised in the proceedings; encourage early resolution of actions (whether on liability or damages); reduce delay; and stop the precipitate commencement of proceedings.[1078] In *Salzke v Khoury*[1079] Ipp JA explained that that rule basically serves case management purposes. Like the NSW I&R Power, that rule was not specifically aimed at addressing the 'problems' but rather had much broader aims associated with limiting and regulating professional negligence claims

From 1999 Practice Note 104[1080] covered the Professional Negligence List. The NSW Independence Rule (1998 Professional Negligence List) required that party experts comply with the 'expert witness code' in the Schedule to that Practice Note. That 'expert witness code' was the first NSW expert witness code of conduct and the second in Australia.[1081] The NSW Independence Rule (1998 Professional Negligence List) was the first NSW Independence Rule. The 'expert witness code' provided that a party expert witness's paramount duty is to assist the court impartially; that duty overrides a party expert's obligation to the engaging party; and a party expert is not an advocate for a party (largely mirroring the English Independence Rule (1993)). That 'expert witness code' further provided the NSW Expert Meeting Power (1999 Professional Negligence List) by allowing the court to direct the parties to request expert witnesses to confer on a 'without prejudice' basis to endeavour to agree matters covered by them and make a joint statement in writing to the Court specifying matters agreed and matters not agreed together with the reasons for any such disagreement. Edmond has explained that the 'expert witness code' aims to reduce bias (and

[1078] Justice A R Abadee, 'Commentary: The Professional Negligence List in the Common Law Division of the Supreme Court 13 May 1999'; Justice A R Abadee, 'Professional Negligence Litigation A New Order in Civil Litigation - the Role of Experts In a New Legal World and in a New Millennium' (Australian College of Legal Medicine, Canberra 1999); The Honourable Justice Abadee, 'The New Professional Negligence List - A Hands-On Approach to Case Management' (1999) 11 (4) Judicial Officers Bulletin 25.
[1079] [2009] NSWCA 195; (2009) 74 NSWLR 580, [59-64]; see also *Report 109* (n 99) 24.
[1080] Practice Note 104 1998 (NSW).
[1081] Earlier in 1998 the Federal Court of Australia introduced a similar code of conduct in its Practice Direction: Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia (18 September 1998)-see R E Cooper, 'Federal Court expert usage guidelines — Justice R E Cooper' (1997) 16 Aust Bar Rev 203.

increase expert objectivity) by explaining a party expert's proper orientation and establishing a regime in which a party expert could be sanctioned for non-compliance eg by having evidence excluded or being charged with professional misconduct.[1082]

It is interesting that the important NSW Independence Rule reforms were also made in a Practice Note rather than a more formal rule of court.

5.3.11 Major December 1999 court-wide reforms

This Chapter 5.3.11 considers the first major NSW reforms to party expert procedure, which became a cornerstone of the NSW reforms. The timing of these reforms (being shortly after the English 'Access to Justice' inquiry and the English CPR) provides a strong point for comparison with England's reforms and demonstrates a strong coevolutionary tendency.

On 20 December 1999, the NSW Rules Committee undertook major reforms to the party expert procedural rules by amending the SCR 1970 (NSW),[1083] including:

- a new NSW Power to Limit Party Experts (1999 harmonised) which formalised and extended the power previously provided under Practice Notes for some Divisions and Lists;
- the NSW Independence Rule (1999 harmonised) which was implemented through the new Pt 36 r13C and Schedule K 'Expert Witness Code of Conduct' (formalising and extending the power previously provided under Practice Notes for the Professional Negligence List);
- the NSW Expert Meeting Power (1999 harmonised) which formalised and extended the power previously provided under Practice Notes for some Divisions and Lists;[1084]
- the NSW CE Power (1999 harmonised including on the Court's own motion) which extended power for the Court to appoint a Court Expert to the Court's own motion;
- a new NSW Expert Assistance Power (1999 harmonised except jury trials) allowing the Court to obtain the assistance of any person specially qualified to

[1082] Gary Edmond, 'After Objectivity: Expert Evidence and Procedural Reform' (2003) 25 SLR 131, 140.
[1083] Supreme Court Rules (Amendment No 337) 1999 (NSW).
[1084] Practice Note No 121 2001 (NSW) which provided further guidance to instructing solicitors and experts to 'facilitate compliance' with directions given under Pt 36 r13CA in relation to joint conferences of experts.

advise on any matter arising in the proceedings and act on the adviser's opinion;

- the extended NSW Disclosure Power (1999 harmonised); and
- the NSW Power to Admit an Expert Report As Evidence in Chief (1999 harmonised) to give case management directions for evidence at hearings in chief by affidavit or statement.

The December 1999 reforms did not include a NSW SJE Power (though the English SJE Power (CPR) was then in place). Again, NSW appears to have cherry-picked only what it like from England's reforms.

Those major amendments were made almost 40 years after Wallace J called for a range of reforms to achieve 'expedition', including a NSW Power to Limit Party Experts and a NSW Disclosure Power.[1085] That again demonstrates how evolutionary change can be incremental and take long periods of time.

There is nothing in the literature about the genesis of the December 1999 reforms. The explanatory note at the end of those new rules however makes clear that the object of the amendments is twofold. Firstly, to ensure that a party expert observes an overriding duty to assist the Court impartially on matters relevant to the expert's area of expertise; observes a paramount duty to the Court and not to the person retaining the expert; does not act as an advocate for a party; makes full disclosure of all relevant matters; and cooperates with other expert witnesses. Secondly, the amendments sought to facilitate the appointment of Court Experts and extend the existing Expert Assistance Power in Equity Division proceedings to Common Law Division proceedings (other than in proceedings tried with a jury).

The timing of the introduction of those new expert evidence rules (being shortly after Lord Woolf's *Final Report* and the commencement of the CPR), and the similarity with the CPR 35, strongly indicates that those new NSW Party Expert Procedural Rules were significantly influenced by Lord's Woolf's recommendations, though were not identical.

Those extensive new December 1999 Party Expert Procedural Rules were made

[1085] Wallace (n 331) 134-5.

unilaterally by the NSW Rules Committee;[1086] and without any prior NSW law reform body recommending them.

The December 1999 rules were implemented approximately three months after Sperling J delivered a paper entitled 'Expert Evidence: The Problem of Bias and Other Things' at the NSW Supreme Court Annual Conference in September 1999. That paper, which is discussed in detail at Chapter 4.3.4 suggested that expert witnesses were partisan; party expert evidence was often useless; and recommended extensive reforms to party expert evidence.[1087] The short period between Sperling J's September 1999 paper and the implementation of the December 1999 NSW Party Expert Procedural Rules indicates those rules were at least in part a product of Sperling J's paper.

The new NSW Independence Rule (1999 harmonised) was enacted because the rules for admissibility of expert evidence were thought not to go far enough towards having only unbiased opinions put before the court.[1088] Einstein J has opined that the clear intent of that rule was that only reports by experts who have proceeded in accordance with the stated norms of conduct should be relied upon and admitted into evidence.[1089] In 2003 the Court explained that the NSW Rules Committee regarded the Expert Code of Conduct as an important reform designed to rectify traditional difficulties dealing with expert evidence, where in some circumstances the idea of experts as 'guns for hire' had become notorious.[1090] The NSW Independence Rule (1999 harmonised) was modelled on a 1998 Federal Court of Australia Practice Direction and Practice Note 104 1998 (NSW), which both mirror the English Independence Rule (1993) and the English Independence Rule (CPR).

As an interesting aside, from 2002 some of the Party Expert Procedural Rules were extended to criminal proceedings, including an expert witness code of conduct and expert meetings with the consent of the parties.[1091]

[1086] There is nothing in the literature indicating the Rules Committee undertook any consultation before the rules were made.
[1087] *Jermen v Shell Company of Australia Ltd and Anor* [2003] NSWSC 1106, [28].
[1088] *Kirch Communications Pty Ltd v Gene Engineering Pty Ltd* [2002] NSWSC 485, [14]; *Australian Securities and Investments Commission v Rich* [2005] NSWSC 149, [253].
[1089] *Commonwealth Development Bank v Cassegrain* [2002] NSWSC 980, [9].
[1090] *Jermen v Shell Company of Australia Ltd and Anor* [2003] NSWSC 1106, [27].
[1091] Supreme Court Rules (Amendment No 363) 2002 (NSW).

The NSW Limited Expert Evidence Rule (2003 where court expert is appointed) provided that when there is a Court Expert, a party may not adduce the evidence of any other expert on the question except with the leave of the Court. This further constrained a party's entitlement to call other party expert evidence when a Court Expert has been appointed as the NSW CE Power (1999 harmonised) had merely given the court power to limit the number of other party experts whose evidence could be adduced.

The 2004 Practice Note No 128 provided the NSW SJE Power (2004 personal injuries actions only) by a standard 'single expert witness direction' to be given in all personal injury cases unless cause is otherwise shown. That was the first NSW SJE Power and effectively made single expert witnesses the default in NSW personal injuries cases for the first time. Some elements of the single joint expert procedure in CPR 35.7-8 were incorporated into the NSW SJE Power (2004 personal injuries actions only).[1092]

5.3.12 Civil Procedure Act 2005 (NSW) and UCPR 2005 (NSW)

The Civil Procedure Act 2005 (NSW) established an 'overriding purpose' of that Act and the rules of court in their application to civil proceedings to facilitate the just, quick and cheap resolution of the real issues in the proceedings.[1093] The Act also, for the first time, imposed a duty on the Court to give effect to the overriding purpose when exercising power,[1094] so for the first time in NSW, the Court, the parties and the parties' lawyers (but not experts) all came under an obligation to further the overriding purpose. One of the techniques regularly used to further the overriding purpose is to take the evidence of party experts concurrently.[1095]

The UCPR 2005 (NSW)[1096] were initially set out in Schedule 7 to the Civil Procedure Act 2005 (NSW) and therefore had statutory authority as a form of delegated legislation. The UCPR 2005 (NSW) were prepared in the light of the earlier expert evidence reforms in the English CPR 35, the Uniform Civil Procedure Rules 1999 (Qld)[1097] and the Federal Court Rules 1979.

[1092] *Report 109* (n 99) [3.8].
[1093] s56.
[1094] Ibid.
[1095] Justice Peter Garling, 'Concurrent Evidence: Perspective of an Australian Judge - Oxford University Seminar Paper' (2013) NSWJSchol 36, [13].
[1096] Uniform Civil Procedure Rules 2005 (NSW).
[1097] Amended in 2004 to include Chapter 11 Part 5 relating to Expert Evidence.

Part 31 Division 2 (commencing at r31.17) covered party experts and largely mirrored the Party Expert Procedural Rules in Pt 36 of the SCR 1970 (NSW), as amended in December 1999.[1098]

The only new major Party Expert Procedural Rule was the NSW Concurrent Expert Evidence Power (2005), which was a NSW first. That power came to be regularly used by the Court to order a phased trial in which all of the factual evidence is heard before any expert is called in lieu of the traditional process which required the plaintiff to completely present its case (including all lay and expert evidence) before the defence presents its case.[1099] The purposes of, and procedure for undertaking, concurrent expert evidence is explained by Edmond.[1100]

As discussed in Chapter 4.3.5, the NSW LRC's *Report 109* was precipitated by a unique NSW scandal about NSW party experts arising from a media report outlining a major NSW 'problem' of bias. That scandal resulted in the NSW LRC *Report 109* making a number of recommendations, including a NSW Permission Rule requiring that a party not be permitted to tender an expert's report or call an expert to give opinion evidence except by leave[1101] (which was rejected by the Working Party's 2006 Report because it would undercut the adversarial basis of litigation and flexible procedures were preferred[1102]).

Most of the other *Report 109* recommendations were included in the UCPR 2005 (NSW) in 2006.[1103]

- r31.17 set out the purposes of Pt 31 Subdivision 2 (covering expert evidence) which are important in interpreting the expert evidence rules. McColl J has described Pt 31 Subdivision 2 as 'creat[ing] a new regime for expert evidence';[1104]
- r31.19 was a new requirement that the parties promptly seek directions from

[1098] Discussed at Chapter 5.3.10.
[1099] McColl (n 382) [40].
[1100] Edmond, 'Secrets of the Hot Tub' (n 108).
[1101] recommendation 6.1.
[1102] NSW Attorney General's Working Party on Civil Procedure, [10-11]. See also Peter McClellan, 'The New Rules' (Expert Witness Institute of Australia and The University of Sydney Faculty of Law (16 April 2007)) and *Civil Justice Review Report* (n 42) 493.
[1103] Uniform Civil Procedure Rules (Amendment No 12) 2006 (NSW).
[1104] McColl (n 382) [37]. McColl J explains the scope of the changes introduced by the new Part 31 Subdivision 2.

the court if intending to adduce expert evidence at trial;

- r31.22 was a new and unique NSW Specific Disclosure Rule (2006) mandating that a party expert provide details of contingency fees or deferred payment schemes in the expert's report (to address the unique NSW scandal);
- r31.36 established the NSW Plaintiff's Expert Report Rule (2006 professional negligence claims) which formalised the earlier NSW Plaintiff's Expert Report Rule (1998 Professional Negligence List); and
- Pt 31 Subdivision 4[1105] provided the NSW SJE Power (2006) (effectively mirroring the CPR 35.7-8).

UCPR 2005 (NSW) has been supplemented by numerous Practice Notes which largely focus on single joint experts and court experts. A 2008 Practice Note[1106] provided the further unique NSW SJE Rule (2008 confer pre-commencement) requiring that the lawyers for prospective parties in Equity Division proceedings must, before proceedings are commenced, confer to attempt to minimise party expert evidence. A purpose of that unique NSW rule was to avoid the traditional approach of all parties separately retaining their own party experts at, or before, commencing proceedings. In effect, the rule was an expansion of the NSW SJE Power.

5.4 Victoria

5.4.1 Introduction

This Chapter 5.4 will largely consider the issues and topics analysed in Chapter 5.2 (in relation to England) and Chapter 5.3 (in relation to NSW), from the Victorian perspective. The aim is to analyse the Victorian procedural rules per se; and in doing so also identify any temporal and causal connections which Victoria's reforming procedural rules have with England and NSW's rules.

Like Chapter 5.2 above (in relation to England) and Chapter 5.3 (in relation to NSW), this Chapter will adopt a largely chronological approach to the Victorian analysis.

Chapters 5.4.2 and 5.4.3 will commence with the analysis of the first Victorian Party Expert Procedural Rules.

Like Chapter 5.2.4 above (in relation to England) and Chapter 5.3.6 (in relation to

[1105] commencing at r31.37.
[1106] Practice Note SC Eq 5 (2008) NSW.

NSW), Chapter 5.4.5 will consider the procedural rules in Victorian patent and monopolies actions in the Intellectual Property List.

Again, like Chapter 5.2.5 above (in relation to the English Commercial Court) and Chapter 5.3.5 (in relation to the NSW Commercial Court), Chapter 5.4.5 will consider Victoria's Commercial List as well as Victoria's other specialist, judge-managed (and party expert heavy) Lists.

Like Chapter 5.2.8 (in relation to England) and Chapter 5.3.8 (in relation to NSW), Chapter 5.4.4 will cover personal injuries actions in Victoria.

Chapters 5.4.7 and 5.4.8 will analyse the major, seminal modern reforming procedural rules in Victoria which were implemented in the shadows of both Lord Woolf's 'Access to Justice' inquiry and NSW's *Report 109* (and the accompanying UCPR (NSW) reforms).

5.4.2 Victoria's judicature system

The first Supreme Court of Victoria rules of practice which were made in the mid-1850s adopted the practice and manner of proceedings of the English Superior Courts in 1853 so far as the circumstances and condition of the colony of Victoria require and admit.[1107] Like NSW, the mode of trial in the Victorian Supreme Court differed little from that of the English Courts in this era. Those rules contained no Party Expert Procedural Rules.

Victoria adopted the English Judicature Act reforms in the late-19th century by the Judicature Act 1883 (Vic) which was based on, though not identical to, the English Judicature Acts. The preamble in the Judicature Act 1883 (Vic) confirmed that 'it is expedient that the amended principles and practice of the Law of England should be extended to this colony'.

The jurisdiction and powers of the Victorian Supreme Court in the period from 1890 to 1957 were regulated by a series of Supreme Court Acts[1108] and Arbitration Acts[1109] which superseded the Judicature Act 1883 (Vic) but maintained a judicature system broadly similar to the English judicature system.

[1107] See n 321.
[1108] Supreme Court Acts 1890-1928 (Vic).
[1109] Arbitration Acts 1910-1958 (Vic).

Victoria's rule making power includes rules 'regulating the pleading, practice, and procedure in the Court', but subject to the proviso prohibiting rules which 'affect the mode of giving evidence by the oral examination of witnesses in trial by jury or the rules of evidence or the law relating to jurymen or juries' (similar to the English Judicature Acts).[1110] The 'rule making' power also extended to making rules 'regulating and directing the means by which particular facts may be proved and the mode in which evidence thereof may be given'. That power was not however subject to the proviso referred to above.[1111] The Supreme Court of Victoria distinguished *Rainbow v Kittoe*[1112] and held that wider Victorian 'rule making' power allows the Court to authorise or direct the proof of facts at the hearing by means not allowed by the common law rules of evidence.[1113]

Victoria's judicature system from 1883 provided the Victorian I&R Power (1883-2010); the Victorian Reference for Trial Power (1883-2010); the Victorian Assessor Power (1883-ongoing); the Victorian Expert Assistance Power (1883-1958 Equity matters in chambers only); and Victorian Power to Direct a Trial without a Jury (1883-ongoing). Unlike the equivalent English power, the Victorian Reference for Trial Power (1883-2010) provided for the Court to appoint a special referee 'if the parties do not agree' (uniquely allowing special referees to be appointed on the Court's own motion). Each Victorian power was otherwise very similar to the corresponding English power, which demonstrates a strong (though not total) coevolutionary tendency between England and Victoria.

5.4.3 Victorian rules of court

A Schedule to the Judicature Act 1883 (Vic) set out the first Rules of Court which were based on the English RSC 1875. Those rules were annulled and replaced by 'The Rules of the Supreme Court 1884' (**RSC 1884 (Vic)**) which adopted, without substantial change, the corresponding orders and rules in the English RSC 1883. The standard approach taken by the Victorian Rules Committee (then and later) was to consider the English rules of court; and adopt those (with or without modification) which were considered suitable for use in Victoria.[1114] This again demonstrates a

[1110] For example ss5, 25-27 of Supreme Court Act 1915 (Vic).
[1111] Ibid ss5 and 25(3).
[1112] *Rainbow v Kittoe* (1916) 140 LT 407.
[1113] *Murine Eye Remedy Co v Eldred* [1926] Vic Law Rp 46.
[1114] *Anglo-Pacific Trading Co Pty Ltd v The Steadfast Insurance Co Ltd* [1955] VLR 424, 429.

strong coevolutionary tendency between England and Victoria.

RSC 1906 (Vic)[1115] consolidated the various rules made under different statutes into separate Chapters 1 to 8[1116] and superseded the earlier RSC 1884 (Vic). Chapter 1 set out the Rules of Procedure in Civil Proceedings (1906) which generally mirrored the corresponding orders and rules in the English RSC 1883 (amended to 1906). The Chapter 1 rules included a new O30 r7 which provided the unique power that, on the hearing of the summons for directions, a judge may order that evidence of any particular fact shall be given at trial 'otherwise as the Judge may direct'.

The 1906 rules were superseded by updated rules in 1916, 1938 and 1957.

None of those Victorian rules of court included any new rules regulating party experts.

5.4.4 Personal injuries actions

As discussed above, the earliest English calls for pre-trial disclosure of expert reports were in the 1930s.

The Victorian Chief Justice's Law Reform Committee, which operated between 1940 and 1971, was one of the oldest law reform bodies in Australia.[1117] In the 1960s a subcommittee of that Committee (which included a Supreme Court judge) recommended that Victoria adopt Tasmanian rules of court which provided for the pre-trial disclosure of expert evidence in personal injuries actions. Those Tasmanian rules had existed from the late-1950s and were updated having regard to American rules of court after the Chief Justice of Tasmania undertook a study tour to the US in the early-1960s.[1118] Unusually, those rules evolved independently of England's rules and English deliberations about pre-trial disclosure of expert evidence. The subcommittee's recommendation was however not accepted by the Victorian Chief Justice's Law Reform Committee.[1119] Notwithstanding, following calls by the Victorian Bar and Law Institute[1120] for the exchange of medical reports in personal injuries

[1115] Rules of the Supreme Court of the State of Victoria 1906 (Vic).
[1116] eg Chapter 1 sets out the Rules of Procedure in Civil Proceedings; Chapter 2 sets out Rules of Procedure in Divorce and Matrimonial causes; Chapter 3 sets out Probate and Administration Rules.
[1117] F C O'Brien, 'The Victorian Chief Justice's Law Reform Committee' (1972) 8 MULR 440, 442.
[1118] S C Burbury, 'The Wind of Change in the Administration of Justice' (1963) 6 U WA LR 163 ; Sir Stanley Burbury, 'Modern Pre-trial Civil Procedure in the USA' (1965) 2 U Tas LR 111.
[1119] 'Supreme Court (Readiness for Trial) Rules 1968' (1969) 43 L Inst J 208, 210.
[1120] In 1964 and 1967 – see 'Delays in the Supreme Court' (1967) 41 L Inst J 403 and 'Supreme Court (Readiness for Trial) Rules 1968' (1969) 43 L Inst J 208, 210.

actions (to address the 'problem' of surprise),[1121] the Victorian Disclosure Rule (1968 personal injuries actions)[1122] was implemented. That rule required the pre-trial disclosure of expert medical reports in personal injuries actions via a 'Certificate of Readiness' regime. That regime required each party's lawyer to certify that a copy of each expert's report has been given to the opposite party; and effectively prohibited any medical expert evidence not so disclosed. That rule which was based on similar Tasmanian rules[1123] was a Victorian first, though limited to personal injuries actions. It may have been indirectly implemented via the 'Certificate of Readiness' procedure due to concerns that a rule of court directly requiring the pre-trial disclosure of expert evidence may have been ultra vires the rule making power. The Victorian rule aimed to mitigate delays in the hearing of Supreme Court actions, particularly jury actions.[1124] Notwithstanding the Victorian Bar and Law Institute's initial support, the Law Institute opposed the Victorian rule because of concerns about the perceived practical unfairness arising from disclosure by plaintiffs before the defendants; and a lack of consultation with the Law Institute before the rule was made.[1125] In 1969, the Victorian Disclosure Rule (1968 personal injuries actions) was revoked,[1126] demonstrating Victorian lawyers to be powerful 'actors' at that time.

The next Party Expert Procedural Rule reforms were undertaken 20 years later. The Victorian Disclosure Rule (1983 personal injuries actions) mandated the pre-trial exchange of medical expert reports and limited a party from leading medical expert evidence other than set out in an exchanged medical expert report. Under that self-executing rule, no Court direction for disclosure was required. The Victorian Power to Admit an Expert Report As Evidence in Chief (1983 personal injuries actions) was also

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[1121] Scott, Pullen and Robbins (n 353) 125.

[1122] Supreme Court (Readiness for Trial) Rules 1968 (Vic) which replaced the 'notice of trial' procedure in RSC 1957 (Vic) O36, rr11-16 with a new 'certificate of readiness' procedure. r14A(2) provided that in personal injuries actions, after a certificate of readiness has been filed a party shall not be permitted to call any medical witness other than a person whose name is set out in the section of the certificate of readiness signed by that party except with the consent in writing of the opposite party or the leave of a Master or of the trial Judge. The prescribed form of 'certificate of readiness' required the plaintiff's solicitor to certify that the names of the medical witnesses the plaintiff intends to call and that the defendant has been given a copy of a report from each such medical witness.

[1123] 'Supreme Court (Readiness for Trial) Rules 1968' (1969) 43 L Inst J 208, 209. Wallace (n 331) 137 also indicates that in 1961 in divorce proceedings, a solicitor must certify the case is ready for trial, including that proofs of expert witnesses have been exchanged.

[1124] Scott, Pullen and Robbins (n 353) 125.

[1125] 'Delays in the Supreme Court' (1967) 41 L Inst J 403; 'Supreme Court (Readiness for Trial) Rules 1968' (1969) 43 L Inst J 208.

[1126] Supreme Court (Readiness for Trial) Rules 1969 (Vic) (discussed in Scott, Pullen and Robbins (n 353) 125).

implemented. Though likely based on the equivalent 1963 NSW rules,[1127] unlike the equivalent 1974 English and 1963 NSW rules, the Victorian rule expressly applied to medical negligence actions. Those Victorian reforms did not apply to civil jury actions; and are good examples of the procedural flexibility available in non-jury actions.

The literature does not explain which Victorian rule making power was used or what prompted the new rules to be made in 1983 (though by that time pre-trial disclosure was required by rules of court in Tasmania, NSW, South Australia and Western Australia).[1128]

As discussed in more detail in Chapter 5.4.6, from 1986 personal injuries actions were regulated by O33 in the General Rules of Procedure in Civil Proceeding

5.4.5 Specialist List reforms

Building List

In 1972 a new O76 established a new Building Cases List,[1129] which was the first Victorian Supreme Court specialist, judge managed List.[1130] The concept of a judge managed List was likely to have been modelled on the English Commercial Court and the NSW Commercial Causes List (established more than 70 years earlier), though the Victorian Supreme Court's powers under the Building Cases Rules were more limited.

The Building Cases List was established because, by the 1970s, building cases had become notorious; were bedevilled by complexity and detail; interlocutory proceedings were tortuous and slow; trials were long and expensive (with the real issues often emerging during the trial); and the parties had become disillusioned.[1131]

O76 included the Victorian Directions Power (1972 Building List) which largely mirrors the text in the NSW Directions Power (1903 -1989 Commercial List) and the English Directions Power (1895 Commercial Causes), indicating that Victorian power was modelled on those NSW and English powers.

[1127] Discussed in Chapter 5.3.8.
[1128] Western Australia LRC, *Final Report on Production of Medical and Technical Reports in Court Proceedings* (WALRC 40, 1975).
[1129] Supreme Court (Building Cases) Rules 1972 (Vic).
[1130] David Habersberger, 'The Building Cases List of the Supreme Court of Victoria (Address to the Building Dispute Practitioners' Society Inc 16 November 2005)'.
[1131] Habersberger (n 1130); *CW Norris* (n 838).

The Building Cases Rules did not give the Court or judge in charge of the List any new or specific expert evidence powers.

By 1982 the Building Cases List came to frequently use the Victorian I&R Power (1883-2010).[1132] References out in NSW building cases also became common, though later as the first NSW I&R Power was not provided until 1985 (see Chapter 5.3.9).

Practice Note No 1 of 2008 (Vic)[1133] sought to establish a new mindset in building cases though did not alter the existing rules applicable to building cases;[1134] it did however provide the Victorian Concurrent Expert Evidence Power (2008 Building List) which was effectively an extension of the Victorian Concurrent Expert Evidence Power (2004 Commercial List) (discussed below).

The Victorian rules of court included a Victorian Power to Limit Party Experts (2009-2014 TEC List[1135]) in from mid-2009 to 2014.

Intellectual Property List

The Intellectual Property List was established in 1976 as another judge managed specialist List of the Supreme Court of Victoria, though there have been relatively few cases in that List.[1136]

The Victorian CE Power (1996 Intellectual Property actions) for the first time in England, NSW or Victoria allowed the Court to appoint a Court Expert on its own motion. The Victorian Power to Limit Party Experts (1996 Intellectual Property actions), which allowed party experts to be limited, was a Victorian first. These reforms demonstrated that Victoria's reforms were not limited in the same way as England and NSW's reforms were.

Commercial List

A Joint Standing Committee of the Victorian Bar and Law Institute[1137] on Supreme Court Practice recommended that a commercial causes list be established to reduce

[1132] Peter Murphy, 'Use by courts of special referees' (1982) 56 ALJ 673, 674. *Nicholls v Stamer* (n 891) is an early example of the use of that power.
[1133] Practice Note No 1 2008 (Vic).
[1134] Supreme Court (Miscellaneous Civil Proceedings) Rules 2008, O3.
[1135] The TEC List superceded the Building Cases List.
[1136] The Honourable Justice Harper, 'The Intellectual Property jurisdiction of the Supreme Court of Victoria: Myth or Reality?' (Intellectual Property Society of Australia and New Zealand Dinner, Melbourne 14 April 2005).
[1137] Which represented Victorian solicitors.

delays (which was considered by the Victorian LRC[1138]). In 1979 a Victorian Commercial Causes List was established[1139] based on the English Commercial Court (which had existed since the late-1800s) and the NSW Commercial Court (which by the 1970s also had a long and distinguished history).[1140] A speech given by the first Judge in Charge of the List on the first sitting day in 1979 confirmed that the object of the Commercial Causes List and its rules was to give preferential treatment to Commercial Causes; and unlike the Building List, causes will only be entered into the Commercial Causes List in the exercise of the Judge in Charge's discretion.[1141]

Interestingly, there has never been a rule of court specifically providing a Power to Limit Party Experts in the Commercial List (though there was one in the Building/TEC List).

From the 1980s the Victorian Chief Justice authorised the issue of Practice Notes. Those Practice Notes often covered a single specific List; and many covered the Building Cases/TEC and Commercial Lists. Initially they provided detailed guidance or information on matters of procedure not otherwise covered by the Rules of the Supreme Court.

Commercial List and Building Cases/TEC List actions have, since the 1980s, been regulated by various Practice Directions, Practice Notes[1142] and Guides.[1143] Practice Note No 4 2004 (Vic) extensively dealt with expert evidence in the Commercial List including providing:[1144]

- the Victorian CE Power (2004 Commercial List);
- the Victorian Concurrent Expert Evidence Power (2004 Commercial List); and
- the Victorian Power to Limit Party Experts (2004 Commercial List).

The Victorian Concurrent Expert Evidence Power (2004 Commercial List) was the first

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[1138] VLRC, *Report No 4* (n 480) [68].
[1139] Supreme Court (Commercial Causes) Rules 1978 (Vic); O14 was replaced in 1985; see also 'Commercial Causes List' (1979) 1979 Victorian Bar News (Autumn Edition) 8.
[1140] *Allan Robinson Textiles Pty Ltd v Pappas* [1983] 1 VR 345.
[1141] Practice Note 1979 (Vic).
[1142] For example, Practice Note 1980 (Vic); Practice Note 1 1985 (Vic); Practice Note 1 1986 (Vic); Practice Note No 10 (Commercial Court) (Vic) and Supreme Court of Victoria Commercial Court Practice Note SC CC 1.
[1143] Guide to Commercial List Practice 1992 (Vic).
[1144] See the discussion in *Civil Justice Review Report* (n 42) 487. The Victorian Court Expert Power (1996 Intellectual Property actions) pre-dates the Victorian Court Expert Power (2004 Commercial List).

formal concurrent evidence power implemented in England, NSW and Victoria.

Providing those powers in a Practice Note (published only a year after O44 was last updated in 2003), rather than in O44 itself, indicates that amending O44 may have been difficult; or that the Court was only prepared to provide those unique new powers for Commercial List matters.

5.4.6 General Rules of Procedure in Civil Proceedings

From 1986 all civil actions were regulated by new rules titled the 'General Rules of Procedure in Civil Proceedings' which constituted Chapter I of the Rules of the Supreme Court (Vic). Those new rules were the result of a major review of the rules which had commenced in 1975; and were the most significant change to Victorian Supreme Court practice and procedure since Victoria adopted the judicature system almost a century before. The new rules were conditionally made by the Judges of the Supreme Court and subsequently ratified, validated and approved by legislation[1145] to ensure the rules were not outside the rule making power in the Supreme Court Act.

Some of the 1986 rules of court were modelled on the English RSC 1965 and some were brand new.[1146]

O33 provided the Victorian Disclosure Rule (1986 personal injuries actions) which extended the Victorian Disclosure Rule (1983 personal injuries actions) to judge and jury trials.

O44, which was based on RSC 1965, O38 (as amended in 1974),[1147] provided the simple Victorian Disclosure Rule (1986 non-personal injuries actions) which contained similar requirements in relation to expert witnesses (other than medical experts).

Unlike England (where the power to order the pre-trial disclosure of expert reports was discretionary), disclosure under O33 and O44 was mandatory; and a Court order or direction was not required. Accordingly, Victoria's responsive reform to address the 'problem' of surprise was much stronger than England's.

[1145] Supreme Court (Rules of Procedure) Act 1986 (Vic), s4(1). Though most of the rules could have been made under the rule making power in the Supreme Court Act 1958 Supreme Court Act 1958 (Vic): *Supreme Court (Rules of Procedure) Bill (Vic), 2nd reading speech* (Parliament of Victoria 1986).
[1146] Neil Williams, *Supreme Court Civil Procedure* (Butterworths 1987).
[1147] Ibid [17.33].

O34 set out the first version of the Victorian Directions Power (1986-ongoing). That power is similar to, but more expansive than, the Victorian Directions Power (1972 Building List). It is an extraordinarily wide power which is not confined to what the rules expressly allow.[1148] Prima facie, the Victorian Directions Power (1986-ongoing) has always been broad enough to address the 'problems' of excessive party experts and contradictory party experts by permitting directions to be given limiting the number of experts and/or requiring that the experts meet pre-trial (though there are no reported cases in which it has done so).

In 2003 O44 was updated[1149] in two ways. Firstly, it provided the Victorian Independence Rule (2003-ongoing)[1150] to address the 'problem' of bias through implementation of an expert witness code of conduct similar to the expert witness code incorporated into the NSW Independence Rule (1999 harmonised). This was the first Victorian Independence Rule but does not appear to respond to any Victorian 'problem' of bias per se. Secondly, it provided a new Victorian Expert Meeting Power (2003-ongoing),[1151] which was another Victorian first, to address the 'problem' of contradictory party expert evidence. Interestingly, the updated 2003 version of O44 did not provide Concurrent Expert Evidence Power equivalent to the power then existing in the Federal Court Rules.[1152]Both reforms may have simply adopted the NSW and Federal Court's reforms.

5.4.7 *Civil Justice Review*

The Victorian LRC's 2008 *Civil Justice Review Report*[1153] was prepared after 18 months of work on an Attorney General's 2006 reference. The LRC's work included publishing an October 2006 Consultation Paper seeking submissions (resulting in 61 submissions being received); and Commissioner Cashman travelling to London for meetings with English judicial officers and others about the impact of the Woolf civil procedure reforms.[1154] Addressing the 'problems' of bias and cost were one of ten

[1148] *ASIC v Infomercial Management Group Pty Ltd* [2001] VSC 181, [28].
[1149] Supreme Court (Chapter I Amendment No 23) 2003 (Vic).
[1150] O44.03(2)(h).
[1151] O44.06.
[1152] Described as an obvious advantage of O43 of the Federal Court Rules by Victorian Bar, 'A Review of the Proposed Amendment To Order 44 Of The Supreme Court Rules of Victoria Concerning the Reception of Expert Opinion Evidence'.
[1153] *Civil Justice Review Report* (n 42).
[1154] Ibid 53.

priority areas.[1155]

Chapter 7 of the *Civil Justice Review Report* covered expert evidence. Much of its analysis was focused on, and adopted, the 2005 NSW LRC's *Report 109*[1156] and Lord's Woolf's *Final Report*.

The *Civil Justice Review Report* records that the Supreme Court of Victoria recommended a discretionary Power to Limit Party Experts (to address the 'problem' of excessive party experts), an expert evidence directions hearing (after discovery and the exchange of lay witness statements) and an Expert Meeting Power (to address the 'problem' of contradictory party experts).[1157] However, the Supreme Court of Victoria rejected a proposed SJE Power which was proposed to address the 'problem' of bias and to a lesser extent the 'problems' of contradictory party experts and of excessive party experts.[1158] That may reflect the Victorian judges' more relaxed disposition to the 'problem' of bias in Victoria.

The Victorian LRC's recommendations 93-97 ultimately recommended that Victoria should adopt reforms largely based on the then recently introduced NSW expert evidence reforms in UCPR 2005 (NSW), which themselves had adopted many of the English CPR reforms.

5.4.8 CP Act 2010 (Vic)

The CP Act 2010 (Vic) implemented many of the recommendations in the *Civil Justice Review Report*. It is the only Victorian statute devoted entirely to civil procedure.[1159] Setting out civil procedure by statute is more powerful than relying on procedural rules of court and inherent court powers.[1160] The stated purposes of Parliament included: overhauling the civil justice system in Victoria; reforming the culture within the Court system; and providing judges with clear legislative assistance to proactively manage cases.[1161]

[1155] Ibid 9 and 52.
[1156] *Report 109* (n 99).
[1157] *Civil Justice Review Report* (n 42) 506.
[1158] Ibid.
[1159] David Bailey, 'Reforming Civil Procedure in Victoria- Two Steps Forward and One Step Back ?' (2011) 1 Victoria Law School Journal 81
[1160] Hon Michael Black, 'The role of the judge in attacking endemic delays: Some lessons from Fast Track' (2009) 19 JJA 88, 93; Hon Ronald Sackville, 'The future of case management in litigation' (2009) 18 JJA 211.
[1161] Explanatory Memoranda Civil Procedure Bill 2010 (Vic).

As originally enacted in 2010, the CP Act 2010 (Vic) included only the Victorian Power to Limit Party Experts (2010); and the unique and much stronger Victorian Independence Rule (2010) which made party experts subject to statutory obligations to act honestly; cooperate; not mislead or deceive; narrow the issues in dispute; ensure costs are reasonable and proportionate; and minimise delay. Imposing those statutory obligations directly on party experts was unique; 'best practice';[1162] and made party experts liable to be ordered to pay costs or compensation if they contravene a statutory obligation, including on the court's own motion.[1163] That is important because punishment is an essential part of the functioning of institutions (rules).[1164]

In 2012 a new Pt 4.6 was incorporated into the CP Act 2010 (Vic) which added further Victorian Party Expert Procedural Rules.[1165] As a consequence, the procedural rules regulating expert evidence in Victoria have since then been set out in both Pt 4.6 of the CP Act 2010 (Vic) and the Victorian rules of court.

The Civil Procedure Amendment Bill 2012 confirms the purposes of Pt 4.6 included: giving judges a clear legislative mandate to proactively manage cases to promote the just, efficient, timely and cost-effective resolution of the real issues in dispute; providing clear statutory provisions to encourage the Courts to actively manage and control expert evidence; to resolve any argument about the limits of existing rule making powers; and to overcome any constraints on the exercise of powers that exist at common law.

The objects of Pt 4.6 are set out in s65G of the CP Act 2010 (Vic) and include: enhancing the Court's case management powers in relation to expert evidence; restricting expert evidence to evidence which is reasonably required (to address the 'problem' of excessive party experts); and emphasising the primary duty of an expert witness to the court (to address the 'problem' of bias).

Victoria, like NSW, did not adopt a Permission Rule equivalent to the English Permission Rule (CPR). NSW and Victoria, unlike England, effectively preserved the

[1162] Kearney (n 551) 127.
[1163] *Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd & Ors (Ruling No 9)* [2014] VSC 622 is an example of the Court ordering an expert to pay compensation.
[1164] North (n 186) 4. Discussed in Chapter 1.5.3 and Chapter 6.
[1165] Civil Procedure Amendment Act 2012 (Vic). Considered in Kearney (n 551).

adversarial system's principle of party autonomy.

The Victorian Power to Limit Party Experts (2012 harmonised) includes limiting expert evidence to specific issues and limiting the number of party experts who may be called to give evidence on a specified issue.

The Victorian Concurrent Expert Evidence Power (2012 harmonised) allows concurrent expert evidence at trial in all civil proceedings.

The Victorian SJE Power (2012 harmonised), which for the first time provides a SJE Power in all civil proceedings, is interesting given the Supreme Court judges rejected single joint experts.[1166]

The Victorian CE Power (2012 harmonised) provides for the appointment of a Court Expert to 'assist the Court' or 'inquire into and report on any issue in a proceeding', including on the Court's own motion. That power extended the Victorian CE Power (1996 Intellectual Property actions) and the Victorian CE Power (2004 Commercial List). Interestingly, that power had not been recommended in the *Civil Justice Report*.

The Victorian Specific Disclosure Power (2012 harmonised) allows the Court to order that a party expert disclose all or specified aspects of the arrangements under which the expert witness has been retained, but only on an application by a party. That discretionary power is similar, though different, to the NSW Specific Disclosure Rule (2006) which is a mandatory rule requiring an expert witness to provide details of contingency fees or deferred payment schemes in the expert's report (without any Court order).

5.5 Desuetude of the powers to obtain expert assistance other than from party experts

The desuetude of existing powers to obtain expert assistance other than from party experts was discussed in Chapters 4.2.13 and 4.5 above. It is considered in this Chapter 5 (covering Party Expert Procedural Rules) because it relates to those rules; however it also is directly relevant to Chapter 6.

The desuetude of existing powers considered in this Chapter is important to research question 3 for the self-evident reason that if other new or different powers would have

[1166] *Civil Justice Review Report* (n 25) 506.

also fallen into desuetude, they too would be ineffective at addressing the 'problems'.

The Party Expert Procedural Rules listed below give English, NSW and Victorian Courts discretionary powers to obtain expert assistance from assessors, special referees, expert assistants and Court Experts as alternatives to party experts to address the 'problems':

- the CE Power;
- the Assessor Power;
- the I&R Power;
- the Reference for Trial Power; and
- the Expert Assistance Power.

As discussed in Chapter 2.2 above, there is no reliable empirical data in the literature about when, or how often, any of those discretionary powers have been exercised (and if not, why not). Accordingly, the analysis in this research is limited to the secondary source material about the exercise of those discretionary powers.

The secondary source material discloses the following about the discretionary powers.

The English I&R Power (1873-1998) was initially used for references to a range of different types of experts, including an architect who reported on buildings affected by noise,[1167] a surveyor who inspected and reported to the Court on the condition of a building[1168] and a chemist to conduct experiments on dyes.[1169]

The English Reference for Trial Power (1873-1998) has always been limited (doctrinally) because a special referee can only be appointed by consent; and (practically) because a special referee's costs are borne by the parties making referee's unattractive. A practical early example of the first limitation arose in a case heard by Lindley J which he thought should be tried by a special referee because of the nature of the case; in which he pressed for a local mining engineer to be appointed as special referee (rather than an OR who would probably not bring any special knowledge to any determination); but the defendant refused to agree.[1170] The English

[1167] *Broder v Saillard* (1876) 2 Ch 692.
[1168] *Mackley v Chillingworth* (1877) 2 CPD 273.
[1169] *Badiche* (n 893). See also *Nicholls v Stamer* (n 891) 487 which lists a number of English cases.
[1170] (1880) 68 LT 308.

Reference for Trial Power (1873-1998) has been infrequently used since the late-19th century.[1171] *The Supreme Court Practice* in 1999 noted that 'It is many years since a special referee has been appointed'.[1172] There is nothing in the literature indicating the Rules Committee has taken any action to make the English Reference for Trial Power (1873-1998) more widely available, for example, by allowing references to a special referee for trial on the Court's own motion.

Bailey v Hutton[1173] and *Moore v Fergusson*[1174] are among the few cases in which the Victorian Reference for Trial Power (1883-2010) was used, by consent in building actions. Beach J made clear in 1982 that the Victorian Reference for Trial Power (1883-2010) is unlikely to be exercised if a party objects.[1175]

In 1996 a NSW judge advised that the NSW Reference for Trial Power (1892-ongoing) was rarely used (except by consent).[1176]

A long time judge in charge of the Victorian Building Cases List did not use the Victorian I&R Power (1883-2010) greatly because he had bad experiences with inordinate delays and high costs of references; and with referee's reports which were criticised.[1177]

The infrequent use of the CE Power is well documented in the literature.[1178] The

[1171] The power was occasionally used in the late 19th century (when ORs were not well respected) to refer actions to a special referee to hear the evidence and report to the Court (as demonstrated by a search for 'special referee' in the *Law Times Reports* – eg *Re Maplin Sands* (1894) 71 LT 56 and *Lamb v Walker* (1878) 1 Legal News 439.
[1172] The Right Honourable Sir Richard Scott (ed) *The Supreme Court Practice 1999*, 683.
[1173] *Bailey v Hutton* (1890) 16 VLR 145.
[1174] *Moore v Fergusson* (1892) 18 VLR 266.
[1175] *AT and NR Taylor and Sons Pty Ltd v Brival Pty Ltd* [1982] VR 762 (discussed in Geoffrey Cohen and Leigh Duthie, 'The role of the special referee in Australia' (1996) 12 Const LJ 100); see also Justice Beaumont, 'References to a Special Referee' (1989) 5 BCL 235.
[1176] Roger Giles, 'The Supreme Court Reference Out System ' (1996) 12 Building and Construction Law 85 notes that (1) a similar regime had been earlier established when the relevant sections of the Judicature Act 1873 (UK) was 'transposed' to the Arbitration Act 1892 (NSW) and (2) the reference out power under the Arbitration Act was rarely used (except by consent).
[1177] David Byrne, 'The future of litigation of construction law disputes' (2007) 23 BCL 398, 406.
[1178] Business of Courts Committee (n 461) [43]; *The Annual Practice 1949* (n 963) 716 (which notes that applications for Court Experts have been but few in number); Committee on Supreme Court Practice and Procedure, *Final Report* (n 297) 98-99 *The Annual Practice 1961* (Sweet & Maxwell 1961); *In re Saxton* [1962] 1 WLR 968; Ormrod (n 722), 245; J A Jolowicz, 'Practice Directions and the Civil Procedure Rules' (2000) 59 CLJ 53; Law Reform Committee (n 685) 8 [13]; *Abbey* (n 704); Freckelton, Reddy and Selby (n 255) 101; The Honourable Justice Abadee, 'Update on the Professional Negligence List and Expert Evidence: Changes for the Future' (2000) ; *Report 109* (n 99) 33-34 (which among other things lists 4 cases in which a Court Expert was appointed in NSW); a search for the term 'court expert' in Austlii reveals the relatively small number of reported cases in which a NSW Supreme Court judge has appointed a Court Expert since 1970 (https://www.austlii.edu.au/cgi-bin/sinosrch.cgi?search-

infrequent use the English CE Power (1934-1998) is likely in part for two reasons. Firstly, because the power was only available on the application of a party.[1179] Secondly, as has been pointed out by Lord Bingham and Lord Justice Lawton, that power (and the English Assessor Powers) is hardly used by the Queen's Bench Division because of the temperamental reluctance of English lawyers, judges and practitioners to depart from the traditional, adversarial format of English proceedings and the inherent conservatism of common lawyers who prefer to decide what that case is and who to call as a witness.[1180]

In 1968 Ormrod J advised that:

- the Court Expert Power 'is very rarely used' as it is not appealing to the parties or their lawyers because it is too much of a gamble; neither side knows what a Court Expert is going to say until the expert's report is provided to the court; challenging or criticising a Court Expert can be difficult; and advocates are concerned about being deprived of the opportunity to put the client's case to the Court; and[1181]
- 'Indifferent scientific advice given into the court's ear [by an assessor] is much worse than the worst expert evidence given from the witness box'.[1182]

Lord Denning has explained that Court Experts are rare because:

> litigants realise that the court would attach great weight to the report of a court expert, and are reluctant thus to leave the decision of the case so much in his hands.[1183]

Lord Bingham has posited that the English Assessor Power was hardly used by the Queen's Bench Division,[1184] and the Swann Department Committee similarly posited that the similar English Assessor Power (1883-1947 patent actions) was hardly used

filter=on;search-text=on;query=%22Court%20expert%22;view=date-earliest;mask_path=au%2Fcases%2Fnsw%2FNSWSC;results=100).

[1179] eg *In re Saxton* [1962] 1 WLR 968, 972 (Denning MR); Basten (n 77); *Abbey National Mortgages Plc v Key Surveyors Nationwide Ltd* [1996] 1 WLR 1534; Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995), Ch 23 [20].

[1180] Lawton (n 409); Bingham (n 19) 22-3.

[1181] Ormrod (n 722) 245.

[1182] Sir Roger Ormrod, 'Scientific Evidence in Court' (1968) Crim LR 240 245-246

[1183] *In re Saxton* [1962] 1 WLR 968.

[1184] Bingham (n 19) 22-3.

in patent actions,[1185] because English lawyers and judges were concerned about undermining the adversarial system of justice; and English lawyers were further concerned about being left in the dark about discussions between the judge and the assessor. Those types of concerns are corroborated by a prominent English barrister's 1930 objection to judges sitting with an assessor because counsel is left in the dark about discussions between the judge and the assessor (so has no opportunity to correct any 'misunderstanding or error on the assessor's part').[1186]

Sir Owen Dixon's 1930 speech set out his multifaceted objections to the use of scientific assessors; and advised that the I&R Power and Reference for Trial Power are 'not often invoked' (but their free use, or more frequent exercise, would be of much advantage).[1187]

The Hanworth Royal Commission's 1936 *Third and Final Report*[1188] made the point that while the machinery for trials with assessors or with Court Experts was amply available in the existing English rules of court, that machinery is in practice not employed.

In the 1950s, the Evershed Committee recommended that the English CE Power (1934-1998) should be used more often; and exercisable by the Court of its own motion.[1189]

The Law Reform Committee's 1970 *Seventeenth Report* further confirmed that little use has been made of the English CE Power (1934-1998)[1190] in its 34 year existence.[1191]

The infrequent use of the English CE Power (1934-1998) up to the 1970s is corroborated by *The Supreme Court Practice* which states that applications for Court Experts 'have been very few in number excepting Orders by Official Referees'.[1192]

In 1985 Lord Bingham explained that, though a court procedure exist for reference of

[1185] Board of Trade Departmental Committee, *Second Interim Report* (Cmd 6789, 1946).
[1186] 'Letter to the Editor (Cost of Litigation Evidence in Technical Cases)', *The Times* (30 August 1930) 11.
[1187] Dixon (n 14) 19-20.
[1188] Business of Courts Committee (n 461).
[1189] Para [293] and recommendation 15.
[1190] At that time in RSC 1965, O40.
[1191] Law Reform Committee (n 685)
[1192] *The Supreme Court Practice 1973*, 599.

a factual issue to a special referee, that procedure (like others) is rarely used and merely provides another mode of trial.[1193]

The first use of the English Expert Assistance Power (1949-onging patent actions) did not occur for 20 years (ie in 1971).[1194] *Hill v Touchlight*[1195] explains how that power was:

1. watered down to apply only in the most technically difficult cases and then not on the issues in dispute; and
2. only infrequently used, with most appointments to assist appeal courts.[1196]

The NSW LRC's *Report 109* identified only a few examples of assessors being used in 19th century admiralty and complex patent matters; and concluded that in Australia appointments of assessors have been very much the exception rather than the rule.[1197]

In 1986 Freckelton concluded that the Assessor Power was 'seldom used'.[1198]

A 1986 report by users of the Commercial Court concludes that the rules for Courts to appoint Assessors and Court Experts are dead letters.[1199]

Lord Woolf's *Interim Report* also made clear that the English CE Power (1934-1998) 'has been very rarely used';[1200] and recommended that the use of assessors should be extended.[1201]

The Victorian LRC's 2008 report advised that 'there is scope for greater use of special referees and that the traditional view of the role of a special referee should be broadened'; '[t]he power to refer questions to a referee can clearly be exercised more frequently than has been the case to date'; and 'the exercise of the power [to appoint

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[1193] Thomas Bingham, 'The Judge as Juror: the Judicial Determination of Factual Issues' (1985) 38 CLP 1, 25
[1194] *The Supreme Court Practice 1973*, 1433.
[1195] *Hill v Touchlight Genetics Limited, Touchlight IP Limited, Touchlight DNA Services Limited* [2024] EWHC 533
[1196] *The Supreme Court Practice 1973*, 1433.
[1197] *Report 109* (n 99) [2.16] and [3.34] (though many court experts were appointed by the NSW Land and Environment Court).
[1198] Freckelton (n 83) 183.
[1199] Commercial Court Committee, *Report of the practitioner members of the Commercial Court Committee approved and adopted by the Commercial Court Committee* (1986), [65]
[1200] Woolf, *Interim Report* (n 1) Ch 23 [20].
[1201] Ibid Ch 23 [24]; Woolf, *Final Report* (n 2) Ch 13 [58].

a referee] should not be constrained by any requirement that the parties consent.'[1202]

The data in this Chapter clearly shows the desuetude of those discretionary powers (largely because of judicial disinterest) in England, NSW and Victoria.

None of those discretionary powers which fell into desuetude were reformed by a Rules Committee to overcome the reasons for desuetude,[1203] notwithstanding that there were specific calls for the English CE Power (1934-1998) to be reformed so it could be exercised on the Court's own motion; and the Rules Committees must have been aware of the desuetude.

5.6 Conclusions

The purpose of this Chapter 5 was to answer research question 2 by analysing how the 'problems' identified in Chapter 4 have been addressed by the implementation, or reform, of various Party Expert Procedural Rules. The analysis in this Chapter 5 has included a detailed consideration of individual rules of court so as to identify similarities and differences between the rules developed by each jurisdiction and temporal connections.

Where possible, this Chapter has been structured to allow for issues and topics applicable to England, NSW and Victoria to be analysed separately, the aim being to analyse each jurisdiction's procedural rules per se and also identify temporal and causal connections between jurisdiction on common issues and topics.

Also, where possible, this Chapter has adopted a largely chronological approach to the analysis to facilitate the evolutionary element of the analysis.

The following high-level conclusions can be drawn from this Chapter 5.

Firstly, the earliest English reforms to address the 'problems' were part of the Judicature Acts reforms (with some of those reforms adopted by NSW and Victoria the late-19th century, though not in identical terms). The earliest NSW and Victorian 20th century reforms, and many later NSW and Victorian 20th century reforms, were not causally or temporally connected to the English reforms (or if they were, they

[1202] *Civil Justice Review Report* (n 25) [2.9] and [2.9.4].
[1203] The only significant exceptions were the Victorian and NSW Court Expert Powers which were reformed to allow appointments on the Court's own motion.

incorporated local nuances eg the Victorian Reference for Trial Power (1883-2010) provided for the Court to appoint a special referee 'if the parties do not agree' (uniquely allowing special referees to be appointed on the Court's own motion).

Secondly, many of the substantial English reforms, including CE Powers (to address the 'problem' of bias), Disclosure Powers (to address the 'problem' of surprise) and Powers to Limit Party Experts (to address the 'problems' of excessive party expert evidence and contradictory party expert evidence), were only partially adopted by NSW and Victoria (and often many decades later).

Thirdly, the earliest 20th century NSW and Victorian reforms were mostly limited to 1960s and 70s rules of court which gave Courts a discretionary power to direct the pre-trial disclosure of medical expert evidence to address the 'problem' of surprise, but only in personal injuries actions. The first Victorian discretionary power to direct the pre-trial disclosure of medical expert evidence was opposed by Victorian solicitors and abandoned within a year which demonstrated their power at the time.

Fourthly, NSW had a unique, and extraordinarily wide, statutory Directions Power[1204] which expressly allowed directions which were not consistent with the NSW rules of court where necessary for the speedy determination of the real questions between the parties; and Victoria had a similar power (though not as expressly wide). Those Directions Powers could have been used to address many (if not all) of the 'problems' in all types of NSW and Victorian civil proceedings by orders for pre-trial disclosure of party expert evidence (to address the 'problem' of surprise); Court Experts (to address the 'problem' of bias) and/or limiting the number or party experts and the scope of party expert evidence (to address the 'problem' of excessive party experts).

Sixthly, the data in this Chapter clearly shows the widespread desuetude of those discretionary powers (largely because of judicial disinterest) in England, NSW and Victoria.

Lastly, major (and mostly similar) party expert reforms were made in England, NSW and Victoria in the late-20th and early-21st centuries. The December 1999 NSW reforms were unique because they were made unilaterally by the NSW Rules Committee without any prior law reform inquiry. Victoria's 2012 reforms remain unique

[1204] From the 1970s (in commercial causes) and the 1980s (in all actions).

in that they were made by statute (rather than rules of court); and provide power for Victorian Courts to order that party experts pay compensation for contraventions of any statutory obligations, including some or all of the legal costs or other costs or expenses of any person.

The next Chapter 6 will build on Chapters 4 and 5 to a focus on questions of 'why', including why choices were made at different times, to understand how things may have been different if different choices had been made. Chapter 6 will be an overarching, and deeper, analysis Chapter which will further consider the data on the 'problems' in Chapter 4 and the key Party Expert Procedural Rules in this Chapter 5 (having regard to the context set out in Chapter 3) from an evolutionary theory of institutional change perspective to understand how things may have been different if different choices had been made. The next Chapter 6 will seek to explain: the nature of the relationship which the legal changes in the 'problems' (set out in Chapter 4) and the procedural law responses (set out in this Chapter 5) have with each other and the wider environment, including any interlinked causal processes or historical factors;[1205] and why choices were made at different times.

[1205] Lipton (n 127) 74.

Chapter 6. Evolutionary theory of institutional change analysis

6.1 Introduction

Chapter 3 set out the all-important temporal context which has been incorporated into the analysis in Chapters 4 and 5; and which will be even more important in this Chapter 6.

Chapter 4 used a chronological, historical methodology to collate the data in the source material about the 'problems', including their impact on the civil justice system (such as the acuteness of the 'problems'), as perceived by judges from time to time; and analyse that data (having regard to the Chapter 3 context), using the legal evolutionary theoretical framework. Chapter 4 has answered research question 1.

Chapter 5 built on the analysis in Chapter 4 to answer research question 2. It necessarily descended into a detailed analysis of individual rules of court to identify temporal and causal connections between the 'problems' and the responsive Party Expert Procedural Rules; and similarities, differences and temporal connections between the various Party Expert Procedural Rules developed by each jurisdiction.

The analysis undertaken in both Chapters 4 and 5 were both preconditions to the analysis in this Chapter 6 which will answer research question 3 (could the acute 'problems' have been avoided if different, or earlier, procedural rules were put in place?). That is because research question 3 can only be answered after both the scope and nature of the 'problems'; and the procedural rules which have addressed the 'problems', are understood.

The earlier Chapters 4 and 5 were mostly focussed on questions of 'how'. Chapter 4 focused on how the 'problems', as perceived by judges, evolved to understand what those 'problems' are. Chapter 5 focused on how the Party Expert Procedural Rules evolved in response to the 'problems'. Chapters 4 and 5 both aimed to identify temporal and causal connections, as well as similarities and differences.

This Chapter 6 will focus on questions of 'why', including why choices were made at different times. It aims to understand how things may have been different if different choices had been made. This Chapter 6 will be a more overarching, deeper analysis of the data on the 'problems' in Chapter 4 and the key Party Expert Procedural Rules in Chapter 5 (having regard to the context set out in Chapter 3) from an evolutionary

theory of institutional change perspective to understand how things may have been different if different choices had been made. In doing so, this Chapter will explain: the nature of the legal changes in the 'problems' and the procedural law responses; the relationship which those changes have with each other and the wider environment, including any interlinked causal processes or historical factors;[1206] why choices were made at different times.

The evolutionary theory of institutional change applied in this research, which incorporates elements of legal evolutionary theory and institutional change theory; and the reasons why those theories apply to this research, were discussed in Chapters 1.5.2 to 1.5.6.

The broad legal evolutionary theory concepts listed below, which are distilled above in Chapter 1.5.2, are applicable to the deeper analysis in this Chapter 6 to answer research question 3 (could the acute 'problems' have been avoided if different, or earlier, civil procedure rules were put in place (and if not, why not)?):

- legal evolutionary approaches involve moving away from an earlier (existing) state of development and reject teleological concepts in which legal change progresses towards a functionally pre-determined design;
- legal evolutionary theory allows for suboptimal outcomes to occur and persist;
- 'history matters' when analysing why the law has developed as it has; and the current state of the law can be a 'carrier of history';
- legal evolutionary change is largely incremental;
- legal evolutionary change can involve long periods of stability;
- legal evolutionary change is usually confined to variations on existing law;
- legal evolutionary change can be coevolutionary;
- legal evolutionary change does not result in the inevitable progress towards a pre-determined optimum outcome because complex historical factors could have resulted in significantly different outcomes; and
- evolutionary legal history involves history unfolding, with choices about possible alternative paths being made at junctures.

Gradual institutional change (**GIC**) theory will also be used in the deeper Chapter 6

[1206] Lipton (n 127) 74.

analysis to understand how and why the Party Expert Procedural Rules (which are institutions (rules) in GIC theory) did (or did not) change over time; and whether small changes in those rules had (or did not have) a significant cumulative effect over time (and if so, how and why).

The following four or five types (or modes) of GIC which are outlined above in Chapter 1.5.4 will be incorporated into this Chapter's deeper analysis of the Party Expert Procedural Rules:

- **Drift** ie institutions (rules) which remain the same but with a changed impact;
- **Conversion** when existing institutions (rules) continue while being interpreted and used in new or different ways;
- **Layering** which also involves existing institutions (rules) continuing but with new rules attaching to, or operating in parallel with, those existing institutions (rules);
- **Displacement/diffusion** when 'old' institutions (rules) are replaced or bypassed by new institutions and/or discredited and pushed aside by new institutions; and
- **Exhaustion** which is when behavior required or allowed under existing institutions (rules) undermines them and results in gradual institutional breakdown or collapse.

Importantly, as GIC theory posits that 'actors' who are 'change agents', 'skilled social actors' or 'policy entrepreneurs' play important roles in shaping institutional evolution, this deeper Chapter 6 analysis aims to identify any of those types of 'actors' and their importance.

The structure of this Chapter 6 largely mirrors the structure used in the earlier Chapters 3, 4 and 5. Each of Chapters 6.1 to 6.4 will be largely chronological. England will be considered first (in Chapter 6.2); NSW will be considered next (in Chapter 6.3); and Victoria will be considered last (in Chapter 6.4). As in previous Chapters, NSW is considered before Victoria because NSW tended to lead Victoria and Victoria tended to consider and adopt developments in NSW.

The Chapter 6.5 comparative analysis will round out, and tie together, the analysis in Chapter 6. England (on the one hand) will be compared with NSW and Victoria (on the

other); and NSW will be compared with Victoria. The use of the comparative methodology in Chapter 6.5 aims to identify elements, concepts, principles and institutions which are common to all, or some, of the English, NSW and Victorian legal systems; and analyse why the legal problems considered in this research have been addressed in a particular way (and sometimes differently).[1207] As Lord Steyn has explained, the comparative method sharpens the focus on the weight of competing considerations.[1208]

England will be compared with the two Australian jurisdictions (NSW and Victoria) for the reasons explained in Chapter 1.6: all are exposed to the 'problems' (but to different degrees and over different timeframes); all are common law jurisdictions which have very similar fundamental characteristics and legal cultures (including judicial cultures) allowing a direct and meaningful comparison; the procedural law responses to the 'problems' have been interactive and interdependent; and Australia is sometimes considered to be innovative in the field of civil procedure.

The two Australian jurisdictions of NSW and Victoria will also be compared because they are the two largest Australian jurisdictions and 'compete' for the top commercial work; Victoria adopted the late-19th century English Judicature Act reforms at around the same time (whereas NSW did not do so until the 1970s); the effective demise of civil jury trials occurred decades earlier in NSW than in Victoria; the major NSW Party Expert Procedural Rules reforms to address the 'problems' preceded the Victorian procedural reforms which were made in the shadows of, and directly influenced by, the earlier NSW reforms; and Victoria's reforms were made by legislation (rather by rules of court as in NSW).

6.2 England

6.2.1 Pre-Judicature Acts (pre-1870s)

This Chapter 6.2.1 analyses the data in Chapters 4.2 and 5.2 having regard to the broader context in Chapter 3.

As party experts were giving evidence in or prior to the 17th century,[1209] the evolution

[1207] von Wangenheim (n 155) 737.
[1208] *McFarlane v. Tayside Health Board* [2000] 2 AC 59, 81.
[1209] Dwyer, 'Expert Evidence in the English Civil Courts, 1550–1800' (n 360) 110 makes the point that expert opinion evidence had been admitted into civil and criminal proceedings for several centuries by the time *Folkes* was decided in 1782. See also the pre-*Folkes* cases discussed in Chapter 4.2 which

of party experts and the Permissive Party Expert Rule commenced well before the seminal *Folkes* case was decided in 1782.

In the pre-*Folkes* period, the evolution of party experts and the Permissive Party Expert Rule were intertwined with the evolution of the broader adversarial system[1210] (which includes the evolution of the civil jury which is essentially a part of the adversarial system[1211]). Party experts were partly a product of the evolving adversarial system and the evolution of party experts was dependent on that system evolving (including the evolution of civil juries). For example, party experts were only possible once the civil jury and adversarial systems had evolved to the point where juries decided facts on the evidence of witnesses (rather than from their own personal knowledge); and parties controlled the production of the evidence.[1212]

The pre-*Folkes* evolution of party experts and the Permissive Party Expert Rule involved a long period of little change during which party experts both evolved from the earlier types of experts who assisted the Courts such as assessors and expert juries; and expanded from mostly providing medical expert evidence in some criminal cases into some civil cases.

Folkes was a juncture in the evolution of party expert evidence and the Permissive Party Expert Rule[1213] at which the Lord Mansfield could either:

1. continue to stymie opinion evidence generally as he had done previously in 1766 in *Carter v Boehm*[1214] (which concerned the opinion evidence of a non-skilled insurance broker); or
2. approve skilled party experts giving opinion evidence as a special type of permissible opinion evidence (as history indicates he did).[1215]

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indicate the party experts were giving evidence in criminal cases approximately 100 years before *Folkes.*

[1210] See Chapter 3.4.

[1211] See Chapter 3.3.

[1212] Party control over the production of evidence is a component of the 'party prosecution' principle ie parties have the right and the responsibility to choose the manner in which they proceed with their case and the proof they will present to support it.

[1213] Lipton, 'The Utilisation of Evolutionary Concepts in Legal History' (n 127) 75 posits that, in evolutionary theory, choices presenting alternative paths are made at junctures in history.

[1214] *Carter v Boehm* (1766) 3 Burr 1905, 97 ER 1162.

[1215] Landsman (n 332) 141 concludes that in *Folkes* '[Lord] Mansfield placed the court's seal of approval on the whole adversarial apparatus including contending experts and hypothetical questions. Dwyer, *Judicial Assessment* (n 67) 249-252 discusses *Folkes v Chadd* at length, including referring to it as the

The positive reference in *Folkes* to the 'opinion' of Mr Smeaton (one of two skilled experts in *Folkes*) in an earlier case 'respecting mills, as a matter of science', indicates that Lord Mansfield generally supported skilled 'men of science' providing assistance to the Courts on matters of science. Oldham's detailed analysis of *Folkes* confirms that Mr Smeaton had been appointed as an arbitrator in at least one case.[1216] Lord Mansfield's general support for external skilled experts assisting courts was considered by Golan who posits that judges of that time were not worried about external experts like Smeaton and Mylne (both Fellows of the Royal Society)[1217] testifying dishonorably because they were men of honor and their integrity guaranteed the truthfulness of their evidence; and judges trusted experts to give evidence of their true opinions.[1218]

Lord Mansfield's reference in *Folkes* to 'send[ing] for some of the brethren of the Trinity House' indicates he may have erroneously conflated two of the different roles which skilled experts then had in English civil proceedings, namely skilled experts who directly advise or assist the court as assessors (which was the most common role which Trinity House brethren had in English civil proceedings); and skilled party experts who give evidence as witnesses.[1219] If Lord Mansfield did make such an error, which Dwyer rightly doubts,[1220] Lord Mansfield's approval of party experts in *Folkes* may have been at least partly based on an erroneous conflation of those different roles.

Lord Mansfield's personal respect for skilled 'men of science' is likely to have been an important factor in the outcome of *Folkes* and the path dependency it established. An 'expert-sceptic' judge like Sir George Jessel[1221] would most probably have decided *Folkes* differently.

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leading case on the admissibility of expert opinion evidence. Jones (n 86) 59 says that *Folkes* legitimised the long standing practice of party experts in civil litigation. *United States Shipping Board v The Ship St Albans* [1931] UKPC 10, 8 confirms the authority of *Folkes*.

[1216] Oldham (n 342) 64 (footnote 231) though no details are provided about whether Lord Mansfield, or another judge, appointed Smeaton as arbitrator or how he was appointed as arbitrator.

[1217] Miller (n 400) 188; Golan, *Laws of Men* (n 88) 51.

[1218] Golan, *Laws of Men* (n 88) 51.

[1219] Ibid 42 at which Golan suggests that Lord Mansfield's opinion treated Smeaton as if he were a court expert.

[1220] Dwyer has opined that it may be difficult to accept that Lord Mansfield was wrong because it presupposes that Lord Mansfield, one of the greatest English judicial minds of the time, lacked foresight: Dwyer, *Judicial Assessment* (n 67) 252.

[1221] Genn, 'Getting to the truth' (n 58) footnote 11.

It seems likely from what Lord Mansfield said in *Folkes*, and the underlying premise that Lord Mansfield was not worried about skilled experts like Smeaton and Mylne[1222] testifying dishonorably, that Lord Mansfield's approval of party experts was premised on them being honourable and truthful and giving independent evidence to assist the Court.

The practical importance of *Folkes* on the evolution of party experts and the Permissive Party Expert Rule was clearly stated by the Privy Council in *The United States Shipping Board v The Ship "St Albans"*:

> The extent to which the opinions or conclusions of skilled persons are receivable … has not been seriously in doubt from the time when, in 1782, in *Folkes v. Chadd*, Lord Mansfield stated the grounds on which the evidence of Smeaton, the famous constructive engineer, was to be admitted upon a disputed question of obstruction to a harbour: "the opinion of scientific men upon proven facts may be given by men of science within their own science."[1223]

That Privy Council statement also demonstrates two things: a key dimension of *Folkes* was that it was decided by Lord Mansfield who was authoritative (and not another judge); and *Folkes* established a strong (and persistent) path dependency.

Lord Mansfield's authority results from his illustrious legal career as a barrister (from 1730); Solicitor General (from 1742); Attorney General (from 1754); and Chief Justice of the Court of King's Bench (for 32 years from 1756-1788).[1224] As Chief Justice of the Court of King's Bench, he was a key judicial actor (if not the key judicial actor) in the late-18th century with high judicial status and authority.[1225] Lord Campbell described Lord Mansfield as the 'most accomplished Judge who ever presided in the Court of King's Bench.'[1226]

[1222] Both Royal Society members at the time of *Folkes*: Golan, *Laws of Men* (n 88) 51.
[1223] *United States Shipping Board v The Ship St Albans* [1931] UKPC 10; see also Dwyer, 'Expert Evidence in the English Civil Courts, 1550–1800' (n 360) 109 which discusses the significance of *Folkes*.
[1224] Oldham (n 342) 6-12.
[1225] W S Holdsworth, 'Lord Mansfield' (1937) 53 LQR 221 provides an authoritative overview of Lord Mansfield's many achievements and his gushing supporters. Dwyer, *Judicial Assessment* (n 67) 252 posits that Lord Mansfield was one of the greatest English judicial minds of the 18th century. Oldham (n 342) 11 makes the point that almost no feature of the evolving common law escaped Lord Mansfield's shaping influence.
[1226] John Lord Campbell, *The lives of the Chief Justices of England*, vol 2 (John Murray 1849), 326.

The strong path dependency established by *Folkes* which was supportive of party experts and the Permissive Party Expert Rule clearly continued for the 150 year period between *Folkes* and *The United States Shipping Board v The Ship "St Albans"*.[1227] That path dependency was likely strengthened by *Folkes* being a decision of Lord Mansfield who was then, and continued to be, a judge of high judicial status and authority.

Folkes can also be seen to be legal change by the chance accident[1228] insofar as *Folkes* involved the sole question of whether or not skilled party experts could give expert opinion evidence; it involved two well respected, leading and authoritative skilled experts (one of whom Lord Mansfield already knew and trusted from a previous case); it did not involve any of the 'problems'; it was decided by Lord Mansfield who was a judge of high judicial status and authority and supported skilled scientists and engineers assisting Courts; and it may have been based on Lord Mansfield erroneously conflating the different roles which experts have.

The evolution of party experts and the Permissive Party Expert Rule to the time of *Folkes* also coevolved with the evolution of the importance of English science and scientists in the 18th century. As discussed in Chapter 3.5, at around the time of *Folkes* (late-18th century) scientists became increasingly prominent and useful within England's increasingly industrialised, specialised and urbanised society; were evolving into professionals; and were important to England's booming Industrial Revolution economy. The engineering project to construct the banks at Wells Harbour in the mid-18th century which became the subject of *Folkes*, and the status of engineers like Smeaton and Mylne who were both members of the Royal Society, are examples of the increasing prominence, usefulness and importance of science and scientists in England at around the time of *Folkes*. In this respect the evolution of skilled scientists and engineers as party experts in civil proceedings had a temporal connection to, and relationship with, broader 18th century developments in the English Industrial Revolution era, including the evolving importance of science and skilled scientists and engineers.

An analysis of the Permissive Party Expert Rule from an institutional theory

[1227] 'path dependence' is both a legal evolutionary theory and institutional change theory concept.
[1228] Lipton, 'The Utilisation of Evolutionary Concepts in Legal History' (n 127).

perspective shows it is an institution (rule)[1229] as theorised by Douglass North et al[1230] for the following reasons.

Firstly, the Permissive Party Expert Rule was, and continues to be, a framework within which human interaction (in Court actions and hearings) takes place; it is a 'rule of the game'.[1231]

Secondly, the Permissive Party Expert Rule was at least partly constraining insofar as it allowed opinion evidence only from skilled witnesses and only when an inexperienced tribunal of fact needed assistance. English common law judges, including Lord Mansfield in *Folkes*, imposed those constraints on litigants, lawyers and party experts, so that they all shared explicit knowledge of the rule.

Thirdly, though the Permissive Party Expert Rule was constraining (as discussed in the previous paragraph), that constraint also opened up the possibility that skilled witnesses could give opinion evidence within the common law system which was otherwise largely structured around oral testimonial evidence from lay witnesses about known and observed facts.

Within the types of institutions (rules) theorised by North, the Permissive Party Expert Rule was:

1. an institution which evolved over time (rather than created at a point in time);[1232]
2. (prior to *Folkes*) an informal institution in the nature of an informal convention, a code/norm of behaviour, or a tacitly understood rule[1233] (which was likely followed with little thought[1234]); and

[1229] The meaning of the term 'institution' in institutional change theory is discussed at Chapter 1.5.3.
[1230] North (n 175) 4. North's literature is discussed, and further developed, in much of the post-1990 institutional change literature.
[1231] The 'rules of the game' metaphor for institutions is used widely in the literature, including Stacey & Rittberger (n 174) 860 and Pierson (n 163) 10.
[1232] North (n 175) 4 theorises that institutions can be created (as was the case with the United States Constitution) or evolve over time (the common law being an example). A rule of court would be another example of an institution that was created at a point in time.
[1233] See also Stacey & Rittberger (n 174) 859-861 for a discussion about the difference between formally established or tacitly understood institutions and how they can be characterised as rules lacking a formal foundation.
[1234] The idea that rules include rules which are followed without much thought was developed by Hodgson (n 175) 3.

3. transformed into a formal institution by *Folkes*.

Further, the Permissive Party Expert Rule was an institution which was passed down, and further developed, by generations of English lawyers (and judges).[1235]

The data about the evolution of Permissive Party Expert Rule and the 'problems' between *Folkes* and the 1870s Judicature Acts reform period broadly shows the following.

Firstly, in *Folkes* and the decade or so following *Folkes*, party expert evidence was an optimal institution (rule) because involved none of the 'problems' and assisted the Court.[1236]

Secondly, within 30 years or so after *Folkes* the 'problems' of bias and excessive party experts arose in at least one civil case which resulted in the presiding senior English common law judge expressing strong public concern about those 'problems' (albeit in a specific case only).[1237]

Thirdly, within 70 years or so years after *Folkes*, the 'problems' had evolved to the extent that significant concerns about the 'problem' of bias generally (ie across multiple cases rather than in a specific case) were expressed by Lord Campbell in *The Tracy Peerage*[1238] and the Lord Chancellor in *Re Dyce Sombre.*

Fourthly, the post-*Folkes* 'problems' which evolved in that 30-70 year or so period commenced transforming the Permissive Party Expert Rule from the optimal legal rule which it was at the time of *Folkes* into a suboptimal legal rule it was becoming as a result of the 'problems'.[1239] There is nothing in the literature which identifies any external exogenous event in that 30-70 year or so period which caused or contributed to the evolution of the 'problems' at all or so quickly after *Folkes*.

[1235] Hodgson (n 175) 3 (which discusses rules being passed between generations). Goodenough (n 128) 810 theorises that law has the property of descent and is a transmitted cultural artifact, handed down over generations like language or some other patterned system of knowledge and behavior.
[1236] *Thornton v The Royal Exchange Assurance Comp* (1790) Peake 37, 170 ER 70; *Goodtitle on the demise of Revett against Braham* (1792) 4 T R 497, 100 ER 1139.
[1237] In the *Severn* litigation.
[1238] *Tracy Peerage* (n 101). Discussed at Chapter 4.2.4.
[1239] Lipton, 'The Utilisation of Evolutionary Concepts in Legal History' (n 127) 93-94 discusses another instance of suboptimal outcomes resulting from historical accidents, namely the application of *Salomon's* principle to corporate groups in cases involving tort creditors which Lipton posits occurred because of two historical 'accidents'.

Fifthly, the data indicates that the 'problems' in the later part of the pre-Judicature Act period may have been more (or perhaps most) acute in patent litigation as demonstrated by the criticism of party experts by the Patent Law Commissioners;[1240] and the patent cases of *Thorn v Worthing*,[1241] *Bottomley v Ambler*[1242] and *Moore v Bennett*.[1243] The possibility that the 'problems' would become more acute in patent cases is unsurprising because as Neville J has pointed out expert assistance in patent actions is generally essential.[1244]

Lastly, though the 'problems' were clearly evolving in the 19th century and there were calls from at least the 1860s for reforms (including for Disclosure Powers and Assessor Powers[1245]), no quick or decisive action was taken to address the 'problems'.

Though the often cited 19th century judicial criticisms of party experts are evidence of the Permissive Party Expert Rule becoming suboptimal, those criticisms did not change the Permissive Party Expert Rule or establish any new institutions (rules) which addressed the 'problems' in the sense theorised by Hodgson.[1246] Those judicial criticisms did not establish any new rule of behaviour, rule of the game or involve any enforcement element. Though some judges were critical of party experts, the data suggests that on the whole the broad college of English judges probably largely adapted to the suboptimal Permissive Party Expert Rule. That adaptation to the suboptimal Permissive Party Expert Rule was at least partly the result of the strong path dependency established by *Folkes*; the vested interests of judges in preserving the established Permissive Party Expert Rule because they needed party expert assistance in areas outside their expertise and experience; and the increasing prominence and importance of science in the 1800s Industrial Revolution period.

6.2.2 Judicature Commission and the Judicature Acts

From the 1870s, the Judicature Acts implemented a raft of reforms to address the broad-based discontent with the English civil justice system, including the following new party expert powers:

[1240] Patent Commissioners (n 410).
[1241] (1876) LR 6 Ch D 415, 418.
[1242] *Bottomley v Ambler* (1878) LT 545.
[1243] *Moore v Bennett* (n 621).
[1244] *Joseph Crosfield* (n 624) 310.
[1245] eg 'The Evidence of "Experts"' (1862) 5 Chemical News 1; Patent Commissioners (n 410).
[1246] Hodgson (n 175) 6.

1. The English I&R Power (1873-1998);
2. The English Reference for Trial Power (1873-1998); and
3. The English Assessor Power (1873-1998).

The relatively benign discussion about the 'problems' in the Judicature Commission's reports (ie benign compared to the other problems with the English judicature system at the time, perhaps other than in commercial actions) indicates that those new powers were recommended as part of a broader response to the discontent with the English civil justice system, including juries being unsuited to complex scientific cases, rather than to specifically address any 'problems' with party experts per se.

The data analysed in Chapter 4.2 shows that the Judicature Acts reforms did not stop the evolution of 'problems' of bias, contradictory party experts or excessive party experts, but rather that those 'problems' continued, and further evolved, in the late-19th/early-20th century period. That is demonstrated by further judicial criticism of party experts in cases in this period including: *Bottomley v Ambler*; *Attorney-General v Birmingham, Tame, and Rea District Drainage Board*, *Joseph Crosfield & Sons v. Techno-Chemical Laboratories* and the *Graigola* litigation.[1247]

The evolution of the 'problems' is also demonstrated by some English judges starting to address the 'problems' on a case by case basis such as:

- *Field v Wagel* (in which the Court made pre-trial orders that each party's expert witnesses not to exceed three); and
- the *Graigola* litigation (in which Tomlin J developed both the English Limited Expert Evidence Rule (1927) and the English Independence Rule (1928)).

Those two early cases are interesting for two reasons. Firstly, they show that it took decades (perhaps as long as six to nine decades) for judges to take action to address the evolving 'problems'. Secondly, they show that early action to address the 'problems' was taken by individual puisne judges in individual cases (rather than in any systematic way eg by the Rules Committee); and before RSC 1883 included any power to limit expert evidence.

In developing the English Limited Expert Evidence Rule (1927) and the English

[1247] Those cases are discussed in Chapter 4.2.11.

Independence Rule (1928), Tomlin J demonstrated himself to be an early institutional entrepreneur[1248] who was interested in changing the existing suboptimal institutions (rules)[1249] in response to the 'problems' he was confronted with. Both of Tomlin J's rules were informal institutions (rules) created at a point in time. The informal nature of the English Limited Expert Evidence Rule (1927) is reflected in the Court of Appeal recognising it as only a working rule.[1250] Tomlin J's institutional entrepreneurship was at least partly successful in changing the existing institutions (rules) because the Court of Appeal[1251] both approved the English Limited Expert Evidence Rule (1927) and confirmed its subsequent adoption by the other Chancery judges; and *Anglo Group plc, v. Winter Brown & Co Ltd*[1252] explains that the English Independence Rule (1928) was 'The starting point in considering the duties of experts'.[1253]

6.2.3 New 1930s and 40s English rules of court

English Rules Committees from the 1930s took action by making new rules of court in response to the Lord Chancellor's call for assistance in finding solutions to the reasons for the growing discontent with the civil justice system caused by the delays and costs of civil litigation.

The English Power to Limit Party Experts (1932 New Procedure list only) was genealogical rather than teleological[1254] because it: was linked to, and continued to be shaped by, the past practice of judges limiting the number of party experts in cases like *Field*,[1255] the *Graigola* litigation and *Frankenburg*[1256] (which approved the English Limited Expert Evidence Rule (1927)); and may have been shaped by Parliament limiting the number of party experts in some types of actions by legislation.[1257]

The English CE Power (1934-1998), which was limited to appointments of Court

[1248] The important role of institutional entrepreneurs in institutional change theory is discussed in Pierson (n 163) 136; Eccleston (n 189) 107; Cini (n 207).
[1249] Including the suboptimal Permissive Party Expert Rule
[1250] *Frankenburg* (n 932) .
[1251] Ibid.
[1252] *Anglo Group plc v. Winter Brown & Co Ltd* [2000] EWHC Technology 127, [106].
[1253] Interestingly, *The Ikarian Reefer* (per Cresswell J) (n 106) 81 did not refer to the English Independence Rule (1928).
[1254] David (n 146) 206 and Lipton discuss the concepts of 'genealogical' and 'teleological' development.
[1255] *Field* (n 922).
[1256] *Frankenburg* (n 932).
[1257] Acquisition of Land (Assessment of Compensation) Act 1919; Places of Worship (Enfranchisement) Act 1920, Sch 2.

Experts on the application of a party, was also genealogical rather than teleological because it too was linked to, and continued to be shaped by, the past practices of the Court, including referees and Masters being appointed by the Court to inquire and report;[1258] ORs who had developed the English SJE Power (1920s informal ORs by consent); and Court Experts mostly being appointed only where the parties consented.[1259]

The English Disclosure Power (1936 patent actions only) and the English Power to Limit Party Experts (1936 patent actions only), which applied in patent actions only, were also genealogical rather than teleological because they too were likely linked to, and continued to be shaped by, the past practice of party expert evidence in patent actions heard in the Court of Chancery being given by affidavit and exchanged before the hearing.[1260]

The new English Power to Limit Party Experts (1937 summons for directions) significantly expanded the scope of the earlier power which had been available in New Procedure list actions only,[1261] to any action covered by the summons for directions procedure.

The new English Expert Assistance Power (1949-ongoing patent actions)[1262] allowed a 'scientific adviser' to be appointed as an assistant to the Court or to inquire and report to the Court. That power was similar to the English I&R Power (1873-1988) and the English CE Power (1934-1998). However, unlike the English CE Power (1934-1998), that power allowed 'scientific advisers' to be appointed on the court's own motion. That Expert Assistance Power was itself an evolutionary innovation which sought to address the concerns with assessors in patent actions.

Each of those new rules of court was a formal institution (rule) as theorised by

[1258] eg when special referees were appointed under the English I&R Power (1873-1998).
[1259] eg *Badiche* (n 893); *Enderwick v Allden* (1889) 88 LT 12. There were some historic examples of courts appointing or consulting experts without party consent (eg *The Harbinger* (1852) 16 Jurist 729).
[1260] Chancery Evidence Commission, *Report of her Majesty's Commissioners Appointed to Inquire into the Mode of Taking Evidence in Chancery and It's Effects* (1860), 17 refers to the evidence given to the Chancery Evidence Commission in 1859 by a barrister practicing in the Court of Chancery about the affidavit evidence of scientific opinions. 'Evidence of Experts' (1863) 7 Sol J & Rep 856 refers to scientific witnesses embodying their reports or opinions in affidavits every day in the Court of Chancery in patent actions.
[1261] Under the English Power to Limit Party Experts (1932 New Procedure list only).
[1262] See Chapter 5.2.4.

Douglass North[1263] because each power was another framework within which human interaction (in Court actions) took place ie another 'rule of the game'; each was constraining- eg the English Power to Limit Party Experts (1937 summons for directions) constrained a party's ability to lead unlimited party expert evidence; and each was created at a point in time by a new formal rule of court.[1264]

Those new formal institutions (rules) can be contrasted with the small number of informal institutions (rules) which were created over time such as the English SJE Power (1920s informal ORs by consent).

The fact that each of the new powers in the 1930s and 1940s rules of court was limited by, and linked to, past (or pre-existing) practices of the Court demonstrates that the 1930s and 1940s Rules Committees were only prepared to make new rules of court which were consistent with the pre-existing practices of the court; and which were not inconsistent with the fundamental principles of the adversarial civil justice system, including party control over the witnesses and judges having only limited functions.

The 1930s and 1940s Rules Committees appear to have tried to find ways to work around the persistent and difficult to change Permissive Party Expert Rule.[1265] However, when considering procedural changes, they had to work within the strongly path dependent Permissive Party Expert Rule which constrained possible changes to 'layering' (ie the new rules were attached to the suboptimal Permissive Party Expert Rule by 'layering', but without replacing that suboptimal rule).[1266] For example, in patent actions the suboptimal Permissive Party Expert Rule continued, but was constrained by the following three 'layered' institutions:

- the English Disclosure Power (1936 patent actions only);
- the English Power to Limit Party Experts (1936 patent actions); and
- the English Expert Assistance Power (1949-ongoing patent actions).

The Lord Chancellor who asked the 1930s Rules Committee to consider what could be done to address the high cost of civil litigation (which led at least to the 1932 New

[1263] North (n 198) 4.
[1264] Ibid.
[1265] The concept of 'working around' unchangeable institutions is discussed in Streeck and Thelen (n 173) 23.
[1266] This form of layering is developed in Pierson (n 163) 137.

Procedure Rules), and the Rules Committees which implemented the new 1930s and 40s Party Expert Procedural Rules by new rules of court, can be seen in two different ways. On the one hand, they can be seen as 'institutional entrepreneurs' with an interest in changing the existing institutions (rules) to address the 'problems'. Alternatively, they can be seen as having engaged in mere symbolic politics by making only symbolic rules of court in the nature of token gestures giving signals and edicts (that action was being taken in response to the criticisms of party experts) but without any accompanying intended real world effect/impact (ie that the rules would be used and have any tangible impact on the 'problems).[1267]

The English CE Power (1934-1998) is the most obvious token gesture or symbolic institution (rule) for two reasons. The 1930s Rules Committee which granted the power knew the Law Society opposed it, yet made the power dependent on parties making applications for Court Expert appointment). Secondly, Chapter 5.5 demonstrates (perhaps unsurprisingly given the Law Society opposed it) that the English CE Power (1934-1998) quickly became a dead letter and fell into desuetude and atrophy.[1268] That desuetude and atrophy involved the gradual institutional change concept of 'drift' whereby that CE Power remained, but its impact changed over time because it was hardly ever used (the parties preferring to appoint their own party experts so made few applications for Court Experts). The merely symbolic nature of the English CE Power is further demonstrated by successive Rules Committees keeping the CE Power in RSC 1883/1965, but taking no steps to actively maintain, reset, refocus, recalibrate or renegotiate the power in response to that obvious change in environment.

6.2.4 1950-2000s

Pre 'Access to Justice' inquiry period

The data analysed in Chapter 4.2 shows the 'problems' of bias, contradictory party expert evidence and surprise continued in the second half of the 20th century, though to a lesser extent than before 1950.

The 'problems' most often discussed in the literature were the 'problem' of bias and the 'problem' of surprise (with the resultant trial inefficiencies). For example, the 1950s

[1267] Campbell (n 171) 43.
[1268] Atrophy as a result of 'drift' is referred to in Streeck and Thelen (n 173) 24. The desuetude of the Court's discretionary powers is discussed in Chapter 5.5.

Evershed Committee made only two modest recommendations concerning expert evidence, one of which was that there should be a more widely available English Disclosure Power to reduce the 'problem' of surprise, save time at the trial and lead to agreement between the experts.[1269] Later English law reform bodies increased calls for reforms to the Party Expert Procedural Rules, though the reforms they called for continued to be modest in scope. The Winn Committee's 1968 report[1270] proposed a Disclosure Power (as a general rule) requiring that parties should be required to disclose expert medical witness's reports.[1271] This, in effect, reproposed the Evershed Committee's Recommendation 14 for more widely available Disclosure Powers. Another example is the Cantley Committee's late-1970s inquiry into personal injuries litigation[1272] which followed up from the Winn Committee's inquiry. The Cantley Committee proposed a self-operating English Power to Limit Party Experts in the form of an automatic pre-trial direction that 'the parties shall have leave without disclosing expert reports to call expert witnesses limited to one for each party'.[1273]

The reforms to party expert evidence made through Party Expert Procedural Rules in the period before Lord Woolf's 'Access to Justice' inquiry were both modest and took a very long time. A good example of the long time for reforms to be implemented is the 20 or so years it took for the Evershed committee's 1954 Recommendation 14 (that expert evidence should not be receivable unless a copy of the expert's report has been made available for inspection by the other side before the trial) to be implemented (in part) in the 1974 English Disclosure Powers.

The Party Expert Procedural Rules reforms in the period from the 1950s to the 'Access to Justice' inquiry were modest for the following four reasons.

Firstly, most of the Party Expert Procedural Rules reforms in this period involved the modest, incremental evolution of the English Disclosure Power in the following broad stages over three or four decades:

- Masters developed the English Disclosure Power (1940s informal by Masters

[1269] Para [290] and recommendation 14. The English Disclosure Power (1936 patent actions only) was the only power then available.
[1270] Committee on Personal Injuries Litigation, *Report* (Cmnd 3691, 1968).
[1271] para [27].
[1272] Personal Injuries Litigation Procedure Working Party, *Report* (Cmnd 7476, 1979).
[1273] Ibid para [34] and Appendix H.

in personal injuries actions) when they commonly gave directions for the exchange of medical expert evidence by consent;

- the English Disclosure Rule (1954 collisions actions only) was the first formal rule of court, though limited to collision actions;
- the English Disclosure Rules (1967 disclosure encouraged only) worked around the absence of a broad-based power in RSC 1883/RSC 1965 to order disclosure by encouraging the exchange of expert reports;
- the first major reforms were the 1974 English Disclosure Powers;
- the English Disclosure Rule (1980 automatic directions) was the first rule requiring the parties to disclose expert evidence (rather than a power giving the Court a discretion to order disclosure); however, even that rule was discretionary; and
- the English Disclosure Power (1987 harmonised all actions) finally provided a harmonised, mandatory regime for the pre-trial disclosure of expert evidence in almost all types of actions.

Secondly, the new Party Expert Procedural Rules made in this period were limited to:

- new English Permission Rules;[1274] and
- new English Expert Meeting Powers.[1275]

Thirdly, some important law reform report recommendations for new or broadened Party Expert Procedural Rules were never acted on at all. The best example is the English CE Power (1934-1998) which was never reformed to allow appointment of a Court Expert on the Court's own motion,[1276] though there was clear evidence that the English CE Power (1934-1998) had hardly been used since it was introduced in the 1930s (in part because such an appointment could only be made by consent and parties preferred to call their own witnesses); and the Evershed Committee recommended that a Court Expert should be able to be appointed on the court's own motion.

Fourthly, the hardly ever used English CE Power (1934-1998), English Assessor

[1274] The first was the English Permission Rule (1954 collision actions only).
[1275] The English Expert Meeting Powers were implemented from the 1980s.
[1276] Other than the similar English Expert Assistance Power (1949-ongoing patent actions) available only in patent actions.

Powers, English Reference for Trial Powers, I&R Power and the Expert Assistance Powers were dead ends that did not work out.[1277] As explained in Chapter 5.5, those powers which were themselves evolutionary outcomes or innovations were hardly ever used. Those dead end reforms failed as evolutionary innovations because Lord Mansfield's approval of the Permissive Party Expert Rule maintained a strong grip on civil procedure; and English judges were reluctant to take action which was inconsistent with the fundamental principles of the adversarial system.

The party expert reforms in this pre-'Access to Justice' era at least partly coevolved with the evolution of the broader English civil justice system away from a 'pure' adversarial system (including civil trial procedure evolving further away from civil jury trials and active judicial case management evolving and eroding the 'pure' adversarial system). That evolution of the broader English civil justice system away from a 'pure' adversarial system enabled, or facilitated, Party Expert Procedural Rules reforms which would have been difficult (if not impossible) because the reforms depended on early pre-trial directions being made about party expert evidence; and/or allowed written expert evidence which is inconsistent with the continuous oral civil jury trial tradition in the 'pure' adversarial civil justice system. The reforms which would have been most difficult (if not impossible) include Concurrent Expert Evidence Powers;[1278] Permission Rules; Powers to Limit Experts; Powers to Admit an Expert Report As Evidence in Chief; Expert Meeting Powers; and SJE Powers.

The 'problems' and the Party Expert Procedural Rules reforms also coevolved with the English civil justice 'crisis' of the late 20th century which developed largely because of increases in litigation, delays, inefficiency and costs; and the decline of the legal aid budget. That late 20th century 'crisis' was an evolutionary punctuation that opened up a window of opportunity for Lord Woolf's 'Access to Justice' inquiry to make sweeping change to party expert procedure which would probably otherwise not been possible[1279] because of the temperamental reluctance of English judges and lawyers to move away from the 'pure' adversarial system.[1280] That 'punctuation' was in part a

[1277] Evolutionary outcomes which become 'dead ends' and/or do not work out are concepts discussed in Lewis and Steinmo, 'How Institutions Evolve' (n 208) 319 and 322.
[1278] Edmond, 'Secrets of the Hot Tub' (n 108) 72 makes the direct point that concurrent evidence requires case management during the pre-trial stages.
[1279] Hathaway (n 133) 432.
[1280] Lawton (n 409); Bingham (n 19) 22-3.

legal ‘punctuation’ within the types discussed by Hathaway as it involved the introduction of Lord Woolf’s novel and new approach to civil litigation, including single joint experts in lieu of party experts.[1281] That ‘punctuation’ was also in part more broadly based than just the civil justice system as it involved the broader societal issues of the public being concerned about civil justice accessibility being limited by costs and delays; and government being concerned about pressures on the civil justice system caused by decreasing legal aid.[1282]

The data on the evolution of the ‘problems’ in Chapter 4 shows that the evolution of the ‘problems’ continued to be unpredictable and depended on the ‘chance occurrences’ of the ‘problems’ arising in particular cases which were heard by an entrepreneurial judge. Creswell J’s summary of the duties of experts in *The Ikarian Reefer*[1283] is perhaps the best example of a ‘chance occurrence’ case heard by an entrepreneurial judge.

Further, the ‘problems’ and the reforming Party Expert Procedural Rules only got close to reaching a point of equilibrium when the extensive expert evidence reforms were made in CPR 35 (with only occasional disturbances thereafter[1284]), making it more likely to be an evolutionary system until the ‘Access to Justice’ inquiry.[1285]

The development of the Party Expert Procedural Rules reforms in response to the ‘problems’ also continued the following persistent suboptimal outcomes:

- the fundamentally flawed Permissive Party Expert Rule continued;
- the English CE Power (1934-1998), the English Expert Assistance Power (1949-ongoing patent actions), the English Assessor Power (1873-1998) and the English Reference for Trial Power (1873-1998) each continued to be hardly ever used; and
- the pre-trial disclosure of expert evidence only become mandatory in most English civil proceedings in the late-1980s when the English Disclosure Power (1987 harmonised all actions) was established.

[1281] Hathaway (n 133) 641.
[1282] See generally Genn, *Judging Civil Justice* (n 252).
[1283] *The Ikarian Reefer* (per Cresswell J) (n 106) 81.
[1284] Such as the English Concurrent Expert Evidence Power (2013).
[1285] Lewis and Steinmo, 'How Institutions Evolve’ (n 208) 320-321.

The ‘problems’ and the Party Expert Procedural Rules reforms further demonstrated the evolutionary elements posited by Goodenough.[1286] The evolutionary element of ‘descent’ is demonstrated by the durability of the Permissive Party Expert Rule; its survival over time; and its replication over generations of lawyers barristers/judges in the insulated court environment by the mode of trial which permitted party experts. The evolutionary element of ‘variation’ is demonstrated by the strongly resistant Permissive Party Expert Rule being forced at least partly to evolve in response to the ‘problems’ through the various new Party Expert Procedural Rules (many of which themselves also evolved).

The English Disclosure Rules (1967 disclosure encouraged only), which encouraged parties to voluntarily disclose party expert evidence (or be exposed to adverse costs consequences), were unique instances of ‘layering’ by an informal institution for three reasons. Firstly, they are among only a few English Practice Directions issued in this era (or at all) covering important matters of procedure. Secondly, they were likely intended to work around the Rules Committee’s failure to provide a broad based, mandatory Disclosure Power/Rule in RSC 1965 as had been recommended by the Hanworth Committee and the Evershed committee. Thirdly, they were in the form of self-operating rules which imposed obligations on the parties (rather than discretionary powers provided to the Court); and did not require a Court order or direction. Imposing obligations on the parties was probably deliberate because history showed judges were unlikely to exercise any discretionary powers granted to them.

The English Independence Rule (1993) was another informal institution (rule) by ‘layering’. Cresswell J, like Tomlin J in the 1920s, was a single judge ‘institutional entrepreneur’[1287] with an interest in changing the existing rules. Cresswell J’s ‘institutional entrepreneurship’ was successful as the English Independence Rule (1993) has been almost universally adopted; subsequently expanded and systematised in England, NSW and Victoria; and it demonstrates the power of a well-situated institutional entrepreneur.

Prior to the ‘Access to Justice’ inquiry and CPR 35 (discussed below), the Permissive Party Expert Rule continued, but that rule had, by incremental layering, become

[1286]Goodenough (n 128).
[1287] Pierson (n 163) 136; Eccleston (n 189) 107; Cini (n 207).

constrained by a number of new institutions, including a Limited Number of Experts Power/Rule; the CE Power; Disclosure Powers/Rules; a Permission Rule; an Expert Meeting Power; and an Independence Rule.

'Access to Justice' inquiry

As discussed above, the late 20th century civil justice 'crisis' was an evolutionary punctuation that opened up a window of opportunity for Lord Woolf's 'Access to Justice' inquiry to make sweeping change (including to party expert procedure) which would probably otherwise not been possible because of the temperamental reluctance of English judges and lawyers to move away from the 'pure' adversarial system.

The new expert evidence regime in CPR 35 involved the gradual incremental change concept of 'displacement' which largely (though not totally) set aside the Permissive Party Expert Rule and the existing Party Expert Procedural Rules (which had been 'layered' on the Permissive Party Expert Rule); and replaced them with a new expert evidence institution (regime). That new CPR 35 expert evidence regime however incorporated a key element of the institutions (rules) which it 'displaced' ie the fundamental elements of the Permissive Party Expert Rule. Accordingly, the strong path dependency established by *Folkes* continued even in CPR 35.

6.2.5 Conclusions

The following broad conclusions can be drawn about the evolution of the English 'problems', and the English Party Expert Procedural Rules which addressed those 'problems'.

The evolution of the 'problems' and the Party Expert Procedural Rules from the 1870s to the late-1920s when *Graigola* was decided, was incremental with some sporadic judicial criticism of the 'problems' of bias, contradictory party experts and excessive party experts.

The 1930s and 40s was a distinct, separate evolutionary period during which the English Rules Committee took action by making new rules of court. An interesting common thread throughout the 1930s period is that Lord Sankey was the Lord Chancellor (1929-1935); and Hewart CJ, Merriman P, Clauson J and three others (Cockburn, Morton and Gregory) were all members of the Rules Committee. That common thread may partly explain why those 1930s Party Expert Procedural Rules

were made at the time.

The 'motor' of change for the Party Expert Procedural Rules reforms[1288] was not to address the evolving 'problems' per se. The data shows that English judges and Rules Committees had little, if any, appetite to address the 'problems' per se through significant new Party Expert Procedural Rules; and the true 'motor(s)' of change were the broader English civil justice 'crises'[1289] caused by the unacceptably high costs of, and delays to, English civil proceedings. Even the commentary surrounding the English CE Power (1934-1998) indicates that that reform, though self-evidently aimed directly at reforming party expert evidence, was part of a broader package of reforms aimed at addressing the broader 1930s civil justice 'crisis'.[1290]

As the true 'motor' of change was the broader civil justice 'crises' (which had effects on the broader English economic and social climate[1291]), the evolution of the party expert reforms was not autonomous, but rather interacted with the broader English economic and social climate of that period. Like the development of company law analysed by Lipton,[1292] the social, legal and economic systems were interrelated in a 'coevolutionary' way.

The data on the evolution of the 'problems' and the Party Expert Procedural Rules shows the evolutionary concept of 'punctuated equilibrium' operated as demonstrated by the long periods of relative 'calm' about the 'problems' which were 'punctuated' by relatively small periods of relative 'unrest'. For example, the long period of relative 'calm' before the 1930s was 'punctuated' by the relatively small period of relative 'unrest' in the 1930s when new Party Expert Procedural Rules were made by rules of court.[1293] The data indicates that the broader problems of cost and delay in the civil

[1288] The 'motor' of change is a concept developed in Robert C Clark, 'The Interdisciplinary Study of Legal Evolution' (1981) 90 Yale LJ 1238, 1257.
[1289] The first 'crisis' preceded the Judicature reforms of the late 19th century. The second 'crisis' was in and around the 1930s. The third 'crisis' preceded the 'Access to Justice' inquiry.
[1290] The commentary surrounding the O37A English Court Expert Power (1934-1998) is set out in Chapter 5.2.7
[1291] The broader English social climate was effected insofar as there was growing public discontent with the civil justice system, including the Courts becoming unpopular and the public unwilling to use them because of delays and the overloading of its lists: *Report on the Royal Commission* (n 462) [67] and [69].
[1292] Phillip Lipton, 'The development of the separate legal entity and limited liability concepts in company law: an evolutionary perspective' (PhD, Monash University 2012)' 341.
[1293] Similar to Deakon and Wilkinson's analysis of English employment law concepts: Simon Deakin and Frank Wilkinson, *The Law of the Labour Market: Industrialization, Employment, and Legal Evolution* (OUP 2005) 33; see also Phillip Lipton, 'The development of the separate legal entity and limited liability

justice system, and the civil justice 'crises', that had developed by the 1930s and 1990s were 'punctuations that opened up windows of opportunity for sweeping change'.[1294] Those 'punctuations' were not purely legal 'punctuations' of the types discussed by Hathaway;[1295] rather they were more broadly based.

The data on the evolution of the 'problems' in Chapter 4 shows that the evolution of the English 'problems',[1296] and the case by case responses to the 'problems',[1297] were often unpredictable and depended on the 'chance occurrences' of one or more of the 'problems' arising in a specific case falling to be determined by an institutional entrepreneur judge such as Tomlin or Creswell JJ.

Prior to the CPR, the 'problems' and the Party Expert Procedural Rules never reached a position of equilibrium or 'a single efficient outcome'[1298] where the rules adequately responded to the evolving 'problems'. That makes it more likely to be a true evolutionary system.[1299]

Unlike the 18th and early-19th century Industrial Revolution period in which the 'problems' coevolved with the evolution of the importance of science (and demands by scientists for reform) in England, there was no similar significant (co)evolution in the period after the 19th century.

The following suboptimal outcomes persisted until the CPR:

- the Permissive Party Expert Rule, which the ongoing judicial criticism of party experts demonstrated was fundamentally flawed, continued;
- the English CE Power (1934-1998), the English Assessor Power (1873-1998), the English I&R Power (1873-1998) and the English Reference for Trial Power (1873-1998) continued to be hardly ever used 'dead letters';[1300] and
- the English CE Power (1934-1998) continued to available only on the application of a parties despite calls for it to be reformed so that the Court could

concepts in company law: an evolutionary perspective' (PhD, Monash University 2012)' 392.
[1294] Hathaway (n 133).
[1295] Ibid 641.
[1296] As evidenced mainly by the criticism of party experts in the cases.
[1297] eg *Field* (n 922) and the *Graigola* litigation which resulted in the English Limited Expert Evidence Rule (1927) and the English Independence Rule (1928).
[1298] Hathaway (n 133) 640.
[1299] Lewis and Steinmo, 'How Institutions Evolve' (n 208) 320.
[1300] See Chapter 5.5.

appoint a Court Expert on its own motion.

Those suboptimal outcomes fall within evolutionary theoretical frameworks which Lipton posits provide for the analysis of legal change which recognises that suboptimal laws may arise and persist.[1301] Those suboptimal outcomes are rules and powers of the type discussed by Goodenough who notes that the law is full of rules which produce persistent suboptimal outcomes because those outcomes better support their own adoption and maintenance than do more 'sensible' (optimal) approaches.[1302]

Interestingly (and importantly in this Chapter's analysis) the English Rules Committee did undertake broad-based reforms to the party expert procedural rules regulating patent actions.[1303] That demonstrates that the Rules Committee could (when it wanted to) undertake broad-based party expert reforms.

The college of English judges took only minimal action to address the 'problems'. The party expert reforms made by successive English Rules Committees were largely limited to tinkering with the suboptimal Permissive Party Expert Rule by 'layering'; they departed little (if at all) from the Court's settled past practice; and they sometimes were only an exercise in symbolic politics. Also, though the ongoing judicial criticism of party experts indicated the 'problems' were defects in the system of procedure and/or the administration of the law, the 'Council of the Judges' procedure was not used to take action.[1304]

Oliver Wendell Holmes's 'evolutionary explanations' for minimalist judicial action apply to the minimalist action taken by the college of English judges to address the 'problems':[1305]

- the past captured and limited English judicial imagination. In the case of the Permissive Party Expert Rule, Lord Mansfield's endorsement of that rule in

[1301] Phillip Lipton, 'The development of the separate legal entity and limited liability concepts in company law: an evolutionary perspective' (PhD, Monash University 2012)' 36.
[1302] Goodenough (n 128) 816.
[1303] eg the English Assessor Power (1883-1949 patent actions), the English Disclosure Power (1936 patent actions only), the English Power to Limit Party Experts (1936 patent actions only) and the English Expert Assistance Power (1949-ongoing patent actions).
[1304] None of the literature indicates that any Rules Committee considered its rule making power to be inadequate. The rules of court actually made by the Rules Committee, particularly for patent actions, indicate that it had ample power.
[1305] Holmes (n 151). Holmes's 'evolutionary explanations' are summarised in Sinclair (n 141) 456.

Folkes made it difficult for any Rules Committee (with only limited agency and power) to reverse that rule and/or narrowed the choices available;

- the paucity of new judicial ideas also limited apparent options;
- perhaps most importantly, the charismatic power of the original judge (Lord Mansfield in the case of the Permissive Party Expert Rule) inhibited the reforming judge; and
- English judges were set in their ways and followed the old course as an easy option and route to peace of mind.

The English 'problems', and the Party Expert Procedural Rules which addressed them, evolved in England over about 180 years between the 1820s (when the 'problems' first arose)[1306] and the late-1990s (when CPR 35 made extensive party expert procedural reforms). The analysis in this Chapter shows it is very likely that legal evolutionary processes were operating during that entire period; and prior to the 'displacement' which occurred in 1998 when the party expert procedural laws were re-written in CPR 35, Lord Mansfield's approval of party experts and the Permissive Party Expert Rule in *Folkes* continued its lasting legacy;[1307] and continued to narrow choices, so that the pre-1998 procedural law reforms were limited to 'layering'.

6.3 NSW

6.3.1 Analysis

The Permissive Party Expert Rule applied in NSW from at least the 1880s.

The Privy Council's statements about *Folkes* in *The Ship "St Albans"*[1308] (*"St Albans"* being an appeal from the NSW Supreme Court to the Privy Council) demonstrates the direct reach of *Folkes* to NSW; and the strong path dependency established by *Folkes* extended to NSW.

The data in the literature indicates the evolution of the 'problems' in NSW commenced in the mid-20th century. The *Hocking v Bell* litigation[1309] and *Clark v Ryan*[1310] are reported cases which demonstrate the 'problems' of bias and contradictory party evidence existed in NSW personal injuries cases in the 1940s-1960s. The 1961 article

[1306] See Chapter 4.2.3.
[1307] Thelan (n 167) 387-8; Pierson (n 163) Ch 1 (pp10-11).
[1308] *United States Shipping Board v The Ship St Albans* [1931] UKPC 10
[1309] *Hocking v Bell* (1945) 71 CLR 430 (HCA); *Hocking v Bell* (1947) 75 CLR 125 (PC).
[1310] *Clark v Ryan* (1960) 103 CLR 486.

authored by a senior NSW Supreme Court judge explained that a cause of then existing delay (and cost) problem in NSW was NSW's retention of civil jury trials in which, among other things, too many expert witnesses were called and questioned in too much detail for the jury's benefit.[1311] In 1963 the NSW Supreme Court expressly recognised the 'problem' of bias to be a 'well-known characteristic' of party expert evidence.[1312]

NSW never adopted the English 1930s reforms.

The first 20th century NSW Party Expert Procedural Rules focused on pre-trial disclosure of medical expert evidence in personal injuries actions only.[1313] The 1963 NSW Disclosure Power (1963 personal injuries actions) and NSW Power to Admit an Expert Report As Evidence in Chief (1963 personal injuries actions)[1314] were similar to the then existing English Disclosure Power (1954 affidavit evidence) and English Power to Admit an Expert Report As Evidence in Chief (1954 affidavit evidence), though those English powers were not limited to personal injuries actions and the English power did not extend to ordering the compulsory exchange of medical (or other) expert evidence.[1315]

In the 1970s the NSW Disclosure Rule (1972 mandatory in personal injuries actions) made the pre-trial disclosure/exchange of party expert evidence in personal injuries actions effectively mandatory; and an express condition of admissibility of a medical expert's evidence in chief. The NSW Disclosure Rule (1972 mandatory in personal injuries actions) was introduced prior to the English Disclosure Power (1974 mandatory for medical evidence in personal injuries actions) which was the equivalent English reform. That 1972 NSW rule was also in different terms to the English equivalent rule because the NSW rule did not require Court directions to adduce expert evidence; and did not extend to personal injuries actions involving alleged medical negligence. NSW did not implement a rule or power equivalent to the English Disclosure Power (1974 discretionary).

[1311] Wallace (n 331).
[1312] *Miller Steamship* (n 785) 963 (Walsh J).
[1313] NSW Disclosure Power (1963 personal injuries actions) and NSW Power to Admit an Expert Report As Evidence in Chief (1963 personal injuries actions).
[1314] General Rules of Court (Amendment) 1963 (NSW) which inserted a new O27 r14 into the General Rules of the Court 1952 (NSW). Discussed in Chapter 5.3.7.
[1315] *Worrall* (n 964).

The evolution of the NSW party expert procedural rules to the 1970s indicates that NSW's reforms to that time largely evolved independently of England's reforms; and mostly operated in personal injuries actions. The NSW CE Power (1970) was one NSW reform which evolved directly from the English CE Power (1934-1998).

Between the late-1980s and December 1999, numerous reforms were made to NSW party expert practice and procedure through a series of uncoordinated, ad hoc (and sometimes apparently random) reforms to address the broader problems of delay and costs in NSW civil proceedings. Many of those reforms were made by Practice Notes (rather than rules of court); and applied only to specific NSW Supreme Court Divisions and/or Lists. Prominent examples include the Commercial Division and the specialist Building and Engineering List (both established in the 1980s); and the Professional Negligence List (established in the late-1990s), each with its own unique rules of court and Practice Notes.[1316] All of those reforming rules involved new institutions (rules) being 'layered' onto the Permissive Party Expert Rule then applying in NSW.

The uncoordinated, ad hoc NSW reforms addressing the problems of delay and costs made by Practice Notes in the 1980s provided the first NSW Disclosure Powers in non-personal injuries actions.[1317] It had taken more than two decades for that procedural law reform, which had been available since 1963 in personal injuries actions,[1318] to be extended to some non-personal injuries actions. That is an example of how the 'punctuated equilibrium' evolutionary concept was operating in this period with the evolution of the 'problems' and the Party Expert Procedural Rules in response characterised by long periods of little change.

In the decade or so commencing in mid-1999,[1319] four very senior NSW Supreme Court judges used the English evolutionary 'punctuation' that opened up the window for Lord Woolf's sweeping changes to English party expert procedure to press for reform to the NSW procedural rules regulating party expert evidence[1320] (though there

[1316] eg Practice Note 35 1985 (NSW); Practice Note No 58 1990 (NSW); Practice Note No 88 1995 (NSW); Practice Note No 89 1996 (NSW); Practice Note No 100 1998 (NSW); Practice Note No SC Eq 3 (NSW).
[1317] NSW Disclosure Power (1985 Building and Engineering List) and NSW Disclosure Power (1985 Commercial Division).
[1318] ie the NSW Disclosure Power (1963 personal injuries actions).
[1319] ie post-Lord Woolf's 'Access to Justice' inquiry and the CPR.
[1320] Discussed in Chapter 4.3.4.

is no empirical data in the literature[1321] evidencing any significant 'problems' with party experts in NSW at that time). Those four NSW judges used Lord Woolf's criticisms of English party experts as an opportunity and springboard for a period of sustained criticism of NSW party experts; and calls for NSW reforms. In doing so, those four judges seem to have adopted the English 'problems' (mostly the 'problems' of bias, excessive party experts and contradictory party expert evidence, as they then were) as NSW 'problems'. The ferocity and volume of that NSW extrajudicial criticism of party experts was unique to NSW. That NSW extrajudicial criticism of party experts is interesting because much of it occurred after the major NSW party expert reforms were undertaken in December 1999.

From 1998/99, NSW progressively adopted some (but not all) of the CPR 35 expert evidence reforms on a piecemeal, and List by List, basis. For example, a 1998 NSW Practice Note 104[1322] implemented an 'expert witness code' containing a range of independence obligations (which substantially mirrored the English Independence Rule (1993)), but for the Professional Negligence List only. Para 2 of that NSW 'expert witness code' provided that an expert witness's 'paramount duty' is to assist the court impartially and that duty overrides the expert witness's obligation to the party retaining the expert. That duty is very similar to the duty under the 1993 and CPR English Independence Rules.

Within a year of CPR 35 coming into operation in England, in December 1999 the NSW Rules Committee unilaterally undertook major party expert procedural reforms by amending SCR 1970 (NSW) to include the following new or extended party expert powers and rules:[1323]

- The NSW Power to Limit Party Experts (1999 harmonised) was the first NSW rule of court providing a Power to Limit Party Experts (and demonstrates a key difference between the evolution of the reforms in NSW and England which had such a power since the 1930s);
- The NSW Independence Rule (1999 harmonised) was the first NSW rule of court which imposed obligations requiring that party experts give independent

[1321] Including in the extrajudicial speeches themselves, other than Freckelton, Reddy and Selby (n 255).
[1322] Practice Note 104 1998 (NSW).
[1323] Some of those powers and rules had existed previously in Practice Notes.

evidence;

- The NSW Expert Meeting Power (1999 harmonised) was the first NSW rule of court giving power to direct that experts meet and prepare a joint statement;
- The NSW CE Power (1999 harmonised including on the Court's own motion) for the first time allowed the Court to appoint a court expert on its own motion (again demonstrating another key difference between the evolution of the reforms in NSW and England);
- The NSW Expert Assistance Power (1999 harmonised, except jury trials) was new; and
- The NSW Disclosure Power (1999 harmonised) was new.

Those December 1999 NSW reforms were the first coordinated, Court-wide reforms to NSW party expert procedure. Those reforms took decades to be implemented after the 'problems' first occurred in NSW in the mid-20th century.[1324] Those December 1999 NSW reforms adopted some, but not all, of the English reforms in CPR 35. The English Permission Rule (CPR) and the English SJE Power (CPR) were notable English reforms which NSW did not adopt.

The December 1999 NSW reforms implemented unique NSW reforms. For example, unlike the CPR which did not include an English CE Power at all, the 1999 NSW reforms included the NSW CE Power (1999 harmonised including on the Court's own motion) which allowed the appointment of a Court Expert on the Court's own motion.

The short period of approximately three months between Sperling J's September 1999 speech to the Supreme Court of NSW Annual Conference calling for reforms to party expert procedure,[1325] and the December 1999 reforms, make it highly likely that those reforms were strongly influenced by Sperling J's speech. Sperling J's 'institutional entrepreneurship'[1326] is particularly interesting because his speech gave no indication that he was involved with the NSW Supreme Court Rules Committee; or that he had engaged with that committee before his speech.[1327] Making a speech at the Court's Annual Conference which was directly critical of the rules of court (and by extension,

[1324] See Chapter 4.3.
[1325] Sperling (n 274). Discussed in detail in Chapter 4.3.4
[1326] The important role of institutional entrepreneurs in institutional change is discussed in Pierson (n 163) 136; Eccleston (n 189) 107; Cini (n 207).
[1327] The NSW Supreme Court's Annual Review for 2000 further confirms Sperling J was not a member of the rules committee member in 2000.

the NSW Rules Committee) was a bold move for a puisne judge and a Rules Committee 'outsider'. Like the English judges (Tomlin and Cresswell JJ), Sperling J's institutional entrepreneurship was successful as the major December 1999 expert evidence reforms implemented most of Sperling J's recommendations.

The above analysis demonstrates that before December 1999 the NSW procedural law reforms evolved largely independently of the English reforms; and from December 1999 the NSW reforms largely evolved from, or as an extension of, the English reforms initiated by Lord Woolf's 'Access to Justice' inquiry and implemented in CPR 35. December 1999 was a unique evolutionary period (or juncture) in NSW at which the evolution of NSW's reforms became strongly attached to England's reforms.

The further reformed NSW Party Expert Procedural Rules in the UCPR 2005 (NSW) are largely, though not wholly, consistent with CPR 35. Key differences between the NSW rules and CPR 35 (as at 2006) include the following:

- The English Permission Rule (CPR) was not adopted by NSW. The NSW LRC's proposal for a NSW Permission Rule was rejected, so UCPR 2005 (NSW) only requires that parties seek directions if intending to adduce party expert evidence at trial;
- NSW had a unique NSW Specific Disclosure Rule (2006) which required that party experts provide details of contingency fees or deferred payment schemes. There is no equivalent procedural rule in the CPR;
- The unique NSW Independence Rule (2006) continued to indirectly impose independence obligations by requiring that party experts comply with the 'code of conduct'. It further provided that an expert's report may not be admitted in evidence if the expert's report does not contain an acknowledgment that the expert has read the code of conduct and agrees to be bound by it. The English Independence Rule (CPR) on the other hand imposed independence obligations directly on party experts; and did not provide for an expert's report which fails to comply with CPR 35 to not be admitted;
- NSW had the unique NSW Concurrent Expert Evidence Power (2005); and
- NSW continued to retain, and expanded, the NSW CE Power (2006) whereas no English CE Power was incorporated into the CPR.

6.3.2 Conclusions

The following conclusions can be drawn from the data about the evolution of the NSW 'problems' and procedural law reforms.

Firstly, the true 'motor' of change for the NSW procedural law reforms to party expert evidence in December 1999 and 2006 was not to address the NSW 'problems' (mostly the 'problem' of bias) because those party expert rules reforms were only a part of a broader package of reforms to extend judicial case management in SCR 1970 (NSW).

Secondly, the earliest NSW power to limit the number of party experts was provided in 1999[1328] which was almost 60 years after the first similar English powers were provided in the 1930s. NSW showed no apparent interest in reforming procedural rules allowing the number of party experts to be limited. That lack of interest perpetuated the adversarial system principle of party autonomy in NSW.

Thirdly, the NSW 'problems' commenced evolving in relatively modern times (from the mid-20th century); had a short history; and the first major, Court-wide reforms in December 1999 took around six decades to be implemented.

Fourthly, the data on the evolution of the NSW 'problems' and procedural reforms indicates that the evolutionary concept of 'punctuated equilibrium' operated in NSW. This is demonstrated by the long period of relative 'calm' about the 'problems' between the 1940s/60s[1329] and the mid-1980s.[1330]

Fifthly, the NSW Rules Committee unilaterally implemented the major December 1999 NSW procedural law reforms with little (if any) prior consultation. None of the other major procedural law reforms in England, Victoria and NSW were made unilaterally by a Rules Committee. Even the later 2006 NSW procedural law reforms were made following consultation through the NSW LRC's very substantial inquiry into expert evidence and *Report 109*.

Sixthly, NSW implemented the first court-wide CE Power (1999 harmonised including on the court's own motion) which allowed a Court Expert to be appointed on the Court's

[1328] NSW Power to Limit Party Experts (1999 harmonised). England had similar powers from the 1930s – eg the English Power to Limit Party Experts (1932 New Procedure list only).
[1329] When the NSW 'problems' first arose.
[1330] When the initial bevy of reforms by Practice Notes commenced.

own motion.

Seventhly, the NSW reforms at least partly coevolved with the broader evolution of the civil justice system (including NSW civil trial procedure evolving further towards judge only civil trials and pre-trial active judicial case management evolving to make NSW civil procedure less adversarial).

Eighthly, many NSW procedural reforms were first implemented by ad hoc, List specific Practice Notes (rather than rules of court). That suggests the preferred NSW approach may have been to experiment with new procedural reforms in a List or Division before those reforms were more widely adopted; different Lists or Divisions had different 'problems'; the judges in charge of the different Lists or Divisions had different views about which (if any) reforms were necessary or desirable; and/or the NSW Rules Committee could not, or would not, implement Court-wide reforms quickly or at all.

Ninthly, the timing and scope of the December 1999 NSW reforms strongly suggests that those reforms evolved from Lord Woolf's 'Access to Justice' inquiry and the party expert reforms in CPR 35, though NSW 'cherry-picked' the CPR 35 reforms it liked and discarded those it disliked; and NSW adopted some unique reforms not in CPR 35.

Tenthly, the evolution of the NSW procedural reforms was strongly path dependent. This is demonstrated by the facts that the Permissive Party Expert Rule was largely maintained; not even the four NSW judges who were intensely critical of party experts seriously proposed that NSW should abandon the Permissive Party Expert Rule; and all of the NSW procedural reforms were limited to variations of the Permissive Party Expert Rule which were implemented by 'layering'.

Eleventhly, the following suboptimal outcomes persisted in NSW:

- the fundamentally flawed Permissive Party Expert Rule continued;
- the NSW CE Power (1970) and NSW Reference for Trial Power (1892-ongoing) were hardly ever used;[1331]
- the pre-trial disclosure of expert evidence only became mandatory in all NSW

[1331] See Chapter 5.5.

civil proceedings in 1999;[1332]

- there was no NSW Independence Rule before 1999;
- there was no NSW I&R Power before 1985; and
- there was no NSW Power to Limit Party Experts before 1999.

Twelfthly, the December 1999 and 2006 NSW reforms were preceded, and accompanied, by a unique period of intense extrajudicial criticism of party experts.

Thirteenthly, there have been no NSW informal institutions (rules) like the English Disclosure Power (1940s informal by Masters in personal injuries actions), the English Limited Expert Evidence Rule (1927) and the English Power to Limit Party Experts (1940s informal by Masters in personal injuries actions). Rather, all the NSW reforms were formal institutions (rules) in the form of rules of court or Practice Notes.

Fourteenthly, prior to the 'displacement' undertaken in December 1999 and 2006, Lord Mansfield's endorsement of the Permissive Party Expert Rule in *Folkes* left a lasting legacy;[1333] and narrowed choices[1334] in NSW, which limited the NSW procedural law reforms to 'layering' by which new institutions (rules) were attached to the Permissive Party Expert Rule to address the 'problems' by constraining the Permissive Party Expert Rule.

Lastly, it is very likely that legal evolutionary forces were operating in NSW.

6.4 Victoria

6.4.1 Analysis

The Permissive Party Expert Rule also applied in Victorian from at least the 1870/80s. There is however some data which points to scientific evidence not being often deployed in Victorian courts in or around the 1920s;[1335] and the 'problem' of excessive party experts in personal injuries actions not being as bad in Victoria as it was in NSW by the 1950s/60s.[1336]

The data in the literature indicates the evolution of the 'problems' in Victoria commenced in the mid-20th century, which (like NSW) was much later than in

[1332] The NSW Disclosure Power (1999 harmonised).
[1333] Thelan (n 167) 387-8; Pierson (n 163) Ch 1 (pp10-11).
[1334] North (n 175) 98; Thelan (n 167) 387.
[1335] Campbell (n 326); Campbell (n 833).
[1336] Comments by Gillard QC after Wallace (n 331) 140.

England.

The absence of any significant Victorian 'problems' prior to the first tranche of Victorian Party Expert Procedural Rules in 1883 indicates those 1883 Victorian rules were implemented because Victoria simply adopted most of the English Judicature Acts reforms (not a response to any actual 'problems' with party experts in Victoria).

Victorian (like NSW) never adopted the English 1930s reforms.

The earliest data about any actual Victorian 'problems' with party experts was the late-1920s discontent among scientific/medical experts about the use of expert evidence in the courts.[1337] As no changes were made to Victorian party expert procedure to address that discontent, Victorian scientists were not sufficiently powerful actors in the first half of the 20th century to achieve practical reforms.

The data shows that by the 1960s the 'problem' of surprise had evolved so as to attract the attention of Victorian law reformers. That occurred in 1964 when a Chief Justice's Law Reform Committee subcommittee considered whether a Victorian Disclosure Power should be implemented. The first Victorian Disclosure Power, which was implemented in 1968,[1338] was however swiftly revoked in 1969 in response to opposition from Victorian solicitors.[1339] That swift revocation of the first Victorian Disclosure Power demonstrates how powerful actors (as Victorian solicitors were in the late-1960s) can influence evolutionary paths and stymie evolutionary changes. The Victorian Disclosure Power (1968 personal injuries actions) is one of only two English, NSW or Victorian party expert reforms which was revoked because of opposition to it (the other being the 1974 NSW Practice Note[1340] which required the disclosure of medical evidence before the time required by the NSW Disclosure Rule (1972 mandatory in personal injuries actions) which was also abandoned after only a short time, likely because lawyers opposed it[1341]).

In the 1970s new 'Building Cases'[1342] and 'Commercial Causes' Lists[1343] were

[1337] Campbell (n 326); Campbell (n 833).
[1338] The Victorian Disclosure Power (1968 personal injuries actions).
[1339] 'Delays in the Supreme Court' (1967) 41 L Inst J 403, 'Supreme Court (Readiness for Trial) Rules 1968' (1969) 43 L Inst J 208.
[1340] Practice Note Common Law Division 1974 (NSW).
[1341] Cranston and others (n 348) 166; Practice Note 1975 (NSW).
[1342] Supreme Court (Building Cases) Rules 1972 (Vic).
[1343] Supreme Court (Commercial Causes) Rules 1978 (Vic).

established as the Victorian Supreme Court's first specialist, judge managed Lists. The scope of delays in Supreme Court civil proceedings at around that time was laid starkly bare in the Victorian LRC's 1976 *Delays in Supreme Court Actions* report.[1344]

Party expert rules reforms were made in 1983[1345] though they applied in non-jury, personal injury actions only.[1346] Those rules included the Victorian Disclosure Power (1983 personal injuries actions) and the Victorian Power to Admit an Expert Report As Evidence in Chief (1983 personal injuries actions). Unlike the equivalent English and NSW rules, those Victorian rules applied to personal injuries actions involving alleged medical negligence.

From 1986 party expert evidence in all Victorian Supreme Court civil proceedings was for the first time comprehensively regulated by O33 which covered most expert evidence in personal injuries proceedings and O44 which covered all other expert evidence.[1347] O33 was similar to the earlier O31A (applicable from 1983). O44, which was based on O38 of RSC 1965 as amended in 1974,[1348]contained similar requirements in relation to other expert witnesses. After a small number of minor changes were made in the 1990s and early 2000s,[1349] O44 was significantly amended in 2003[1350] to include the first Victorian Independence Rule[1351] and the first Victorian Expert Meeting Power.[1352] The Victorian Independence Rule (2003) was similar to the NSW Independence Rule (1999 harmonised) and the Victorian Expert Meeting Power (2003) was similar to the NSW Expert Meeting Power (1999 harmonised), indicating those Victorian rules evolved from NSW.

The Victorian CE Power (1996 Intellectual Property actions) was the first rule in England, NSW and Victorian which allowed a Court to appoint a Court Expert on its own motion.

From the 1980s to 2010 numerous Supreme Court of Victoria Practice Notes were

[1344] VLRC, *Report No 4* (n 480) [68].
[1345] Supreme Court (Medical Examination) Rules 1983 (Vic).
[1346] The scope of these rules was limited as only around a quarter of Victorian cases were non-jury cases: Cranston and others (n 348) [12.16].
[1347] General Rules of Procedure in Civil Proceedings 1986 (Vic).
[1348] Neil Williams, *Supreme Court Civil Procedure* (Butterworths 1987), para [17.33].
[1349] General Rules of Procedure in Civil Proceedings 1996 (Vic); Supreme Court (Chapter I Amendment No 23) 2003 (Vic).
[1350] Supreme Court (Chapter I Amendment No 23) 2003 (Vic).
[1351] Victorian Independence Rule (2003).
[1352] Victorian Expert Meeting Power (2003).

published to implement additional Party Expert Procedural Rules for specific List(s).[1353] That ad hoc approach was similar to NSW (though not to the same extent). Like NSW, the preferred Victorian approach may have been to experiment with new procedural reforms in a List or Division before being adopted Court-wide; different Victorian Lists or Divisions may have had different 'problems'; the judges in charge of the different Victorian Lists or Divisions may have had different views about which (if any) reforms were desirable; and/or the Victorian Rules Committees could not, or would not, implement Court-wide reforms quickly or at all.

A 2004 Victorian Practice Note[1354] provided the first Victorian Concurrent Expert Evidence Power and Victorian Power to Limit Party Experts, though only in the Commercial List.[1355]

In the late-2000s, Victorian civil procedure reforms were dominated by the recommendations made in the Victorian LRC's 2008 *Civil Justice Review Report*.[1356] That report resulted in Victoria adopting most of the NSW 2006 expert evidence reforms as part of a much larger package of civil justice reforms, though the Victorian reforms were uniquely implemented by legislation rather than rules of court.[1357] The legislative-based Victorian reforms included a unique Victorian Independence Rule (2010) which imposed direct statutory obligations on party expert witnesses to act honestly; cooperate; not mislead or deceive; narrow the issues in dispute; ensure costs are reasonable and proportionate; and minimise delay. The legislative-based reforms also gave the Court a unique statutory power to order that party experts provide compensation for loss and damage caused by any breach of the Victorian Independence Rule (2010).

Though a small number of senior Victorian judges have given extrajudicial speeches about problems with the Victorian civil justice system since the 1990s (including

[1353] Many of those Practice Notes applied to the expert-heavy Commercial and Building Lists eg Practice Note 1 1985 (Vic); Practice Note No 2 2001 (Vic); Practice Note No 1 2008 (Vic); Practice Note No 2 2009 (Vic); Practice Note 1 2010 (Vic); Practice Note 2010 (Vic); Practice Note No 10 2011 (Vic).
[1354] Practice Note No 4 2004 (Vic).
[1355] Victorian Court Expert Power (2004 Commercial List), Victorian Concurrent Expert Evidence Power (2004 Commercial List) and Victorian Power to Limit the Number of Party Experts (2004 Commercial List).
[1356] *Civil Justice Review Report* (n 42).
[1357] Civil Procedure Amendment Act 2012 (Vic) which inserted a new Part 4.6 into the Civil Procedure Act 2010 (Vic) in 2012. Considered in Kearney (n 551).

problems with specific types of cases),[1358] only one senior Victorian judge (Marks J) has directly criticised party experts in the extrajudicial literature.[1359]

6.4.2 Conclusions

The following conclusions can be drawn from the data about the evolution of the Victorian 'problems' and party expert reforms.

Firstly, the significant Victorian 'problems' commenced evolving in the mid-20th century. That, and the small amount of Victorian judicial criticism of party experts, indicates the Victorian 'problems' were more recent; and never as acute as the English or NSW 'problems'.

Secondly, the Victorian 'problems' were probably most pronounced in personal injuries actions (initially in the 1960s) and later in the expert-heavy Commercial and Building Lists.

Thirdly, the Victorian Party Expert Procedural Rules first evolved in personal injuries actions; were subsequently extended to the expert-heavy Commercial and Building Lists; and then finally extended to all types of actions

Fourthly, though there was a Victorian civil justice 'crisis' resulting from the high costs of, and delays to, civil proceedings in the mid-20th century, the data does not indicate that 'crisis' was the 'motor' of change for the modern Victorian Party Expert Procedural Rules reforms commencing in the 1980s. The 'motor' of change for the 2012 reforms was not to address the 'problems' per se as those reforms were part of a much larger tranche of civil procedure reforms.

Fifthly, the evolutionary concept of 'punctuated equilibrium' operated in Victoria in the 20th century as demonstrated by the long period of relative 'calm' about the 'problems'

[1358] eg Byrne J (see David Byrne, 'Victorian Supreme Court Building Cases - List Provisions for Referees' (1993) 30 Australian Construction Law Newsletter 20; David Byrne, 'Promoting the efficient, thorough and ethical resolution of commercial disputes: A judicial perspective' (LexisNexis Commercial Litigation Conference, Melbourne); David Byrne, 'The future of litigation of construction law disputes' (2007) 23 BCL 398; David Byrne, 'Building Cases – A New Approach Practical Role of the Barrister Under Practice Note No 1 of 2008' (Victorian Bar 9 April 2008)); Croft J (see Justice Clyde Croft, 'Case management in the Commercial Court and under the Civil Procedure Act ' (2010) Vic J Schol 26); Habersberger J (see David Habersberger, 'The Building Cases List of the Supreme Court of Victoria (Address to the Building Dispute Practitioners' Society Inc 16 November 2005)') and Nettle J (see Nettle (n 281)).

[1359] Marks (n 39).

before the 1960s; and between the 1960s[1360] and the mid-1980s (when the first significant reforms were made[1361]).

Sixthly, the major 2012 Victorian party expert reforms were the result of a major civil justice reform inquiry which was undertaken by the Victorian LRC[1362] in the shadows of Lord Woolf's mid-1990s 'Access to Justice' inquiry; and the 2006 NSW reforms. Those significant Victorian reforms largely evolved from the NSW 2006 reforms (which themselves evolved from the English CPR 35 reforms).

Seventhly, the Victorian reforms at least partly coevolved with the broader evolution of the civil justice system (including Victorian civil trial procedure evolving further towards judge only civil trials and pre-trial active judicial case management evolving to make Victorian civil procedure less adversarial).

Eighthly, the evolution of the 'problems' and the Victorian reforms was strongly path dependent. This is demonstrated by the facts that there has never been a Victorian proposal to abandon party experts;[1363] and all of the Victorian Party Expert Procedural Rules reforms have been limited to variations of the Permissive Party Expert Rule implemented by 'layering'.

Lastly (unlike NSW) the Victorian party expert reforms were not accompanied by any significant extrajudicial criticism of party experts. On the whole, Victorian judges had a relaxed attitude to the 'problems'.

6.5 Comparative analysis

6.5.1 Evolutionary similarities between England, NSW and Victoria

The evolution of the procedural reforms in England, NSW and Victoria were strongly path dependent as a result of Lord Mansfield's approval of the Permissive Party Expert Rule, which had 'a continuing influence upon the shape of the present',[1364] narrowed

[1360] When the Victorian Disclosure Rule (1968 personal injuries actions) was implemented then quickly abandoned.
[1361] Victorian Disclosure Power (1983 personal injuries actions); Victorian Power to Admit an Expert Report As Evidence in Chief (1983 personal injuries actions); Victorian Disclosure Rule (1986 non-personal injuries actions).
[1362] *Civil Justice Review Report* (n 42).
[1363] Marks J unsuccessfully advocated for that: Marks (n 39).
[1364] David (n 146) 206.

choices,[1365] and left a lasting legacy[1366] in England, NSW and Victoria. That had three outcomes in all three jurisdictions. Firstly, Rules Committees were generally unwilling, or unable, to make significant changes to the Permissive Party Expert Rule (though it was suboptimal).[1367] Secondly, most of the important party expert reforming institutions (rules) were made following a major law reform inquiry conducted outside the respective Court[1368] eg Lord Woolf's mid-1990s 'Access to Justice' inquiry (which resulted in CPR 35), the NSW LRC's inquiry (which resulted in the 2006 NSW reforms)[1369] and the Victorian LRC's inquiry[1370] (which resulted in the 2012 Victorian reforms made by amendment of the CP Act 2010 (Vic). Thirdly, the procedural law reforms in all three jurisdictions were largely limited to 'layering' by which new institutions (rules) were attached to the suboptimal Permissive Party Expert Rule to address the 'problems' by constraining that suboptimal rule. The result is that the Permissive Party Expert Rule continued in each of the three jurisdictions (prior to the 'displacement' of that rule in each jurisdiction), but incremental 'layering' changed that rule so that it was constrained by a combination of one or more the following institutions (rules):

- Powers to Limit Party Experts;
- Disclosure Powers;
- Powers to Admit Expert Reports As Evidence in Chief (with or without attending the trial);
- Expert Meeting Powers;
- Concurrent Expert Evidence Powers;
- CE Powers;
- Permission Rules;
- Independence Rules; and
- SJE Powers.

The evolution of the party expert reforms in England, NSW and Victoria was

[1365] North (n 175) 98; Thelan (n 167) 387.
[1366] Thelan (n 167) 387-8; Pierson (n 163) Ch 1 (pp10-11).
[1367] The December 1999 NSW reforms were an exception.
[1368] Again, the December 1999 NSW reforms were an exception.
[1369] Uniform Civil Procedure Rules (Amendment No 12) 2006 (NSW).
[1370] *Civil Justice Review Report* (n 42).

genealogical rather than teleological[1371] because the party expert procedural rules were linked to, and continued to be shaped by, the originating context (ie Lord Mansfield's approval of the Permissive Party Expert Rule in *Folkes*); and the past circumstances of judges being reluctant to depart from the established adversarial system.

As expected by Deakin and Wilkinson, suboptimal rules and outcomes persisted and survived in England, NSW and Victoria for long periods.[1372] The fundamentally flawed Permissive Party Expert Rule is the most prominent, and persistent, suboptimal outcome that has survived in all three jurisdictions. Other persistent suboptimal rules and outcomes include:

- the hardly ever used CE Power, which remained in the English rules of court for around 60 years until the 1990s;[1373] and continues in an expanded form in NSW and Victoria (though hardly ever used there either);
- Assessor Powers, Expert Assistance Powers, I&R Powers and Reference for Trial Powers which were hardly used (yet remained on the books);
- the inefficient outcome that permitted the 'problem' of surprise to continue for some types of non-personal injuries actions in England until the 1980s,[1374] in Victoria until 1986[1375] and in NSW until 1999;[1376]; and
- the Independence Rule being first developed in 1993[1377] as an informal rule until it was transformed into a formal rule of court in the late-20th and early-21st centuries.

The 'punctuated equilibrium' concept in which long periods of little change are punctuated by a sudden period of major change(s) has operated in England, NSW and Victoria. There have been only two periods of major changes in England: the 1930s and the 1990s. Both NSW and Victoria have experienced only a single period

[1371] Simon Deakin and Frank Wilkinson, *The Law of the Labour Market: Industrialization, Employment, and Legal Evolution* (OUP 2005) 33.
[1372] Ibid 33.
[1373] A Court Expert Power was not included in the CPR.
[1374] The Rules of the Supreme Court (Amendment No 2) 1986 which implemented a new O38 rr2A and 3 and O38 r38(3).
[1375] General Rules of Procedure in Civil Proceedings 1986 (Vic) put in place the Victorian Disclosure Power (1986 personal injuries actions) and the Victorian Disclosure Power (1986 non-personal injuries actions).
[1376] Supreme Court Rules (Amendment No 337) 1999 (NSW).
[1377] The earlier English Independence Rule (1928) was posited but never developed further.

of major change: 1999 to 2006 for NSW and 2012 for Victoria.

In all three jurisdictions, many of the earliest modern party expert reforms addressed the 'problems' in personal injuries actions.

The 'problems' and the reforming Party Expert Procedural Rules only reached an equilibrium when the extensive expert evidence reforms of the late-20th and early 21st centuries were made,[1378] making it more likely that each of the three jurisdictions were evolutionary systems until then.[1379]

In England, NSW and Victoria a number of the reforms, which were themselves evolutionary innovations, became dead ends and fell into desuetude, including the CE Powers, Assessor Powers, Expert Assistance Powers, I&R Powers and Reference for Trial Powers.

In England and NSW 'institutional entrepreneurs' such as Tomlin, Cresswell and Sperling JJ played important evolutionary roles.

The strong path dependency established by Lord Mansfield's approval of the Permissive Party Expert Rule, and the long history of earlier evolutionary reforms becoming dead ends and falling into desuetude (largely because judges did not exercise discretions granted to them under those reforms), raises the possibility (perhaps likelihood) that Courts will not exercise discretions under the late-1990s and 2000s reforms; or punish parties and party experts who contravene their obligations under those rules (which is essential part of the functioning of institutions).[1380]

In the end in all three jurisdictions, the strong path dependency meant that the 'problems' could not be adequately addressed by gradual institutional change (including 'layering'); and were ultimately only addressed by 'displacement'.

The post-reforms extrajudicial criticisms of party experts suggests that some of the 'problems' continue in England and NSW.

6.5.2 Evolutionary differences between England, NSW and Victoria

The 'problems' evolved at different times and over different timeframes. The evolution

[1378] CPR 35, UCPR 2015 (NSW) and CP Act 2010 (Vic).
[1379] Lewis and Steinmo, 'How Institutions Evolve' (n 208) 320-321.
[1380] North (n 186) 4.

of the 'problems' in England (as recorded in the case reports and contemporaneous literature) can be traced back at least as far as the 1820s *Severn* litigation,[1381] whereas the earliest Australian 'problems' are from the mid-20th century. Also the earliest 'problem' in England was bias whereas in Victoria the earliest significant 'problem' was surprise.

Neither NSW nor Victoria adopted the English 1930s and 1940s reforms and the NSW and Victorian 1960s and 1970s reforms developed independently of England. That mid-20th century disconnect between the evolution in NSW and Victoria, and England, is particularly interesting because at that time NSW and Victoria generally followed the English lead.

The English procedural rules reforms were overwhelmingly made by formal Court-wide rules of court whereas many reforms in NSW (and to a lesser degree, in Victoria) were undertaken on an ad hoc basis, at least initially, by less formal Practice Notes which often operated only in a single Court Division or List.

The English and Victorian evolutionary paths have involved minimal extrajudicial criticism of party experts[1382] whereas the NSW evolutionary path is unique insofar as it involved substantial and sustained extrajudicial criticism by four prominent NSW Supreme Court judges.

Victoria made its most significant procedural law reforms by legislation[1383] (which imposed direct statutory obligations on party experts and made party experts liable to pay compensation for contraventions of their obligations) whereas the bulk of the most recent English and NSW reforms were made by rules of court.

The English 'problems' were prominent (perhaps most acute) in patent actions and the English Party Expert Procedural Rules reforms included rules tailored to patent actions. There have been no NSW or Victorian 'problems' in patent actions

Victorian Supreme Court judges rejected a SJE Power when proposed in the 2000s.[1384] That is in stark contrast to English and NSW judges who strongly supported

[1381] See Chapter 4.2.
[1382] Lord Woolf was the most notable English exception and Marks J was the most notable Victorian exception (see Marks (n 39)).
[1383] Civil Procedure Act 2010 (Vic) as amended by Civil Procedure Amendment Act 2012 (Vic).
[1384] *Civil Justice Review Report* (n 25) 506.

them.[1385]

In the 1970s-1980s English judges and Rules Committees struggled with imposing an English Disclosure Power/Rule in personal injuries actions involving medical negligence claims because it would require the disclosure of the lay evidence which the medical experts were briefed with.[1386] NSW and Victoria did not struggle to the same degree.

Unlike the English 'problems' which in part coevolved with the rise in importance of science and scientists during the Industrial Revolution period, the evolution of the NSW and Victorian 'problems' did not coevolve in any significant way with any rise in importance of science and scientists.

The end result of the party expert reforms leaves unexplained and unnecessary inconsistencies between England, NSW and Victoria, including the following:

- the Victorian Independence Rule (2010) is unique and more expansive;
- the English Permission Rules[1387] are unique;
- the NSW Independence Rule (2006) is unique because it operates indirectly through an expert witness 'code of conduct' (whereas the English and Victorian Independence Rules operate directly on party experts);
- NSW and Victoria continue to have a CE Power (while England does not);
- Victoria does not have a Plaintiff's Expert Report Rule similar to England and NSW; and
- the NSW Disclosure Rule (2006) is unique and requires more expansive disclosure of contingency fees and deferred payment arrangements.

6.5.3 Coevolution

The legal evolutionary theory concept of 'coevolution' was discussed in Chapter 1.5.2.

In England, NSW and Victoria, the 'problems' and the party expert procedural reforms coevolved with the broader evolution of the civil justice system (including civil trial procedure evolving further towards judge only civil trials and pre-trial active judicial

[1385] In particular Lord Woolf.
[1386] *Rahman v Kirklees AHA* [1980] 1 WLR 1244; *Naylor v Preston Area Health Authority* [1987] 1 WLR 958; *Wilsher v Essex Area Health Authority* [1987] QB 730.
[1387] English Permission Rule (CPR) and English Permission Rules (2013).

case management evolving to make civil procedure less adversarial). The shift from judge and civil jury to judge only civil trials may have amplified or heightened the judiciary's awareness of the 'problems' because the trial judge in a judge only trial has to resolve any contradictory party expert evidence and provide reasons for doing so.

In all three jurisdictions, the 'problems' and the party expert procedural reforms also at least partly coevolved with the civil justice 'crises' that developed in each jurisdiction.

Cashman has made that point that 'Civil justice reform is symbiotic in nature: the Woolf reforms were in part based on civil justice developments in other jurisdictions, including Australia'.[1388] The data shows that NSW and Victoria adopted many English reforming Party Expert Procedural Rules (though not in identical terms); and the procedural reforms in NSW and Victoria in the late-1990 and 2000s were intrinsically linked to Lord Woolf's 'Access to Justice' inquiry and the party expert reforms in CPR 35. The Concurrent Expert Evidence Power is a reform which was developed in Australia and later adopted in England.[1389] The English CE Power (1934-1998) is an interesting example of an English reform which was adopted by both NSW and Victoria decades after it was first implemented in England; and continues in NSW[1390] and Victoria[1391] in an expanded form long after it was abandoned in England. It is at least arguable that the evolution of the late-19th and early-20th century procedural law reforms in England, NSW and Victoria was continuous, though asynchronous with England's CPR 35 reforms in the late 1990s; NSW's UCPR 2005 (NSW) reforms in December 1999 and 2006; and Victoria's Civil Procedure Act reforms in 2012.

The Australian literature on the 'problems' indicates that the English 'problems' may have been 'adopted' by NSW in the late-1990s and early-2000s, when no significant 'problems' actually existed in NSW. The four NSW Supreme Court judges who were

[1388] Peter Cashman, 'The Cost of Access to Courts' (Confidence in the Courts Canberra, 9-11 February 2007), section 2.1 (though Cashman doesn't explain which Australian development(s) the Woolf reforms took into account).
[1389] English Concurrent Expert Evidence Power (2013). The Concurrent Expert Evidence Power may in fact have first been developed at least partly in England – see English Concurrent Expert Evidence Power (1960s ORs only by consent). Edmond 'Secrets of the Hot Tub' (n 108) 58 suggests that concurrent evidence techniques emerged during the 1970s from experiments in the Australian Competition Tribunal.
[1390] The NSW Court Expert Power (1999 harmonised including on the Court's own motion) and the NSW Court Expert Power (2006).
[1391] s65M of the Civil Procedure Act 2010 (Vic) provided the Victorian Court Expert Power (2012 harmonised).

critical of party experts at that time appear to have used the English 'punctuation' which allowed Lord Woolf's sweeping changes in England as a basis to press for reforms in NSW.

England, NSW and Victoria directly assisted with each other's reforms. Some key English and Australian law reformers undertook studies tours to the other jurisdiction to discuss the other jurisdiction's reforms. For example Jackson LJ undertook two 'civil justice reform' related study tours to Australia to discuss Australia's concurrent evidence process;[1392] and the Victorian LRC's Commissioner Cashman travelled to London in the mid-2000s to meet with judicial officers, the legal profession and consumer organisations about the impact of the English civil procedure reforms.[1393] There were also cross-jurisdictional discussions, including the 2004 debate between two senior Australian judges (Heerey J and Davies J) in the *Civil Justice Quarterly*[1394] which Sir Robin Jacob 'refereed';[1395] and May LJ and Hallett J's papers on English party expert evidence which were delivered to Australian conferences in 2004.[1396]

Those 'coevolutionary' features fall within both von Wangenheim's theory that legal evolution need not be confined to one country and one country's legal rules can coevolve with another country's legal rules;[1397] and Deakin and Wilkinson's description of 'coevolution' occurring when systems reciprocally influence each other.[1398]

6.6 Conclusions

This overarching and deeper Chapter 6 has analysed the data on the 'problems' in Chapter 4, and the key Party Expert Procedural Rules in Chapter 5, from an overarching evolutionary theory of institutional change perspective (having regard to the context set out in Chapter 3) to explain the nature of the legal changes in the 'problems' and the procedural law responses; the relationship which those changes have with each other and the wider environment, including identifying any interlinked

[1392] Jackson (n 260).
[1393] *Civil Justice Review Report* (n 25) 53.
[1394] Davies, 'Current issues -expert evidence' (n 46); Heerey (n 24) ; Geoffrey L Davies, 'A Response to Peter Heerey' (2004) 23 CJQ 396; Heerey (n 24) 394-5 titled "Addendum" in which Heerey J replied to Davies J; Jacob, 'Court Appointed Experts v Party Experts: Which is Better ?' (n 4).
[1395] Jacob, 'Court Appointed Experts v Party Experts: Which is Better ?' (n 4).
[1396] Lord Justice May, 'The English High Court and Expert Evidence' (2004) 6 TJR 353; Hon Mrs Justice Heather Hallett, 'Expert witnesses in the courts of England and Wales' (2005) 79 ALJ 288.
[1397] von Wangenheim (n 155) 739.
[1398] Simon Deakin and Frank Wilkinson, *The Law of the Labour Market: Industrialization, Employment, and Legal Evolution* (OUP 2005) 32.

causal processes and the interaction of historical factors; why civil procedure choices were made at different times; and how different choices may have had different results.

The analysis in this Chapter 6 demonstrates the following overarching conclusions:

Firstly, there are many evolutionary similarities, and some evolutionary differences (those differences including temporal differences, possible different 'motors' of change and unexplained and unnecessary inconsistencies between the reforms in England, NSW and Victoria).

Secondly, the 'problems', and the late-1990s/early-2000s party expert reforms, in England, NSW and Victoria were in many respects 'coevolutionary'; and possibly continuous (though asynchronous).

Thirdly, the evolution of the procedural reforms in England, NSW and Victoria were strongly path dependent as a result of Lord Mansfield's approval of the Permissive Party Expert Rule which had a strong and continuing influence on each jurisdiction, left a lasting legacy and narrowed choices, including:

- the Rules Committees in all three jurisdictions were generally unwilling, or unable, to make significant changes to the Permissive Party Expert Rule;[1399]
- many earlier evolutionary innovations (such as Assessor Powers, I&R Powers and CE Powers) fell into desuetude and became 'dead letters';
- suboptimal outcomes persisted (including the suboptimal Permissive Party Expert Rule); and
- the procedural law reforms prior to the 'displacement' which occurred in the late-20th and early-21st centuries (when the party expert procedural laws were re-written) were limited to 'layering'.

Lord Mansfield's civil procedure choice in *Folkes* was made by chance in part because of the unique circumstances in *Folkes*. A different choice by Lord Mansfield in *Folkes*, or a civil procedure choice by another judge, may have had vastly different evolutionary results.

The evolutionary past of the 'problems' and the procedural reforms is important

[1399] The December 1999 NSW reforms were an exception.

because it is likely to explain, inform or predict their future.[1400]

[1400] Zamboni (n126) 534.

Chapter 7. Conclusions

This research has analysed the data and the issues, including the 'problems' (and their negative impacts on the justice system), solely from the perspective of judges. It has not advanced the 'problems' as objective problems. Also, references in this thesis to the magnitude of the 'problems', or their impact on the civil justice system (such as the acuteness of the 'problems'), are not objective references, but rather also adopted and reflected judges' perceptions of the magnitude and impact.

That approach is considered sound because, by virtue of their central and unique position in the common law adversary system, judges have authority to determine that the 'problems' exist; and the appropriate responses to the 'problems'.

The hypothesis for this research was that the acute[1401] 'problems' with the use and perception of party expert witnesses which had evolved by late-20th century could have been avoided if civil procedure rule makers had made better civil procedure rule design choices.

This research set out to test that hypothesis by analysing the following normative research questions:

Question 1: when did the 'problems' evolve into acute 'problems' in England, NSW and Victoria?

Question 2: how and when were the Party Expert Procedural Rules made (or amended) to address the 'problems' before they became acute?

Question 3: could the acute 'problems' have been avoided if different, or earlier, civil procedure rules were put in place (and if not, why not)?

Chapter 3 set out the all-important context for the evolution of the 'problems' and the procedural rules reforms. As indicated in Chapter 3.1, temporal context is important in social science research and historical analysis; data can be distorted if disconnected from temporal context;[1402] and sense can only be made of changes to institutions (rules) when the changes are considered in the context of a larger temporal

[1401] See n 6 as to the meaning of 'acute'.
[1402] Pierson (n 163) 1. See also Paul Pierson, 'Not Just What, but When: Timing and Sequence in Political Processes' (2000) 14 Studies in American Political Development 72.

framework.[1403] The Chapter 3 context allowed the analysis in the later Chapters to incorporate an element of contextual analysis.

The Chapter 4 and Chapter 5 data has shown that the evolution of the 'problems', and the procedural law responses, in England has a long history commencing in the early-19th century; whereas NSW and Victoria's history commenced much later and is much shorter. Those Chapters contain important data about the desuetude of the discretionary powers which English, NSW and Victorian judges had to address the 'problems'.

The Chapter 4 data demonstrates that the English 'problems' were most prominent in the 19th century (in patent actions in particular). Other than the 'Access to Justice' inquiry and reports themselves, there is no data which persuasively shows that the 'problems' were acute at the time of the mid-1990s 'Access to Justice' inquiry. In fact, the data strongly indicates there were other causes of the civil justice 'crisis'.

The Chapter 4 data about the NSW 'problems' before 1999 is on the whole relatively benign; and does not indicate that the 'problems' were a significant cause or contributor to cost or delay in NSW. The principal data pointing to the NSW 'problems' (in particular the 'problem' of bias) being acute is the extrajudicial literature authored by four NSW Supreme Court judges from May 1999 and continuing into the 2000s. When all of the NSW data is objectively considered, including the data about the desuetude of the NSW powers (which could have been used to avoid the 'problems') and an objective analysis of the trustworthiness of NSW extrajudicial criticisms of party experts,[1404] the Chapter 4 data demonstrates the 'problems' in NSW were not acute in the late-1990s/early-2000s; and were never as bad as England's 'problems' or the NSW extrajudicial criticisms indicated.

The analysis in this research does not support the bulk of the extrajudicial literature about the 'problems', including Lord Woolf's criticisms and the criticisms of the four NSW Supreme Court judges from May 1999 and continuing into the 2000s.

The Chapter 4 data about the Victorian 'problems' demonstrates that, though there

[1403] Thelan (n 110) 296. Institutions are discussed in Chapter 1.5.3.
[1404] An objective assessment of the trustworthiness (or accuracy) of NSW extrajudicial criticisms of party experts is detailed in Chapter 4.3.4.

were some ‘problems’ in Victoria (particularly in personal injuries actions), the Victorian ‘problems’ were never acute at all; and the Victorian Supreme Court judges on the whole had a comparatively relaxed attitude to the ‘problems’.

Chapter 5 shows that English Party Expert Procedural Rules have been made at least partly to address the ‘problems’ as far back as the 19th century Judicature Acts reforms. The 1930s was a distinct period of English reform which included the first discretionary powers to appoint a Court Expert and limit party experts. The post-1930s English reforms largely involved the difficult expansion of the English Disclosure Power from an informal power exercised by consent to a mandatory, formal rule in the English rules of court.

Chapter 5 also shows that NSW Party Expert Procedural Rules have been made to address the ‘problems’ since the 1960s (initially in personal injuries actions), with a period of major ad hoc reform in the 1980s and late-1990s. Unlike England where most Party Expert Procedural Rules were implemented through rules of court, many NSW and Victorian reforms were first implemented through less-formal Practice Notes.

The overarching and deeper analysis in Chapter 6 indicates that different, or earlier, civil procedure rules would not have avoided the ‘problems’ of the late-1990s (whether or not the ‘problems’ were acute) for three reasons.

The first reason is that many of the party expert reforms of the late-1990s and early-2000s are fundamentally inconsistent with the civil jury mode of trial which involves one continuous oral hearing at which all the evidence is adduced (including oral evidence from party expert witnesses); and continued until the mid to late 20th century.

The second reason is that many of the party expert reforms of the late-1990s and early-2000s would have been impractical (and unlikely to work) before judicial case management powers were widely available in the late-1980s/early-1990s because those reforms were dependent on early pre-trial directions about party expert evidence.

The third (and perhaps most important) reason is the long and established history of desuetude of the substantial party expert discretionary powers available to judges from the 18th and 19th centuries (which could have been used to avoid party experts

altogether and/or to address the 'problems') strongly indicates that judges would not have used any different, or earlier, discretionary powers granted to them. The history which is analysed in this research shows two things very clearly: Lord Mansfield's approval of party experts and the Permissive Party Expert Rule in *Folkes* had a lasting legacy well into the 20th century, including the continuation of the suboptimal Permissive Party Expert Rule and narrowed choices; and judges were prisoners of the adversarial civil justice system path that they had grown accustomed to and long trodden.[1405]

Future research topics

As discussed in Chapter 1.7.2, the bulk of the literature is premised on, or assumes, that the 'problems' are serious (or acute) legal problems which adversely impact on the civil justice system. There are a small number of academics and judges who do not accept that premise or assumption. Edmond for example posits that as long as judges can recognise the 'problem' of bias, they can deal with it and it should not therefore be regarded as a serious problem;[1406] and in the absence of much empirical information or theorising about the 'problems' of party expert bias, it is possible that they are not particularly serious problems.[1407]

This research also indicates that Rules Committees and 'Council of the Judges' procedures may not be able to address systemic problems with the civil justice system because judges are themselves prisoners of that system.

Undertaking further empirical and theoretical research about the 'problems', and the limitations of the Rules Committees and 'Council of the Judges' procedures to address system problems, are worthy topics for future research for the following reasons.

Firstly, the little empirical data that exists about the 'problems', including Freckelton's 1999 empirical study, is both problematic and now out of date. Any further empirical research should be based on a methodology which avoids the problems with that 1999 empirical study. Any empirical or theoretical research into judicial attitudes towards party experts also needs to be cognisant of the institutional commitments which judges are likely to have to their courts and legal institutions, as well as other judicial

[1405] See Lord Macmillan, *Law & other things* (CUP 1937), 34-35
[1406] Edmond, 'Judging Surveys' (n 100) 105.
[1407] Edmond, 'Secrets of the Hot Tub' (n 108) 80.

sensitivities, which may encourage judges to blame others involved in the legal system for the legal system's failures and problems.[1408]

Secondly, complying with many of the most recent Party Expert Procedural Rules probably increases costs, so they should only be continued if there is empirical data demonstrating they actually, and materially, improve access to justice so as to justify those costs.

Thirdly, this research indicates that the 'problems' may not have been as acute as Lord Woolf and other senior judges indicated they were in the 1990s and 2000s.

Fourthly, the strong path dependency established by Lord Mansfield's approval of the Permissive Party Expert Rule which continues, and the history of the 'problems' and reforms to address them, raises the possibility (perhaps likelihood) that the recent reforms will be undermined (or become ineffective, non-functional or brought into disrepute) because Courts will not exercise the discretions granted to them; or punish parties and party experts who contravene their obligations (which is essential part of the functioning of institutions).[1409] Further research into the exercise of judicial discretions, and enforcement of party and party experts' obligations, would accordingly be useful.

Finally, the evolution of party experts analysed in this research suggests that party experts will continue to play a major (perhaps even an increasing) role in civil litigation; and the judicial criticism of party experts (which continues to date)[1410] indicates that some of the 'problems' continue and further party expert reforms may be required. As Lady Justice Sharpe said in 2016 'No system is ever perfect, and we mustn't be complacent.'[1411]

[1408] Chapter 2.4 discusses those types of the judicial institutional commitments and sensitivities.
[1409] North (n 186) 4; Hodgson (n 186) 15.
[1410] eg Hallett (n 57); Gross (n 114); The Hon Justice Peter McClellan, 'Contemporary Challenges for the Justice System— Expert Evidence' (Australian Lawyers' Alliance Medical Law Conference (20 July 2007)); *Civil Justice Review Report* (n 42) 485 (which records that a number of Victorian judges thought bias remained a 'problem' even after there was an expert code of conduct); The Rt. Hon. Lady Justice Heather Hallet, 'Objectivity in an adversarial system' (2020) 88 Medico-Legal Journal 114.
[1411] Sharpe (n 115).

Table 1 List of English Party Expert Procedural Rules

Rules	Source of the power or rule
Assessor Powers	
English Assessor Power (1873-1998)	Various
English Assessor Power (1883-1949 patent actions)	Various[1412]
English Assessor Power (CPR)	CPR 35.15; Practice Direction 35, [10.1-10.4]
Concurrent Expert Evidence Powers	
English Concurrent Expert Evidence Power (2013)	Practice Direction 35-Experts and Assessors, [11.1][1413]
CE Powers	
English CE Power (1934-1998)	RSC 1883, O37A; RSC 1965, O40
Disclosure Power/Rules	
English Disclosure Power (1936 patent actions only)	RSC 1883, O53A r21A(2).
English Disclosure Power (1940s informal by Masters in personal injuries actions)	Recorded in *The Annual Practice 1949*.[1414]
English Disclosure Rule (1954 collisions actions only)	RSC 1883, O37 r1E(1)(b); RSC 1965, O38 r6(1)
English Disclosure Rules (1967 disclosure encouraged only)	Various Practice Directions[1415]
English Disclosure Power (1974 mandatory for medical evidence in personal injuries actions)	RSC 1965, O38 r37.
English Disclosure Power (1974 discretionary)	RSC 1965, O38 rr37 and 38.
English Disclosure Rule (1980 automatic directions)	RSC 1965, O25 r8.
English Disclosure Power (1987 harmonised all actions)	RSC 1965, O38 r37.
English Disclosure Rule (CPR)	CPR 35.5 and 35.13
Expert Assistance Power	
English Expert Assistance Power (1852-1998 Chancery chambers matters only)	Master in Chancery Abolition Act 1852, s42; RSC 1883, O55 r19; RSC 1965, O32 r16
English Expert Assistance Power (1949-ongoing patent actions)	Patents Act 1949, s84(2); RSC 1883, O37A r12; RSC 1965, O104 r11; Senior Courts Act 1981, s70(3)

[1412] Patents, Designs, and Trade Marks Act 1883, s28; Patents and Designs Act 1907-1942, s31. The power was available until 1949 when it was not included in the Patents Act 1949.
[1413] Inserted by *60th Update- Practice Direction Amendments* (2013).
[1414] *The Annual Practice 1949* (n 963), 517-518.
[1415] Practice Direction (PDAD Divorce Expert Evidence) [1967] 1 WLR 1240; Practice Direction (Official Referees) 1968; Practice Direction (Admiralty Evidence of Expert Witnesses) [1968] 1 WLR 312.

Expert Meeting Power	
English Expert Meeting Power (1980s ORs by party consent)	Various[1416]
English Expert Meeting Power (1986 non-personal injuries actions)	RSC 1965, O38 r38(3).
English Expert Meeting Power (1986 patent actions only)	RSC 1965, O104 rr13 and 14.
English Expert Meeting Power (1987 harmonised all actions)	RSC 1965, O38 r38.
English Expert Meeting Power (CPR)	CPR 35; Practice Direction 35-Experts and Assessors, [9.1-9.8]
Independence Rules	
English Independence Rule (1928)	*Graigola*.[1417]
English Independence Rule (1993)	*The 'Ikarian Reefer'*.[1418]
English Independence Rule (CPR)	CPR 35.3
I&R Power	
English I&R Power (1873-1998)	Various[1419]
Plaintiff's Expert Report Rule	
English Plaintiff's Expert Report Rule (1989 personal injuries actions only)	RSC 1965, O18 r12(1A) –(1B).
Permission Rules	
English Permission Rule (1954 collisions actions only)	RSC 1883, O37 r1E(1)(b); RSC 1965, O38 r6(1)
English Permission Rule (1974)	RSC 1965, O38 r36.
English Permission Rule (CPR)	CPR 35.4
English Permission Rule (2013)	CPR 35.4
Power to Admit an Expert Report As Evidence In Chief	
English Power to Admit an Expert Report As Evidence In Chief (1954 affidavit evidence)	RSC 1883, O37 r1A.
English Power to Admit an Expert Report As Evidence In Chief (1986 specialist non-personal injuries divisions)	RSC 1965, O38 r2A.
Powers to Direct a Trial without a Jury	
English Power to Direct a Trial without a Jury (1883)	RSC 1883, O36 r5; RSC 1883, O36 r2;[1420] RSC 1965, O33 r2
English Power to Direct a Trial without a Jury (1883-1949 patent actions)	Various.[1421]
Powers (Rules) to Limit Party Experts	

[1416] Woolf and Williams (n 516) 232. Newey (n 985); Dyson (n 985) 343; *The Supreme Court Practice 1999*, 678.
[1417] *Graigola Merthyr Co v Swansea Corporation* (1928) 1 Ch 31.
[1418] *The Ikarian Reefer* (per Cresswell J) (n 106) 81-82.
[1419] Judicature Act 1873, s57; Arbitration Act 1889, s13; Supreme Court of Judicature (Consolidation) Act 1925, s88; Administration of Justice Act 1956, s15; RSC 1965, O36 rr8 and 10(2) as inserted by The Rules of the Supreme Court (Amendment No 2) 1982.
[1420] As amended in 1925 by Rules of the Supreme Court (No 2) 1925.
[1421] Patents, Designs, and Trade Marks Act 1883; Patents and Designs Act 1907-1942, s31; Patents Act 1949, s84(4).

and Expert Evidence	
English Limited Expert Evidence Rule (1927)	*Graigola*.[1422]
English Power to Limit Party Experts (1932 New Procedure list only)	RSC 1883, O38A r8(2)(h)
English Power to Limit Party Experts (1936 patent actions only)	RSC 1883, O53A r21A(2).
English Power to Limit Party Experts (1937 summons for directions)	RSC 1883, O30 r2(2)(e).
English Power to Limit Party Experts (1940s informal by Masters in personal injuries actions)	This power is recorded in *The Annual Practice 1949*.[1423]
English Power to Limit Party Experts (1954-1998)	RSC 1883, O37 r1A; RSC 1965, O38 r4
English Limited Expert Evidence Rule (1980 automatic directions)	RSC 1965, O25 r8.
English Limited Expert Evidence Rule (CPR)	CPR 35.1
Reference for Trial Power	
English Reference for Trial Power (1873-1998)	Various[1424]
SJE Power	
English SJE Power (1920s informal ORs by consent)	Various[1425]
English SJE Power (CPR)	CPR 35.7
Specific Disclosure Rules	
English Specific Disclosure Rule (CPR)	CPR 35.5 and 35.10
Miscellaneous	
English Directions Power (1895 Commercial Causes)	Commercial Causes Notice, rule 8[1426]

[1422] *Graigola Merthyr Co Ltd v Swansea Corporation* (1927) WN 30, 71 Solic J Wkly Report 129, 163 LT 116
[1423] *The Annual Practice 1949* (n 963) 517-518.
[1424] Judicature Act 1873, s57; Arbitration Act 1889, s14; Supreme Court of Judicature (Consolidation) Act 1925, s89, RSC 1883 O36 r2; Administration of Justice Act 1956, s15; RSC 1965, O36 rr3 and 10(1) inserted by The Rules of the Supreme Court (Amendment No 2) 1982.
[1425] Referred to in Newbolt (n 457); Reynolds, *Caseflow Management* (n 376) 76; Reynolds (n 720).
[1426] Judges of the Queen's Bench Division, *Commercial Causes Notice* (1895).

Table 2 List of NSW Party Expert Procedural Rules

Rules	Source of the power or rule
Assessor Powers	
NSW Assessor Power (1903 patent actions only)	Patents Act 1903 (Cth), ss86(8) and 88(1)
Concurrent Expert Evidence Powers	
NSW Concurrent Expert Evidence Power (2005)	UCPR 2005 (NSW), r31.26
CE Powers	
NSW CE Power (1970)	SCR 1970 (NSW), Pt 39
NSW CE Power (1996 and 1998 Commercial Division and the Construction List)	Practice Note 89;[1427] Practice Note 100.[1428]
NSW CE Power (1999 harmonised including on the Court's own motion)	SCR 1970 (NSW), Pt 39 (Division 1)[1429]
NSW CE Power (2006)	UCPR 2005 (NSW), r31.46-31.54
Disclosure Power/ Disclosure Rules	
NSW Disclosure Power (1963 personal injuries actions)	General Rules of the Court 1952 (NSW),[1430] O27 r14. [1431]
NSW Disclosure Power (1970 personal injuries actions)	SCR 1970 (NSW), Pt 25 r7(1)-(2)
NSW Disclosure Rule (1972 mandatory in personal injuries actions)	SCR 1970 (NSW), Pt 36 r13A[1432]
NSW Disclosure Power (1974 Commercial List)	Practice Note 1974.[1433]
NSW Disclosure Power (1985 Building and Engineering List)	Practice Note 35,[1434] cl 7
NSW Disclosure Power (1985 Commercial Division)	Practice Note No 39,[1435] cl 11
NSW Disclosure Power (1990 Construction List)	Practice Note No 58.[1436]
NSW Disclosure Power (1996 and 1998 Commercial Division and the Construction List)	Practice Note 89[1437] and Practice Note 100.[1438]
NSW Disclosure Power (1999 harmonised)	SCR 1970 (NSW), Pt 26 r3(f).
Expert Assistance Power	

[1427] Practice Note No 89 1996 (NSW).
[1428] Practice Note No 100 1998 (NSW) (which replaced Practice Note 89).
[1429] Inserted by Supreme Court Rules (Amendment No 337) 1999 (NSW).
[1430] General Rules of the Court 1952 (NSW).
[1431] Inserted by General Rules of Court (Amendment) 1963 (NSW).
[1432] Supreme Court Rules (Amendment No 21) 1972 (NSW).
[1433] Practice Note Commercial List 1974 (NSW).
[1434] Practice Note 35 1985 (NSW).
[1435] Practice Note No 39 1986 (NSW).
[1436] Practice Note No 58 1990 (NSW). This Practice Note superseded Practice Note 35 1985 (NSW).
[1437] Practice Note No 89 1996 (NSW).
[1438] Practice Note No 100 1998 (NSW) (which replaced Practice Note 89).

NSW Expert Assistance Power (1880 to 1999 Equity proceedings)	NSW Equity Acts 1880 and 1901; SCR 1970 (NSW), Pt 39 r7.
NSW Expert Assistance Power (1985 Building and Engineering List)	SCR 1970 (NSW), Pt 14A r14
NSW Expert Assistance Power (1990 Construction List)	Practice Note 58,[1439] cl13
NSW Expert Assistance Power (1996 and 1998 Commercial Division and the Construction List).	Practice Note 89[1440] and Practice Note 100.[1441]
NSW Expert Assistance Power (1999 harmonised, except jury trials)	SCR 1970 (NSW), Pt 39 (Division 2).
Expert Meeting Power	
NSW Expert Meeting Power (1985 Commercial Division)	Practice Note No 39.[1442]
NSW Expert Meeting Power (1990 Construction List)	Practice Note 58, cl 22[1443]
NSW Expert Meeting Power (1996 and 1998 Commercial Division and the Construction List)	Practice Note 89[1444] and Practice Note 100.[1445]
NSW Expert Meeting Power (1999 Professional Negligence List)	Practice Note 104, Schedule (para [5] of the Expert Witness Code)[1446]
NSW Expert Meeting Power (1999 harmonised)	SCR 1970 (NSW), Pt 36 r13CA and Practice Note 121
Independence Rules	
NSW Independence Rule (1998 Professional Negligence List)	Practice Note 104, [18].[1447]
NSW Independence Rule (1999 harmonised)	SCR 1970 (NSW), Pt 36 r13C and Schedule K 'Expert Witness Code of Conduct'
NSW Independence Rule (2006)	UCPR 2005 (NSW), r31.23
I&R Power	
NSW I&R Power (1985-ongoing)	SCR 1970 (NSW), Pt 72; UCPR 2005 (NSW), r20.13-20.24
Permission Rules	
There are no NSW Permission Rules	
Plaintiff's Expert Report Rule	
NSW Plaintiff's Expert Report Rule (1998 Professional Negligence List)	SCR 1970 (NSW), Pt 14C r6(1).
NSW Plaintiff's Expert Report Rule (2006 professional negligence claims)	UCPR 2005 (NSW), r31.36

[1439] Practice Note No 58 1990 (NSW).
[1440] Practice Note No 89 1996 (NSW).
[1441] Practice Note No 100 1998 (NSW) (which replaced Practice Note 89).
[1442] Practice Note No 39 1986 (NSW), section 11 (e).
[1443] Practice Note No 58 1990 (NSW). This Practice Note superseded Practice Note 35 1985 (NSW).
[1444] Practice Note No 89 1996 (NSW).
[1445] Practice Note No 100 1998 (NSW) (which replaced Practice Note 89)
[1446] Practice Note 104 1998 (NSW).
[1447] Ibid.

Power to Admit an Expert Report As Evidence in Chief	
NSW Power to Admit an Expert Report As Evidence in Chief (1963 personal injuries actions)	General Rules of the Court 1952 (NSW), O27 r14(2)(c).
NSW Power to Admit an Expert Report As Evidence in Chief (1979 personal injuries actions)	SCR 1970 (NSW), Pt 36 r13B
NSW Power to Admit an Expert Report As Evidence in Chief (1985 Commercial Division)	Practice Note No 39,[1448] cl 11
NSW Power to Admit an Expert Report As Evidence in Chief (1990 Construction List)	Practice Note 58.[1449]
NSW Power to Admit an Expert Report As Evidence in Chief (1996 and 1998 Commercial Division and the Construction List)	Practice Note 89[1450] and Practice Note 100.[1451]
NSW Power to Admit an Expert Report As Evidence in Chief (1999 harmonised)	SCR 1970 (NSW), Pt 26 r3(j).
Powers to Direct a Trial without a Jury	
Powers (Rules) to Limit Party Experts and Expert Evidence	
NSW Power to Limit Party Experts (1999 harmonised)	SCR 1970 (NSW), Pt 34 r6AA(1)[1452]
NSW Limited Expert Evidence Rule (2003 where court expert is appointed)	SCR 1970 (NSW), Pt 39 r6
Reference for Trial Power	
NSW Reference for Trial Power (1892-ongoing)	Arbitration Acts 1892 and 1902 (NSW);[1453] SCR 1970 (NSW), Pt 72; UCPR 2005 (NSW), r20.13-20.24
SJE Power	
NSW SJE Power (2004 personal injuries actions only)	Practice Note No 128.[1454]
NSW SJE Power (2006)	UCPR 2005 (NSW), rr31.37 and following
NSW SJE Rule (2008 confer pre-commencement)	Practice Note,[1455] cl 6
Specific Disclosure Rules	
NSW Specific Disclosure Rule (2006)	UCPR 2005 (NSW), r31.22
Other (miscellaneous) Powers (Rules)	

[1448] Practice Note No 39 1986 (NSW).
[1449] Practice Note No 58 1990 (NSW).
[1450] Practice Note No 89 1996 (NSW).
[1451] Practice Note No 100 1998 (NSW)
[1452] Supreme Court Rules (Amendment No 337) 1999 (NSW).
[1453] Arbitration Act 1892 (NSW), s12. Arbitration Act 1902 (NSW), s15 (repealed by the Commercial Arbitration Act 1984 (NSW)).
[1454] Practice Note No 128 2004 (NSW).
[1455] Practice Note No SC Eq 3 (NSW)

NSW Directions Power (1903 -1989 Commercial List)	Commercial Causes Act 1903 (NSW), s5; Supreme Court Act 1970 (NSW), s56(3)
NSW Directions Power (1989 harmonised)	Supreme Court Act 1970 (NSW), s76A

Table 3 List of Victorian Party Expert Procedural Rules

Rule	Source of the power or rule
Assessor Powers	
Victorian Assessor Power (1883-ongoing)	RSC 1906 (Vic), Chapter 1;[1456] Supreme Court Act 1986 (Vic), s77; General Rules of Procedure in Civil Proceedings 1986 (Vic), O50.07
Concurrent Expert Evidence Powers	
Victorian Concurrent Expert Evidence Power (2004 Commercial List)	Practice Note No 4[1457]
Victorian Concurrent Expert Evidence Power (2008 Building List)	Practice Note No 1[1458]
Victorian Concurrent Expert Evidence Power (2012 harmonised).	CP Act 2010 (Vic), s65K
CE Powers	
Victorian CE Power (1996 Intellectual Property actions)	Supreme Court (Intellectual Property) Rules 1996.[1459]
Victorian CE Power (2004 Commercial List)	Practice Note No 4[1460]
Victorian CE Power (2012 harmonised)	CP Act 2010 (Vic), s65M
Disclosure Power/ Disclosure Rules	
Victorian Disclosure Rule (1968 personal injuries actions)	Supreme Court (Readiness for Trial) Rules 1968 (Vic)
Victorian Disclosure Rule (1983 personal injuries actions)	Chapter I of the Rules of the Supreme Court (Vic), O31A.
Victorian Disclosure Rule (1986 personal injuries actions)	General Rules of Procedure in Civil Proceedings 1986 (Vic)
Victorian Disclosure Rule (1986 non-personal injuries actions)	General Rules of Procedure in Civil Proceedings 1986 (Vic)
Expert Assistance Power	
Victorian Expert Assistance Power (1883-1958 Equity matters in chambers only)	RSC 1906 (Vic), Chapter 1[1461]
Expert Meeting Power	
Victorian Expert Meeting Power (2003-ongoing)	Chapter I of the Rules of the Supreme Court (Vic), O44.06.
Independence Rules	
Victorian Independence Rule (2003-ongoing)	Chapter I of the Rules of the Supreme Court (Vic), O44.03.
Victorian Independence Rule (2010)	CP Act 2010 (Vic), s10(3)
I&R Power	

[1456] Rules of the Supreme Court of the State of Victoria 1906 (Vic).
[1457] Practice Note No 4 2004 (Vic).
[1458] Practice Note No 1 2008 (Vic).
[1459] Supreme Court (Intellectual Property) Rules 1996 (Vic)
[1460] Practice Note No 4 2004 (Vic).
[1461] Rules of the Supreme Court of the State of Victoria 1906 (Vic).

Victorian I&R Power (1883-2010)	Various[1462]
Permission Rules	
There are no Victorian Permission Rules	
Power to Admit an Expert Report as Evidence in Chief	
Victorian Power to Admit an Expert Report As Evidence in Chief (1983 personal injuries actions)	Chapter I of the Rules of the Supreme Court (Vic), O31A
Powers to Direct a Trial without a Jury	
Victorian Power to Direct a Trial without a Jury (1883-ongoing)	Judicature Act 1883 (Vic), s30; RSC 1906 (Vic), Chapter 1 (O36 r5); RSC 1957 (Vic)[1463]
Powers (Rules) to Limit Party Experts	
Victorian Power to Limit Party Experts (1996 Intellectual Property actions)	Supreme Court (Intellectual Property) Rules 1996.
Victorian Power to Limit Party Experts (2004 Commercial List)	Practice Note No 4 (Vic).
Victorian Power to Limit Party Experts (2009-2014 TEC List)	Chapter II of the Rules of the Supreme Court (Vic), O3[1464]
Victorian Power to Limit Party Experts (2010)	CP Act 2010 (Vic), s49(3)
Victorian Power to Limit Party Experts (2012 harmonised).	CP Act 2010 (Vic), s65H
Reference for Trial Power	
Victorian Reference for Trial Power (1883-2010)	Various[1465]
SJE Power	
Victorian SJE Power (2012 harmonised)	CP Act 2010 (Vic), s65L
Specific Disclosure Powers (Rules)	
Victorian Specific Disclosure Power (2012 harmonised)	CP Act 2010 (Vic), s65P(1)
Miscellaneous	
Victorian Directions Power (1972 Building List)	O76 r4(3).[1466]
Victorian Directions Power (1986-ongoing)	Various[1467]

[1462] Judicature Act 1883 (Vic); Supreme Court Acts 1890 to 1928 (Vic); Arbitration Acts 1910-1958 (Vic); Chapter I of the Rules of the Supreme Court (Vic), O50.
[1463] Rules of the Supreme Court of the State of Victoria 1957 (Vic), O36 r2(5). This specific power was subsumed within a more general power from 1986 – see General Rules of Procedure in Civil Proceedings 1986 (Vic), O47.
[1464] Supreme Court (Chapter II Amendment No 1) Rules 2009 (Vic).
[1465] Judicature Act 1883 (Vic); Supreme Court Acts 1890 to 1928 (Vic); Arbitration Acts 1910-1958 (Vic).
[1466] Inserted by Supreme Court (Building Cases) Rules 1972 (Vic).
[1467] General Rules of Procedure in Civil Proceedings 1986 (Vic), O34; CP Act 2010 (Vic), s47; Supreme Court (General Civil Procedure Rules) 2015, O34; Civil Procedure Act 2010 (Vic), s47(3)(a).

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