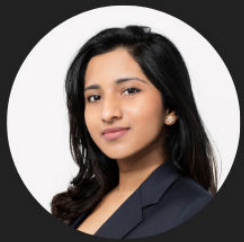


## What Maketh the Expert?

By SM Shanmugam & Shona Anne Thomas



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On 30 July 2021, the Court of Appeal unanimously dismissed the plaintiff's appeal whereby the issue of expert witnesses was heavily contested (among others).

Partner SM Shanmugam (together with associate Shona Anne Thomas) acted as counsel for the first defendant at all tiers of the court.

### Facts

In 2013, the plaintiff was involved in a car accident. The airbag of the car did not deploy due to the low impact. After successfully suing the motor lorry driver for negligence and the motor lorry owner for vicarious liability, the plaintiff commenced action against a wholesaler and the car dealer (who sold him the vehicle) alleging the non-deployment of the airbag caused both the damage to the car as well as his injuries. During the trial of the matter, the plaintiff relied on the evidence of a forensic scientist whereas the first defendant relied on an expert in automobile safety systems. In dismissing the claim on merits after full trial, the trial judge at the court of first instance made, among others, the following findings:

- (a) the plaintiff's forensic scientist is not an expert on the subject matter; and
- (b) the first defendant's expert witness had the qualification, skill and experience to be an expert on the subject matter.

On appeal to both the High Court and the Court of Appeal, the plaintiff strenuously argued, among others, that the forensic scientist is qualified to be an expert in the matter.

### Principles on expert evidence

The law of evidence stipulates that any inference drawn from observed facts constitutes an opinion<sup>1</sup> and the general rule is that opinions based on inferences are irrelevant. An exception to this rule is the opinion of experts.<sup>2</sup> When the court must form an opinion upon, among others, a point of foreign law or of science or art, an expert's opinion upon that point is considered

<sup>1</sup> Rupert Cross, *Law of Evidence* (1979) at p 442  
<sup>2</sup> Evidence Act 1950, s 45



relevant facts.<sup>3</sup> However, to quote Lord Mansfield CJ, “if on the proven facts a judge or jury can form their own conclusions without help then the opinion of an expert is unnecessary”.<sup>4</sup>

So, who can be called as an expert to assist the court during litigation? The Court of Appeal in *Batu Kemas*<sup>5</sup> provides a clear guide on the essentials required by an expert witness:

“[38] Before the court can accept the testimony of the expert the competency of the expert witness must be established. In *Junaidi bin Abdullah v. Public Prosecutor* [1993] 4 CLJ 201; [1993] 3 MLJ 217 (SC), the (then) Supreme Court made the following observations:

First, does the nature of the evidence require special skill? Second, if so, has the witness acquired the necessary skill either by academic qualification or experience so that he has adequate knowledge to express an opinion on the matter under enquiry? The answer to both questions must necessarily depend on the facts of each particular case. The specialty of the skill required of an expert witness under s. 45 would depend on the scientific nature and complexity of the evidence sought to be proved. The more scientific and complex the subject matter, the more extensive and deeper will be the court required to enquire into the ascertainment of his qualification or experience in the particular field of art, trade or profession. But in the final analysis in a non-jury trial, it is for the trial judge himself as both judge of fact and law to determine the weight to be attached to such evidence notwithstanding the outstanding qualification or experience (or lack of it) of the expert.

In short, the main threshold to be met is the necessary qualification, experience and skill in a particular subject matter. It is essential that the person offering the opinion is “specially skilled” in the relevant field. A problem that may arise 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 non-professional person be sufficient in certain cases to qualify him as a person “specially skilled”.<sup>6</sup> For these reasons, the Court of Appeal reminded that the court must be vigilant and must satisfy itself that the “expert” is indeed an expert specially qualified.<sup>7</sup>

<sup>3</sup> Ibid

<sup>4</sup> *Folkles v Chadd* (1782) 3 Doug KB 157 at p 159

<sup>5</sup> *Batu Kemas Industri Sdn Bhd v. Kerajaan Malaysia & Anor* [2015] 7 CLJ 849

<sup>6</sup> H M Zafrullah, “Expert Testimony – Some Reflections from Malaysia” (Journal of Malaysian and Comparative Law, Vol 7 No 2, 1980)

<sup>7</sup> *Yoong Sze Fatt v Pengkalen Securities Sdn Bhd* [2011] 4 MLJ 805



## Court's findings

In the present matter, the trial judge at the court of first instance and the High Court judge had carefully canvassed the curriculum vitae and evidence of both the plaintiff's forensic scientist (**PW2**) and the first defendant's expert (**DW3**) in deciding whether they were specially skilled in the subject matter of the dispute i.e. automobile safety systems. On this issue, the High Court remarked:

[74] In the present appeal, it is not in dispute that the Plaintiff's case is wholly and entirely dependent on the evidence of PW2. *Who then is this PW2?* PW2 by profession is a Senior Forensic Consultant. He holds a Bachelor of Science (Honours) in Forensic Science Universiti Sains Malaysia.

[75] PW2's curriculum vitae (CV) was produced before the learned SCJ. The CV has set out the full details of PW2's career achievements, professional qualifications, professional experiences and court appearances. It is pertinent at this juncture, for this Court to reproduce PW2's CV...

...

[77] This Court has closely perused the grounds of judgment of the SCJ and this Court must state that the said grounds of judgment was quite meticulously prepared. The learned SCJ had properly and thoroughly evaluated the evidence of PW2 and correctly found that PW2 is not an expert in the field automobile safety system. Notwithstanding the fact that PW2 is a Forensic Consultant with various working experiences and had attended various courses relating to his work, none of those experiences and courses are relevant and related to the field of airbags installed in automobiles.

[78] Therefore, PW2 is not a witness who possesses relevant expert qualification, equipped with the necessary skill, knowledge and experience in the field of the automobile safety system, and specifically airbags system."

The Court of Appeal, having heard extensive submissions by counsel of both parties on the issue of expert witnesses, unanimously pronounced that the matter does not require appellate intervention as there is no manifest error and affirmed the decision of the High Court, which can be read [here](#).

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