EXPERT TESTIMONY – SOME REFLECTIONS FROM MALAYSIA*

The reception of expert opinion evidence in the law of Malaysia is regulated by section 45 of the Evidence Act.[1] According to Cross on Evidence, any inference drawn from observed facts would constitute an opinion.[2] The general rule or what has been termed the "orthodox doctrine"[3] is that opinions based on inferences are irrelevant. The rationale embodying the exclusionary rule has been stated as follows:[4]

> [The exclusionary rule] endeavours to save time and avoid confusing testimony by telling the witness: "The tribunal is on this subject in possession of the same material or information as yourself; thus, as you can add nothing to our materials for judgment, your further testimony is unnecessary and merely cumbers the proceedings".

The general rule excluding evidence of opinion is subject to a list of exceptions.[5] The rationale for the inclusionary rule has been set out in the following terms:[6]

> Since most human discourse is largely made up of opinions, an insistence that no statements of opinion be made would be unworkable. Expert opinions are necessary to point out to laymen the inferences they cannot themselves draw, and non-expert opinions must be admitted where this is convenient in the interests of a reasonably normal prose during the giving of testimony.

*The author wishes to express his sincere gratitude to Professor Ahmad Ibrahim for kindly consenting to read the manuscript and making valuable suggestions. This does not however relieve the author of sole responsibility for any opinions expressed or errors committed.

[1] No. 11 of 1950.

[2] Rupert Cross, *Law of Evidence* (1979) 442. See also J.D. Heydon, *Cases and Materials on Evidence* (1975) 369.

[3] J.D. Heydon, *op. cit.* 369.

[4] Wigmore, Law of Evidence, Vol. 7 paragraph 1918.

[5] Evidence Act, sections 45–51.

[6] J.D. Heydon, *op. cit.* 369.

The reception of expert testimony under section 45 of the Evidence Act constitutes one of the exceptions to the orthodox doctrine that a witness may not give his opinion. It is proposed in this article to discuss the principles emerging from the application of section 45 of the Evidence Act before the Malaysian Courts.

The rule permitting the reception of the opinion of experts is set out in the following terms:[7]

> When the court has to form an opinion upon a point of foreign law, or of upon a point of science, or art, or as to identity or genuineness of handwriting or finger impressions, the opinion upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger impressions, are relevant facts.
>
> Such persons are called experts.

The opinion of an expert is relevant under section 45 of the Evidence Act when the court has to form an opinion in respect of the following matters –

(1) Foreign Law.[8]
(2) Science or Art.[9]

[7] Evidence Act, section 45.

[8] Foreign law is law not in force in Malaysia. Expert evidence cannot be admitted where a particular law is the law of the land – see Ratanlal & Thakore, *Law of Evidence* (1973) 130. In *Ramah* v. *Lanton* (1927) 6 F.M.S.L.R. 128, 129 it was held by Acton and Thorne JJs. that Mohammedan law is not foreign law but local law. As such it was part of the law of the land and being local law the courts must take judicial notice of it. In *Mak Sik Kwong* v. *Minister of Home Affairs (No. 2)* [1975] 2 M.L.J. 175,180 Abdoolcader J. said, "foreign law on a particular topic is a question of fact. An opinion upon a point of foreign law can be proved by evidence of experts (section 45(1) Evidence Act) and in this connection statements as to any law of any foreign country contained in law books, printed or published under the authority of the government of that country, are relevant (section 38 Evidence Act)". For local cases where expert evidence was admitted on a question of foreign law, see *Re Sim Siew Guan decd.* [1932] M.L.J. 95; *Sivagami Achi* v. *Ramanathan Chettiar* [1959] M.L.J. 222; *Cf. Ngai Lau Shia* v. *Low Chee Neo* [1915] 14 S.S.L.R. 35 and *In re M. Meyer decd.* [1938] M.L.J. 190.

[9] According to Ratanlal and Thakore *op. cit.* p. 131 the words 'Science or Art' include all subjects on which a course of special study or experience is necessary to the formation of an opinion. Hence the terms 'science' and 'art' are wide concepts. However it may be important to note the limits imposed on the terms 'science' and 'art' in the Sri Lankan case of *R* v. *Pinhamy* (1955) 57 N.L.R. 169. This was a case of murder. At the trial the Judicial Medical Officer of Colombo expressed the opinion that the skull produced in the case was that of the accused. This opinion was based

(3) Identity or genuineness of handwriting or finger impressions.[10]

EXPERT EVIDENCE SHOULD BE DIRECT

It is essential that when the opinion of an expert is sought under section 45 of the Evidence Act, the expert should give direct oral evidence. Where the expert himself does not testify in court but submits a report expressing his opinion, such evidence cannot be admitted. This ensures that the opposite party in a suit or proceeding is presented with an opportunity to cross-examine the expert. This is intended to ensure that the opinion is "filtered" by the process of cross-examination before being received in evidence.

Mohamed Nor v. *P.P.*[11] concerned a charge of cheating. The charge arose out of the following circumstances. The accused entered the firm of Doshi and Company and induced the firm to give him five parker fountain pens on the strength of a purchase form purporting to be on behalf of a government department. In order to prove that the purchase form was in fact forged by the accused, the prosecution sought to put in evidence a report made by the Acting Director of Chemistry, Malaya. In this report, the Director stated that in his opinion the purchase form was in the handwriting of the accused.

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entirely on the examination of a superimposition of an enlarged photograph of the deceased's head on a photograph of his skull. The Court of Criminal Appeal held that this opinion could not be received in evidence. One of the principal reasons for the rejection of this opinion was that it had not been established that identification of deceased persons by superimposition of photographs was a 'science' or 'art' within the meaning of section 45 of the Evidence Ordinance No. 14 of 1895 (Sri Lanka). See also *Chandrasekaran and Ors.* v. *P.P.* [1971] 1 M.L.J. 153, 159 where Raja Azlan Shah J. held that expert opinion on typewriting is a science within the meaning of section 45 of the Evidence Act, *Cf. Hanumanth* v. *State of Madya Pradesh* 1952 A.I.R. 345 S.C.

[10] Section 45 of the Sri Lanka Evidence Ordinance expressly lays down that expert opinion can be received in relation to the identity or genuineness of palm impressions or foot impressions. The Malaysian and Indian Evidence Act are silent with regard to these aspects. But it is submitted that section 45 of the Malaysian or Indian Evidence Act is wide enough to accomodate these matters – see Ratanlal and Thakore *op. cit* 132.See also *Emperor* v. *Babulah Behari* 30 Bom. L.R. 321; *Pritam Singh* v. *State of Punjab* [1956] A.I.R. 415 S.C.

[11] [1949] M.L.J. 231.

Russell J. ruled that the report cannot be admitted. According to His Lordship it was incumbent on the prosecution to call the Director of Chemistry to give evidence. The court conceded that the Director of Chemistry could be considered a handwriting expert within the meaning of section 45 of the Evidence Ordinance.

However it should be noted that the Criminal Procedure Code[12] makes admissible in evidence reports made by certain categories of persons. In this respect the Code makes a departure from the general rule that an expert witness should testify in open court. As Storr J. said in *Chong Yik* v. *P.P.*,[13] "Section 399(i), Criminal Procedure Code, is in effect a departure from the ordinary procedure of proving documents in a Court and is obviously enacted to save the party wishing to use as evidence a report of persons named the trouble and expense of calling such persons as witnessess to prove the report". Under section 399 of the Criminal Procedure Code reports made by the following categories of persons are made admissible without the necessity for the maker himself to testify in court, namely;

(i) An officer of the Institute of Medical Research.
(ii) Government Medical Officers.
(iii) Chemists in the employment of any government in the Federation or the government of Singapore.
(iv) Any person appointed by the Minister to be a document examiner.
(v) Inspector of Weights and Measures.
(vi) Any person or class of persons to whom the Minister by notification in the Gazette declares that the provisions of this section shall apply.

In the context of the above provision, the vital qualification is employment by the State or a State Agency. Thus the abundance of academic qualifications cannot make up for the lack of the legal qualification e.g. being a government medical officer which alone would entitle his report to be used in evidence.[14]

[12] Criminal Procedure Code (F.M.S. Chap. 6) section 399 and 399A.

[13] [1953] M.L.J. 72, 73.

[14] *Dharmasena* v. *Sub-Inspector of Police, Kaduganawa* (1969) 73 N.L.R. 359, 360.

Nevertheless section 399(i) of the Criminal Procedure Code is qualified to the effect that the person or Registrar who submits the report can be called upon to attend as a witness

(a) by the court; or

(b) by the accused, in which case the accused must give notice to the Public Prosecutor not less than three days before the commencement of the trial.

In other words, the prosecution is entitled to use the report as evidence if the court or the accused (who has to give notice) does not want to examine the maker of the report. Ordinarily, if the accused gives proper notice, the prosecution must call the maker of the report and the prosecution must prove its case in the ordinary way.[15]

It should also be noted that where the Public Prosecutor intends to give in evidence any such report he must deliver a copy of the report to the accused not less than ten clear days before the commencement of the trial.[16] The effect of non-compliance with the proviso attached to section 399(i) Criminal Procedure Code has been the subject of judicial interpretation. In *Chong Yik* v. *P.P.*[17], Storr J. held that where the prosecution produces a certificate from a government Chemist without delivering to the accused a copy of the report ten days before the trial, this rendered the report inadmissible in evidence amounting to an illegality not curable by section 422 of the Criminal Procedure Code. On the other hand in *Ng Yee* v. *P.P.*[18], Mathew C.J. was of the view that the non-supply of the report as provided for by the proviso to section 399(i) was merely an irregularity curable by section 422 of the Criminal Procedure Code.

Commenting on these conflict of views as regards compliance by the prosecution with the proviso to section 399(i) of the Criminal Procedure Code, Syed Othman J in *Mohd. Bin Abdul*

[15] See Syed Othman J. in *Mohd. Bin Abdul Rahman* v. *Pendakwa Raya* [1979] 1 M.L.J. 252.

[16] Criminal Procedure Code, section 399 (i) proviso.

[17] [1953] M.L.J. 72.

[18] [1953] M.L.J. 250.

Rahman V. *Pendakwa Raya*[19] made the following remarks:[20]

> With the utmost respect, I must confess that I fell somewhat uncomfortable in Mathew C.J.'s ruling in his judgment that the report was not inadmissible *per se*. I am inclined to agree with Storr J. that without section 399(i) of the Code, the report by itself would not be admissible in evidence as, if not for the provisions in the sub-section, the circumstances in which it could be admitted in evidence would be in accordance with section 32 of the Evidence Act i.e. where the maker is dead or cannot be found etc., evidence in respect of which must be adduced. If the report could, indeed, be said to be admissible per se, then there would be no need to have section 399(i) at all. But without the section what Storr. J said stands out.

In *Mohd. Bin Abdul Rahman* V. *Pendakwa Raya*[21] a prosecution under the Dangerous Drugs Ordinance of 1952, it was sought to put in evidence a Chemist's report in terms of section 399 of the Criminal Procedure Code. The accused gave notice to the prosecution that he intended to examine the Chemist at the trial. The prosecution disregarded this notice in the sense that the prosecutor did not call the Chemist to give evidence in person. However at the trial the defence did not object to the report being admitted as evidence. In the circumstances should the trial judge have excluded the report from consideration?

In appeal, Syed Othman J. answered this issue in the negative. His Lordship said:[22]

> Since the admission of the report would have affected the accused, it was, I would say, a matter for the defence to inform the court, particularly at the time when the report was about to be introduced as evidence, that it wanted the Chemist to be called. The inaction or silence of the defence at this juncture can only be construed as a withdrawal or waiver of the notice and that it had no objection to the report being admitted. As far as I can see, in law, there is nothing to prevent the accused from withdrawing or waiving his notice at any

[19] [1979] 1 M.L.J. 252.

[20] *Id.* 253. See also *Chong Peng* v. *P.P.* [1954] M.L.J. 39; *P.P.* v. *Ng Fah* [1954] M.L.J. 150 and *Liew Chin Yoong* v. *P.P.* [1971] 1 M.L.J. 127.

[21] [1979] 1 M.L.J. 72.

[22] *Id.* 253.

> time. For this reason I am of the view that the learned President was right in not excluding the report when considering the case against the appellant.

The Criminal Procedure Code also contains another provision which makes a departure from the general rule that an expert witness must give evidence in open court. Where a court is called upon to decide whether a currency note or coin is or is not forged, it will be sufficient and legally admissible evidence if a certificate signed by the Governor of the Bank Negara or any officer authorized in writing by him is issued stating that the Governor or the authorized officer is satisfied after personal examination that such note is or is not forged.[23] Here again the court in its discretion can order that the witness give oral evidence before the court.[24]

It should be noted that even though the report made by the categories of persons mentioned in section 399 of the Criminal Procedure Code constitutes legally admissible evidence, the fact that it has not been tested by cross-examination would naturally affect the value of that report. Hence the trial judge should sound a note of warning to the jury that in considering the weight to be attached to such reports, the jury should take into account the fact that it has not been subjected to cross-examination.

THE REQUIREMENT OF SPECIAL SKILL

It is essential that the person offering the opinion should be "specially skilled" in the relevant field.

A problem which has to be resolved in this area is whether a person should be proved to have had the benefit of a professional training before he could be termed an "expert" or could the training, practical knowledge and experience of a person who is not a professional sufficient in certain cases to qualify him as a person "specially skilled" and therefore qualified to tender opinion under section 45 of the Evidence Act.

[23] Section 399A.

[24] *Ibid.*

This aspect was considered by the Court of Appeal of the Straits Settlements in *Chin Ah Yee* v. *P.P.* and *Chin Pau* v. *P.P.*[25] In these two cases, the appellants were convicted by the Magistrate with possession and sale of dutiable liquor without a licence, an offence punishable under section 67 of the Excise Ordinance. It was contended on behalf of the appellants that since the Excise Officer who tested the liquor had not been appointed an analyst under section 54 of the Excise Ordinance, his evidence was wrongly admitted.

The Court of Appeal unanimously held (Terrell A. C. J., Whitley and Aitken JJ.) that where a person had practical experience in testing liquor for its alcoholic contents, it is not necessary that he should in addition be appointed an analyst under section 54 of the Excise Ordinance. As Whitley J. remarked, "It seems to me that if a person is called and gives evidence of testing liquor for its alcoholic content, states the result and says that he is experienced in such testing, the court is entitled to accept his evidence as to the alcoholic content so stated".[26]

The view emerging from the above decision is that the practical knowledge and experience of a person who is not a professional analyst may be sufficient in certain cases to qualify him as an expert. This view is supported by the later case of *Said Ajami* v. *Comptroller of Customs*[27] a Privy Council decision from Nigeria. In that case Mr. L.M.D. de Silva delivering the opinion of the Judicial Committee held that the knowledge which entitles a person to be deemed "Specially Skilled" on some points of foreign law is admissible as expert evidence even though that person's profession is not that of law.

In this case Their Lordships were called upon to decide on the admissibility of the evidence of a Bank Manager, who had been engaged in banking business in Nigeria for twenty-four years and who in the course of his business kept in touch with current law and practice with regard to notes which were legal tender in French West Africa. He testified to the effect that a

[25] [1937] M.L.J. 14.

[26] *Ibid.*

[27] (1954) 1 W.L.R. 1404.

number of French Colonial notes which the appellant had attempted to export from Nigeria were at the time of the alleged offence "legal tender" in French West Africa. The Privy Council held that the testimony of the Bank Manager was admissible to prove that there had been a contravention of section 22(1) of the Nigerian Exchange Control Act which prohibited its exportation.

These developments in relation to the requirement of special skill is in harmony with the English law on the identical point. In *R* v. *Silverlock*[28] where the court had to decide on the genuineness of handwriting, it was held that any witness of experience in the matter may be called to prove handwriting. It is not necessary for him to be a professional expert. Lord Russell C. J. observed:[29]

> It is true that the witness who is called upon to give evidence founded on a comparison of handwriting must be peritus; he must be skilled in doing so; but we cannot say that he must have become peritus in the way of his business or in any definite way. The question is, is he peritus? Is he skilled? Has he an adequate knowledge? . . . There is no decision which requires that the evidence of a man who is skilled in comparing handwriting, and who has formed a reliable opinion from past experience, should be excluded because his experience has not been gained in the way of his business.

On the other hand certain Malaysian cases have taken the view that any person who by reason of experience has special knowledge in relation to the matter in question may testify. Their evidence however do not fall within the ambit of section 45 of the Evidence Act, but rather they are considered as non-expert witness. "The existence of a particular issue may necessitate the reception of evidence which is not that of an expert and yet is nothing short of a witness's opinion concerning an ultimate issue in the case."[30] This aspect is exemp-

[28] [1894] 2 Q.B. 766.

[29] *Id.* 771.

[30] Rupert Cross, *op. cit.* 451. According to Heydon, "A non-expert may give his opinion if the facts on which it was based were too fleeting to be noticed or remembered, or if it would disturb the flow of his narrative too much to state them. He may give a compendious account of what he observed by stating an opinion.

lified by *P.P.* v. *Lee Pak*[31] and *P.P.* v. *Lee Ee Tiong.*[32]

In *Lee Pak's* case, the appellant was charged under section 45 of the Motor Vehicles Ordinance with using a bus the condition of which was likely to be dangerous by reason of the fact that the brakes and steering were out of order. The commanding officer of the Rawang Police Station who had a certain knowledge of motor engineering tested the brakes in question and gave evidence that they were defective. This evidence was objected to on the ground that the witness was not an expert.

On appeal, the court overruling the objection held that anyone with a sound working knowledge of motor cars is competent to testify as to whether the brakes he had examined and tested were in a condition likely to be dangerous. Dealing with counsel's argument that the police officer's evidence as to the condition of the brakes was not sufficient in as much as his only knowledge of motor engineering was what he derived from spending three months in a garage, Whitley A.C.J. observed:[33]

> No doubt there are some types of cases which it is impossible or at any rate undesirable to decide without expert evidence, but it seems to me that anyone with a sound working knowledge of motor cars ought to be competent to give an opinion as to whether the brakes which he has examined and tested are or are not in a dangerous condition. If a brake when applied has no effect it does not require an expert to say that brake is useless, and if such a test and its results are described to the court, I can see no reason why the court should not use its own common sense and draw the conclusion that the brake is in such a condition as to be likely to be dangerous to passengers and others.

Similarly in *P.P.* v. *Lee Ee Tiong*[34] which concerned a

Questions about identity are very clear illustrations of both points". – see J.D. Heydon, *op. cit.* 370.

For a statutory recognition of a non-expert to testify see the Civil Evidence Act 1972 of England which states that a non-expert may not be asked for his opinion on the ultimate issue though he may give it in the form of a statement "made as a way of conveying relevant facts personally perceived by him".

[31] [1937] M.L.J. 265.

[32] [1953] M.L.J. 244.

[33] [1937] M.L.J. 251, 253.

[34] [1953] M.L.J. 244.

prosecution under section 4(i)c of the Common Gaming Houses Enactment[35] for assisting in carrying on a public lottery, the evidence of a detective who by reason of experience had special knowledge of the methods of gambling was deemed admissible. However Thomson J laid down that such evidence in order to sustain a conviction must be sufficient to prove that:—[36]

(i) The persons who conduct lotteries or collect subscriptions in relation to lotteries keep records of a particular sort.
(ii) That the paper in evidence is in the opinion of the witness, such a record.

WHERE EXPERT TESTIMONY IS BASED ON REPORTS OF FACTS, THOSE FACTS MUST BE PROVED INDEPENDENTLY

In Pacific Tin Consolidated Corporation V. Hoon Wee Thim,[37] Ong Hock Thye F. J. said:[38]

> Where the opinion of experts is based on reports of facts, those facts, unless within the experts' own knowledge, must be proved independently.

The insistence on this requirement is to ensure that the conclusion of the expert is not based on false premises but on a set of facts which are capable of proof by evidence *aliunde.*[39] It also ensures that the opinion of the expert is not based on hearsay evidence.

In the *Pacific Tin Consolidated* case, the appellants for the purpose of their drege mining operations, maintained on their lands large ponds separated from each other by intermediate bunds. By means of spillways the flow of water from one pond to another was regulated and the water-level of each pond maintained as desired. The lands being situated in an inclined valley, with a drop of some 60 feet, step ponds had to be constructed well above ground level. A large breach in the bund between two large ponds (which together held nearly

[35] (F.M.S. Chap. 47)
[36] [1953] M.L.J. 244, 246.
[37] [1967] 2 M.L.J. 35.
[38] *Id.* at p. 37.
[39] Phipson on Evidence (10th ed. 1972) para 1280.

500,000,000 gallons of water) caused such a violent overflow from the higher pond to the other on the lower level, that the combined volume of water broke through the perimeter bund, causing extensive damage to life and property in the low-lying lands adjacent to the ponds.

The appellants were sued for damages on two grounds, negligence and the rule in *Rylands* v. *Fletcher*.[40] The fundamental question for determination was: What caused the breach in the bund? The appellants' contended that the breach was due entirely to the irruption of a subterranean spring, which if true, would exonerate the appellants' from liabitity.[41] In order to establish this fact, the appellants' relied on the testimony of two geologists, who based their opinion on the hypotheses of certain data supplied by the appellants.

The trial judge rejected the opinion of the experts. In appeal it was contended that the trial judge was wrong in ignoring the evidence of highly qualified and independent experts who had made a study of the cause of the breach, but should have held, upon such evidence, that the breach was caused by the emergence of an artesian spring. It was argued that, when the evidence of the experts stood uncontradicted, it could not be ignored, and the views of the judge himself, as a layman, should yield to those of the expert.

Ong Hock Thye F.J. speaking on behalf on the Federal Court rejected these arguments.[42] His Lordship stated that in all cases where the opinion of experts is led, the grounds or reasoning upon which such opinion is based may properly be inquired into.[43] Since the opinion of the experts was based on hypotheses which were not capable of independent proof, it substantially vitiated the effect of such evidence.[44]

[40](1865 – 6) L.R. 1 Ex. 265.

[41]Under the exceptions to the rule in *Rylands* v. *Fletcher* damage caused by a factor entirely outside the control of the defendant, would amount to an Act of God, thus affording a complete defence to the action – see *Winfield on Torts* (1979) 416.

[42][1967] 2 M.L.J. 35, 37.

[43]*Ibid.*

[44]See also *Caldeira* v. *Gray* [1936] M.L.J. 110, 113 where Lord Alness speaking on behalf of the Privy Council stated that where a scientific theory put forward by an expert is based on speculation rather than experience, it would be unsafe to act upon it.

WEIGHT TO BE ATTACHED TO THE OPINION OF AN EXPERT

This aspect has been discussed in a number of Malaysian decisions. The several implications flowing from the probative value of the testimony of an expert may be noted.

It is settled law that the principal responsibility of deciding the matters in dispute is placed upon the court and not on the expert. "Our system of jurisprudence does not generally speaking, remit the determination of disputes to experts."[45] Thus an expert should not give his opinion on the ultimate issue – the very issue the court has to decide.[46]

In the early case of *Choo Ang Chee* v. *Neo Chan Neo*[47] the Supreme Court of the Straits Settlements laid down that while the court will pay every respect to the evidence of expert witnesses, they cannot be permitted to decide for the Court. The Court must weigh their evidence and decide for itself, not hesitating to disagree with the expert, if necessary. In this case one of the issues which the court was called upon to decide was whether Chinese marriages were polygamous.[48] Dealing with their evidence, Hyndman-Jones C.J. said:[49]

> I say however great the respect we may entertain for the views of these gentleman [meaning the expert witnesses], we cannot allow them to decide this question for us. On the contrary it is our duty to consider the position which the law of China has given to these women so far as we can gather it from all the sources above indicated, and in the light of that law and having regard to the position and being aided, but not restricted by the evidence to which I have referred, decide for ourselves the question whether the Chinese as a nation are monogamous or polygamous.

[45] *Wong Swee Chin alias Botak Chin v. P. P. [1981]* 1 M. L. J. 212, 213. See also *Chandrasekaran & Ors. v. P. P. op. cit.* at p. *160* where Raja Azlan Shah J. observed: "With regard to the evidentiary value of expert evidence it is of course true to say that the court cannot delegate its authority to the expert but has to satisfy itself as to the value of such evidence in the same manner as it has to weigh any other evidence".

[46] J.D. Heydon, *op.cit.* 369.

[47] (1911) 12 S.S.L.R. 120.

[48] *Id.* 184–185.

[49] *Id.* 185

In the recent case of *Wong Swee Chin alias Botak Chin* v. *P.P.*[50] Raja Azlan Shah C.J. speaking on behalf of the Federal Court reiterated the established rule that expert evidence is only for the guidance of the court. His lordship remarked that:

> In the ultimate analysis it is the tribunal of fact, whether it be a judge or jury, which is required to weigh all the evidence and determine the probabilities. It cannot transfer this task to the expert witness, the court must come to its own opinion.[51]

It would seem that since the ultimate decision is that of the court, the duty of an expert witness is to draw upon the store of his knowledge and experience in order to explain some matter which his experience should qualify him to understand. While an expert is entitled to express his opinion, which is the natural corollary of his explanation, a bare expression of his opinion has no evidential value at all.[52] Thus an expert must give reasons in support of his opinion.[53] This is to enable the court to evaluate the expert's opinion and assess their validity.

In *Sim Ah Oh* v. *P.P.*[54] Adams J. laid down that where an expert deposes on documents to say these are documents for carrying on a public lottery, the expert must state his reasons for his opinion that the exhibits relate to betting and staking in the character lottery. His Lordship went on to state that the evidence of the expert must be tested like any other evidence against the facts upon which he is deposing.[55]

In *Sim Ah Oh's* case, the accused was charged and convicted by the lower court, for the offence of assisting in carrying on a public lottery, contrary to s. 4(1)c of the Common Gaming Houses Ordinance No. 26 of 1953. His conviction was quashed on appeal on the basis that, "the expert should have been asked

[50] [1981] 1 M. L. J. 212

[51] *Ibid.*

[52] *Sim Ah Song & Anor.* v. *R.* [1951] M.L.J. 150, 151 and *Ang Chwee Keong* v. *R.* [1955] M.L.J. 36, 37.

[53] *Sim Ah Song & Anor* v. *R., op. cit.* and Teoh *Teoh Ng & Ors.* v. *P.P.* [1955] M.L.J. 59.

[54] [1962] M.L.J. 62.

[55] *Id.* 63.

by the prosecutor to elaborate and give his reasons as to why he said these odd pieces of paper were in fact documents relating to public lottery, and the learned President should have considered these reasons before he came to his finding".[56]

In the subsequent case of *Ang Chwee Keong* v. *R*[57] Spenser Wilkinson J. expressed complete agreement with the remarks of Brown A.C.J. in *Sim Ah Song* v. *R*[58] as regards the responsibility resting upon the court in evaluating the testimony of expert witnesses.[59] In *Ang Chwee Keong* the accused had been convicted on a charge of assisting in carrying on a public lottery. Expert evidence was led in relation to certain documents found in the accused's possession. The expert testified to the effect that these documents were betting slips and records of stakes. The expert however gave no reasons for his opinion. Spenser Wilkinson J. had no hesitation in quashing the conviction. In doing so His Lordship laid down that (i) it was the duty of the Magistrate to look at the documents and decide for himself with the assistance of the expert, whether or not the documents were betting slips or records of stakes and wagers relating to a lottery and (ii) the Magistrate had relied entirely upon the bare expression of opinion of the expert which was clearly wrong.[60]

The Malaysian courts have also laid down that while the opinion of an expert is relevant, it is not conclusive in effect.[61] Thus where expert evidence is led in order to establish identity it can only be taken as an item in the chain of evidence that is led to establish identity. Similarly where expert opinion is led

[56] *Ibid.* See also *P.P.* v. *Lee Ee Yeong* [1953] M.L.J. 244 and *Ang Chwee Keong* v. *R.* [1955] M.L.J. 36.

[57] [1955] M.L.J. 36.

[58] [1951] M.L.J. 150, 151.

[59] [1955] M.L.J. 36.

[60] *Id.* 37.

[61] *P.P.* v. *Mohamed Kassim Bin Yatim* [1977] 1 M.L.J. 64. The courts in India and Sri Lanka have also adopted the same view – see *Ishwari Prasad* v. *Mohamed Isa* 1963 A.I.R. 1726 S.C.; *Indar Dat* v. *Emperor* 1931 A.I.R. 408, 413 Lahore; *In re B. Venkata Row* (1913) I.L.R. 36 Mad. 159; *Srikant* v. *King-Emperor* (1905) 2 A 444; *Kali Charan Mukerji* v. *Emperor* (1909) 9 Cr. L.J. 498; *R.* v. *Pinhamy* (1955) 57 N.L.R. 169, 171–172; *Charles Perera* v. *Motha* (1961) 65 N.L.R. 294, 195.

to establish the genuineness or otherwise of handwriting such evidence is not conclusive but only a relevant fact.

In the recent case of *P.P.* v. *Mohamed Kassim Bin Yatim*[62] the Federal Court was called upon to consider the effect of the evidence given by an expert as to the genuineness of handwriting. In this case the accused was charged under s. 12(1)(d) of the Passports Act 1966 in that he had knowingly made false statements separately on the passport application forms of W., L. and M. respectively to the effect that he had known these applications for a certain number of years and signed against those statements with the name "Mohd. Kassim Bin Yatim, P.J.K.".

According to the prosecution, the application forms had been filled up by a certain Chinese petition writer who typed out the particulars in the forms and who also told them that he could find a suitable recommender for them. The forms were returned to the applicants on the following day and the recommendation already made and appeared to have been signed by a person named "Mohd. Kassim Bin Yatim – P.J.K.". The applicants paid the petition writer a sum of money for the recommendation. The applicants also testified to the effect that they never saw much less knew who the said "Mohd. Kassim bin. Yatim" was and therefore the prosecution contended that to that extent the statements in the applications were false.

The Chinese petition writer could not be traced. Thus there was an absence of a direct link between those signatures and the accused. In view of this disadvantage the prosecution had to endeavour to show by indirect evidence that it was the accused who made the statements in the application forms and signed the statements under his name. Consequently the prosecution led evidence of other witnesses who were familiar with the accused's handwriting and signature and also the evidence of a handwriting expert.

According to the handwriting expert, he was not absolutely certain that the specimen signatures and the signatures in the application forms were made by the one and the same person. His opinion was that they were similar. On this ground the

[62] [1977] 1 M.L.J. 64.

lower court rejected the evidence of the expert as unreliable. In appeal, Hashim Yeop Sani J. held that the evidence had been rightly rejected. The evidence of experts can never go beyond an opinion and can never therefore be of absolute certainty. Neither is it conclusive.[63]

It must be emphasised however that the trial judge would not be justified in brushing aside the expert's opinion lightly without adequate reasons. In *Shaw & Shaw Ltd.* v. *Lim Hock Kim*[64] one of the issues which the court had to decide was whether a building was of a permanent or temporary character. On this issue the evidence of an architect and an engineer was led but their evidence was not considered by the trial judge. Whyatt C. J. on appeal held that in doing so the trial judge had acted wrongly.

The question arises whether the expert's opinion is sufficient to establish the case of the side calling him or should it be accepted only if it is supported by independent evidence. The answer to this question may be found in the judgment of Hashim Yeop A. Sani J. in *Mohamed Kassim Bin Yatim's* case.[65] In that case His Lordship laid down that a court would hesitate to act solely on the expert's testimony alone. The expert's evidence would be accepted if there was corroboration either by direct or circumstantial evidence which tends to show that the conclusion reached by the expert is correct.

SPECIAL POSITION OF AN EXPERT AS A WITNESS

A witness of fact is generally obliged to testify to a fact in issue

[63] *Id.* 67. His Lordship quoted with approval Dr. Lawson on the *Law of Expert and Opinion Evidence* cited in *In re B. Venkata Row* (1913) I.L.R. 36 Mad. 159 to the following effect:

"The evidence of the genuineness of the signature based upon the comparison of handwriting and of the opinion of experts is entitled to proper consideration and weight. It must be confessed however that it is the lowest order of evidence or of the most unsatisfactory character. We believe that in this opinion experienced layman unite with the members of the legal profession. Of all kinds of evidence admitted in a court this is the most unsatisfactory. It is so weak and decrepit as scarely to deserve a place in our system of jurisprudence."

[64] [1958] M.L.J. 118.

[65] [1977] 1 M.L.J. 65, 67.

or a relevant fact. But an expert as a general rule is not required to give evidence against his wishes in a case where he had no connection with the facts or history of the matter in issue. This principle will apply with particular force where the expert cannot give the evidence required of him without a breach of confidence, and where the preparation of the evidence required of him would require considerable time and study.

The above distinction between expert evidence and evidence as to matters of fact was spelt out by Cooke J. in the English case of *Seyfang* v. *Seale and Co.*[66] In that case the High Court applying the principles enunciated above held that two medical witnesses were not obliged to testify on the following grounds,[67]

(i) The witnesses were not in any way concerned with the facts of the case.
(ii) They could not give the evidence required of them without considerable and careful preparation.
(iii) They could not answer all the questions which might be put to them without serious risk of a breach of confidence.

It is submitted that the above principles though formulated in the context of the uncodified English rules of evidence should provide guidance to the Malaysian Courts when called upon to determine whether an expert witness is obliged to testify or not.

SOME PROBLEMS OF EXPERT EVIDENCE

Two marked problems which the courts have to face in this area are,

(i) conflicts in expert testimony especially in relation to medical matters and
(ii) the question of bias.

(i) *Conflict*

In *R* v. *Jennion*[68] the Court of Criminal Appeal was called

[66] [1973] 2 W.L.R. 17, 21.

[67] *Ibid.*

[68] (1962) 1 All. E.R. 689.

upon to determine the proper approach to be taken where there is a conflict of medical evidence in a trial for murder where the accused is tried before a judge and jury. The facts were that the accused-appellant had killed her aunt in a fit of temper, striking her on the head with an ash tray, and strangling her manually and with a cord. At the trial she pleaded the defence of diminished responsibility under Section 2(1) of the Homicide Act, 1957.[69] In order to establish the plea of diminished responsibility, the defence called two doctors, both of whom deposed that, in their opinion, at the time the accused killed her aunt, she was suffering from such abnormality of mind as substantially impaired her mental responsibility for her act.[70] The Crown, in rebuttal called another medical witness who testified to the effect that, while the accused was suffering from an abnormality of the mind and had a mildly psycopathic personiality, he was of the view that the abnormality was not such as substantially to have impaired her mental responsibility.[71]

On the evidence led it was clear that the medical evidence was not all one way. In his summing up to the jury, the trial judge drew attention to the differing views expressed by the medical witnesses and concluded, "well, it is now for you twelve people to decide, even though the doctors disagree. I do not know how I can help anymore".[72]

Edmund Davies J. speaking for the Court of Criminal Appeal held that the trial judge's direction to the jury was unexceptional. His Lordship stated in unequivocal terms that "where as in the present case, medical men differ, it is for the jury, after a proper direction by the judge, that by the law of

[69] Section 2(1), so far as material for the defence in *Jennion's* case, is as follows:

"Where a person kills . . . another, he shall not be convicted of murder, if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing . . . the killing."

[70] (1962) 1 All E.R. 689, 690–691

[71] Id. 691

[71] *Id.* 691

[72] *Id.* 672

this country, the decision is entrusted."[73]

In the Singapore case of *Mimi Wong* v. *P.P.*[74] a case of murder, the first accused-appellant relied on the defence of diminished responsibility as embodied in exception 7 to section 300 of the Penal Code of Singapore.[75] Medical opinion on this point was one of conflicting evidence.[76] The trial judge[77] after a consideration of the conflicting medical testimony came to the conclusion that the defence had not proved on a balance of probabilities, that at the time of the commission of the offence, the first accused was suffering from any abnormality of the mind.[78] He went on to find, that on the assumption that the accused was suffering from encephalities (inflamation of the brain), he was not satisfied on a balance of probabilities that the illness had caused impairment of the brain function so as to have substantially impaired her mental responsibility for her acts in causing the death of the deceased.[79]

Wee Chong Jin C.J. speaking on behalf of the Court of Criminal Appeal held that the conclusions reached by the trial judge after a consideration of the conflicting testimony of the medical experts could not be disturbed.[80] The reasoning of the court was that where evidence of this nature is led it is for the trial judge (when sitting without a jury) to ultimately come to the conclusion whether the accused suffered from diminished

[73] *Ibid.* See also *R* v. *Rivett* (1950) 34 Cr. App Rep. 87, 94 where Lord Goddard C.J. said in a case involving the testimony of medical experts that ". . . it is for the jury and not for medical men of whatever eminence to determine the issue."

[74] [1972] 2 M.L.J. 75.

[75] Exception 7 to section 300 of the Penal Code reads:

"Culpable homicide is not murder if the offender was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omission in causing the death or being a party to causing the death."

[76] [1972] 2 M.L.J. 75, 79–80.

[77] Jury trials have been abolished in Singapore.

[78] [1972] 2 M.L.J. 75, 81.

[79] *Ibid.*

[80] *Ibid.*,

responsibility after taking into account the conflicting medical testimony on the point.

The decisions in *Jennion* and *Mimi Wong* are also in harmony with one of the cardinal principles pertaining to the reception of expert testimony, namely that the primary responsibility of deciding the matters in dispute is upon the court and not on the expert.[81]

(ii) *Bias*

The element of bias is inherent in most cases where the opinion of experts are led in evidence. The position was summarized by Lord Jessel M.R. in *Thorn* v. *Worthing Skating Rink Company*[82] in the following terms:[83]

> The mode in which expert evidence is obtained is such as not to give the fair result of scientific opinion to the court. A man may go, and does sometimes, to half a dozen experts. I have known it in cases of valuation within my own experience at the Bar. He takes their honest opinions, he finds three in his favour and three against him; he says to the three in his favour, will you be kind enough to give evidence? and he pays the three against him their fees and leaves them alone; the other side does the same . . . therefore I have always the greatest possible distrust of scientific evidence of this kind, not only because it is universally contradictory, and the mode of its selection makes it necessarily contradictory, but because I know of the way in which it is obtained. I am sorry to say the result is that the Court does not get that assistance from the experts which, if it were unbiassed and fairly chosen, it would have a right to expect.

In an earlier case[84] it was laid down that "hardly any weight is to be given to the evidence of what are called scientific

[81] *Supra* p. 255 See also *Collector of Land Revenue*, v. *Alagappa Chettiar; Collector of Land Revenue* v. *Ong Tbye Eng* [1971] 1 M.L.J. 43, 44 (a case in which the expert evidence of valuers were in dispute) where Lord Diplock delivering the judgment of the Privy Council said, ". . . where expert oral evidence of valuers has been called at the trial and discloses a conflict of opinion between them, the judge's finding as to which he regarded as most reliable is entitled to considerable weight . . .".

[82] Cited in *Plimpton* v. *Spiller* (1877) 6 Chancery Div. 412, 415–417.

[83] *Id.* 416.

[84] *Tracy Peerage case* (1843) 10 Cl. & Fin. 191.

witnesses; they come with a bias on their minds to support the causes in which they are embarked".[85]

In order to overcome the problem of bias, the question is sometimes asked, why does not the court appoint an expert of its own? Undoubtedly a court of law has the power to appoint an expert of its own and sometimes this course is taken by the court. Here again the task of the court of finding an unbiassed expert is not easy. The reasons for this are numerous. The court does not know how many of these experts have been already consulted by the parties to the case. Further, it may turn out that a particular expert has been already employed by the particular solicitor on the one side or the other in the case. For these reasons it may be extremely difficult to find out a really unbiassed expert and a man who has no preconceived opinion or prejudice. For these reasons the courts have sometimes abstained from utilizing its power to select an expert to give evidence. It must be emphasised however that despite these difficulties, a court of law cannot retract from its proper function of deciding the case.

CONCLUSION

In relation to English law the view has been expressed that "the law of expert opinion evidence involves a constant tension between orthodoxy and common sense in which the latter is beginning to triumph both at common law and by legislation".[86] Such a development has not taken place in Malaysia because the law of evidence is codified and the courts are powerless to alter the basic principles embodied in the Code. Neither has there been any legislative attempt to reform the law relating to the reception of expert testimony.

The Evidence Act of Malaysia is a verbatim reproduction with minor modifications of the Indian Evidence Act of 1872. The Indian Act in turn was a codification of the nineteenth century English law of evidence. The disadvantage of codification is that it crystalizes the law as it stood at the time of codification thereby shutting out future developments, unless

[85] *Ibid.* For similar criticisms see also P. Taylor, *Treatise on the Law of Evidence* (1931) 59 and W.M. Best, *Principles of the Law of Evidence* (1911) 491.

[86] Heydon, *op. cit.*, 372.

of course, Parliament seeks to amend the law to bring about new changes.

In England in recent times the courts have permitted the expert to testify on the ultimate issue.[87] Thus Lord Parker C.J. commented:[88]

> I cannot help feeling that with the advance of science more and more inroads have been made into the old common law principles. Those who practise in the criminal courts see every day cases of experts being called on the question of diminished responsibility and although technically the final question, "Do you think he was suffering from diminished responsibility?" is strictly inadmissible, it is allowed time and again without any objection.

It is submitted that the opinion rule embodied in section 45 of the Evidence Act does not permit an expert to express his opinion on the ultimate issue – the very issue which the court is called upon to decide. The preferable course would be to amend section 45 of the Evidence Act in order to permit expert testimony on the ultimate issue and this should be confined to civil cases only; otherwise the function of the jury in criminal cases may be usurped. In England this has been done by the Civil Evidence Act 1972 which permits an expert to give his opinion on the ultimate issue.

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[87] *R. v. Mason* (1911) 76 J.P.184 CCA; *R. v. Holmes* [1953] 2 All. E.R. 324.

[88] *D.P.P. v. A & B.C. Chewing Gum Ltd.* [1968] 1 Q.B. 159, 164. See also Law Reform Committee 17th Report, *Evidence of Opinion and Expert Evidence* 1970 para 268.

VALIDITY OF WAKAFS IN MALAYSIA – WHERE LIES THE ISLAMIC LAW?

The case of *Haji Embong b. Ibrahim and others* v. *Tengku Nik Maimunah* [1980] 1 M.L.J. 286 is disappointing as a strong Federal Court missed the opportunity to affirm that Islamic Law is the Law of the land in Malaysia. The case concerned the validity of a wakaf made by Tengku Nik Maimunah in favour of the following beneficiaries –

(1) her brothers and sisters, nieces and nephews and their children;
(2) four adopted daughters;
(3) two persons who were not her blood relations;
(4) religious, pious and charitable objects.

Salleh Abas F.J. in giving the judgment of the Federal Court referred to the definition of wakaf 'am and wakaf khas in section 2 of the Trengganu Administration of Islamic Law Enactment, 1955 and rightly pointed out that the operative words of the definitions are "for religious or charitable purposes recognised by Islamic Law". The expression is not explained in the Enactment, and as rightly pointed out again, as the Enactment does not legislate upon the substance of Islamic Law but deals merely with the administration of Islamic Law, the meaning of the expression must therefore be found elsewhere. "Elsewhere" in the context must surely be the Islamic Law but unfortunately the Federal Court chose to follow its earlier decision in *Commissioner for Religious Affairs* v. *Tengku Mariam* [1970] 1 M.L.J. 222 and in effect held that it should follow the decisions of the Privy Council from India, which held that –

(a) a wakaf for the benefit of the settlor's family, children and descendants and for charity will only be valid if there is a substantial dedication of the property to charitable uses at some period of time or other, *Sheikh Mohamed Ahsanullah Chowdhry* v. *Amarchand Kundu* (1889) 17 I.A. 28.