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R. D. Slayton

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NOTES AND COMMENTS

EVIDENCE—EXPERT TESTIMONY—THE ULTIMATE-ISSUE RULE

INTRODUCTION

Although jurors are to apply their ordinary experience in reaching a decision, they may lack knowledge or experience in a specialized field, knowledge of which might be essential in reaching a just conclusion. In its search for truth on a contested issue of fact, the trier of fact should be supplied with information which will be useful in resolving the issue at hand. It is this need for information which has compelled the courts to

permit qualified witnesses who have not only the normal experiences of the jurors, but possess special knowledge, skills, or experience. The expert's specialized experience, not common to the rest of the world, renders his opinion as an aid to the jury.

While a lay witness may testify only to things heard or seen, "the expert . . . offers the knowledge of the interaction or relation of things and events which he has gained from study or experience or both."[1] Therefore, in cases where subjects under scrutiny are unfamiliar to the trier of fact, if expert testimony were rejected, there would be no adequate way of arriving at the right and just conclusion.

Evolution of the Ultimate-Issue Rule

At common law every witness was prohibited from giving his beliefs, surmises, conjectures or guesses.[2] His function was to supply facts as he saw and heard them. About 1801 some English text writers began to state that a liberalization of the original rule had taken place: "Though witnesses can in general speak only as to the facts, yet in questions of science persons versed in the subject, may deliver their opinions. . . ."[3] Lord Mansfield declared that experts or persons instructed by experience, "men of science," could give their opinions upon questions of science, skill or trade, as to the sea-worthiness of ships, or their unskillful navigation, the genuineness of handwriting, the cause of disease and of death, the consequences of wounds, the sanity or insanity of an individual, or other questions of a like kind.[4]

As early as 1873, the Illinois Supreme Court accepted the opinion of experts, witnesses possessing peculiar skill,

> . . . whenever the subject matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance; in other words, when it so far partakes of the nature of a science as to require a course of previous habit or study, in order to the attainment of a knowledge of it.[5]

The justification for allowing opinion evidence seemed to be that:

1 King and Pillinger, *Opinion Evidence in Illinois* 251 (1942).

2 Adams v. Canon, Dyer 53b (Eng. 1622); Bushnell's Case, Vaughan 135 (1670); Carter v. Boehm, 3 Burr. 1905 (1766).

3 Peake, *Evidence* (1st Ed. 1801); Phillips, *Evidence* (1st Ed. 1814).

4 Folkes v. Chadd, 3 Douglas 157 (1782).

5 Linn v. Sigebee, 67 Ill. 75, 81 (1873). Other early Illinois cases supporting that position: Chi. and Alton Ry. v. Springfield and Northwestern Ry., 67 Ill. 142 (1873); Hopkins v. Ind. and St. Louis Ry., 78 Ill. 32 (1875); Chicago v. McGiven, 78 Ill. 347 (1875); Hoener v. Koch, 84 Ill. 408 (1877); Penn. Co. v. Concan, 101 Ill. 93 (1881); Ill. Cent. Ry. v. Latimer, 128 Ill. 163, 21 N.E. 7 (1887); Pyle v. Pyle, 158 Ill. 289, 41 N.E. 999 (1895); Ill. Cent. Ry. v. Smith, 208 Ill. 608, 70 N.E. 628 (1904); Yarber v. Chi. and Alton Ry., 235 Ill. 589, 85 N.E. 928 (1908); Lyons v. Chi. City Ry., 258 Ill. 75, 101 N.E. 211 (1913); Kimbrough v. Chi. City Ry., 272 Ill. 71, 111 N.E. 499 (1916).

> Only upon subjects not within the knowledge of men of ordinary experience, and upon the ground that the facts are of such a nature that they can not be presented in such a manner that jurors of ordinary intelligence and experience in the affairs of life can appreciate them in their relations and comprehend them sufficient to form accurate opinions and draw correct inferences from them on which to base intelligent judgments. The opinions of witnesses should not be received as evidence where all the facts on which such opinions are founded can be ascertained and made intelligible to the jury. . . . If the expert witness did not know all the facts his opinion would be only a guess. If he did know them, they could be detailed to the jurors and they would be as competent to form an opinion as the witness.[6]

However, experts were not given *carte blanche* to express any opinion asked of them by counsel. The earliest statement of limitation by the Illinois Supreme Court appears in *Chi. and Alton Ry. v. Springfield and Northwestern Ry.*:[7]

> This evidence was improper, not only upon the ground that the question called for the mere opinion of the witness, upon the assumption that appellee would put in the work when in nowise obligated to do so, but upon the further ground that it was an opinion covering the *very question* which was to be settled by the jury, and so conclusive of it as *to leave the jury no other duty but that of recording the finding of appellee's witnesses.* It amounts to nothing more nor less than permitting the witnesses to *usurp the province of the jury*. By this we do not mean to be understood as holding that it is incompetent for experts, such as engineers, to give their opinions in this case in respect to matters which may form the proper ingredients of a verdict. But what we mean is, that, where the witness is an expert, and it is competent for him to give an opinion as to such ingredients of a verdict, still it is not competent to ask the opinion of witnesses *in such way* as to have it *cover the very question* to be found by the jury. In addition to the fact that none of the witnesses but one were shown to be competent to give an opinion at all, the point of the objection is, that, by the *form* of the question, *the witness was made to take the place of the jury.*[7a] (Emphasis supplied.)

The phrase "usurp the province of the jury" and similar terms were used frequently in the early cases, evidently being the basis for the rule;[8] the words "ultimate-issue" in Illinois cases did not appear until 1913, in *Keefe v. Armour.*[9] In that case, a personal injury action, the ultimate fact in issue was whether the method which the defendant's foreman directed the plaintiff to use in testing a tank car for leaks was reasonably safe. It

6 Yarber v. Chi. and Alton Ry., *id.*, at 593, 594.

7 67 Ill. 142 (1873).

7a *Id.*, at 146.

8 Hoener v. Koch, *supra* note 5, at 410; Ill. Cent. Ry. v. Latimer, *supra* note 5, at 170; Pyle v. Pyle, *supra* note 5, at 299; Ill. Cent. Ry. v. Smith, *supra* note 5, at 617; Yarber v. Chi. and Alton Ry., *supra* note 6.

9 258 Ill. 28, 33, 34, 101 N.E. 252, 253, 254 (1913).

was held proper to permit the plaintiff to prove, by properly qualified experts, what conditions might arise from the use of such methods with reference to gases, heat, etc., but it was held to be error to allow an expert witness to state that in his opinion the method employed was "unsafe." The expert was not allowed to take the place of the jury and declare his belief as to the ultimate fact.[10]

This line of reasoning has been maintained through the years with refinements designating that to which an expert may testify. An example is found in a 1934 case:

> [The expert] is permitted to express his opinion upon an assumed or stated set of facts, but he cannot invade the province of the jury by hearing, and weighing *the evidence* at the trial and from such consideration express *his opinion* upon one of the contested issues involved in the case.[11] (Emphasis supplied.)

In a 1937 case, the court stated that a witness may not be called upon to testify to "ultimate conclusions," which must be drawn by a court or a jury in determining the case.[12] Although no definition of "ultimate conclusion" was given, it apparently meant that if offering counsel's only purpose in presenting expert testimony was to ask the trier of fact to draw the conclusions the lawyer would propound to the expert, then that testimony would concern ultimate facts and should not be allowed. Of course, counsel contended that that was not his purpose, but the court said, "where a portion of testimony offered is inadmissible for the purpose stated, it is not error to reject the offer."[13]

Later cases do not use the term "ultimate conclusions," but rather return to further developing the delicate relationship between the scope of hypothetically questioning an expert and his response as it might bear on ultimate issues. Whereas in a 1931 case, medical testimony that there "might or could" be a causal connection between the accident and the condition described in a hypothetical was held incompetent,[14] in a 1944 medical malpractice case the court reasoned that when plaintiff's medical experts were permitted to testify directly that X-ray treatment caused plaintiff's condition, although it might to some "slight" extent appear that such witnesses testified directly to that effect, it was clear that they were "but giving their opinion that the treatment *might or could* have caused

10 The only criticism of this case seems to be that the court designated the expert, a chief boiler inspector, as not qualified "as an expert concerning gases" and then goes on to say that . . . "any one of the jury was as well qualified as he to determine whether the explosion was a gas explosion or not." *Id.* at 33. A better statement would have been that the witness was not qualified to testify at all concerning gaseous explosions instead of saying he was equal to the jury and accusing him of invading the jury's province by so testifying. His testimony was incompetent, not invasionary.

11 Maton Bros. v. Cent. Ill. Serv. Co., 356 Ill. 584, 596, 191 N.E. 321, 326 (1934).

12 Hairgrove v. Jacksonville, 366 Ill. 163, 182, 8 N.E.2d 187, 196 (1937).

13 *Id.* at 182.

14 Sanitary Dist. v. Indus. Comm., 343 Ill. 236, 175 N.E. 372 (1931).

plaintiff's condition and that the jury were not misled."[15] (Emphasis supplied.)

Further evolution can be seen in a 1947 case where, even though expert opinion was not allowed because it would invade the jury's province, it was stated that:

> Opinions of experts may be given in respect to matters which form the proper ingredients of the verdict in a case, based on a state of facts assumed to be true but they should not state whether the evidence establishes the assumed state of facts. . . .[16]

Present Status of the Rule

Justice Robson in *Wawryszyn v. Ill. Cent. Ry. Co.*[17] gave an excellent treatment of the rule as of the date of that decision. He initially affirmed the concept that neither an expert nor a non-expert can give his opinion on an ultimate issue in the case.[18] Specific opinions on "unsafe methods," conduct that is "negligent," "extra-hazardous or dangerous methods," and, in *Wawryszyn*, "not good practices" were recognized as inadmissible; to admit the same would be improper.[19] However, the Judge took apparent judicial notice of the "modern tendency" away from the ultimate-issue rule and declared that "the objectionable question and answer, while erroneous, were merely cumulative on that point, and not of sufficient importance to require a reversal."[20] The lower court's finding was not disturbed despite the strong language below:

> The purpose of the ultimate issue rule is to preserve the independence of the jury. The application should not be affected by technical, semantical distinctions. If the probabilities are that the jury will construe an expert's opinion that defendant's conduct or method was bad or improper to be the expert's opinion on the ultimate issue of negligence, then, according to the purpose of the rule, that opinion should not be allowed. We feel that Bianchi's opinion that defendant's practice was not good is, as far as the jury is concerned, an opinion on the ultimate issue of negligence.[21]

A conclusion from this case could be that the rule is given credulance but not put into consistent operation unless the error is "important."

What could be considered as a further erosion of the rule is found in cases similar to *Babbitt v. May*.[22] In that case, since there was no dispute as

15 Simon v. Kaplan, 321 Ill. App. 203, 209, 52 N.E.2d 832, 835 (1st Dist. 1944). In Bobalek v. Atlass, 315 Ill. App. 514, 43 N.E.2d 584 (1st Dist. 1942), an expert (medical) was properly allowed to testify in the nature of a conclusion because it was "difficult to explain the subject," and particularly where there were "movements of an object."

16 Gillette v. Chicago, 396 Ill. 619, 624, 72 N.E.2d 326, 328 (1947).

17 10 Ill. App. 2d 394, 135 N.E.2d 154 (1st Dist. 1956).

18 *Id.* at 403.

19 *Id.* at 403-405.

20 *Id.* at 404-405.

21 *Id.* at 404.

22 6 Ill. App. 2d 85, 126 N.E.2d 859 (2d Dist. 1955).

to manner of injury, doctors gave their opinions on the extent of the injury; the question was whether certain physical conditions were caused by the inflicted injury. Testimony was allowed because "the determination of the question involved a special skill or trade, or a knowledge of science that does not come within the experience of laymen. . . ."[23] Even so, what opinion is more determinative of the specific ultimate issue involved than the following given by a doctor at the trial: "My opinion is that those headaches were increased in frequency and in severity by this fall."[24] This type of case however, must be considered on a different footing since the ultimate issue of liability had been determined and the main problem was the extent of injury inflicted by the defendant.

Described as the best statement of the general rule[25] is *Clifford-Jacobs v. Indus. Comm.*[26] In answering the specific question as to whether an expert, in answer to a hypothetical, could state whether a given set of facts "may, might, or could" have been the cause of an injury, the court overruled earlier decisions which limited the form of answer.[27] On this point Justice Hershey stated:

> So long as the witness is not called upon to decide any uncontroverted fact, but is asked to assume the truth of *facts testified to*, he may give his opinion thereon in *any form*. The objection, if any, should be a specific one directed to that which might improperly be incorporated or deleted from the hypothetical question. . . . The form of the question, or the form of the answer, when in terms of "what did" or "what might" have caused the injury and death, is immaterial.[28] (Emphasis supplied.)

That this *Clifford-Jacobs* doctrine has been put into operation is shown in *Rysdon v. Wice*[29] where the answer of a medical witness, based on reasonable medical certainty in response to hypothetical questions concerning whether the accident "might or could" have aggravated a pre-existing arthritic condition, was held to be based upon evidence and proper in form.

A principle collateral to the ultimate-issue rule is that hypothetical questions posed to experts must be based on and supported by the facts in evidence.[30] The defendant-appellant contended on appeal in *Healy v.*

23 *Id.* at 91.

24 *Id.* at 88. Likewise in Brown v. Sterling Abrasive, 5 Ill. App. 2d 1, 124 N.E.2d 607 (2d Dist. 1955), there was no dispute as to the manner in which the injury was received and an expert was allowed to answer that he believed the wheel he had examined failed because of a lack of uniformity in its construction.

25 Gard, *Illinois Evidence Manual* 262 (1963).

26 19 Ill. 2d 236, 166 N.E.2d 582 (1960).

27 *Id.* at 241-243.

28 *Id.* at 243.

29 34 Ill. App. 2d 290, 180 N.E.2d 754 (1st Dist. 1962).

30 Butler v. Palm, 36 Ill. App. 2d 35, 184 N.E.2d 633 (2d Dist. 1962); Schwartz v.

Nordhous[31] that it was prejudicial and reversible error to admit the testimony of plaintiff's physician in response to the following question:

> Doctor, do you have an opinion, based upon a reasonable degree of medical certainty, as to whether or not there *could or may* be a causal connection between the condition that you have described with reference to Mr. Healy, that is, the whiplash injury of the neck and the headaches and trauma occurring on February 15, 1961.[32] (Emphasis supplied.)

In response to that contention, the Court quoted from *Kimbrough v. Chi. City Ry.*:[33]

> A physician . . . may be asked whether or not a given condition or malady of a person *may or could* . . . be caused by the facts stated in the hypothetical question, but he should not be asked whether such facts *did* cause . . . such condition or malady.[34] (Emphasis supplied.)

The Court then went on to say:

> In response to this question and to several questions subsequently asked, it appears that the physician's answers were unresponsive and perhaps even invaded the province of the trier of facts. However, none of those responses were objected to at the time. Any objections which could have been made at that time and are now being made in the Appellate Court for the first time, have been waived.[35]

Here again, the burden was on the objecting counsel, who, having failed to object on the proper grounds, was subsequently estopped from raising other grounds on appeal even though the expert's testimony usurped the jury's function concerning the ultimate-issue.

CONCLUSION

The evidentiary principle denominated as the ultimate-issue rule appears to have gone through a refinement so thorough that the safe-guards it was designed to foster have been circumvented. Through the means of a carefully timed and stated hypothetical question posed to an articulate expert, trial counsel may be able to present the trier of fact with a formiable and persuasive conclusion as to an ultimate issue. The burden has shifted from the lawyer posing the hypothetical to the opposing, objecting counsel. Now, as before, the hypothetical must be based on the exact factual situation before the court, but more important, now the objections of

Peoples Gas Light and Coke Co. 35 Ill. App. 2d 25, 181 N.E.2d 826 (1st Dist. 1962); Kanne v. Metropolitan Life Ins. Co., 310 Ill. App. 524, 34 N.E.2d 732 (1st Dist. 1941).

31 40 Ill. App. 2d 320, 188 N.E.2d 227 (1st Dist. 1963).

32 *Id.* at 324.

33 272 Ill. 71, 77, 111 N.E. 499 (1916).

34 40 Ill. App. 2d 324.

35 *Id.* at 324, 325.

opposing counsel must be specific. Failure to so assert objections in that manner will result in a waiver of other grounds of objection on appeal. Especially is this important where there are uncontroverted issues of fact and the remaining question centers around the extent of the injury or damage.

The question whether the province of the jury is being usurped seems to have been replaced with the question whether the jury has been significantly disrupted or surprised in its mental processes so as to create a prejudicial atmosphere toward one of the litigants. One cannot argue with the original basis for the rule, but where the conditions for the operation of the rule have been met, the more difficult question remains as to whether the qualified expert, in answering a properly framed question, really expresses his opinion on a hypothetical question, or whether he actually gives to the trier of fact his own weighty conclusion as to how the case should be resolved. The words "might or could" intermingled with technical terms in a complex hypothetical certainly lose their significance in relation to the overall professionally worded opinion enunciated by the expert. The ultimate-issue rule is further undermined by the requirement that the so-called hypothetical must be based upon the facts in evidence before the court.

R. D. SLAYTON