How to guarantee the realibility of expert testimony – reality in China

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Abstract

High technology plays an increasingly important role in criminal lawsuits, however, the high-tech information must be presented in front of the judge who normally is a layman. As a consequence, the expert could exert so great influence on court that whose knowledge must be presented in an understandable way. Or, otherwise the expert instead of the judge would be the master of the court. In China, the implementation of the new Criminal Procedure Law fails to improve the present situation of an extremely low expert's court appearance rate, which seriously hinder the judgment to the expert testimony. It is because there is no restriction to the judges' discretion to decide whether the attendance is necessary. Due to the extremely high caseload, the judge tends to solve the case as soon as possible without asking the attendance of the expert. Hearsay rules based on their stern exclusion and the operability of perfecting details can solve this problem significantly.

Keywords: *forensic science, expert, hearsay rule, experts' appearance in court*

1. Why is the attendance of the expert so important?

A. *To Make the Trial Substantive*

With the development of science and technology, high technology facilitates the case investigation profoundly. Expert testimony as the most important forms of testimony in criminal trial of forensic science is playing an increasingly important role. But in China, expert witnesses rarely testify in court, while the judges lacking the relevant professional knowledge tend to be difficult to review and judge expert testimony, which makes the expert testimony become a kind of indisputable evidences, and the judges have no choice but admit its probative value. Thus, the court cannot effectively question the expert testimony at all, and the court trial descents to be an affirmation procedure of the expert testimony produced in investigation stage. In this case, it is the police who dominates the trial but not the judges. It is very dangerous that the trial procedure become a mere formality, because the whole criminal lawsuit is likely to become a punishment procedure dominated by investigation organ. Especially in China, expert testimony of the criminal case is mainly produced by the internal certifying agency of the police station, and often is presumed to be with high probative force. However, in the United States, judges have already realized their power and flexibility when evaluating expert testimony. In order to make the judge better exercise this power but with appropriate constraints on its flexibility, expert witnesses to appear

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in court is important, because paper expert testimony are more likely to offer expert the power to determine the case facts, and makes it hard for the judge's power being transparent[1].

B. *For the Authenticity of Expert Testimony*

The science is developing and progressing constantly, and the scientific conclusion is always under self-correcting that is to say the only accurate and correct identification result is often just an ideal state. Every decision of judges, as the dominator in criminal cases, often affects the defendants' liberty and even their lives. Therefore, every judge should play the role of "gatekeeper" and exclude the so-called "junk science"[2]. The April 18th report on Washington Post, alleging that America's Justice Department and FBI admitted that during the past 20 years almost all judicial forensic staffs of FBI have made flawed expert opinions. In another word, one possibility is that those unreliable expert testimonies have resulted in so many wrongful convictions that hundreds of innocent people were sent into prison for wrong.

But it is impossible that each judge is an all-powerful scientist who has the ability to find defects of expert testimony at a glance so that expert witness appearance in court is needed to demonstrate the scientific principles of expert testimony[3]. Moreover, the authentication is processed secretly, which makes the paper expert testimony difficult for showing careless omission and error, while the cross-examination in court can make unilateral conclusion be questioned by parties of prosecution and defense. In addition, due to lake of relevant professional knowledge, rare others except experts in court can come up with proper questioning opinions so that the judge tends to be affected by expert witnesses. The 192th regulation of *"Criminal Procedural Law", therefore, stipulates* the expert auxiliary system: auxiliary experts can be hired by both the prosecution and the accused in order to question or further evidence the scientificity of the expert testimony.

The expert witnesses and auxiliary experts' appearance in court can strengthen the effect of cross-examination to the expert testimony. A collegial bench can make scientific judgment to special issues involved in the case, and get rid of its excessive dependency on expert testimony or even credulity through demonstrating the special issues involved in the case in court and effective cross-examination of both parties of prosecution and defense to clarify.

2. Low percentage of experts' Court attendance

Low expert witnesses' appearance rate in court has always been one of the main reasons for impacting cross-examination to expert testimony effectively. "In Shanghai, Qingdao and Hohhot cities, which are there big cities in China, after random retrieval of

[1] See H. Stewart, R. Murphy, M. Pilkington, S. Penney, J. Stribopoulos, *Evidence: A Canadian Casebook* (Toronto: Emond Montgomery Publication, 3rd ed., 2011), 8.

[2] See F. Schauer, B.A. Spellman, *Is Expert Evidence Really Different*, (Notre Dame L Rev. Press, 1st ed., 2013), 89.

[3] See H.W. Rogers, *Expert Testimony* (Fred B. Rothman&Co Press, 2nd ed., 1991), 4.

all court files from the intermediate people's court, we found there is no one case with record of expert witnesses appearing in court to accept cross-examination"[4].

In 2012, the new criminal litigation law made significant amendments in terms of judicial authentication, mainly including renaming expert conclusion as expert testimony; stipulating expert witnesses must appear in court under particular conditions; increasing the protection measures for the expert witnesses and their families etc. These series of modification mainly aim to increase the expert witnesses' appearance rate in court and guarantee for expert testimony are reviewed materially by court. But judging from the results of empirical research, achievements are few. We selected three provinces in west, south and center of China respectively in this research that represent different economic levels, degree of openness and geographical environment so as to the result can have certain representativeness. Specific data are shown in the table below.

Table 1

	In 2012		In 2013		In 2014	
	The number of concluded cases	The number of expert witnesses in court	The number of concluded cases	The number of expert witnesses in court	The number of concluded cases	The number of expert witnesses in court
D district people' court in C City, S Province	454	0	380	3	373	1
X district people' court in C City, S Province	233	0	219	0	232	1
R district people' court in S City, H Province	246	2	256	3	274	4
M district people' court in S City, H Province	182	0	180	0	153	0
Intermediate court in K City, Y Province	262	0	215	0	234	10
Y district people' court in K City, Y Province	138	0	170	0	153	0

[4] 汪建成 [W. Jiancheng], 《中国刑事司法鉴定制度实证调研报告》 [The Chinese Criminal Expert Testimony Empirical Research Report] (2010) 14(3) 中外法学 *Chinese and Foreign Law* 67, 72.

Results show that after the implementation of new criminal litigation law the expert witness appearance rate in court stayed the same to the before, still maintaining at a fairly low range.

3. Analysis of causes

This research mainly adopts questionnaire survey to study the reasons why expert witnesses' appearance in court is too low. We issued 450 questionnaires to the judges, lawyers and expert witnesses of the three provinces and cities mentioned above respectively, and effectively withdrew 450 questionnaires. (The research team entrusted local courts and judicial bureaus with the distribution job.) Specific results are as follows:

Table 2

Profession	Main reason for a low expert witness appearance rate in court					amount
	Expert witnesses were unwilling to appear.	The judge did not want them to appear.	Parties did not understand.	Expert testimony without dispute.	others	
The judge	65	56	5	17	7	150
Lawyer	56	63	8	19	4	150
Expert witness	53	69	2	23	3	150
Amount	174	188	15	59	14	450

Results showed that there are many reasons that cause expert witnesses' absence in court, but the uppermost two reasons are that expert witnesses were unwilling to attend and the judges did not hope them appear. Then, research group made a questionnaire about the deeper reasons.

Table 3

Profession	The main reasons for expert witnesses' reluctance to appear in court					amount
	Fear of retaliation	There is no need to attendance for having given a clear expert testimony.	Considerations of transportation, practice, energy and financial condition	Fear of unable to explain clearly for lack of ability.	others	
Expert witness	51	30	24	38	7	150

Table 4

Profession	The main reasons for expecting expert witnesses absent					amount
	it will consume too much judicial resources, and reduce the efficiency of lawsuit	Trust expert testimony	to avoid embarrassment for being unable to understand	to take account of the investigation organ	others	
Judge	72	13	5	53	7	150

Through the analysis of research results, we can own the failure of the new criminal litigation law amendment on expert witness appearance in court to its partial cognition of this issue in that most modification of the criminal litigation law was to deny the effectiveness of the paper expert witnesses, protect the safety of expert witnesses and their families, and ensure economic compensation. However, these measures are aimed at only expert witnesses' subjective reluctance to appear in court, but ignore another reason leading to expert witnesses' general absence from court which is the reluctance of the court to have the expert attending the trial[5]. Instead, the new law also grants the court final right to decide the expert witnesses' attendance in court that is to say without the necessary condition considered by the court, expert witnesses have on obligations to appear in court. Therefore, the court can exclude the need of expert witnesses' appearance in court and hold the right of treating the expert testimony as the judicial basis. Therefore, at present stage, to increase expert witnesses' appearance rate in court must limit the discretionary power of the court.

4. Solutions – Hearsay rule

A. *The Overview of Hearsay Evidence Rule*

Hearsay evidence rule is the most distinctive rules on evidence acts of common-law countries, which is also a great contribution of the outstanding judicial system to judicial procedure[6]. According to the "*Federal Rules of Evidence*" of the U.S., hearsay evidence refers to a statement that: the declarant does not make while testifying at the current trial or hearing; and a party offers in evidence to prove the truth of the matter asserted in the statement. In accordance with the hearsay rule, the evidence with the feature of hearsay must be excluded from the court strictly. Consequently, if an expert testimony is produced in investigation phase, and no expert witness appears in court to testify, then this expert testimony, which is certainly within the scope of the adjustment of the hearsay evidence rules, will be excluded from the court.

[5] According to the research, the judges' unwillingness about the attendance of expert witnesses are mainly because they tend to trust the expert testimony which is mainly provided by the prosecution and what's more questioning the testimony in court will take too much time.

[6] See Wigmore, *Treaties on Evidence*, (Chadburn Press, 5th ed., 2009) 28.

B. *Value of Hearsay Evidence Rules*

As stated above, the main reason for a low expert witness appearance rate that has not been resolved by the new criminal litigation law is that no limit is given to the judges' discretionary power of determining whether the expert witnesses need to appear in court. Why hearsay evidence rules can guarantee expert witnesses to appear in court? First of all, it eliminates the absoluteness of hearsay evidence. In another word, evidence with hearsay attributes can be excluded as long as it is not within the exceptional reserve range, even the judge does not have any discretionary power[7]. In accordance with the "*Federal Rules of Evidence*" of the U.S., a declarant is considered to be unavailable to attend the trial and the testimony obtained before trial is admissible only if the declarant: firstly, is exempted from testifying about the subject because the court rules that a privilege applies; the second, refuses to testify about the subject matter despite a court order to do so; thirdly, testifies to not remembering the subject matter; the last, cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness. Consequently, the specific situations under which the judge can deny the necessity of witnesses' attendance are stipulated so clearly that the court can't exempt expert witnesses' duties from appearing in court just because of its subjective preferences in that it has no discretionary power.

Secondly, the hearsay evidence rules are not hollow doctrines with no content. Instead, it is an evidence rule that contains rich contents and is operated extremely easily, including the definition of hearsay evidence; the applicable scope of hearsay evidence rules; specific programs of the rules applied in court, like proposing program of motion, pleading program, reviewing program; and all exceptions of the hearsay evidence rules[8]. "*Criminal Procedural Law*" focuses more on the practical procedures, one of whose values lies in insuring the smooth running of judicial proceedings. However, if judges were only empower to exclude the application of hearsay evidence but without clear using regulations, then, as for the power, there would be only two results: abuse or abandonment, and both cause related procedure useless[9]. Introducing the hearsay evidence rule is equivalent to the introduction of a set of operating mechanism, by which the judges can learn every steps about excluding hearsay evidence, so the corresponding judicial procedures can go smoothly.

In China, the absence of evidence rules with strong operability contributes to a number of problems in judicial practice. According to the 187th clause of "*Criminal Procedural Law*", the attendance of the witnesses in court has a precondition, which is that judges consider expert witnesses' appearance in court to be necessary. Then, what are the necessary conditions? If it is necessary to ask expert witnesses to appear in court, then how to fulfill the specific judicial proceeding? And if the expert witnesses refuse to appear in court, whether are there any other measures to compel them appear in addition to generally excluding the application of the expert testimony, especially in some cases where authentication can't be made again? These problems are unable to

[7] See R.J. Allen, R.B. Kuhns and E. Swift, *Evidence: Text, Cases, and Problems*, (Modern Press, 3rd ed., 2002) 109.

[8] *The Federal Rules of Evidence*, 3 USC §§ 801 (2011).

[9] See D.H Kaye, D.E. Bernstein and J.L. Mnookin, *The New Wigmore: Expert Evidence*, (Aspen Publishers, 7th ed., 2003) 105-113.

solve in the concrete implementation process, as well as obstacles to restrict the smooth running of program.

C. *The Appropriate Way to Apply Hearsay Evidence Rule in Practice*

The application of hearsay evidence rules is costly. First of all, it may exclude evidences collected by investigation organ out of the court, which could eventually lead to ill-founded accusation, and then all pretrial judicial investment is in vain; Secondly, the hearsay attribute of evidence need to be confirmed in court, and every procedure such as motion proposing, debate between parties of prosecution and defense, and judgment from the judge cost a lot of judicial resources. While China faces a serious shortage of judicial resources, especially the number of criminal trial judges. If every case is tried strictly in accordance with the requirements of hearsay evidence rules, it is inevitable to cause a long trial for each case and then a backlog of cases; at last, the hearsay evidence rules have not any foundation in criminal trials in China, as we all know, the absorption of every new system often inevitably suffer intermittent pain during the adjustment period theoretically, whether the effectiveness in practice can reach theoretic prospection needs the test of time. So a new system should be applied in a smaller range:

First, the application of hearsay evidence rules is limited to ordinary procedure of first instance. The value of hearsay evidence rules lies in the guarantee for the cross-examination rights of the parties of prosecution and defense so that it can prevent false evidence that is difficult to distinguish to disturb the case facts[10]. As prescribed in paragraph 3 of clause 225 of the "*Criminal Procedure Law*" in our country, if the people's court for the second instance consider that the facts of the original judgment are not clear or lack of evidence, the court can amend the judgment of the first instance after ascertaining the facts; or can cancel the original judgment, and require the people's court of first instance to rehear. Therefore, in the procedure of second instance, only under the condition of finding out the facts and amending judgment of the first instance the application of hearsay evidence rules can realize its value. But even under this condition, the evidence has already experienced the cross-examined in the first instance, so its hearsay attribute has been ruled out. And in other kinds of second instances, there is no involvement of finding the facts, so the application of hearsay evidence rules is unnecessary.

As prescribed in clause 208 of the "*Criminal Procedure Law*", the applicable conditions of summary criminal procedure include: case fact is clear with complete evidence; the defendant admits his crimes, and has no objection to charges of criminal facts. Since the case fact does not exist controversy, there is no need to apply hearsay evidence rules. In addition, the hearsay evidence rules run counter to the purpose of summary procedure, because the rules will make the process more complicated and time-consuming.

Second, motion of excluding hearsay evidence from either of the parties is indispensable. In common-law countries, motion of excluding hearsay evidence proposed by prosecution or defense should be the premise of hearsay evidence

[10] See C.B Mueller and L.C. Kirkpatrick, *Evidence: practice under the rules*, (Law&Business 6th ed., 1999) 490-510.

exclusion. Even if the evidence has obvious hearsay attributes, but without present of motive, the judges have no right to exclude, which in addition to emphasizing the dominating role of both the prosecution and the accused in criminal trial, also take account of saving the cost and improving the efficiency of fact finding, especially for expert testimony which itself has certain scientificity. If both parties of prosecution and defense have no objection, there is no need to spend too much resource of litigation. So, although in China the judge plays a much more important role than both the prosecution and the accused, in order to more effectively find the case reality, as long as there is no question of evidence from parties of prosecution and defense, even the judge should admit the probative force of evidence with the most obvious hearsay attribution. But an exception must be specified – as the hearsay evidence rules are strongly theoretical rules, it is difficult for people except judicial and other legal professionals to know the content clear, so the discrimination to hearsay evidence mainly depend on the judges, public prosecutors and lawyers. But, based on the results of empirical research of Prof. Gu Yongzhong, criminal defense rate has still been at a very low rate[11]. It is difficult for the defendant to judge the hearsay attribute of the hearsay evidence without lawyers' help. So, if the defender is absent, the judge shall explain the potential hearsay attribute of an evidence for the defendant and inquire whether he needs to apply to exclude.

D. *Rebuttal to the Idea of Denying Hearsay Evidence Rules*

There is a view in academia that the hearsay rule is not suitable for the criminal proceedings in China for its occurrence and development is to meet the needs of jury system litigation model of common-law countries. The jury consists of citizens in social without any legal expertise basically, and the establishment of the hearsay evidence rules is to provide the jury with a good judging environment, eliminating the improper influence of inadequate evidence to the jury, but in our country, there is no such concern, because we follow the litigation mode of continental-law system, and the judges, who can hardly be misled by the hearsay evidences because they are all elites and familiar with law and evidence, dominates the trial in court and is responsible for the cognizance of the case facts. Moreover, hearsay evidence rules will limit the judge' ability to find the case facts from the hearsay evidences, and be not conducive to find case reality[12].

However, the research results show that the current situation of China is that lower courts occur a widespread problem of insufficient number of criminal justices, and a collegial panel basically consists of a judge with two people's assessors in practice. (For specific data, see Table 5) Based on years of experience in the trial and profound legal literacy, a judge can naturally avoid the misleading by hearsay evidences and form accurate judgement. Compared to the judges, people's assessors have the same decision-making power to the case facts, but because of the lack of legal professional quality, it is difficult for them to consciously shield misleading from false evidences. Therefore, the most important thing is how to ensure that people's assessors in court can cognize

[11] 顾永忠 [G. Yongzhong], 《中国司法实践与国际标准》 [International Standard and the Practice of China], （北京大学出版社 [Peking University Press], 2012, 47.

[12] 汪蓉 [Wang Rong], 传闻证据规则若干基本问题研究》[Research on Basic Issues of Hearsay Rule] (2005) 11(2) 中国刑事法杂志 *Criminal Science* 90, 103.

accurately the case facts for the widespread collegial panel system of our country in the judicial practice. Although, to some extent, hearsay evidence rules may hinder the formation of the judge's judgment, whose effect is indispensable for the jurors and the jury court. In addition, only in terms of expert testimony, no matter how many experiences the judge has, he/she has no ability to judge the scientificity and authenticity of evidence independently. So, hearsay evidence rules are indispensable for the comprehensive cognition of an expert testimony.

E. *Some Detailed Measures*

The expert rarely appearance in court which always puzzles how to examine expert testimony in both criminal and civil procedure. The introduction of the hearsay rule offers a practical solution, however, in order to well implement the rule some detailed procedural rights and measures to assist the expert witnesses' attendance are indispensable, such as, to strengthen litigant's relevant procedure-choosing right, endow them reward-requiring right and security-requiring right. At the same time, we should define the contents of appearance in court, perfect expert auxiliary system and testification system of two-way audio-visual transmission technology and so on by detailing the regulation which appraiser appearance in court and the appraisal opinion admission standard.

It is clear that the application of forensic science will reach historically high levels in the coming years with pros and cons. Given these trends, how to make a good use of modern technology and avoid its misleading risk will almost certainly become increasingly prominent, with the emerging legal issues outlined in this article requiring the introduction of the Hearsay Rule into Chinese criminal procedure. With both the general hearsay rule and the detailed implementary procedures, we cherish the hope that the attendance of expert witnesses can be improved significantly.

Table 5

	The number of judges	The number of officers working in criminal justice	The number of concluded criminal cases in 2014
D district people' court in C City, S Province	51	3	373
X district people' court in C City, S Province	18	3	232
R district people' court in S	14	3	274

	The number of judges	The number of officers working in criminal justice	The number of concluded criminal cases in 2014
City, H Province			
M district people' court in S City, H Province	36	3	153
intermediate court in K City, Y Province	60	8（distributed in 2 courts）	234
Y district people' court in K City, Y Province	40	3	142

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