

Discussion between Experts and Lawyers in Court: Proposal of “Conference of Evidence” for Litigation Requiring Expertise in Japan

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ABSTRACT

This paper explores innovations in the methods of obtaining expertise for litigation which requires specialised knowledge in Australia and Japan. Those innovations seem to be more effective than conventional cross-examination in Australia’s adversarial system and conventional inquiry by a single court-appointed expert in Japan’s more “inquisitorial” system. Cross-examination of experts, tends to be too pointless or obstructive for the purpose of eliciting helpful expert opinions. Generally speaking, partisan witness-box specialists abound in judicial areas which adopt adversarial system such as United States and Australia. On the other hand, courts in Japan have been suffering from the chronic shortage of experts willing to help the court. Rarely is more than one expert called upon to act as a court-appointed expert, and hardly ever is the expert asked to give advice orally, so that discussions among experts are hardly ever to be expected. A single expert’s written advice, however, tends to be too specialised or technical to help the court and sometimes biased. Thus far, both common law courts and Japanese courts have experienced difficulties being helped with appropriate expert opinions. However, after the turn of the century, innovations have been made in Sydney and Tokyo, bringing “conversational” elements: “concurrent evidence” in New South Wales, in which expert witnesses exchange their opinions orally, and a round-table conference among three court-appointed experts at the Medical Divisions of the Tokyo District Court. But it is not straightforward to introduce the Australian concurrent evidence into Japan which has a different legal system and expert culture. A conference of court-appointed experts has hardly ever been convened in any other judicial district in Japan, and not in any cases other than medical negligence, due to the shortage of willing experts. This paper proposes a new hybrid method combining the Sydney and Tokyo innovations, which is capable of wider practical application in Japan, i.e. a round-table conference among a court-appointed expert, expert witnesses who are commissioned by parties and lawyers. This procedure should be called “Conference of Evidence”.

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Keywords: litigation requiring expertise; medical negligence actions; expert opinion; concurrent evidence; conference among experts and lawyers; conference evidence; uncertainty of science

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1. Purposes of Litigation Requiring Expertise

This paper explores methods of using more helpful expert opinions in court. Litigation requiring expertise¹⁾, such as professional negligence cases, mostly takes the form of claiming compensation. However, plaintiffs tend to want to know, first of all, detailed professional information about what has happened; secondly, what are legal consequences of what has happened (for example, whether or not the conduct of the defendant falls below the reasonable standard expected of him/her, and whether or not causation can be legally established between any breach of duty of care and the damage);

1) Litigation requiring expertise in this paper means a type of litigation which requires specialised knowledge which lawyers are not expected to possess. There are two categories of specialised litigation: one where there is the lack of symmetry of expertise knowledge between the parties, such as cases involving medicine, pharmaceuticals, construction and technology, product liability, emissions of harmful substances into the environment, etc.; and one where there is symmetry of knowledge, such as commercial cases and intellectual property cases. In this paper, the former category of cases is mainly considered but it does not deny the applicability of conference evidence in the latter category.

thirdly what steps need to be taken in order to prevent the same event from happening again. Honest experts/defendants should like to identify causes of accidents in order to prevent any like error from being committed again, and should desire a pertinent legal judgment which is not far-removed from professional reality. Therefore, the principal purposes of litigation requiring expertise are correct fact-finding, reasonable legal decision-making, and practical prevention.

2. Participation of Experts: Necessity and Methods

How helpful are Japan's existing methods of obtaining expert opinions in litigation requiring expertise? This paper will analyse medical negligence litigation which is an archetype of this category.

(1) Court-appointed Experts (*kantei-nin*)

The conventional method of obtaining experts' opinions in Japan's courts has been the court's appointment of a single expert (*kantei-nin*) who submits his/her written opinion to the court. However, experiences such as cross-examinations involving attacks on the expert personally, and the lack of feedback about the outcome of the case to the expert, tend to make the task too onerous and unrewarding for experts to undertake.²⁾ A set of amendments to the Civil Procedure Code concerning the rules of court-appointed experts which came into force in 2004 as well as some changes in practice, addressed such problems. For example, amendments banned closed questions to be put to court-appointed experts, introduced a new practice of informing court-appointed experts of the outcome of the case, and established the new mechanisms of pooling of information about experts at the Supreme Court Medical Litigation Committee, and similar regional arrangements. Still, unlike in Germany and France, acting as court-appointed experts does not help experts build professional careers in Japan. It is difficult to say that the changes so far have provided professionals with sufficient incentives to act as court-appointed experts.³⁾

It is also difficult to obtain a balanced view from a single expert, and to get prompt answers to questions about his/her opinion in writing, which tends to be produced after a very long time, and at a very high cost. So, a court's appointment of a single expert is not a very efficient method of obtaining specialist information.

For these reasons, the proportion of medical negligence cases where a court appoints experts has recently been in sharp decline. In 2004, 22.4% of cases involved court-

2) Saiko Saibansho Iji Kankei Sosho Iinkai (Supreme Court, Medical Litigation Committee), "Iji Kankei Sosho Iinkai Toshin" (A Report of the Committee), *Hanrei Times* no. 1179 (2005) p. 5.

3) Tsukasa Oda, "Kantei Seido no Genjo to Kadai" (Court-Appointed Expert: Facts and Problems) *Horitsu Jiho* no. 1088 (2015) p. 33.

appointed experts,⁴⁾ while in 2014, only 10.4% of cases did so.⁵⁾ The proportion is less than 1% in Tokyo District Court.⁶⁾ Therefore, this once conventional method has become an exception today.

(2) Literature and Guidelines

In inverse proportion to the decline of the proportion of medical negligence cases which involve court-appointed experts, there has been an increase in the proportion of cases where parties utilise medical literature and clinical practice guidelines which are easily available on internet these days. However, it is difficult, without the help of a qualified professional, to apply this evidence to the facts of the case and to assess properly the medical conduct of the defendant. It is as same as a layperson can not make a proper decision about legal issue without lawyers advice even though he/she is provided statutes and casebooks.

(3) Expert Witnesses

More recently, therefore, courts recommend to the parties to submit to court their instructing experts' written reports.⁷⁾ Such experts can apply relevant professional standards to the particular medical conduct in question, and draw reasoned conclusions from a professional point of view. Therefore, such experts' reports tend to be seen as reliable. However, they are, after all, opinions in writing of experts, and as such, they share the same difficulties as written reports of court-appointed experts. When an opinion of the plaintiff's expert and that of the defendant's expert differ from each other, the procedure does not envisage any discussion between experts, so that the judge is left in the dark to make a decision on his/her own. It is very difficult for any judge without expertise knowledge of medicine to make a decision when there are two conflicting professional opinions and to write a persuasive judgment.

4) Saiko Saibansho Jimu Sokyoku (General Secretariat of the Supreme Court), "Saiban no Jinsokuka ni kakawaru Kensho ni kansuru Hokokusho (Dai 1 kai)" (Review Report Towards Expeditious Disposition of Cases, No. 1) (2005) p. 78.

5) The same author, the same title (Dai 6 kai) (No. 6) (2015) p. 38.

6) Masaaki Kondo, Hiroaki Ishikawa "Tokyo Chiho Saibansho Iryo Shuchubu niokeru Jiken Gaikyo (Heisei 26 nendo)" (Annual Report of Medical Divisions of the Tokyo District Court, 2014-2015), *Hoso Jiho* vol. 67, no. 7, p. 33.

7) Tatsuo Ikeda, Hideki Hama, et al, "Iji Kankei Soshu niokeru Shinri Tetsuzuki no Genjo to Kadai (Jo)" (Case Management of Medical Negligence Litigation, Facts and Problems, No. 1) *Hanrei Times* no. 1330 (2010) p. 14; Osaka Chiho Saibansho Dai 17, Dai 19, Dai 20 Minjibu (Osaka District Court, the 17th, 19th and 20th Civil Divisions) "Osaka Chiho Saibansho Ijibu no Shinri Unei Hoshin" (Case Management Policy of Medical Divisions of the Osaka District Court) *Hanrei Times* no. 1335 (2011) p. 15.

(4) Utility of Hearing Multiple Experts Together

An individual expert who is not confident enough to make a decision on his/her own may like to share information with his/her colleagues in order to make sure that a right decision is made. Therefore, the provision of specialist information by a number of experts for litigation is something to be welcomed. In a survey conducted by the Japanese Supreme Court among doctors who have experience of acting as court-appointed experts, there is a view that the conclusion of one expert may differ from that of another, and therefore, it is more desirable to have opinions of multiple court-appointed experts.⁸⁾

In terms of the manner of delivery of such opinions of a number of experts in court, there are two ways: orally at a hearing, and in writing. Some regard an opinion in writing as more accurate and fuller in terms of both the mastery and delivery of expert information than orally at a hearing. Still, it is difficult to put questions and obtain answers promptly and directly on a piece of paper. It is, therefore, desirable to clarify a range of issues by exchanging a number of experts' written opinions, and then to have a discussion among experts. In the Supreme Court survey among doctors, there is a view that it is easier to give an expert's opinion directly in a hearing, rather than in writing.⁹⁾

In the following pages, two different methods of delivery of the opinions of multiple experts, both orally and in writing, are discussed; concurrent evidence in Australia and a round-table conference among court-appointed experts in the Tokyo District Court.

3. Two Methods of Discussions among Experts

(1) Concurrent Evidence¹⁰⁾

(a) Overview

The disadvantages of cross examination to experts are firstly the lack of reliability of "pretend-experts" or "know-it-all experts" who are paid to give opinions in favour of their clients; secondly, piecemeal cross-examination which tends to obstruct coherent delivery of very complex expert opinion; and thirdly, lengthy and costly trials. In New South Wales, Australia, in order to avoid such disadvantages, a concurrent evidence procedure in which a number of experts are examined simultaneously, was introduced in 2005. The new method is now adopted in a wide range of litigation requiring expertise across Australia.

Experts who are instructed by the parties have to affirm that they comply with their overriding duty to help the court impartially, and their duty to cooperate with the other

8) Saiko Saibansho Iji Kankei Sosho Inukai niokeru Ankeito no Kekka nitsuite, "Kanteinin Hen" (On Survey Results of Medical Negligence Litigation Committee of the Supreme Court, "Court-Appointed Expert") http://www.courts.go.jp/saikosai/vcms_lf/80406002.pdf p. 6

9) Ibid. p. 4.

10) Peter McClellan J, "New Method with Experts—Concurrent Evidence" *Journal of Court Innovation*, winter 2010, pp. 259-268; Ian Freckelton and Hugh Selby, "Expert Evidence" 5th ed. (Sydney: Lawbook, 2013), pp. 391-407.

experts. Experts then answer briefly a list of questions prepared at or after a case management conference among the parties and the court. Experts proceed to discuss in a conclave (“joint conference”) in which neither the judge nor barristers or solicitors participate, and to try to determine, as far as possible, areas of agreement and those of disagreement among themselves.

The outcome of such a conclave is summarised in a joint report. Where consensus emerges on many issues on the agenda, the case is often settled.

Then, “concurrent evidence” of experts is given at trial.¹¹⁾ In most cases barristers of the parties may put questions to the group of experts. The trial judge may ask supplementary questions although the judge has power to change the order. All experts are free to make their answers. In doing so, experts are encouraged to put questions to each other, and answer and discuss freely. The chairperson of the discussion is the judge.

(b) Appraisal

(i) Lawyers

One of the advantages of concurrent evidence is that any professionally incorrect argument is set aside, as the quality of expert opinion is ensured by peer review. Another advantage is that a succinct and structured discussion among experts may help the judge’s understanding of issues far better than a lengthy, often haphazard and obstructive cross-examination of experts. The new procedure facilitates settlement, or otherwise helps the judge to fathom real issues and to make a ruling not in the dark, but in the light of experts’ help with confidence. The procedure greatly saves time.¹²⁾

In order to allay fears that experts with senior status and richer experience might exert controlling influence on other experts, a facilitator may be appointed, who may be a professor, an ex-judge or a senior barrister, to counterbalance such controlling influence. The confidential nature of such a conclave is regarded as the price to be paid to ensure expert’s willingness to speak freely, as an expert may change his/her view during a conclave, and disadvantage his/her client. Even so, it is regarded to be more desirable to instruct an expert who is honest enough to engage in professional discussion and to be ready to change his/her mind in order to maintain his/her professional integrity in discharging his/her overriding duty to the court.¹³⁾

(ii) Experts

Those experts who have gone through concurrent evidence tend to say that the procedure gives them satisfaction for three main reasons: 1) they can say things without being interrupted by lawyers; 2) they can feel that their opinions are heard, valued and will

11) In this article, the term “concurrent evidence” refers to both a conclave/joint conference of experts out of court, and concurrent evidence in stricter sense in court.

12) Steven Rares, J, “Using The “Hot Tub” —How Concurrent Expert Evidence aids Understanding Issues”, “NSW Bar Association News 67 (summer 2011), pp. 64–72.

13) David Higgs SC and Bill Madden, an interview with the author dated 5 March 2014.

help the resolution of the case; 3) they can have discussions among themselves to the best of their professional ability. To help the court has become a more pleasant experience than ever before, satisfying experts' intellectual curiosity and desire to help the real world with their expertise. Experts of good quality are therefore coming back to courts. Thus, the quality of discussion, opinion and judgment has been rising.¹⁴⁾

(2) Conference of Court-appointed Experts¹⁵⁾

Since 2003, the Medical Divisions of the Tokyo District Court has adopted the following procedure, which may be referred to here in terms of “conference of court-appointed experts” (conference kantei). The court decides whether or not to appoint court-appointed experts to help with specialist fact-finding. The court has a list of thirteen university hospitals from which the court picks three hospitals in order and requests that each hospital recommend one expert who it considers suitable to help the court with their expertise. If one or more picked hospitals cannot recommend any, then the court goes down to hospitals lower on the list in order to ensure three court-appointed experts to act in each case. The court asks the parties' attorneys to screen whether or not the recommended experts have any conflict of interest. If there is none, the court appoints the three to act as court-appointed experts in the case. Each of the three submits to the court a short report of several pages, and receives a copy of each of the other experts. Three judges and the parties' attorneys attend a conference among court-appointed experts after reading copies of their reports. The conference is held in a courtroom with a large round table, publicly. One of the three judges on a panel (recently, more often the youngest judge than the presiding judge)¹⁶⁾ acts as a moderator of discussions. Judges put questions to the court-appointed experts first, and the parties' attorneys follow. While it depends on the directions of the presiding judge, discussions among experts are rare, and more often, each of the three court-appointed experts answers each question in order as in *taishichi* (literally “concurrent evidence”) in accordance with Clause 118 of the Japanese Civil Procedure Rules. In this procedure, an oral hearing of court-appointed experts in accordance with Article 215 of the Civil Procedure Code and putting questions to court-appointed experts in accordance with Article 215-2 of the Civil Procedure Code are

14) Peter Garling, J, of NSW Supreme Court, an interview with the author dated 3 March 2014; Peter McClellan, J, of NSW Court of Appeal, an interview with the author dated 5 March 2014.

15) Tokyo Chiho Saibansho Iryo Soshō Taisaku Iinkai (the Tokyo District Court, the Medical Negligence Litigation Committee), “Tokyo Chiho Saibansho Iryo Shuchubu niokeru Kantei no Jitsujō to sono Kenshō (Jo)” (Facts and Problems of Expert Inquirers of Medical Divisions of the Tokyo District Court, No. 1) Hanrei Jiho no, 1963 (2007) pp. 3-35; The same author, “Iryo Soshō no Shinri Unei Hoshin, Kaiteiban” (Case Management Policy of Medical Negligence Litigation, Revised) Hanrei Times no. 1389 (2013) p. 21.

16) Judges of the Tokyo District Court, Medical Divisions, interview with the author dated 9 September 2014.

conducted simultaneously.

A conference of court-appointed experts is conducted for the following reasons. Firstly, reports of three court-appointed experts tend to be prepared faster because each of the experts feels easier to act with his/her peers than to act alone. Secondly, as a result, it is easier to find experts willing to act. Thirdly, a discussion among court-appointed experts ensures a peer review of each experts' opinion so that a higher standard of reliability, fairness, professional integrity and objectivity is expected.¹⁷⁾

(3) Comparisons

(a) Similarities

There are following similarities between the Australia's concurrent evidence and the Japan's conference of court-appointed experts. Firstly, both of the new methods make it easier to obtain expert opinions which are more likely to get consensus among the relevant scientific community than conventional methods. Secondly, both of the new methods help judges with their evaluation of evidence. Thirdly, short reports of each expert are exchanged in advance. Fourthly, a number of experts give their opinions concurrently in public. Fifthly, questions and answers are recorded simultaneously, and transcript is made. Sixthly, both save trial time.

(b) Differences

There are a number of differences as well. Firstly, in concurrent evidence parties instruct their experts while in conference of court-appointed experts, the court appoints the experts. Secondly, expert witnesses who join concurrent evidence have an opportunity to have discussions among themselves twice: first in conclaves in private and second at trial in public, whereas court-appointed experts have only one opportunity over a round-table in court in public. Thirdly, discussions among experts are at the heart of concurrent evidence whereas it is not necessary in conferences of court-appointed experts. Fourthly, the number of experts who give concurrent evidence ranges from two to twelve, whereas the number of court-appointed experts who attend a round-table conference is fixed at three.

Lastly, but not least, concurrent evidence comes into being following judges' initiatives, whereas conference of court-appointed experts was suggested by experts (medical institutions). During discussions between the Medical Divisions of the Tokyo District Court and medical institutions (university hospitals), the latter wondered whether the customary practice of a court-appointed single expert's written report was really helpful for judges, and suggested that court adopt something similar to a case conference among doctors, nurses and other hospital staff who determined a suitable course of treatment of a patient.¹⁸⁾ This seems to explain why conference of court-appointed experts has, so far,

17) Oda (see footnote 3), p. 33.

18) Tokyo Chiho Saibansho Iryo Sosho Taisaku Iinkai "Tokyo Chiho Saibansho ..." (see footnote 15), p. 4.

never been adopted in any other judicial district in Japan. Even the Tokyo District Court conducts conference of court-appointed experts just three to five cases a year.¹⁹⁾

4. Advantages of Discussions between Experts and Lawyers

Discussions between experts and lawyers in court are advantageous for a number of reasons.

Firstly, a discussion among experts ensures the provision of peer-reviewed, reliable expert information to the court, and thereby helps the court deliver a judgment which makes more professional sense. A view that comparing standard of proof in science with that in trials, where the former does not tolerate any doubt but the latter is beyond an ordinary person's reasonable doubt²⁰⁾ is not reflecting the uncertainty of science accurately. Any scientifically "established" fact is, in reality, "nothing more than a hypothesis which has come to be seen to be probable within a certain scientific community at a certain point in time merely because it has survived a series of tests, surveys, and reviews so far".²¹⁾ Therefore, an opinion which has come out of a discussion among experts is expected to be more probable to be shared by the relevant scientific community than a single expert's point of view.

Secondly, the burden of experts is shared among a number of experts so that those experts of high professional reputation, who are expected to be very busy, find it easier to agree to act for the court. There should be improvement in the quality and quantity of experts willing to help the court.

Thirdly, the joining of non-experts, i.e. lawyers, would ensure that discussions are conducted in manners accessible to non-experts, including lay clients, in terms of vocabulary and illustration. Non-professional clients want to know what has really happened. Lawyers' participation, by itself, may help explain what has happened in plain language that is easily understood by non-professional clients.

Fourthly, lawyers can facilitate discussions so that they are focused on issues specific to the case at hand, and prevent such discussions from going astray.

Fifthly, lawyers' active participation in discussions among experts helps lawyers, and hence non-professional clients, understand the information which the experts are discussing. It clarifies issues and saves time and cost of litigation. When judges and attorneys share the expertise with experts, cases are easier to settle.

Sixthly, depending upon the skills of a facilitator of discussion, preventive measures

19) Kondo (see footnote 6), p. 33.

20) Supreme Court, Judgment of 24 October 1975 (50th year of Showa), Minshu vol. 29, no. 9, p. 1417, Lumbar Shock Case.

21) Chihara Watanabe, "Jijitsu Nintei niokeru 'Kagaku', no. 1" (*Science and the Establishment of Facts in Court*) Minshoho Zasshi vol. 116, no. 3 (1997) p. 362.

may be discussed for the future. Such discussion may not be necessary for the determination of legal liabilities. But non-professional clients want to know what has happened, and do not want it happen again in the future. Quite often, they sue very much for these purposes. Lawyers' participation in discussions among experts may satisfy such demands of non-professional clients. Where a discussion among experts to help the court gives rise to ideas of effective prevention, the general public and relevant scientific community would benefit from the judiciary delivering a concrete service.

For these reasons, discussions between experts and lawyers serve the purposes of litigation requiring expertise better than conventional cross-examination or conventional single court-appointed expert written report.

5. Practicability of these Methods in Japan

(1) Concurrent Evidence

For concurrent evidence, parties instruct expert witnesses and the court is not involved in the selection of experts. In countries such as Australia, where it is less difficult to find experts willing to cooperate with litigation than in Japan, this system may not handicap non-professional clients so much.

By contrast, the first and foremost problem in Japan is to find an expert willing to help a non-professional client's litigation. The introduction of the Australia's system against such a backdrop in Japan would not help with the improvement in the accessibility of professional experts and with the re-balancing of the asymmetry of expert information between parties.

Furthermore it takes time and money to assemble a number of busy experts twice for the administration of justice, first for a conclave and again for a hearing in court.

Further, Lawyers may not be happy about any discussion among "their" experts and other experts behind the closed doors of a conclave, without the presence of legal counsels.

(2) Conference of Court-appointed Experts

Is it practicable to conduct a conference of court-appointed experts in judicial districts other than that of Tokyo as well as in other kinds of litigation requiring expertise in Japan?

According to judges of the Medical Divisions of the Tokyo District Court, the hospitals on their list are cooperating with the court for the purpose of improving the medical service in Tokyo, but not elsewhere.

The Tokyo District alone has thirteen university hospitals. But the rest of Japan is not so fortunate. Even the Osaka District Court, which is the second largest District Court in Japan, experiences difficulties securing a single expert for contested matters. It is unrealistic to select three experts for the disposal of each case.

Further, a conference of court-appointed experts has its own procedural difficulties. While acting as court-appointed experts, experts may harbour a fear that they, too, can be defendants themselves in the future. A certain plaintiff's attorney said that in her case, court-appointed experts came to a view that the defendant's medical conduct was above the lowest acceptable standard, i.e. 'reasonable', which rendered her case very difficult to win. If a professional group desire to exploit the system for their advantage, they might recommend experts who are unwilling to see their fellow experts held liable by the court. From the plaintiff's point of view, this does not seem to be fair.

The solid hierarchy of doctors in Japan is also problematic. If two junior doctors hesitate to differ from a senior one in their opinions as court-appointed experts, the senior doctor's opinion is seen to be supported by the other two.

For these reasons, it is neither practical nor appropriate to adopt conference of court-appointed experts nationwide in all kinds of litigation requiring expertise in Japan.

6. Conference of Evidence: A New Style Conference between Experts and Lawyers

Then, what style of discussions between experts and lawyers best serves the purposes of specialist fact-finding and pertinent legal decision-making in Japan?

The author is of the view that it would be desirable to have a round-table discussion among expert witnesses who are instructed by parties, a court-appointed expert, a panel of judges, and the parties' attorneys. Experts, whether as "witnesses" or "court appointed", should have discussions among themselves to give their opinions. While it is a round-table conference of experts, the procedure is a hearing of "evidence". So, the idea is a mixture of the conference of court-appointed experts and concurrent evidence adapted to the Japanese trial environment, which could be named "conference of evidence".

(1) Procedure

In a conference of evidence system, both parties first submit written reports of their experts and supporting literatures to the court. Then, each of the parties files a motion of examination of their experts, and at the same time, the parties jointly request the court to appoint an expert. The cost of a court-appointed expert is shared between the parties.

The court's appointment of an expert is facilitated by a regional list of institutions which can recommend suitable experts, at the suggestion of relevant academic societies of experts and the Medical Litigation Committee of the Supreme Court. A court-appointed expert's report clarifies areas of agreement and disagreement between the parties' experts, puts the court-appointed expert's own comments or observations on them, and identifies issues to be discussed among experts. Copies of the report are brought to the parties' experts through their attorneys.

The court fixes a date of hearing of the parties' experts and a court-appointed expert. The procedure in which their opinions are given is not like the examination-in-chief, cross-examination, and re-examination of each expert one by one, but it is organised to be a round-table conference among experts and lawyers in court.

A conference of evidence is divided into two stages. At the very beginning of the procedure, experts affirm that they will discharge their duty to join the conference without bias as an expert and will cooperate with each other to help the court.

At the first stage, the court chooses, from a list of "technical advisers to court" (senmon-iin)²²⁾, a facilitator of a free discussion among expert witnesses and a court-appointed expert.²³⁾ Judges, attorneys and parties attend the discussion, and listen to it, because they need to understand the knowledge which has been shared in the relevant community of experts, and identify points on which they differ. The facilitator should ensure that all the opinions of experts are equally heard, that experts discuss the matter as peers, and no undue weight is attached to the opinion of the court-appointed expert by authority of the court. When judges and attorneys find it difficult to follow what experts are talking about, lawyers can ask the facilitator for clarification. The facilitator thus assumes the task of an interpreter between experts and lawyers.

At the end of the first stage, the facilitator draws up conclusions of the discussion among experts, and where there is any area of disagreement, he/she explains it to the judges and the attorneys. For example, he/she might say, "from the point of view of A, the defendant should have done this and this, while from the point of view of B, he/she should not have done so. No conclusion as to which point of view is better has been reached among the experts". Or he/she might say, "as far as this issue is concerned, a great number of reliable test outcomes, surveys and so forth are available which tend to support the point of view of A". Ultimately, it is judges who decide which of the competing points of view should be adopted.

At the second stage, the presiding judge of the panel becomes the chairperson of a conference among experts, judges and attorneys. First attorneys ask questions to experts because they usually know the case better than judges. The parties themselves also can put questions to experts through their attorneys. This is because it is the task of the lawyers to consider the legal implications of the outcome of the discussion among experts. The discussion is neither a study workshop nor a clinical case conference but something

22) Senmon-iin is an expert who is appointed by a court to provide expertise to the court from a neutral position. But unlike kantei-nin (court-appointed expert), senmon-iin's advice does not consist of evidence. Remarks of senmon-iin are only explanatory, not expressions of opinion (Civil Procedure Code article 92-2).

23) A technical adviser does not need to be an expert of the exactly relevant field in question, but it suffices that he/she is an expert in a broader sense. In order to facilitate discussions among experts on an equal footing, a facilitator may be selected from among senior academics or practitioner in the relevant field.

conducted for litigation. For example, where three experts reach an agreement that “the defendant did not do A at this stage but he/she *should* have done it”, it remains a question for lawyers to determine the meaning of “should”; whether it means that “the defendant’s omission of A means his/her conduct falls below the standard expected of a reasonable professional in his/her position” or that “it is better for the defendant to have done A, but his/her decision is within the range of reasonable professional options available under the circumstances”. As regards to causation, for example, where experts say “there is a possibility” simply because they believe that there is nothing *absolutely* certain in science and that the negation of *absolute impossibility* is possibility, the lawyers would find it necessary to seek clarification whether or not the expert means that there is *legal* causation between a breach of duty and damage. And for example when scientific experts say, “it cannot be proven”, the lawyer has to clarify whether or not his expression means “it cannot be proven without any scientific doubt”.

In terms of the layout of the courtroom, in conference of court-appointed experts, three judges take seats facing the gallery, whereas three experts take seats in a manner in which their faces cannot be seen from the gallery. In the proposed conference of evidence, at the first stage, a facilitator, a court-appointed expert, and the two parties’ experts take seats around a round-table in a manner which does not suggest any order of seniority. Until everyone at the table has had a chance to state their opinion, judges and attorneys are advised to take seats away from the round-table, hearing the discussion over the round-table from some distance. When the discussion has come to a conclusion, there is a break. Thereafter, judges and parties and their attorneys take seats around the round-table to launch the second stage.

Anything said over the round-table, except by the facilitator, may be adopted as admissible evidence. Therefore everything is recorded and transcript is made.

A simpler version which is conducted without a court-appointed expert (i.e. a discussion of parties’ experts which is facilitated by a technical adviser) may be an option for simpler or smaller claims.

The first-stage discussion among experts is conducted to provide expertise to the court and it is followed by the second-stage discussion of the legal implications of the expertise.

(2) Advantages

(a) Substantial Advantages

(i) Participation of Experts of Good Quality

In addition to Japan’s convention of a court-appointed expert, each of the parties also instructs experts in the new method. In contrast to the appointment of three court-appointed experts, the burden of finding experts in the new method is thus shared among court and the parties, so that the task is made easier. Parties will competitively choose the best practicable one for them, so that experts of higher quality are likely to be chosen than

the appointment of all three by the court.

The proposed method makes it much easier for parties to instruct their experts and for experts to give their opinions to the court, because experts no longer need to undergo any hostile cross-examination at a trial, but a round-table conference with other experts in court. For the court, finding one court-appointed expert is easier than finding three. Experts will find it easier to be appointed to participate in a round-table discussion with the parties' experts rather than to act alone as single court-appointed expert. Unlike the Tokyo District Court's method, the proposed method which obliges court to appoint only one expert can be adopted by any court in any judicial district in Japan.

Because the court and parties seek the best possible experts for themselves, opinions provided by experts are likely to be of high quality. And the court is obliged to find an expert as technical adviser (*senmon-iin*) who can facilitate a fair and clear discussion among experts. Therefore, experts of higher professional and communication abilities are naturally likely to assemble.

Last but not least, the participation in a proposed round-table conference of evidence gives experts not only an opportunity to satisfy their desire to provide a public service to wider society beyond the specific scientific community to which they belong, but also an opportunity for further study. A conventional single court-appointed expert's report involves only giving without taking, whereas participation in conference evidence involves both the provision of service and the reception of something new from the discussion. A conference of evidence gives experts something both socially and individually, so that it will ease the court's arduous task of appointing a suitable expert both as a court-appointed expert and a technical adviser.

(ii) Improvement in the Quality of Evidence

In the proposed conference evidence system, experts, rather than lawyers, lead discussion. The proposed method thus eases the discussion among experts to be conducted exactly on specialist issues, producing an outcome which makes professional sense.

Lawyers are afraid of discussions among experts getting out of control. However, if lawyers want a better outcome, they should refrain from intervening and leave the chosen experts free to discuss the issues among themselves as much as they like. At the first stage, the technical adviser facilitates free but structured discussion in a way which ensures exact scientific issues are clarified and debated among experts on an equal footing. To serve such purposes of a facilitator, an eminent academic or practitioner in the relevant field may be a good choice to prevent the most senior expert from dominating the discussions, as often happens under the Japanese process. The presence of lawyers at this stage is in order merely to follow the discussion and to make judgments for themselves, rather than to control the discussion.

The Tokyo District Court's experience shows that court-appointed experts are almost exclusively chosen from among the middle-ranking doctors such as associate professors of

the listed university hospitals. However, as far as a case in which a general practitioner is involved, the standard of a reasonable general practitioner should be an issue. It would be better to ask another general practitioner rather than a doctor of a university hospital to act in such a case. Unlike the Tokyo District Court's method, the proposed method is flexible enough to seek the help of a more pertinent professional community, so as to help the court make a judgment which makes better professional sense for the relevant community. To apply the standard of care which is seen as reasonable by university hospital doctors in a case involving a general practitioner is to ignore the relative nature of the standard of reasonable care.²⁴⁾

The proposed conference of evidence method is conducted following the exchange of experts' reports, and therefore, this method combines the advantages of written evidence (i. e., accurate, comprehensive) and those of oral evidence (i.e., prompt, communicative, and expansive), while offsetting their disadvantages. For example, one of the issues which arouse in a conference of experts which I observed as a member of the public was whether a reasonable surgeon in the defendant's position would keep a drainage tube in the body of a patient after the surgery in question. One of the court-appointed experts said "there is no settled view on this" in his written advice. However, during the subsequent round-table discussion, it was revealed that all of the three court-appointed experts, including this particular expert himself, had ever kept drainage tube in a patient's body after the surgery. The expert in question had written "there is no settled view", because he was unable to find any medical literature addressing this issue, presumably because keeping drainage tube was too rudimentary to be worth mentioning in professional literature. It is an example of tacit knowledge. If there was only a single court-appointed expert's written report, judges might reach a wrong conclusion that there is no settled professional practice as to the removal or not of a drainage tube. This episode is intended to illustrate the manner in which a round-table conference serves the first purpose of the litigation requiring expertise, to obtain appropriate professional information.

(iii) Improvement in the Quality of Judgment

Following a round-table conference, where any area of disagreement remains among three experts, the panel of three judges makes a judgment. This judgment is a legal judgment on legal issues such as culpability and causation. A judicial conclusion cannot be said to be not making professional sense, because at least one expert opinion supports it.

To go through conference evidence is safer for the court than to rely on a single court-appointed expert's advice. Where there are three experts, even if one of them is not as good as he/she should be, the court benefits from the other two experts' views in order to reach a conclusion.

24) Supreme Court, Judgment of 9 June 1995 (7th year of Heisei) Minshu vol. 49, no. 6, p. 1499.

In both concurrent evidence and conference of court-appointed experts, it may be too difficult for a non-expert (including a judge) to preside over, or to facilitate, discussions among experts, whereas in the proposed method, there is no such a worry, because an expert technical adviser assumes the task of facilitator at the first stage.

The proposed method thus ensures the court's access to high quality professional information and serves the second purpose of litigation requiring expertise, that is, to obtain a pertinent legal judgment.

(iv) Feedback to Expert Community

A judgment of a court following a conference of evidence in which experts of parties and an expert of the court, each of high quality participate, may set a standard which is respected by the relevant professional community. An outcome of a round-table conference and of a judgment which follows it are reported back to the relevant professional community through the participating experts and publication, and thereby serves the wider society not only as a code of conduct but also as a means of prevention of like mistakes from happening again in the future.

(b) Procedural Advantages

(i) Procedural Fairness

The conference of evidence enables parties to instruct their expert witnesses, and thereby ensures procedural fairness. In particular, an expert witness who is instructed by the plaintiff, in a sense, impeaches a professional community to which he/she belongs. Giving such an expert an opportunity to join a round-table discussion with the other experts, serves fairness between parties.

(ii) Publicity and Transparency

The conference of evidence is conducted in court in public, so that publicity and transparency of the process is guaranteed.

(iii) Parties' Initiatives

The conference of evidence ensures parties' initiatives, in that they choose their own experts. The function of Japan's inquisitorial system, which delegates the specialist fact-finding duty to a court-appointed expert (or "experts" when it comes to Tokyo method), depends heavily on the integrity of the relevant profession which selects court-appointed expert(s) for the case. Given their overwhelming professional authority, plaintiff's counterargument hardly carries sufficient weight before court. Against this backdrop, conference evidence gives the parties security that at least one expert whom he/she can trust participates in the process.

(iv) Saving Time and Cost

Of course a conference of evidence costs parties more than a method involving neither appointment of court-appointed experts nor instruction of expert witnesses. The cost and time of a conference of evidence is something necessary for the achievement of the purposes of litigation requiring expertise. A speedy and cheap proceeding which does not

achieve the purposes may still give satisfaction to court somewhat, but not to the parties. The question is how to obtain professional information of high quality as expeditiously and cheaply as possible.

Regarding time, in a conference of evidence, the written opinions of parties' experts are submitted at the preliminary written-evidence stage, and a court-appointed expert's written report, which aims to set the agenda for round-table discussions based on reports of parties' experts, is less time-consuming than conventional fact-finding report of a single court-appointed expert. The conference of evidence could be shorter than examinations of three experts in turn.

As regards the cost of a court-appointed expert who participates in a conference of evidence, it would be equivalent of the fee for an expert who is instructed to review the reports of two other experts, to set an agenda, and to participate in a round-table conference which lasts a number of hours. His/her fee is bound to be smaller than that of a conventional court-appointed expert.²⁵⁾ Experts who are instructed by parties would charge less than in cases where they undergo cross-examination.²⁶⁾ Further, the parties need not pay for the cost of a technical adviser who acts as a facilitator, because it is paid by the court.

7. Conclusions

Where three experts come together, there is synergy and their collective wisdom is greater than one multiplied by three. That is why a clinical case conference is convened to decide a course of treatment for medical patients, and a senior court consists of a panel of three or more judges. There are great advantages in a number of experts coming together to discuss an issue, rather than merely exchanging their written opinions.

A round-table conference can make litigation a process of promoting better understanding and satisfaction, as opposed to that of promoting hostility. The conference of evidence may achieve something more than the resolution of a dispute, and to lead parties and courts to common understanding about causes and future prevention of like accidents.

An existentialist may believe that there must be one *truth* only. In the reality of civil

25) A conventional single court-appointed expert whose duty is returning written advice charges from 500,000 to 800,000 Yen. Tokyo Chiho Saibansho Iryo Sosho Taisaku Iinkai (the Tokyo District Court, the Medical Litigation Committee), "Tokyo Chisai Iryo Shuchubu niokeru Iryo Sosho no Shinri no Jittai nitsuite" (the Facts about Medical Negligence Litigation before the Medical Divisions of the Tokyo District Court), Hanrei Times no. 1105 (2003) p. 43. Court-appointed experts attending conferences at Medical Divisions of Tokyo District Court charge around 200,000 Yen each.

26) In Japan, a party's expert charges more-or-less the same amount as a court-appointed single expert. More importantly, it is often not about how much is paid but whether or not an expert is willing to go to the court. Once an expert agrees to help the party, he/she tends to not care about the amount of money to be paid. Because they desire to help victims and improve the quality of their profession.

litigation, however, there is rarely a case which is resolved by the discovery of the single truth.²⁷⁾ Modern litigation requiring expertise including professional negligence litigation is about finding an opinion which can achieve consensus or near consensus among the relevant professional community, setting it as a normative standard and applying it to the set of facts of a particular case. It is no longer enough to ask an eminent authority in the relevant field in question to declare one scientific *truth*, and to make a judgment in accordance with it. It is now necessary to realise that the court is a forum in which scientists and lawyers should come together to give directions as to how society should come to terms with the uncertainty of science, which is a given, and to make rules.²⁸⁾

An example of a new procedure in accordance with which the court may serve this purpose is conference evidence as the author proposed in this paper. It is entirely possible under the current Japanese law to conduct the conference of evidence procedure. This method would help the court raise the quality of both of the process and outcome of litigation and bridge the gaps between science and society.

27) In criminal cases, however, there would be a single truth about whether or not the defendant is the culprit.

28) Chihara Watanabe, “Saiban to Kagaku~Forum toshiteno Saiban to sono Tetsuzuki no arikata nitsuite no ichi Kosatsu~” (Justice and Science: An Essay on the Process of Administration of Justice in Court Forum Bridging Science and Society) *Ho to Shakai Kenkyu* no. 1 (2015) p. 132.