THE HANDWRITING EXPERT AND ITS PROBATIVE VALUE IN MALAYSIA

Ramalinggam Rajamanickam,[1] Anita Abdul Rahim[2] & Anisah Che Ngah[3]

[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 the area of globalization, infringement of rights either through civil or criminal activities is increasing and people come to the court to settle their disputes as well as to obtain justice. The court solves the disputes mainly through the testimony of witnesses. Generally, a witness is not allowed to give an opinion in the court of law. However, this principle subject to an exception whereby the court may permits the expert witnesses to state their opinion pertaining to any issue in disputes. One of the important areas which the expert may give his or her opinion is the field of handwriting. Thus, this writing focuses on the relevancy of the handwriting expert under the Evidence Act 1950. This writing also explains the admissibility of such evidence and its probative value in a case.
Key words: Handwriting Expert, Probative Value, Relevancy, Witness

INTRODUCTION

With the increasing complexity of cases, particularly those that require the resolution of scientific or technical questions, the expert witness has become critical to the success of litigation. Expert can provide a bridge between the particular facts of a case and patterns of fact that can be observed and understood only through much wider study (Jack V. Matson, Suha F. Daou and Jeffrey G. Soper, 2004, p.7).

In Malaysia, before the opinion evidence of any expert could be considered by the courts, including that of handwriting experts, it has to first be shown to be relevant as required under section 45 of the Evidence Act 1950 which states:

"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 above provision, there are few categories of expert recognised 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 handwriting expert is clearly one of the experts under Section 45 of the Evidence Act 1950.

MEANING OF "EXPERT"

The Evidence Law recognizes two categories of witnesses. Lay witnesses, also called percipient of fact witnesses, are called to testify because they have seen, heard, or done something relevant to the facts and circumstances of the case. The testimony of such witnesses contributes directly to establishing the factual events (Jack V. Matson, Suha F. Daou and Jeffrey G. Soper, 2004, p.7). The second category is the expert witness. An expert witness is a person who, by reasons of education or special training, possesses knowledge of a particular subject that may be beyond the understanding of the average person. Experts are not always required. They are hired only if their expertise is necessary to present technical and/or complex facts, or to provide expert opinions based upon their knowledge, experience, and qualifications (Jack V. Matson, Suha F. Daou and Jeffrey G. Soper, 2004, p.7). In addition to that, expert witness also can be defined as 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).

Before a court will admit evidence of an expert, it must be satisfied that the witness has the appropriate expertise. Generally, an expert witness can be 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. The expert witness is used to explain and provide opinions about particularly complex issues that are beyond the general knowledge of most people. 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). Expert witness also has been defined as "an individual who is required to appear in court in order to give factual information and opinion based on fact, from within his or her area of expertise" (Andrew R.W. Jackson and Julie M.Jackson, 2008, p. 432).

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). According to Section 4 of New Zealand Evidence Act 2006, expert means "a person who has specialised knowledge or skill based on training, study, or experience." While, 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" (Section 4 of New Zealand Evidence Act 2006). An Expert, according to Lord Russell CJ in the case of *The Queen v Silverlock* [1894] 2 QB 766 at p.771 is "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." Moreover, in the case of *PP v Lee Ee Teong* [1953] MLJ 244, 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's opinion is a reasoned conclusion drawn from specialised knowledge based on facts which the expert has observed, assumed, or been instructed to assume (Miiko Kumar, 2011, p. 427). It is necessary to demonstrate to the court that the "expert" possesses specialize, 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. Writing, research, and active membership in pertinent professional organizations are

expected of most experts if they are to be considered current in the field (James W. Osterburg and Richard H. Ward, 2010, p. 42). Once in the witness box, the expert must be limited to giving evidence within the scope of his or her expertise.

ROLE OF HANDWRITING EXPERT

It is a generally established principle of case law that expert evidence is only admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge. This opinion can be seen in the case of *Chou Kooi Pang v PP* (1998) 3 SLR 593, where Yong Pung How CJ stated that:

"..iIt 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."

Moreover, in the case of *Ong Chan Tow v R* [1963] MLJ 160, Singapore High Court through Winslow J 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, High Court of Malaya decided that; “The ultimate decision on any issue is with court.”

In *Syed Abu Bakar bin Ahmad v PP* [1984] 2 MLJ 12 at p.23-24, 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.”

Furthermore, in the case of *John David O’Sullivan* 53 Cr App R 274, it was held that ‘there should never be an invitation or exhortation by the judge to the jury to look at disputed handwritings for the purpose of making comparisons without the assistance of an expert.’

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).

One of the important cases on the issue of admissibility of expert evidence is the case of in *R* v *Turner* [1975] QB 834. In *R* v *Turner*, the defendant had killed his girlfriend with a hammer after she told him with a grin that she had been sleeping with two other men and that the child that she was carrying was not his. He pleaded provocation, claiming that he had been overwhelmed with blind rage and had hit her with the hammer without realising what he was doing. Although he showed no signs of any mental disorder, the defence wished to introduce psychiatric evidence to show that he had enjoyed a deep emotional relationship with the deceased, that he was likely to have experienced an explosive outburst of blind rage after her confession to him, and that after the crime his behaviour showed profound grief for what he had done, which was consistent with his defence of provocation. But after examining a psychiatric report outlining the evidence that the expert witness intended to give, the trial judge ruled the evidence inadmissible on the ground that it dealt with matters of 'common knowledge and experience' within the experience of the jury. Lawton LJ justified the Court of Appeal decision as follows in *R* v *Turner* at p. 841:

"If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary. In such a case if it is given dressed up in scientific jargon it may make judgment more difficult. The fact that an expert witness has impressive qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of the jurors themselves; but there is a danger that they may think it does."

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."

The aid of an expert may be of value was clearly the opinion of so distinguished a Judge as Blackburn, J., who in *R v. Harvey*, 11 Cox. C. C. 546 refused to allow a comparison to be made without the help of experts. In *Hari Singh v. Sardani Lachmi Devi*, A.I.R. 1921 Lah. 126, the court held that:
"There certainly may be, and perhaps are cases where the handwriting expert's opinion may be of assistance to the Court in forming to a conclusion as to the genuineness of disputed handwriting."

Thus, based on the above cases and explanations, it is clear that the handwriting expert may be called to testify in a case to furnish the court with scientific information which is likely to be outside the common experience and knowledge of a judge. If a judge can form his own conclusions without the help handwriting expert, the opinion of the expert is unnecessary.

THE PROBATIVE VALUE OF HANDWRITING EXPERT EVIDENCE

Before a court gives value to any piece of evidence in a case, the evidence adduced by the parties must be admitted first. In Malaysia, 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 the Malaysian Evidence Act 1950. As stated earlier, the evidence of handwriting expert is relevant under Section 45 of the Evidence Act 1950, therefore, admissible.

Once the evidence from handwriting expert is admissible, the next issue which must be determined by the court is the probative value of such evidence. In the case of *Phoodee Bibee v. Govind Chunder Roy*, 22 W.R. 272, it was said by the court that:

"A comparison of signature is a mode of ascertaining the truth which ought to be used with very great care and caution."

The similar decision also found in the case of *Teng Kum Seng v. PP* [1960] MLJ 225 where the court stated that:

"The evidence of an expert on handwriting, especially Chinese characters, must be treated with caution."

Meanwhile, in *Mohd Isa Khan v. State of U.P*., 1992 Cri CLJ 3987, 3993, the court held that "it is unsafe to base a conviction wholly on expert opinion without substantial corroboration." Furthermore, in the case of *Srikant v. King-Emperor* [1905] 2 ALJ 444, two learned judges in the High Court of Allahabad stated that:

"To base a conviction upon the evidence of an expert in handwriting is, as a general rule, very unsafe."

This decision was affirmed by the other two judges in the same court in the case of *Kali Charan Mukerji v. Emperor* [1909] 9 Cr LJ 498. According to the decision of Yeop A Sani J in the High Court of Malaya in the case of *PP v. Mohamed Kassim bin Yatim* [1977] 1 MLJ 64:

"Expert evidence, especially of handwriting, is merely opinion evidence and is not conclusive."

Based on the above cases, it is clear that the evidence of experts on handwriting is very weak type of evidence; hence the court should accept it with great caution. After all, their evidence is opinion evidence. It is not conclusive. The court must not take the handwriting expert's opinion for granted. The must examine the evidence in order to satisfy itself that there can be no mistake.

CONCLUSION

Expert witnesses play a large and increasingly important role in the trial of actions in Malaysia. The majority of all civil and criminal cases currently litigated involve expert evidence of some sort. The law allows most witnesses to testify only about facts, but expert witnesses are uniquely permitted to give evidence of their opinions as well. The role of expert witness is different from that of any other witness in a trial as an expert is the only type of witness who can give opinion evidence. Opinion evidence is evidence in the form of an inference or a conclusion, rather than a statement of the facts from which the inference or conclusion has been drawn; or evidence of facts based on conjecture or belief, rather than personal knowledge. "Opinion" is a slippery term that can include both inferences and other non-factual evidence (Mark Reutlinger, 1996, p.181).

The use of handwriting expert in court can heavily influence the outcome of a case and impact directly or indirectly on the individuals involved and society more broadly. The

law allows most witnesses to testify only about facts, but expert witnesses are uniquely permitted to give evidence of their opinions as well. The role of expert witness is different from that of any other witness in a trial as an expert is Malaysian court does not have any standard or guidelines as a guidance to determine the reliability of evidence presented by the handwriting expert in the courtroom even though their evidence influences the judge decision in a case.

REFERENCES

Andrew R.W. Jackson and Julie M.Jackson. (2008). *Forensic Science*, Second Edition, Pearson
Education Limited, England

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

Mark Reutlinger. (1996). *Evidence: Essential Terms and Concepts*, Aspen Law and Business, United States of America

Miiko Kumar. (2011). *Admissibility of Expert Evidence: Proving the Basis for an Expert's Opinion*, Sydney Law Review [VOL 33:427]

Richard Saferstein. (2007). *Criminalistics: An Introduction to Forensic Science*, Ninth Edition, Pearson Education International, New Jersey

Robert Sutherland. (20 April 2009). *Expert Evidence: The Role, Duties and Responsibilities of the Expert Witness in Litigation*, this article is based on a presentation which was first delivered at an Expert Witness Training Seminar hosted by Terra Firma Chambers

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