

THE ADMISSIBILITY OF POLYGRAPH TEST EVIDENCE IN MALAYSIA

Ramalingam Rajamanickam,¹ Anita Abdul Rahim² & Anisah Che Ngah³

¹ Faculty of Law, The National University of Malaysia

rama@ukm.my

² Faculty of Law, The National University of Malaysia

aar@ukm.my

³ Faculty of Law, The National University of Malaysia

anisah@ukm.my

ABSTRACT

In this technologically oriented society, detecting deception by examining bodily changes is not a new phenomenon. The test for examining the deception or lying is often referred to as a "lie detector test," now referred to as polygraph test. Polygraph test evidence has been admitted as a relevant piece of evidence in some jurisdiction in the world. But, the position of polygraph evidence still remains ambiguous in the context of Malaysia Evidence Law. This paper, therefore, examines the relevancy of the polygraph evidence with regard to the Evidence Act 1950. The present paper focuses also on the issue of the admissibility of polygraph test evidence. The introduction of polygraph test is an important exemplar of the type of scientific issues that that courts must address.

Key words: Admissibility, Evidence Law, Polygraph Test, Relevancy

INTRODUCTION

The polygraph (from the Greek 'poly' = 'many', and 'graph' = 'to write') is widely used by analytical staff in a variety of medical and scientific settings for purposes other than lie detection. In lie detection situations its use is based on the premise that lying is accompanied by changes in the activity measured by the polygraph (BPS Working Party, 2004, P.8).

The term "polygraph" literally means "many writing." The name refers to the manner in which selected physiological activities are simultaneously recorded. Polygraph examiners may use conventional instruments, sometimes referred to as analog instruments, or computerized polygraph instruments. It is important to understand what a polygraph examination entails. A polygraph instrument will collect physiological data from at least three systems in the human body (Ahmad Zaki Abu Bakar, Rose Alinda Alias and Hashim Bin Hj Yusoff).

The polygraph can be described as an instrument that measures physiological reactions. It operates by measuring the reactions of the involuntary nervous system i.e. those functions of our body that we can't control (Supt Amar Singh Sidhu, p.3).

Throughout history (Bull, 1988) it has often been assumed that lying is accompanied by a change in the body's physiological activity. The polygraph is a set of equipment that accurately measures various sorts of bodily activity such as heart rate, blood pressure, respiration, and palmar sweating. In recent years brain activity has also

begun to be measured in this setting. This bodily (and brain) activity can be displayed via ink writing pens on to charts or via a computer's visual display unit (BPS Working Party, 2004, P.8)

Although the polygraph test has been in use in the United States for almost a hundred years, this technique is relatively new in the Asia Pacific region. There is no court ruling on the admissibility of polygraph evidence in most of these countries. In Japan, polygraph evidence is admissible in court. In the United States, most states permit polygraph test results to be used as evidence where parties have agreed to their admissibility before the examination is given, under the terms of a stipulation. In Singapore, the polygraph was first introduced by the Ministry of Home Affairs more than 34 years ago.

POLYGRAPH WITNESS AS EXPERT EVIDENCE

It is necessary to demonstrate to the court that the "expert" possesses specialized, relevant knowledge ordinarily not expected of the average layperson. Such knowledge can be acquired through any combination of education and practical experience, and augmented through a study of books and journals in the field.

According to *Section 5 of New Zealand Evidence Act 2006*, an "expert" is "a person who has specialised knowledge or skill based on training, study, or experience." Meanwhile, "expert evidence" means: "the evidence of an expert based on the specialised knowledge or skill of that expert and includes evidence given in the form of an opinion."

An expert witness is generally defined as a person possessing certain specialized knowledge, training, education, skill and/or experience that goes beyond the knowledge of ordinary members of the general public. Richard Saferstein states that expert witness may be defined as "an individual whom the court determines to possess knowledge relevant to the trial that is not expected of the average layperson" (Richard Saferstein, 2007, p. 18). Whereas Jay Feinman defines expert witness as:

"a person who is permitted to testify at a trial because of their special knowledge or proficiency in a particular field that is relevant to the case" (Jay M. Feinman, 2003, p.69).

Apart from that, Lord Russell CJ in the case of *The Queen v Silverlock* [1894] 2 QB 766 defines expert as "someone who is skilled and has adequate knowledge in an area of expertise. Qualifications of an expert may have been acquired through study, training or experience." Besides that, in *PP v Lee Ee Teong*, the court held that: 'A person who is skilled or knowledgeable on certain matters by reason of his experience and exposure may be an expert.'

An expert is a person who, by reason of education or special training, possesses knowledge of a particular subject area in greater depth than does the public at large (Jack V. Matson, Suha F. Daou and Jeffrey G. Soper, 2004, p. 6).

Mark Reutlinger defines expert witness is a witness who, because of specialized knowledge, skill, training, experience, or education, is particularly qualified to give an opinion or draw an inference about a matter within that area of expertise (Mark Reutlinger, 1996, p.188). Meanwhile, Daniel Oran describes expert witness as:

“A person possessing special knowledge or experience who is allowed to testify at a trial not only about facts (like an ordinary witness) but also about the professional conclusions he or she draws from these facts” (Daniel Oran, 2000, p.183).

WHEN THE POLYGRAPH EVIDENCE IS REQUIRED?

Expert witnesses, because of their experience and training, are able to contribute useful opinions based on the observations of others as well as themselves. However, the witnesses' opinions are admitted only if and to the extent they are likely to aid the trier of fact in reaching its ultimate conclusions on the evidence (Mark Reutlinger, 1996, p. 183). Unlike ordinary “lay” witnesses, the expert witness is called not to testify with respect to the factual background of an action but rather to provide an opinion with respect to those facts which will help the judge, jury or tribunal reach its conclusion. The ability of an expert witness to provide evidence in connection with a factual situation with which they had no connection is thus a major exception to the hearsay rule, which generally provides that indirect evidence may not be led to support the truth of the matter asserted (Steven J. O'Melia, November 1991, p. 1). The job of the ‘expert witness’ is not simply to articulate their client's position; it is to assist the decision maker (a court, tribunal or other similar body) with the information about the specialist area which is necessary before a decision can be made (Robert Sutherland, April 2009, p. 1).

In *R v. Abbey* [1982] 2 S.C.R. 24 at p. 42, Mr. Justice Dickson (as he then was) of the Supreme Court of Canada commented on the role which experts play in the trial process as follows:

“Witnesses testify as to facts. The judge or jury draws inferences from facts. With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with the ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. An expert's opinion is admissible to furnish the court with scientific information, which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary.”

In the case of *Kulasingam v. Thambipillai* (1997) 1 MLJ 288, the court held that ““expert witness may give opinion evidence but the court is free to draw its own conclusions.” Meanwhile, in the case of *Chou Kooi Pang* (1998) 3 SLR 593, Yong Pung How CJ stated that:

“.. it is well established that expert opinion is only admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge. If, on the proven facts a judge can form his own conclusions without help, the opinion of an expert is unnecessary.”

In addition to that, Winslow J in the case of *Ong Chan Tow v R* [1963] MLJ 160 held that “experts should not be asked to give conclusions on matters which eminently matters for the court to decide.” Meanwhile, in *Chin Sen Wah v PP* [1958] 24 MLJ 154, the High Court of Malaya decided that “the ultimate decision on any issue is with court.”

This decision further emphasized in the case of Metropolitan Properties Co. Ltd. v. London, (1968) 1 All ER 354 where it was decided that “experts give evidence and do not decide the issue.”

Not everything will be regarded as suitable for expert comment, and the general rule states that expert opinion will not be regarded as necessary where the matter in question does not call for specific expertise (Jonathan Doak and Claire McGourlay, 2009, p.315-316).

Therefore, it is clear that the expert is not allowed to decide any ultimate issue as it is the duty of a judge. The expert may give his/her opinion on the issue which is beyond the common knowledge and experience of a judge. If the issue before the court is likely to be outside the knowledge and experience of a judge, then the expert must be called to testify on that matter. This opinion can be seen in the case *Syed Abu Bakar bin Ahmad v PP* [1984] 2 MLJ 12 at p.23-24 where Abdul Hamid FJ held that:

“It is settled principle that while it is true that a Judge who sits alone is entitled to weigh all the evidence, to put his own magnifying glass to determine the probabilities so to speak and form his own opinion or judgment, it would be erroneous for him to form a conclusion on a matter which could only be properly concluded with the aid for expert evidence.”

In *R. v. Preeper* (1888) 15 S.C. R. 401 at p. 409, Strong, J., said:
“There can be no doubt as to the rule established in practice and by incontrovertible authority that no evidence of matters of opinion is admissible except where the subject is one involving questions of a particular science in which persons of ordinary experience are unable to draw conclusions from facts. The jury must, as a general rule, draw all inferences themselves, and witness must speak only as to facts.”

The role of expert witness is different from that of any other witness in a criminal trial as an expert is the only type of witness who can give opinion evidence. The purpose of obtaining an expert opinion is to assist the trier-of-fact in its decision-making process. The opinion of the expert is not meant to usurp the role of the judge or jury, which must still apply their own judgment to the expert's opinion in the context of the proven factual background (Steven J. O'Melia, 1991, p.3).

THE ADMISSIBILITY OF POLYGRAPH EVIDENCE IN MALAYSIA

Before a party can adduce any evidence at trial, it must first be shown that the evidence in question is relevant. The legal definition of relevance was laid down by Lord Simon in *R v Kilbourne* [1973] AC 729. Evidence was considered to be ‘relevant’ ‘if it is logically probative or disprobative of some matter which requires proof’.

In Malaysia, the legislation pertaining to evidence is Evidence Act 1950. Thus, in order to know the position of polygraph expert evidence in Malaysia, the provision of Evidence Act 1950 must be construed. The evidence of polygraph expert must be relevant before the court can admit it. Relevancy is a concept that runs through the Evidence Act 1950. The significance of relevancy is apparent. Whatever is not provided for in the Act is irrelevant and therefore inadmissible. Consequently, only evidence declared relevant by the Act can be considered as judicial evidence.

The provision relating to relevancy of expert evidence is covered under Section 45 of the Evidence Act 1950. According to Section 45, "When the court has to form an opinion upon a point of foreign law or of science or art, or as to identity or genuineness of handwriting or finger impressions, the opinions upon that point of persons specially skilled in that 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." Based on the provision of Section 45, there are few categories of expert accepted by the law i.e. experts in foreign law, experts in science or art and experts in identity or genuineness of handwriting or finger impressions.

The question is where is place of polygraph expert in this provision since there is no specific category for polygraph? Can 'polygraphy' be considered, in law, to be on a point of science? Though there is no mention of the word polygraph expert under section 45 of the Evidence Act 1950, it would nevertheless include it if we construe the liberal interpretation from decided cases and opinion of authors. According to *Article 49 in Stephen's Digest of the Law of Evidence*, 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,' and amongst others the examination of handwriting. Based on this article, polygraph can be regarded as one of the subject in "science or art " as a special study or experience is important to give an opinion on the matter involving that matter.

Moreover, *Field's Expert Evidence* states that the term 'science' or 'art' must be interpreted widely. This is further emphasized in the case of *Chandrasekaran & Ors v PP* [1971] 1 MLJ 153, Raja Azlan Shah J (as His Highness then was) held that: "The expression 'science or art' is elastic enough to be given a liberal interpretation. ...was not specifically mentioned in section 45, then equally there is no mention of handwriting or foot-print or telephony and yet the evidence of handwriting, foot-print or telephonic experts has been held admissible. So also of ballistic or medical experts who too have not been mentioned in section 45."

In addition to that, Yong Pung How CJ in the case of *Leong Wing Kong* (1994) 2 SLR 54 stated that:

"...if the evidence covers an area of 'science or art'. The scope of the term has been widely construed and is not restricted to the subjects of pure science and art."

Thus, it can be sum up that polygraph opinion is within the expression 'science' under section 45 of the Evidence Act 1950. However, the problem always arises in terms of admissibility of such evidence. In this country, the only criterion to admit the expert evidence is relevance. As long as the evidence is relevant to the issue, it is admissible. This is the general principle under Malaysian Evidence Act 1950. The court does not have any standard or guidelines as a guidance to determine the reliability of evidence presented by the expert in the courtroom even though the expert evidence influences the judge decision in a case.

CONCLUSION

Polygraphy is a “method for determining whether a person is lying, using what is commonly called a “lie detector” (Mark Reutlinger, 1996, p.50). Polygraph tests are currently used in criminal investigations in many countries including Belgium, Canada, Israel, Japan, Turkey, Singapore, South Korea, Mexico, Pakistan, the Philippines, Taiwan, Thailand, and the USA. Polygraph is useful in determining whether a person is a viable suspect of a reported crime. It eliminates possible suspects, which in turn saves investigative time and effort. It is useful in determining the degree of involvement of suspect in the crime, i.e., co-conspirator, accessory before or after the fact, or the violator himself. By admissions or confessions made by the individual being tested, direct involvement can be established which often leads to a plea. Admissions made by the individual being tested can establish involvement in other or unreported crimes.

As discuss earlier, the evidence of polygraph is adduced through the testimony of an expert witness. The role of the expert witness is to assist the court through the provision of an independent and unbiased opinion about matters coming within the expertise of the witness. This duty is paramount.

The admissibility of polygraph expert opinion evidence in the context of professional disciplinary proceedings has, surprisingly, not been the subject of extensive judicial consideration. To date, there are no local cases which discuss on the issue of a polygraph experts testimony.

REFERENCES

A review of the Current Scientific Status and Fields of Application of Polygraphic Deception

Detection, Final report (6 October 2004) from the BPS Working Party

A Review of Question Formulation in Polygraph Literature of Polygraphic Method For Counterproductive Behaviour Index Profiling by Ahmad Zaki Abu Bakar, Rose Alinda Alias and Hashim Bin Hj Yusoff from Faculty of Computer Science and Information System, Universiti Teknologi Malaysia, Johor.

Daniel Oran, 2000, Oran's Dictionary of Law, Third Edition

Jack V. Matson, Suha F. Daou and Jeffrey G. Soper, 2004, Effective Expert Witnessing, Fourth Edition, CRC Press, United States of America

James W. Osterburg and Richard H. Ward, 2010, Criminal investigation: A Method for Reconstructing the Past, Sixth Edition, LexisNexis

Jay M. Feinman, 2003, 1001 Legal words You Need To Know, Oxford University Press, Inc.,

New York

Mark Reutlinger, 1996, Evidence: Essential Terms and Concepts, Aspen Law and Business,

United States of America

Steven J. O'Melia, November 1991, The Expert Witness, Miller Thomson, ON Canada

Supt Amar Singh Sidhu, The Polygraph as a Tool for Investigations: Its Basis and Legal Implications

The Polygraph as a Tool for Investigations: Its Basis and Legal Implications, Supt Amar Singh Sidhu