Forensic Science in Inquisitorial Systems of Criminal Justice

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To appreciate the place of forensic science in inquisitorial (or Continental European) systems of criminal justice it is necessary to appreciate some of the essential features of those systems and the ways in which those systems differ from adversarial (or accusatorial) systems. In this article I will focus on the French system as representative of inquisitorial systems.

One of those features is that the primary focus of inquisitorial systems is on the investigation into the alleged crime. The investigation provides the foundation on which the other stages of the criminal justice process (that is, committal, trial and appeal) are based. The trial, for instance, could properly be described as a public audit of the investigation.[1] Witnesses are called at the trial and give oral evidence, but it is given in response to questioning by the presiding judge and that questioning is based on the witness' deposition (or report) in the dossier. It is essentially a way of confirming in public the deposition (or report) obtained in the secrecy of the investigation. This is in contrast with adversarial systems in which the primary focus is on the trial, where witnesses come forth and give the evidence that will be determinative of the issue of guilt, notwithstanding what those witnesses might have told investigators or others preparing the case for trial.

Another feature is that the investigation is under the control of an investigating judge (*juge d'instruction*) for the more serious crimes and of a prosecutor (*procureur*) for the less serious crimes. The prosecutor is regarded for this purpose as part of the judiciary and has similar investigatory powers to those of the investigating judge. The prosecutor in fact plays a major role in the whole of the criminal justice process. It is the prosecutor who "requisitions" the investigating judge to investigate serious crimes and to whom the investigating judge reports back at the end of the investigation. It is the prosecutor also to whom the police must immediately report knowledge of a crime. Although the police will carry out much of the actual investigation into a crime (including taking statements from witnesses and the initial interrogation of the suspect) this is done under the supervision and often the direction of the investigating judge or the prosecutor. By contrast in adversarial systems investigations are normally carried out by the police without reference to or supervision by a prosecutor or a judge, except when warrants are required for measures such as searches or electronic surveillance.

A third feature is that the inquisitorial investigation results in a dossier or file in which all investigative measures and their results are recorded. This dossier is under the ultimate control of the prosecutor, and for serious crimes, will go backwards and forwards between the prosecutor and the investigating judge. The accused and "civil parties" (victims of the crime) have access to the dossier, as do experts for the purpose of their reports. After the

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1 The "audit character" of Continental trials has been noted by Damaška, *The Faces of Justice and State Authority* (1986) at 195.

investigation has been completed the dossier goes to the indicting court (in the case of a crime to be tried before the superior criminal court, the *cour d'assises*), then to the trial court, then to any appeal court. The dossier could be described as the backbone of the inquisitorial criminal justice process. There is no equivalent to the dossier in adversarial systems. In those systems the police send selected documents from their investigation to committing bodies, prosecutors and the defence, but a new documentary phase opens with the transcript of the trial, and it is that transcript rather than anything from the investigation that goes up to any appeal court.

These features of inquisitorial systems should allow us to appreciate better the place of forensic science and the role of experts in those systems and the difference in those respects between the two types of systems. It is thus to be appreciated that experts enter the inquisitorial process during the investigation and their reports have their major impact at that time rather than at the trial. It is to be appreciated also that experts' reports are commissioned by "judicial" investigators investigating judges or prosecutors. They are not commissioned by the police, and they generally cannot be commissioned by the defence or the civil parties. It is to be appreciated finally that experts' reports form part of the dossier. As such they are available to the defence and the civil parties and they are relied upon, with the rest of the dossier, by the indicting court, the trial court and any appeal court. Experts will generally be called as witnesses at the trial but they will essentially present in public the conclusions reached in their reports. They may be asked questions by the lawyers for the parties but this will usually be to explain, clarify or defend their reports made during the investigation.

Experts commissioned by investigating judges and prosecutors are drawn from official lists. There are two types of list. One is the national list maintained by the *cour de cassation* (the final court of "appeal"[2]) in Paris. The other is comprised of regional lists maintained by the *cours d'appel* for the 28 regions of France over which those intermediate courts of appeal have jurisdiction. Experts are "inscribed" by those courts on their lists after nomination by a selection commission, and with the approval of the *procureurs généralis* attached to those courts.[3] Experts so inscribed are generally well established in their field of expertise and well regarded by their peers. They must also be "honourable".[4] Appointments are sought after and are of some prestige, both professionally and socially. Remuneration is at fixed rates which are apparently somewhat below that which can be earned in practice, research or industry.

In exceptional circumstances investigators may choose to use experts who are not on any official lists. This can only be done on the basis of a reasoned decision.[5]

An expert will be commissioned to report to the investigating judge or the prosecutor on some aspect or aspects of an investigation involving a "technical question".[6]

The commission will generally ask the expert to carry out any necessary investigations for the purpose of responding to questions asked or reporting on matters raised by the in-

2 The jurisdiction of the *cour de cassation* is exercised on a *pourvoi* (petition) rather than an *appel* (appeal) and the jurisdiction is confined to error in the application of the legislated laws.

3 Code de Procédure Pénale (CPP) art 157.

4 Id, art 160.

5 Id, art 157.

6 Id, art 156.

vestigation. The expert will be empowered to interrogate persons with material information, to carry out tests on relevant items, to take samples, to utilise the services of the police, and to access the dossier. Accused persons can be interrogated by an investigating judge or a prosecutor at the request of, for the benefit of, and in the presence of an expert, or the accused can elect to make any necessary explanations, directly to the expert in the presence of his or her lawyer.[7] On complex matters two or more experts may be commissioned to report, either jointly or, if necessary, separately.[8] Since 1986 officers of the judicial police investigating "flagrant" (very recently committed) offences have had the power to commission "qualified persons" to conduct "technical or scientific examinations" which cannot be delayed. These persons need not be on the official lists of the courts.[9]

The prosecutor, the accused and any civil party can request of an investigating judge, and the accused and any civil party of an investigating prosecutor, that a commissioned expert be required to carry out specified investigations or interview designated people.[10] Those parties can also request that more than one expert be commissioned.[11]

The report of an expert to the "judicial" investigator must contain a description of the "operations" of the expert and the conclusions reached. If two or more experts have been commissioned jointly they must report any difference of opinion or any individual reservations to a common conclusion.[12]

On receipt of an expert's report the investigating judge or the prosecutor must inform the parties and their lawyers of the expert's "conclusions" either in person or by registered letter. The parties may then request a "complementary expertise" or a "counter-expertise". The rejection of any such request must be by reasoned decision.[13] Except in exceptional circumstances a "counter-expertise" must be sought from an expert on the official lists.[14]

There is a right of appeal to the *chambre d'accusation* against decisions taken by an investigating judge concerning experts and expertise.[15] Such appeals are rare in practice.

At the hearing of a case (more apt than the "trial") experts who have reported during the investigation are called to give oral evidence. They swear an oath, different from the oath of an ordinary witness, to "assist the administration of justice on their honour and conscience".[16] They "expose" to the court the results of their investigations and may consult their reports for that purpose. (Their reports will already be on the dossier, which is available to the judges before and at the hearing. The reports will also have been available to the parties soon after they were placed on the dossier.) The presiding judge may question an expert witness, either on his or her own initiative or at the request of the parties or their lawyers.[17] There is generally some questioning of experts, after they have presented

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7 Id, art 164.
8 Id, art 159.
9 Id, art 60.
10 Id, art 165.
11 Id, art 167.
12 Id, art 166.
13 Id, art 167.
14 Id, art 157.
15 Id, arts 185–7.
16 Id, art 168.
17 Ibid.

their conclusions, both by the presiding judge and by the defence lawyer who, in practice, will be allowed to pose questions to an expert directly.

There is provision in the Code for the situation in which a witness at the hearing contradicts the conclusions of an expert or supplies new "technical" information. The presiding judge is then to seek the views of the expert witness(es) and the parties, and may adjourn the hearing and prescribe further measures of expertise, including the designation of an expert or experts to investigate further and report back to the court.[18] This provision is some acknowledgment that matters may emerge at a hearing that have not been dealt with sufficiently during the investigation. The solution, in the last resort, is to carry out further investigation.

It may be helpful to illustrate the position as set out above by reference to a French case. It is a case I followed closely in Le Mans in 1993. It involved charges of murder and aggravated assault against a man who had allegedly shot and killed the lover of the man's estranged wife with a shotgun and then wounded his estranged wife with a revolver. I attended the two days of the hearing at the end of which the accused was convicted on both charges and sentenced to 18 years imprisonment. I subsequently read the dossier in the case and then interviewed the investigating judge, the prosecutor, and the lawyers for the accused and the "civil parties" (the wife of the accused and the family of the deceased).

During the investigation the investigating judge had commissioned nine experts to report on the "technical" issues that were seen to have arisen. The experts were medical (two), ballistics (one), chemical (two), mechanical (one), psychiatric (two) and psychological (one). Those experts produced 11 reports. There were an autopsy report, four ballistics reports, two chemical reports, a mechanical report, a psychiatric and a psychological report on the accused and a combined psychiatric/psychological report on his wife.

The autopsy report was commissioned from two medical experts. They concluded that the cause of death was multiple interior injuries from two firearm wounds to the left side of the body. They hypothesised that one of the wounds was from a shot fired at point blank range but said that hypothesis required further consideration in the light of ballistics expertise. There were 19 photographs taken by the police annexed to the autopsy report.

The first ballistics report (four pages) noted that the shotgun used by the accused fired bullets from one barrel and buckshot from the other and concluded that five shots had been fired at the scene (the deceased's house), the first (a bullet) into the lock of the front door, the second and third (buckshot and a bullet) through the door, the fourth (buckshot) into the left side of the deceased, and the fifth (a bullet) through a bedroom door. After receipt of this report the investigating judge commissioned a "complementary" report seeking greater precision on the relation between the shots fired and the wounds to the deceased, having regard particularly to the autopsy report and the clothing of the deceased (which was delivered to the expert). The second report was of 31 pages plus two books of photographs, one showing the trajectories of the five shotgun shots and the other the two weapons, the munitions and the results of test firings. The conclusions on the shots that hit the deceased were that the second shot, fired through the door, had hit the deceased in the left thigh while he was braced against the door from the inside, and that the fourth shot, resulting in a wound under the left rib-cage, was "incontestably" fired directly into the de-

18 Id, art 169.

ceased while lying on the ground from point blank range. This was "proved" by the size and nature of the *tatouage* around the wound as evidenced by the autopsy report and the accompanying photographs.

Two chemical reports were commissioned during the investigation to determine whether powder traces on the pullover of the deceased and the jacket of the accused matched. The first report was by a research laboratory and was inconclusive. The second report was commissioned from the ballistics expert and an expert chemist. This report concluded that the powder traces on the two garments matched. It also concluded, although there had been no such specific commission, that the powder from inside other buckshot cartridges of the same brand as used by the accused matched the powder on the garments. The experts drew a further conclusion that the accused had shot at least once "from the hip". This report was highly technical and contained many spectographs.

For the purposes of the investigation the investigating judge directed a re-enactment of the crime and a confrontation between the accused and the three persons in the house at the time of the shooting (the accused's estranged wife, a daughter of the deceased and her boyfriend). The accused and two of the persons present at the time asserted at the re-enactment and confrontation that two shots had been fired into the lock of the front door. The accused also asserted that he had fired four shots in all from the shotgun while the deceased's daughter's boyfriend thought that six shots had been fired.

In consequence of these allegations the investigating judge commissioned the ballistics expert to report a third time, determining if what the accused and the witnesses had said was compatible with the conclusions in his earlier reports that there was only one shot fired into the lock and five shots in all. The third ballistics report (15 pages) excluded the "hypotheses" that two shots had been fired into the lock (one would have to have been of buckshot and none was found in the lock) and that four or six shots were fired rather than five (the deceased was shot twice with buckshot and three bullet shots were fired).

The fourth ballistics report (12 pages) was on the revolver shots. The accused had fired two shots into the air after his fleeing wife and a third into the back of her head (the revolver fired lead pellets). This had not been the subject of any expertise at the instance of the investigating judge before he returned the dossier to the prosecutor. The prosecutor accordingly issued a requisition to the investigating judge requesting him to investigate further the circumstances in which the revolver shots had been fired. The investigating judge commissioned a report from the ballistics expert. The report concluded that the revolver shot that hit the wife in the back of the head could not have been fatal. The accused when interrogated by the investigating judge about that shot said that he had no intention to kill his wife, if he had have he would have used the shotgun. In consequence of this further investigation the initial charge of attempted murder of the wife was "requalified" to assault with a weapon.

The mechanical report had been obtained from a mechanical expert who had been commissioned to test the battery of the accused's car. The police had witnesses that the accused had driven his car to and from the scene of the shooting. The accused initially denied that he had used his car that night. When asked why the motor was warm he said he had run it for a period with the car stationary because he was having problems with the battery. The mechanical report concluded that there was nothing wrong with the battery.

The psychiatric and psychological reports on the accused were obtained as part of the investigation into the accused's character, temperament and personal history (*personnalité*). (In the French system the "person" is judged rather than just the "facts" — *on juge*

l'homme, pas les faits.) The psychiatric report was not unfavourable to the accused, finding that his depressive condition during the months before the shooting (after his wife had left him) had resulted in a "slight diminution of responsibility" but that there was no mental abnormality. The psychological report was also not favourable. It concluded that the accused had an egocentric and rigid psychological structure, that he had refused to accept the separation and divorce proceedings taken by his wife, that his behaviour could be characterised as suppressing an intruder (the deceased) and reappropriating his wife as an object, that there were no "extenuating circumstances", and that he continued to be a danger to his wife.

The joint psychiatric/psychological report on the wife seems to have been commissioned as relevant to "extenuating circumstances" for the crimes and to punishment. The report concluded that the wife was normal and without psychiatric problems, that she was in a state of anxiety as a result of the shootings which necessitated treatment, and that she had been very attached to the deceased.

The accused was brought before the investigating judge to be acquainted with these reports as they came in.[19] The accused's lawyer was always notified in advance of these interviews and generally, but not always, attended with the accused. The accused had the right to request any complementary or counter-expertise but never did so.[20] It was suggested to me by the investigating judge and the lawyer for the civil parties that a counter-expertise should have been requested from another psychologist to counter the unfavourable report from the psychologist who had been commissioned, but that a counter-expertise on the ballistics would not have been advisable as it would only have confirmed the conclusions of the commissioned expert.

On the criteria for the selection of experts to investigate and report in this case, the investigating judge informed me that he sought to use experts he had used before whom he had found reliable and neutral. All the experts commissioned in this case had been on the regional list maintained by the *cour d'appel* at Angers.

At the hearing of the case before the *cour d'assises* (comprising three judges and nine jurors sitting and deliberating collegiately, on punishment as well as liability), four of the nine experts who had been commissioned during the investigation were called to give evidence. These were, in the order called, the psychiatrist and the psychologist who had reported on the accused (on his *personnalité*), one of the medical experts who had conducted the autopsy and the ballistics expert (on the facts). These experts were asked by the presiding judge to state the conclusions contained in their reports. Further questions were asked of the psychiatrist, the psychologist and the ballistics expert by the presiding judge. Questions were asked of the psychologist and the ballistics expert by the accused's lawyer (of the latter for the purpose of raising a doubt whether a shot had been fired at point blank range into the deceased). One question was asked by the lawyer for the civil parties of the ballistics expert. No questions were asked of the medical expert about the autopsy. No questions were asked of any expert by the prosecutor.

What are the arguments for and against the way inquisitorial systems such as the French deal with experts and matters involving expertise as opposed to adversarial systems? The following arguments in summary form may be suggested.

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19 As required by CPP art 167.

20 Ibid.

Arguments for

First, experts in the French system are likely to be relatively neutral and impartial. They are not expected to produce conclusions sought by the parties, nor do they have a financial interest in producing such conclusions.

Second, these experts are free to pursue scientific questions fully and without inhibitions arising from the interests of the parties. The interests to be served are those of scientific truth.

Third, the reasons witnesses to factual issues may give conflicting evidence (for example, bias and faulty perceptions) do not, or should not, operate in relation to expert opinion on scientific issues.

Fourth, litigation will be best served by consensus opinion from the mainstream of science rather than by becoming a battleground for conflicts in science, or an opening for marginalised or "junk" science (including fraudulent science).

Fifth, expert opinion so presented will be less likely to confuse the trier of fact, particularly a jury, than conflicting opinions presented by the parties. The jury, particularly, should not be called upon to arbitrate between conflicting scientific opinions.

Sixth, fewer experts per scientific issue are required than in adversary litigation, which should shorten and cheapen litigation.

Arguments against

First, French expert opinion is never really tested by cross-examination. (It is too late at the hearing for an opposing party to achieve much by way of questioning an expert.)

Second, a single or uniform view is likely to prevail on questions requiring expertise. (A "judicial" investigator faced with a plurality of views on a question should seek other views until a consensus or a prevailing view emerges.)

Third, the view that prevails is likely to be from the mainstream scientific position and tending to scientific conservatism.

Fourth, a scientific view accepted by the investigator at an early stage in the investigation is likely to contribute to a "theory of the case" or a view of the "truth of the matter" which will persist throughout the case and which will welcome further corroborative evidence but reject inconsistent evidence.

Fifth, official experts will tend to identify with the prosecution and the judiciary (both of whom are instrumental in appointing them) and to produce reports perceived as furthering the interests of those officials, which will tend to be those of law enforcement and the punishment of offenders.

Sixth, there will be a tendency for a single or uniform expert view to override inconsistent lay evidence. (An example of this can be seen in the case sketched above in relation to the number of shots fired by the accused from his shotgun.) This problem would not arise in the (adversarial) situation where there were conflicting expert views and the lay evidence supported one of those views.

Is there scope for improvement in the way adversarial systems handle scientific evidence and, if so, could those systems adopt anything from the inquisitorial way? There is certainly concern about miscarriages of justice in adversarial systems in recent times that are seen as stemming partly at least from partisan or otherwise unreliable expert evidence adduced by the prosecution. Australian examples that come readily to mind are the cases

of *Chamberlain, Splatt* and *McLeod-Lindsay*.[21] In England the most notorious examples have been the Guildford Four and the Birmingham Six.[22]

What does the inquisitorial way suggest to minimise partisan or unreliable expert evidence? I would venture three proposals.

First, a forensic laboratory system could be introduced under which any (or most) forensic science issues could be investigated and reported upon. The system would be publicly funded and would draw upon the expertise of forensic scientists employed full or part- time. There may be state laboratories or a national laboratory with branches in state centres. The laboratories would be administratively within Departments of the Attorney-General or Justice rather than Police Departments. Experts would be appointed to the laboratories on the recommendation of a commission on which the scientific disciplines, the judiciary, the legal profession and the executive government would be represented. Generally only such experts would be able to give forensic evidence.

Second, magistrates could be given powers to oversee forensic science investigations. These powers could be exercised from when a defendant was first brought before a magistrate and on application, then or subsequently, by the prosecution or the defence. The powers envisaged would be as to the type of investigation to be undertaken and the expert to undertake it. This would probably require an official list of experts from which persons would be selected and approved to investigate and report and to ultimately give evidence. Ideally the reports would be available to both sides. Magistrates already have powers to approve investigative measures in the areas of searches of premises and electronic surveillance so this may not be such a radical extension of their powers. Also it is at the investigative stage that some control over scientific investigation on behalf of the prosecution should be exercised.

Third, trial judges could be given (or could assume) greater powers to commission and to call expert witnesses. This is a suggestion that will be seen as going against the grain in a system where judges are thought of as referees between contending parties. Where, however, there is a judicial perception that the whole truth is not being revealed by the parties there is an argument for remedial power in the judge. This proposal would probably require the judge to be acquainted pre-trial with the scientific issues and the evidence to be called on those issues by the parties so that any judicial commissioning of experts could be attended to before the trial. Such matters should be dealt with in the context of the investigation rather than be left to the trial. Judicially commissioned experts would have to come from an official list compiled as suggested above. If forensic science issues are not in their nature as party-partisan as the issues addressed by lay witnesses the suggestion that judges be empowered to commission and call scientific experts should not be seen as subverting the adversary system.[23]

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21 These cases, among others, are dealt with conveniently for present purposes by Wilson, P, "Miscarriages of Justice in Serious Criminal Cases in Australia" in Carrington. K, et al (ed), *Travesty! Miscarriages of Justice* (1991) at 1–17.

22 Also conveniently dealt with by Molomby, T, "Miscarriages of Justice in Britain: The Guildford Four and the Birmingham Six", id at 18–30.

23 There is some judicial support in Australia for a power in judges at criminal trials to call witnesses. See, for example, Deane J in *Kingswell v R* (1986) 60 ALJR 17 at 32 ("court witnesses" to advise or guide a jury on scientific disputes between specialists), and Sheppard, J, "Court Witnesses — A Desirable or Undesirable Encroachment on the Adversary System?" (1982) 56 *ALJ* 234.