

**Building a credible and believable narrative:
The role of direct examination in expert witness testimony**

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Abstract:

Educational best practices deem that students must be able to access, utilize and produce the discourse of the target community - a site that is shaped by social, institutional and historical underpinnings. The domain of law in Malaysia and the Malaysian courtroom, for instance, is one site that is influenced and shaped by such variables. To participate meaningfully in such a domain thus requires participants to be aware of literacy practices, which in turn, involve the acquisition and learning of the relevant and existing complex roles, identities, codes, registers and social artifacts. While officers of the court (judges and counsels for instance), are trained participants, witnesses who are called to court to give evidence are not. As such during direct examinations, which mark the start of the process of evidence taking, witnesses are usually led by counsels through the questioning process to build a foundation of their narrative. This paper, which is based on a case study of criminal trial in Malaysia, will show how the successful undertaking of direct examinations, is crucial for a narrative version that is believable and credible. The roles of the judge, counsels and expert witnesses in the adversarial system practiced in Malaysia and the strategies employed by the counsels during the direct examinations of expert witnesses will also be highlighted.

Introduction

A trial is a high risk activity that is usually well crafted and well planned by the main actors, namely the counsels, with the sole aim of winning the case. The success of a case is dependent on the evidence and testimony adduced that support a particular version. Under Malaysian law, evidence can only be adduced through the oral tradition, with the witness coming to court and be subjected to the questioning process. This oral tradition is a legacy of the common law system of England that has been adopted by our legal system. Briefly, the English common law is based on judicial precedent and the doctrine of *stare decisis*. The doctrine implores the courts to follow the *ratio decidendi* or principles of law of past cases which have been documented.

In Malaysia, the questioning process comes under the purview of High Court Rules of Practice and Procedure (that delineates what counsels can and cannot do in court) as well as the Evidence Act 1951. Thus when a witness is summoned to court, he will undergo a direct examination by his own counsel, and he may if necessary undergo cross-examination by the adversarial counsel and then a re-examination by his counsel.

To participate meaningfully in such a domain thus requires participants to be aware of literacy practices, which in turn, involve the acquisition and learning of the relevant and existing complex roles, identities, codes, registers and social artifacts. While officers of the court (judges and counsels for instance), are trained participants, witnesses (eye witnesses or experts), who are called to court to give evidence, are not. As such during direct examinations, which mark the start of the process of evidence taking, witnesses are usually led by counsels through the questioning process to build a foundation of their narrative (Gibbons 2003). Atkinson and Drew (1979), Conley and O'Barr (1990), Tiersma (1999), among others, have reported that counsels will ask questions (whose answers are already known to the counsels) at this stage. There is a lawyer-client collaboration (Aust 2000) and the process is usually friendly, non-confrontational and witness-bashing is usually not present.

Aim of the paper

Stygall (1994) reports that despite the fact that expert testimony is highly regarded and persuasive, such evidence is usually accepted under the strictest consideration and because of this, where necessary, the court will call for rebuttal evidence. In light of this, this paper will examine the strategies counsels use to introduce these experts in direct examination in the quest to create a believable and credible evidence. This paper, which is based on a case study of criminal trial in Malaysia which was the focus of a doctoral dissertation, will show how the successful undertaking of direct examinations, is crucial to build a narrative version that is believable and credible. The paper will highlight several strategies successfully employed by the counsels with the corroboration of the expert witnesses during the questioning process, and discuss the role(s) of the judge, counsels and expert witnesses in the adversarial system practiced in Malaysia. To this

end, data will be extracted from that of DW3, a defence expert witness as his evidence captures all the strategies employed by counsels of both a parties.

Methodology and analysis

This paper is based on a qualitative research paradigm based on the tenets of “ask, observe and collect” (Saville-Troike, 1982) at the Kuala Lumpur High Court. In order to collect data of ‘thick description’, a case study was employed and *in-situ* observations of a selected criminal case was conducted for a period of two years and three months in a trial that called for four expert prosecution witnesses and five defence experts. The data collected from the entire trial were transcribed orthographically by the researcher adhering to the conventions of Conversation Analysis. This procedure was deemed sufficient for the purpose of the study. Close perusal of the data was conducted and several emergent themes were identified. These themes were then triangulated with data from interviews with counsels, legal practitioners, and members of the gallery as well as the judge’s notes of proceedings, counsel’s field notes and notes from newspaper reporters. Close perusal of legal cases and statutes was also done.

Courtroom questioning

Courtroom questioning process is akin to a conversation (Atkinson and Drew 1979) but in reality it has its own procedural constraints depending on the context. Despite its closeness to the adjacency pair of question-answer, studies have reported that the questions have various functions and objectives (Gibbons 2003), which may be not very clear to the witnesses, who have been amply recorded to be, “often baffled by foreign technicalities and assemble line proceedings they do not fully understand, but are nevertheless caught up in and of which they are legally responsible” (Beach 1994:51).

Direct examination

In comparison to cross examinations, direct examinations have remained relatively not well researched despite being the starting point of an examination process. One reason for this can be because this examination seems rather straightforward and non-confrontational. Despite its seemingly straightforward nature, Aust (2000) has, for

instance, found that a direct examination serve three important functions: it builds a themed narrative and is built with the collaboration of the counsel and witness; it enables the presence of story detailing which allows participants and non-participants to follow the trial, and finally the testimony adduced is at best inoculated to prevent any ‘mishaps’ during cross-examinations.

As such, direct examinations are (normally) focused on material facts only and are not inclined to adhere to any chronological order of events. Hence it can be seen that counsels will build the testimony from what is deemed important and those which are less important will be dealt with later.

Strategies of counsels

Research has shown that pre-trial preparatory stages are crucial to the trial. Counsels will plan their strategies in adducing both the testimony as well as the calling of witnesses. Such keen planning will also include the rhetorical choices to be presented in court. O’Barr (1982), Levi and Walker (1990), Tiersma (1999), Cotterill (2003) and Gibbons (2003) have shown how counsels would use various strategies to build and inoculate the testimony adduced to ensure a believable narrative.

Expert witnesses

A trial involves the calling of witnesses to adduce evidence. Witnesses may be divided into witnesses of fact and witnesses of opinion. While witnesses of fact are usually directly related to the case (i.e. eye witnesses), witnesses of opinion are usually experts, who are called to court to assist the court to come to a finding. Section 45 of the Malaysian Evidence Act 1951 outlines who can be called as an expert witness, while Paul (2000) provides the legal parameters for the calling of such witnesses. To reiterate, briefly, a person is deemed an expert if he has special ‘expertise’ that is crucial in the pursuit of a fair decision. For example, we will see how in this case study, a trained endocrinologist was called to give his opinion of hypoglycemia unawareness, which falls under the purview of endocrinology.

The use of expert witnesses to assist the court is not a new phenomenon but it is gaining popularity not just in Malaysia but also in other jurisdictions due to the rise in

'new' and more sophisticated crimes. In the United Kingdom, United States of America and Australia, there is a growing body of literature on expert witness testimony but this is not the case in Malaysia.

Facts of the case

This paper is based on a trial where the accused was charged under Section 302 of the Malaysian Penal Code for causing with intent, the death of the victim, on 22.08.2000. During the trial, this charge was revised to culpable homicide not amounting to murder. The defence was built on the argument that the accused was under the influence of hypoglycemia unawareness and automatism when he shot the victim. The prosecution, on the other hand, contended that the accused was in a state of alcohol intoxication when he committed the act.

To build their case, the defence team called an expert witness to prove that the accused had undergone a condition of automatism and hypoglycemia unawareness based on an event ten years prior to the incident. The accused had then sought medical advice at a private hospital and his condition was diagnosed as provisional hypoglycemia.

The prosecution's case was based on the events prior to the shooting where the accused had consumed liquor which, according to the report by the government chemist, was higher than the allowable limit for driving.

Strategies in the courtroom

From the data gathered it was noted that for both parties, the objective of the direct examinations was to lay the groundwork for the reception of the evidence to be adduced by the experts. As such the strategies employed were to demonstrate how competent, knowledgeable and qualified the experts were. The following section will discuss these strategies.

Competent, credible and believable evidence

Both adversarial teams were found to have made thorough preparations facilitated by the calling of a number of experts. The prosecution had called for a forensic pathologist, a

forensic chemist and a gun expert. Later, two rebuttal witnesses, an endocrinologist and a forensic psychiatrist were called after the defence had called all their witnesses in order to rebut the defence of hypoglycemia unawareness.

As a high-stake capital offence with the accused from an illustrious and wealthy Malaysian family, the defence team had armed themselves with medical experts to prove that the accused was affected by hypoglycemia unawareness, a rare medical condition. As testimony had to be adduced that this medical condition could happen any time and without a traceable history, clinical endocrinologists, research endocrinologists, a forensic chemist, and a psychiatrist had to be called in to support such evidence. In response to this medical evidence, the prosecution had to call two rebuttal expert witnesses; an endocrinologist and a forensic psychiatrist.

Procedural strategies

The study revealed that both the prosecution and defence employed what is termed as ‘trial by ambush’. This is a legacy of the English adversarial system, which has already been abandoned in most other adversarial jurisdictions, including the UK, but is still alive in criminal hearings in Malaysia. Trial by ambush means that parties can surprise their adversary by applying for new witnesses to be put to stand or apply for new evidence to be introduced as seen in Example 1 that follows:

(In the Examples that follow, DPP is the Deputy Public Prosecutor, Defence is the Defence Counsel, DW is the defence witness and Judge is the presiding judge. The underlined words indicate a raised tone. Two strokes // indicate overlapping. A blank that follows indicates data attrition. The data is authentic and the structures have not been corrected).

Example 1: Submissions on 1.11.01 (application by the prosecution for Rebuttal witness)

Judge	:	Very hard. It is against all known justice. If they call	1
		endocrinologist what can they do? Get story of hypoglycaemia?	2
		What is hypoglycaemia? When it was discovered? That’s all.	3
		Hypoglycaemia is so vast, diabetic or non-diabetic, recurring or	4
		non-recurring, so what function? Do they know what point they	5
		are going to set up? And even if they know, can they rebut what	6
		they put up?	7

Defence	:	All these problems	8
Judge	:	I am not recording all these	9
Defence	:	All these problems are because we have the most archaic system.	10
		The prosecution ambush us, we ambush the prosecution	11
DPP	:	<u>We do not ambush</u>	12
Defence	:	Because we do not take in notes, we are not as developed as in	13
		England, and we are duty bound as we follow English law but	14
		we do not follow English law here.	15

Example 1 was taken at the end of the prosecution case where the prosecution team applied to the judge to call for a rebuttal witness. We see in lines 1-7 how the judge explained to the court that there was nothing to rebut and thus no ground to support the application for an endocrinologist. The pronoun ‘they’ repeatedly used in lines 1,2,5,6 refers to the prosecution, who were present but not directly addressed by the judge. At this point, my notes showed that the judge was rather annoyed by the development but in the interest of justice did not record the application (line 9).

Nevertheless, there was recognition of ‘trial by ambush’ (brought up by defence but vehemently denied by prosecution, in line 12 where the underlined words indicate a raised tone and emphatic stress). Despite being used by both parties, trial by ambush or non-disclosure of evidence and witnesses result in much guessing and the litigating parties must be prepared to move their arguments in any direction, as and when the situation warrants. This procedural strategy, when successfully employed will throw the adversarial party off-guard and counsel would have to scramble and think on their feet in order to lessen the damage.

Trial by ambush is also practiced in the adducing of documentary evidence tendered in court as seen in Example 2 below.

Example 2: Direct Examination of DW2 on 13.11.01 p.1

Defence	:	My lord, before we proceed to ask the witness his qualifications and so on, I have here a typewritten document on his curriculum vitae. I wonder if I ask some questions on his qualifications but we will have it to be marked.	1 2 3 4
Judge	:	It will be quite painful for me to record but at the end of the day if not it will be inadmissible.	5 6
Defence	:	I leave it.	7
Judge	:	I don't want to be in a difficult position to justify. Indian cases on that point, totally inadmissible.	8 9
Defence	:	Anyway he will be giving his opinion about his expertise	10
Judge	:	Not too much. He is an expert, something extraordinary, qualifications will be enough and the _____	11 12
Defence	:	May I? Err Dr. Ridzwan first of all can you state your professional qualify cations, your medical professional qualifications	13 14
DW	:	I attained the MBBS in1975 at UM. Subsequently,	15
Defence	:	Slowly, the judge, we have a system where the judge has to write down. So, MBBS Malaya 1975	16 17 18
DW	:	In 1978 I attained membership in MRCP UK	19
Judge	:	Royal College?	20
Defence	:	Physician my lord UK	21
Judge	:	Erm	22
Defence	:	Subsequent to that did you attend anything else?	23
DW	:	Three years after that I managed to obtain fellowships in four Royal Colleges, these are the / Royal /Colleges	24 25
Judge	:	/ I managed to obtain /four/	26
Defence	:	/from four, from four	27 28
DW	:	from four colleges, they are Royal College of Physicians London,	29
Judge	:	Royal College of Physicians, London	30
Defence	:	that is FRCP London	31
.....	:	32 33
Defence	:	FRCP Ireland. Now, you obtained something else in America in 1997? Did you become and Associate Fellow in America?	34 35
DW	:	That is correct, you are going,	36
Defence	:	Sorry	37
DW	:	In 1997, you are correct I was an enrolled Fellow in Cardiology Associate Fellow in American Institute of Cardiology	38 39
Judge	:	Associate Fellow of American Institute of Cardiology in 1997.	40
Defence	:	Any more of professional qualifications?	41
DW	:	In 1998, external examiner for the Royal College of Physicians London.	42 43
Judge	:	Erm	44
Defence	:	Any more after that?	45
DW	:	That is as far as my memory serves me	46

Defence	:	Now, you have presented various papers on your area of expertise that is, cardiology, ya?	47 48
DW	:	Yes	49
Defence	:	I don't think I need to go into various papers	50
Judge	:	No	51
Defence	:	Currently, from 1998 to present, are you not also the President of the Association of Private Hospitals in Malaysia?	52 53
DW	:	That is correct	54
Defence	:	Perhaps one last one, you are currently apart from serving Pantai as the CEO?	55 56
DW	:	Ya	57
Judge	:	How does it help his medical career? That is his business acumen, success there.	58 59 2

When experts are put on stand to give their opinion, such opinion will be based on the findings deduced from the facts of the case made available to them and the deductions they make based on their expertise. Such expertise is usually based on reference made on learned treatise in the forms of books, journal articles, graphs, reports, and legal cases. Hence such reports and other supporting materials will have to be made available to the adversarial party to be perused. But such perusal needs time and denying time by not giving adequate notice is a procedural strategy by counsels as seen in Example 2 above.

In Example 2, DW2 is an expert in cardiology and he had prepared a report which included his curriculum vitae which would establish his expertise. However, it had yet to be tendered to court. Here the defence wanted to tender without the oral tradition (of questioning) but only by reading, and thus understood by all as an attempt to ambush (see lines 1-4). However, this attempt was thwarted by the judge (lines 5-6) who then proceeded to explain his stand in lines 8 to 9 by bringing the position of the Indian precedent. Further in lines 11-12 the judge explained what he perceived to be relevant and sufficient for an expert.

My observations revealed that while trial by ambush is a much favored strategy of the defence (to the detriment of the prosecution) this does not mean that the prosecution does not practice it at all.

Example 3 below shows how towards the end of the direct examination of PW18 (prosecution second rebuttal witness), a forensic psychiatrist, the defence counsel registered his objection to the court (lines 1- 4). This was rebutted by DPP 1 who replied

that the prosecution would look into tendering the documents ahead of time so as not to waste time but at the same time he also registered his complaint that that was exactly the treatment that the prosecution has been receiving from the defence. Here the judge displayed his excellent courtroom control by dealing with the complaint in a rather provocatively light-hearted manner (line 7). My ethnographic notes showed that the stress emphasized by the judge was followed by laughter all round. A difficult situation was again diffused. Further in lines 10 and 11, addressed the witness so as to put her at ease again. These acts by the judge were very insightful in terms of court control and to maintain the climate of the courtroom.

Example 3: Direct Examination of PW18 (Rebuttal Witness 1) on 08.07.2002

Defence	Yang Arif	I was wondering if I could put it to my learned friend	1
		if witness is going to rely on any literature, we as lawyers will	2
		read it at a crawling pace and hold the court back, I would not	3
		like to come to read	4
DPP 1	:	We will look into that my lord only this is what always happen	5
		to us my lord	6
Judge	:	<u>Yes what he is telling is that don't do what I did</u>	7
Defence	:	Your lordship will know that learned prosecutor asked for half a	8
		day, I do not want to repeat that.	9
Judge	:	Is it ok Dr? Those publications and their materials to be made	10
		available to us?	11
PW	:	Yes	12
Judge	:	So that's all, that is all for today.	13

Thus in terms of procedural strategies, the process of discovery in terms of non-disclosure of the order and appearance of witnesses as well as the (late) tendering of documents are very effective strategies in court. However, there are other strategies that are directly useful to the building of a credible and believable version of the expert witnesses.

Testimony in direct examinations must be able to produce a believable version of what happened, or in other words, persuasive and convincing. This is especially so in the case of expert witnesses where the opinions forwarded must be convincing. Hence, the introduction of experts to the court followed a certain procedure.

Boosting credibility

To adduce expert testimony is by establishing the credibility of the experts first. In comparing the approach taken by both sides, the defence was observed to be highly dramatic and aggressive in amplifying or 'boosting' their witnesses' credentials, an approach not shared by the prosecution. This boosting was done with all their experts, before, during and even after, the calling of the witness.

Boosting of the defence witnesses adhered to a certain pattern; a comprehensive laying out of both the basic academic qualifications, followed by post graduate work that focused on the areas relevant to this case, professional affiliation notably with internationally acclaimed bodies, and then their working experience. The defence would also foreground the institutions (usually highly reputable) and the noted specialists with whom the experts had worked with.

This boosting of credibility via qualifications is a very important strategy as once it was established, the defence team would repeatedly use this as a strategy to dispute and rebut the evidence of the prosecution's experts – by juxtapositioning the prosecution expert's lack of qualifications, experience, expertise, etc.

The second defence witness, DW2 (as seen in Example 2 above) for instance, was an expert witness, who was also the consultant physician of the accused. He was called to give testimony on the medical history of the accused, focusing on the four occasions the accused presented himself at the hospital. Although he was a cardiologist and not an endocrinologist, his evidence was adduced to demonstrate how similar the symptoms experienced and exhibited by one suffering from hypoglycaemia and a heart condition, thereby paving the way for the raising of doubt. This was an important aspect of the testimony, for subsequently, the symptoms allegedly suffered by the accused came under close and repeated scrutiny by the defence, to establish the fact that the prosecution's witness (PW8), the medical doctor at Kuala Lumpur General Hospital, the one and only doctor, who examined and took blood and urine samples from the accused about five hours after the incident, may have erred in her diagnosis of alcohol intoxication.

To establish credibility, the defence utilized the direct examination to its fullest. Each defence expert witness produced not only a written expert opinion, with a preface of

their qualifications appended to either a bibliography of their achievements, and/or with research papers published. This can be seen in Example 2 above. The counsel first established DW2's credibility, with his 'professional qualification' in lines 13- 43. Interestingly, his position as Chief Executive Officer (CEO) of a private hospital, was deemed a business position, and thus, not accepted by the judge (lines 56-57). But the amplification of testimony succeeded, as seen in lines 13-14, from the list of professional qualifications, professional medical qualifications (corrected), establishing him as an eminent scholar, having acquired professional expertise from the four colleges in the UK.

With a combination of Yes/No questions (line 23), *Now*-prefaced questions and questions prefaced with *Any more* (lines 39, 43), the defence counsel led the witness to reveal more qualifications and this implies that the expert's credibility is enhanced.

Hence the counsel and witness corroborated to show that he was a good scholar, who gained his specialist qualifications not just in the UK but also the US, and also credible in academia and research was then highlighted. Attempts to adduce testimony of research papers in cardiology failed as the judge contended that they were not relevant to the facts in issue.

The data also reveals that to boost the credibility of the expert, the defence counsel would employ the strategy of *repetition and reformulation*. In line 18, the counsel repeated *MBBS Malaya 1975*, as it was the basic qualification of the expert and then proceeded to repeat *Physician* for the Royal College in line 21, then proceeded to repeat and in so doing highlighting an impressive *four* colleges in line 27. When the witness stated that he was a fellow of four Royal Colleges (line 29), an accomplishment indeed, the defence counsel lost no time in reformulating, *that is FRCP London*.

Initially it appeared that the counsel was genuine in assisting the court as lines 16-17 showed that he had to caution the witness to speak slowly as Malaysian judges had to take their own notes of proceedings. However, as the trial progressed, it became obvious that this was a mode employed to lay emphasis on the testimony adduced (notably that which the counsel perceived to be of crucial importance).

The same strategy of boosting credibility of an expertise was also seriously pursued by the defence in relation to the testimony of DW3, an eminent overseas expert, as seen in Example 4 that follows on the next page.

Example 4: Direct examination of DW3 on 15.11.01

Defence	:	And are you a former Vice President of the Royal College of Pathologists?	1 2
DW	:	I am	3
Defence	:	That would be in the UK?	4
DW	:	In the UK, ya	5
Judge	:	Erm	6
Defence	:	And you are currently a member of the Board of Academy of Experts?	7 8
DW	:	I am.	9
Defence	:	Now that point needs a little highlighting. Can you tell the court the significance of becoming a member?	10 11
DW	:	The Academy of Experts was set up 12 years ago to encourage a high standard of expert evidence in the courts.	12 13
Judge	:	To encourage?	14
Defence	:	High standard of expertise in the courts, ok. In the British courts ya?	15 16
DW	:	British courts. And as a code of which you must subscribe	17
Defence	:	And as a code of ethics, which one must subscribe	18
DW	:	And is now available for membership to those who satisfy the highest standard of expertise	19 20
Defence	:	We need a little more on the Royal College of Pathologists. Can you state briefly what is the Royal College of Pathologists?	21 22
Judge	:	Sister college of the Royal medical colleges.	23
DW	:	Royal College of Pathologists is a sister, Royal medical colleges responsible for determining standards required.	24 25
Judge	:	It is responsible	26
Defence	:	For standards required	27
DW	:	For standards required for practice in the specialty of the laboratory medicine	28 29
Judge	:	For practice in the (.) required for practice in the?	30
DW	:	Laboratory medicine	31
Defence	:	You have _____ to do.	32

	Just since we are on the subject, you have been to Malaysia	33
	some time ago for some purpose on pathology?	34
DW	: I was here eleven years ago	35
Defence	: What specific purposes?	36
DW	: For the evaluation of the training of pathologists in Malaysia.	37
Defence	: Evaluation of the training of pathologists in Malaysia. Now	38
	Professor, you were formerly the Dean of Medicine and	39
	currently Professor Emeritus of Clinical bio-Chemistry at the	40
	University of Surrey?	41
Judge	: A former dean of?	42
Defence	: Medicine and currently Professor Emeritus of Clinical bio-	43
	Chemistry at the University of Surrey my lord, s-u-r-r-e-y. And	44
	you were consultant in Chemical pathology in the national health	45
	service ?	46
Judge	: And Consultant in?	47
Defence	: Chemical pathologist in National Health Service from '62 until	48
	1995. That is correct?	49
DW	: Yes.	50
Defence	: Now, how much experience would you have on aspects of	51
	clinical medicine especially in laboratory experiences?	52
DW	: I have practised medicine since 1955 until I retired from clinical	53
	practice in 1985.	54
Defence	: Now, with respect to carbohydrate metabolism especially	55
	hypoglycaemia can you tell the court your experience and	56
	research that you have _____ to do?	57
Judge	: With respect	58
Defence	: With respect to carbohydrates metabolism and hypoglycaemia.	59
DW	: I published my first paper on a new method of measuring blood	60
	sugar	61
Defence	: On a new methodology	62
DW	: A new method of measuring blood sugar in 1959. With that	63
	method I investigated patients with	64
Judge	: with that method	65
Defence	: I investigate patients	66
DW	: Patients with hypoglycaemia	67
Judge	: With?	68
DW	: With hypoglycaemia and published my first paper on	69
	hypoglycaemia in 1960	70
Defence	: 1960, six zero.	71
Judge	: Erm	72
DW	: In 1961, I published (.)	73
	I published the first paper to use the term neurogly	74
Judge	: The first paper in 1961 I published the first paper	75
DW	: To use the term neuroglycopenia	76
Judge	: Use the term neuro?	77
Defence	: Could you spell it?	78

DW	:	n-e-u-r-o-g-l-y-c-o-p-e-n-i-a	79
Judge	:	neuroglycopenic, where is the 'co'? The exhibit did not say so	80
Defence	:	I'm sorry, neuroglycopenic	81
		Thank you. We always for spelling mixed them. Now you said	82
		the article used the term for the first time. Who coined the term?	83
DW	:	<u>I coined the term to distinguish the effect</u>	84
Judge	:	To distinguish	85
DW	:	The effects	86
Judge	:	The effects	87
DW	:	Of a shortage or lack of glucose in the blood and the chemical	88
		condition of hypoglycaemias.	89
Judge	:	And the chemical condition of hypoglycaemia	90
DW	:	Which merely means low blood sugar	91
Judge	:	Hypoglycaemia merely means low blood sugar	92
Defence	:	Low blood sugar. Yes, you wrote a book on hypoglycaemia.	93
DW	:	I wrote the book with a co-author, Dr. Rose on hypoglycaemia.	94
Judge	:	Dr what?	95
Defence	:	Rose, my lord as a _____	96
DW	:	First edition was in 1964, second and latest edition was in 1981.	97
Defence	:	Could you confirm this is the book? Second edition?	98
		This is a copy of the second edition of hypoglycaemia?	99
		Could, could this be marked my lord?	100
Interpreter	:	B1	101
Defence	:	My lord, you and I cannot buy a copy of this 'cos it, it out of	102
		print. Maybe we should photostat and return the book.	103
Judge	:	I want to read the book	104
Defence	:	Could we photostat?	105
Judge	:	Could we keep it? Why don't we keep it?	106
Defence	:	We will photocopy the whole lot.	107
Judge	:	I'm interested in reading this book to find out more	108
Defence	:	Professor, how is this book regarded? I know it is difficult to ask	109
		the authority how it is regarded,	110
Judge	:	Shall I write there again to be returned to witness and photocopy	111
		to be made	112
Defence	:	How is this book regarded in the field of hypoglycaemias,	113
		Professor?	
DW	:	I believe it is still referred to as the most important as a source of	114
		information for hypoglycaemia up until 1981.	115
Judge	:	I believe it is still referred to as the most important book on	116
		hypoglycaemia, you said what? Until 1981?	117
DW	:	It still has to be brought up-to-date but contains the truth of	118
		hypoglycaemia	119
Defence	:	Yes. In addition to this book Prof. Have you followed up with	120
		any papers you have published _____	121
DW	:	I have published usually in conjunction with fellow workers over	123
Judge	:	How many in conjunction with others?	124

Defence	:	Fellow workers?	125
DW	:	Researchers, over 200.	126
Defence	:	Sorry for that.	127
Judge	:	Over 200 papers on?	128
DW	:	Carbohydrates _____ ment	129
Defence	:	Which included?	130
DW	:	Many of them on hypoglycaemia the most recent papers	131
Judge	:	Hold on, hold on.	132
DW	:	The most recent	133
Judge	:	The most recent	134
DW	:	Published in March 2001 and was called Hypoglycaemia disorders	135 136
Judge	:	Called?	137
DW	:	Hypoglycaemia disorders	138
Defence	:	Is that a copy now before you of the article that you just referred?	139 140
DW	:	Yes that is a copy	141
Defence	:	Marked 2001. Which publisher is it Professor?	142
DW	:	Periodic journal	143
Judge	:	Marked as?	144
Interpreter	:	82	145
DW	:	periodic journal called Challenges in the Laboratory Medicine	146
Judge	:	Never mind	147
Defence	:	Yes. _____ Now Dr. yes, could you tell the court where you have had a hand in the setting up of a specialized lab in the study of metabolic disorder hypoglycaemia and so on?	148 149 150
DW	:	In 1974, I set up a lab under auspicious to carry out tests on patients, for patients from all over the country	151 152
Defence	:	In the UK?	153
DW	:	Who were suffering or thought to be suffering from illnesses causing hypoglycaemia. That laboratory still functions but I'm no longer its director.	154 155 156
Judge	:	No longer the director	157
DW	:	But I do act as its consultant	158
Judge	:	As a consultant	159
DW	:	This is popularly known as Guilford lab	160
Defence	:	It is known a Guilford S.A.S.	161
DW	:	Guilford	162
Judge	:	I know Guilford	163
DW	:	Supra Regional Lab	164
Defence	:	Now have you also made a specific study of metabolism of alcohol in man?	165 166
DW	:	I have	167
Judge	:	I have also made a specific study	168
Defence	:	Of alcohol in man	169
Judge	:	Erm	170

Defence	:	And you have published articles on the subject?	171
DW	:	I have.	172
Defence	:	And you are a member of the Editorial Board of Alcohol and Alcoholism the International Journal of Medical Council of Alcoholism	173 174 175
DW	:	I am.	176
Judge	:	I am a member of the Editorial Board	177
Defence	:	Of Alcohol and Alcoholism, the International Journal of Medical Clinical of Alcoholism and are you not the senior author on the chapter of Alcohol in the metabolic molecular basis?	178 179 180
Judge	:	And a senior author	181
Defence	:	On the chapter on alcohol in the metabolic and molecular basis	182
Judge	:	Molecular basis	183
.....	
Defence	:	Er Professor Marks could you tell, could you tell the court how did you come to this, to this case? Who recommended you?	185 186
PW	:	I was appointed by you sir, who I gather was given my name by Prof. Amiel	187 188
.....	
Defence	:	You have acted as expert witness in courts in England?	189
DW	:	Yes, on many occasions	190
Defence	:	For both prosecution and defence?	191
DW	:	Yes, about equally I should think	192
Defence	:	Not in the same case?	193
DW	:	Sometimes as the only witness	194
Defence	:	I see. In matters relating to hypoglycaemia and alcohol?	195
DW	:	Matters relating to hypoglycaemia and matters relating to alcohol	196 197

Here the Example illustrates how the question-answer process succeeded in establishing that the witness was a credible witness in relation to the plea. Again through subtle collaboration, the witness showed that he is an eminent research endocrinologist; a former dean of the medical faculty; a researcher with more than 200 papers published both individually as well as in collaboration with other researchers in the UK and internationally; the author of a seminal book on endocrinology; is the editor and board member of Advisory boards, and one who is a blood expert who set up a blood testing laboratory. In short, the credibility of the witness, regarding his knowledge, was established through the turn taking and could not be disputed.

This witness was asked to provide an opinion on the possibility of hypoglycaemia and the maintenance of the integrity of blood sampling. Like a ‘dream witness’, the

transcript of his basic qualifications alone was five pages long. In very well structured questioning regarding the curriculum vitae, the defence counsel adduced the basic and post graduate qualifications of the witness from prestigious universities in the UK (Oxford and Edinburgh) and that he was also a board member of the regulatory body of experts, with an emphasis on the ethical obligations of its members (lines 10-11), continuing into line 19-20.

In order to dispute the method of blood collection and analysis by the police and the Chemistry Department, the defence expert set the stage by establishing the qualifications of the witness in terms of laboratory medicine highlighting the fact that not only was he responsible to train laboratory researchers, he was also responsible for training pathologists in Malaysia. In short, this expert should be able to say if samples were collected, kept and analyzed following the correct procedures. This part also strengthened the counsel's strategy of establishing the fact that this witness was an authority at blood collecting and testing, and that he had trained local doctors in Malaysia (lines 33 onwards). This move is important as it then became obvious that witness would know the shortcomings of local hospitals. This was especially in view of the fact that the examining doctor at the hospital (PW8) had instructed the laboratory technician to collect urine and blood samples from the accused, that were then handed over to the police, who in turn handed them over to the Chemistry Department for analysis. Hence, this expert's competence, to know the stringent procedures that needed to be adhered to in the collection and storage of the samples, would be crucial to determining the integrity of the quality of the samples.

The defence then established that the expert is the leading researcher in neuroglycopenia (he gave the terms its name), which is a shortage or lack of glucose in the blood and the chemical condition of hypoglycaemia. This aspect was deemed necessary by the defence in order to interpret the symptoms of hypoglycaemia, and to reassert the witness's position. Hence, a book co-authored by the author was produced.

In an interesting digression, the judge indicated his interest in reading the book written by the Professor to find out more about hypoglycaemia (lines 104 and 108 and 111). Interestingly, his request seemed to have been ignored by counsel, in lines 109-110, and 112, who proceeded to trying to establish the reputation of the book. There were

probably two motivations for the judge's interest: firstly, on a personal note, as a diabetic himself, he would be able to find out more about the illness; and secondly, and the more probable reason is that both he and the defence counsel were both aware that the book would throw light into the issue of hypoglycaemia.

In line 166, there is a topic shift (indicated by the *Now-prefaced* question) to yet another important area, the metabolism of alcohol in man. Here, evidence was adduced to show how this witness was also an expert in this area (lines 174-184). This was aimed at disputing the evidence adduced by the prosecution. It must be noted that intoxication was not a pleaded defence, but the fact that this witness was an expert in the metabolism of alcohol in man indicates that the defence was not taking any chances.

Any expert who comes to court must be reputable and credible – in that they should not be 'hired hands'. Evidence adduced from lines 185-187, and 189-196, sought to establish this. In the former, the court was informed that the witness was recommended by yet another eminent medical doctor and Example 4 has shown how the court stopped the defence counsel from adducing non-material facts simply because he (counsel) wanted to further boost the testimony of this expert. This was also seen in the case of DW7, another defence witness, who affirmed that she was approached by the second defence counsel to state that she was not in any way related to the accused.

Finally, to provide the icing on the credibility 'cake', so to speak, this witness attested that he had been summoned to give expert evidence in the UK, not just for the defence but for both parties, sometimes being the sole witness on matters of hypoglycaemia and alcohol (lines 189-196). The mental image built for this witness was that he was eminent and well-qualified, well experienced, well researched, and often sought after as an impartial witness. Thus, he was credible.

If we examine the questioning process, we note yet again that the defence laboured over each and every detail of this witness's expertise in slow and deliberate moves. Typical of Q-A of the friendly counsel-witness, the counsel was asking for information which he did not already know. But the structure of the questions in the above example is of two types: information seeking and information confirming. This was ably handled by the defence counsel because he is very competent in English. In information-seeking *Wh* –questions were used to realize this function in lines 36, 83, and

113, for instance. The answer given was relatively long. However, the modals *Can* and *Could* in lines 10-11, 21 and 98, for instance, also seemed to elicit an information seeking response – for the response was not the usual *Yes* or *No*, but answers to the real issues. And this was possible because there was a certain understanding between the counsel and the witness, and that this witness was an experienced court witness.

Information confirming questions were realized in this case by *Yes/No* questions structures like *Are you a ...? ; Have you...? And... that is correct?* We have seen these samples in lines 7, 45-46, 166, for example. . Again, these were embedded with information, highlighting the procedural requirement of the testimony being orally produced.

On the prosecution side, data from direct examinations, of both rebuttal witnesses to ascertain expert credibility, revealed the use of similar structures – both information seeking and information confirmation, but with less drama. However here, there were fewer interruptions and witnesses had longer narrative spans. In terms of relative expertise, the first prosecution rebuttal witness seemed rather ‘inexperienced’ and ‘less qualified’ than the adversaries, while the prosecution psychiatrist seemed to be very well versed in trial procedures.

Stating the referent

This move was evidently displayed in the direct examinations of all the defence witnesses. It could have been a strategy on the part of the defence, who wanted to ensure that all their questions were found to be relevant to the issue, and also for adding drama to the ‘frame’ of ‘reliable and credible experts’ that the defence subscribed to. Let us turn to the following example from DW8, the defence expert forensic chemist.

Example 5: Direct Examination of DW8 on 23.11.01

Defence	:	Now Mr. Hacharan, are you ready? In regards to this case, you	1
		have been approached to prepare a /certain report/?	2
DW	:	/Yes my lord/	3
Defence	:	Roughly please state to us the referent or requirement that has	4
		been asked. What is the referent before we go into your	5
		qualifications, your referent?	6
DW	:	I was asked to give certain understanding of facts	7
Judge	:	Give certain	8

DW	: Give certain understanding facts to determine and report	9
Judge	Erm	10
DW	: On the level of alcohol and blood in the urine and make relevant observation on this and particularly I was asked to determine what would have been the blood alcohol level at 8 p.m.	11 12 13
Defence	: <u>On the day of the incident</u>	14
DW	: On the day of the incident using my study and research on the subject.	15 16

This witness was called to dispute the findings provided by the prosecution witness regarding the results of the blood and urine samples taken after the incident. The focus, undoubtedly, was the reading of 198mg of alcohol in the blood five hours after the incident. This is way above the legal limit of 80 mg. A person caught driving with a blood alcohol level higher than 80mg. can be charged with drunk driving. But here the defence began his line of questioning with asking about the report (lines 1-2) and then proceeded to the referent or requirement that was required (lines 4-6). The witness was then led to state that the expert opinion that he tendered calculated retrospectively by using *my study and research on the subject* (lines 15-16). This indirectly implied that the expert is one who is reliable as he had sought a scientific approach in coming up with his report. A scientific approach is deemed to be impartial and objective.

(Boosting) Basis of opinion

This is a strategy that is built from the requirement of Section 45 of the Evidence Act, where an expert must have evidence for the basis of his or her opinion. This basis is crucial and must be founded on scientific evidence. Findings from the data on both the prosecution and defence show that the defence was normally dramatic in his approach. One appreciates that the defence called experts of national and international standing, and the counsel had painstakingly charted out a strategy for boosting the basis of opinion in two ways. Firstly, he emphasized the fact that each expert had independently come up with the opinion, and secondly, he listed the resources or documents referred to in forming his or her opinion.

Hence, in Example 5 that follows the counsel strategically introduced the basis of opinion prior to introducing the report itself as a strategy to show how impartial the expert was in producing the opinion.

Example 5: Direct Examination of DW3 on 15.11.01 at pages 21 –23.

Defence	:	Now let's leave the executive summary aside first, let's go to the material before you for you to come up with your opinion.	1 2
DW	:	I received a letter from you explaining your view of the case. Then you sent me various documents after I have spoken to you on the telephone	3 4 5
Defence	:	Ya	6
DW	:	I had explained that everything that you had explained to me was possible but /that/	7 8
Judge	:	/Hold/ on, hold on	9
Defence	:	sorry	10
Judge	:	erm	11
DW	:	But that in involuntary	12
Judge	:	But that	13
DW	:	Involuntary voiding	14
Judge	:	Involuntary voiding	15
DW	:	Involuntary voiding of the bowels	16
Judge	:	Of the bowels	17
DW	:	And bladder was most unusual in uncomplicated hypoglycaemia <u>except when this had caused epilepsy like fit</u>	18 19
Defence	:	Yes	20
DW	:	You Mr. Shafee then sent me a bundle of reports and has continued to send me copies of reports as and when they became available. I have listed in my statements to	21 22 23
Judge	:	Have?	24
Defence	:	Listed these in your reports	25
DW	:	No, statement not reports	26
Defence	:	That would be in Para 11 Professor	27
DW	:	Yes	28
Defence	:	Page 3 my lord, pages 3, 4 and 5. My lord, could that be sufficient to identifying the pages? I don't think your lordship need to mark, they are all there, and they are all marked. The good Professor will read from there	29 30 31 32
Judge	:	No, no. I have these to record.	33
Defence	:	I think there is no necessity as long as the good Professor will identify these pages as having been there. He will my lord, read it quickly (.) What they are. I am only concerned about your lordship writing	34 35 36 37
Judge	:	(Judge reads the report) Who is Tan Ah Chai?	38
Defence	:	He is an expected witness my lord. He is a director of Green Mountain Holdings. And of course my lord all the notes of	39 40

	proceedings have been recorded verbatim by my assistants.	41
Judge	: How do you know these are accurate?	42
Defence	: My lord have been kind to repeat and we got almost everything	43
Judge	: You could apply from the court	44
Defence	: If your lordship permits, we could apply for witness to re____. If that is not a problem	45 46
Judge	: Erm (Judge continues to peruse). Erm very interesting, he said that if the evidence of alcohol at <u>7 p.m. was 78 ml. 1.20 a.m. to 198, I think it will come down, this one goes up?</u>	37 48 49
Defence	: My lord,	50
Judge	: I think we should get recorded, although it is a pain for me	51
Defence	: Could we	52
Judge	: <u>So, the document that I considered in preparing my report are as follows.</u>	53 54
DW	: Number One, The report dated 2 nd October 2000	55 56
Judge	: This one? (gestures) report dated?	57
Defence	: 2 nd October 2000 by the chemist	58
Judge	: By Pua Tian. Number 2?	59
Defence	: P48. Now	60
Judge	: That one I don't know. You have to show me P48 and ask whether this is the report (Judge directing defence to allow DW to identify the report)	61 62 63
Defence	: Can I have P48. (to DW) Is that the report? A copy of which you have considered?	64 65
DW	: Yes but it did not contain pictures	66
Defence	: Yes but without pictures, P48 without photos	67
DW	I think my lord, ____ with me all the pictures sent	68
Judge	: Number 2?	69
DW	: Autopsy report	70
Defence	: P72?, yes	71
DW	: Identified.	72
Defence	: Yes, exactly my lord, 100%	73
Judge	: That is report number 3?	74
Defence	: Certificate dated 26th September 2000.	75
DW	: Called, to whom it may concern	76
Defence	: To whom it may concern by Dr. Thiagiselvanayagam	77
Judge	: By Dr?	78
Defence	: Thiagiselvanayagam. Ere he is going to be called by us.	79
Judge	: Then show me the report and get it marked	80
Defence	: I don't know whether it can be ticked	81
Judge	: You said he is coming? Get him, ask him whether that, that is what he prepared, that can be marked as an ID. Don't have?	82 83
Defence	: We have, I took the view that it is not admissible	84
Judge	: If not I will straight away accept as evidence. See, at the end of the day although I told Dr. Ridzwan although he is highly	85 86

	qualified I have to decide whether it is admissible or not.	87
Defence	: My lord, we got it, er by___ could you have a look Professor,	88
	whether these are the certificates? We undertake to make copies	89
	my lord	90

There were many references made to the counsel by the witness in lines 3, 7 and 21 (e.g. You, Mr. Shafee) demonstrating that there were no other parties acting as intermediaries or go-betweens once the expert has been introduced to the counsel (by yet another eminent medical expert). It is also noted that emphasis was made on the how the expert first became interested; leading to his involvement in the case after the phone call he received when he was in the United Kingdom. This focused on the ‘facts of the case’, namely the alleged ‘involuntary voiding’ at the police station. This ‘key element’ (lines 8, 12, 14 and 16) was then diagnosed as most unusual in ‘uncomplicated hypoglycaemia’, except when this had caused an epilepsy-like fit.

The two pieces of ‘evidence’ led to the Professor to categorise this as a case of uncomplicated hypoglycaemia, and he categorized what the accused experienced in the police station as an epilepsy-like fit. And from there, evidence was adduced as to the care both counsel and the witness took in perusing the documents to come up with the report. We refer, for instance, to the use of the adjectival, ‘various’ (documents) in line 4, and the nominals, ‘bundles’ and ‘copies’ (of reports) in lines 21 and 22, and the continued availability of new documents and evidence aimed at producing the image of an unbiased, careful and professional opinion. Here, the expert demonstrated that he was adept at courtroom practices, as his smooth narration shows that he was not new to giving evidence in court.

One can appreciate that line 29 onwards is part of ascertaining the rules of procedure concerning the admissibility of the report. This part was also covered in Chapter Five, but it is really interesting to see how the defence counsel repeatedly attempted to get the report accepted without the oral tradition of adducing it. In the process, he reiterated that he was merely trying to assist the judge who might have been fatigued from so much writing – when portions of it could have been so easily reproduced (lines 36-37). However, in keeping with the rules of procedure, the judge

perused the report quickly and found that the report had been prepared based on certain other reports, statements and documents that had not yet been adduced in court (line 39). He seemed to find certain conclusions mentioned alarming (lines 49, 51, and 53). Hence, in order to maintain the quality of evidence, the court ruled that the report had to be read out and marked. As such, it can be clearly seen that absolute power and courtroom control resided in this judge.

Interestingly, once the judge had decided on having the report orally presented, a further attempt by the counsel was ignored, and in line 52, a very strong face threatening act was performed by the judge – totally ignoring the attempt by counsel, in line 52, and then adopting the first person voice of the witness, in a very loud voice (shown by the underlined utterance) began recording his notes of proceedings and with a so-prefaced utterance as the introduction silenced the counsel at that point. Interestingly too, the linguistic marker ‘so’ here was adopted to show a resolution had been reached – after the argumentation of presenting orally or otherwise. And, the data continued to show how the judge seemed to get more careful as each document was introduced to the court (line 48 onwards).

It is also noted that the judge would reiterate his stand on the procedure at any time when he thought a breach was committed. And hence, the recording of the documents proceeded with lines 67, 71 and 75. However, on the issue of the marking of certificates by a doctor (who happened to be the personal physician of the accused) the counsel took a differing view from the judge. But again, this matter was quickly resolved by the judge who again exercised his duty and power by procedure and then dismissing it, respectively.

In short, Example 5 shows how careful the court was in making sure that the basis for opinion was properly adduced so that in the event of an appeal, there would not be any discrepancies on the matter. And to this end, we see the adducing of each document that was used for the basis, including reports from witnesses, medical reports from doctors, statements from the wife, a psychiatric report from the consultant psychiatrist, the laboratory reports, etc.

It is clear from that example that the simple act of stating the basis of opinion can be a strategy to be employed by the counsel to indirectly boost the testimony of the witness.

Conclusion

To establish the credibility of an expert opinion, counsels have to establish the credibility of the expert witnesses first, through co-operative and corroborative measures. Experts are thus seen to be given a greater leeway than lay witnesses demonstrated in the types of questions asked and the longer turns afforded. However, full control of the interactions still lie with the judge who still had absolute authority to redirect the issues or change the topics.

While this paper is not pedagogically inclined, I hope that it can be seen that an awareness of literacy practices, which in turn, involve the acquisition and learning of the relevant and existing complex roles, identities, codes, registers and social artifacts is crucial in the courtroom. Expert witnesses who are summoned to court can only participate meaningfully if they are properly eased into the target community by the counsels, who must take the role of trainers, notably during the non-contentious direct examinations.

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