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# Opinion Testimony and Ultimate Issues: Incompatible?

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# Notes

## OPINION TESTIMONY AND ULTIMATE ISSUES: INCOMPATIBLE?

The general rule in this country controlling the admission of testimonial evidence is that a witness must confine his testimony to facts which are within his personal knowledge.<sup>1</sup> The requirement of personal knowledge is based upon a rule of the common law.<sup>2</sup> The additional requirement that a witness must testify to facts, and avoid opinions, stems from the manner in which the American courts have interpreted this common law rule. At common law, the English courts were denouncing testimony which was not based on personal knowledge when they condemned opinion testimony.<sup>3</sup> Apparently, our courts misinterpreted this criticism as meaning that a witness should not be allowed to draw an inference or make a conclusion even if he did have personal knowledge of the facts.<sup>4</sup> The present American view on this point, therefore, is more strict than that of the early common law.

In theory this general rule is sound. Since the witness is limited to relating personally observed facts, the function of forming opinions and drawing inferences rests exclusively with the jury. As a practical matter, however, courts have recognized the need of allowing opinions by lay and expert witnesses in certain situations. Generally, the lay witness "may be permitted to state his opinion, inference, or conclusion from observed facts where his mental impressions or observations cannot be adequately conveyed to the jury otherwise."<sup>5</sup> The expert's opinion is "admissible where the subject matter is such that a jury cannot be expected to draw correct inferences from the facts."<sup>6</sup> In these situations, however, the opinions of these witnesses will not be admitted into evidence as a matter of right. Additional requirements may have to be satisfied. In one jurisdiction for example, the court pointed out that

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<sup>1</sup> McCormick, Evidence §§10, 11 (1954) [Hereinafter cited as McCormick];  
<sup>5</sup> Richardson, Kentucky Practice §2229 (1957).

<sup>2</sup> McCormick §10.

<sup>3</sup> See McCormick, p. 21 nn.6 & 7.

<sup>4</sup> See McCormick §11; 7 Wigmore, Evidence §1917 (3d ed. 1940).

<sup>5</sup> Richardson, *op. cit. supra* note 1. This represents the view taken by the majority of jurisdictions in the United States, including Kentucky. See generally McCormick ch. 3.

<sup>6</sup> *Ibid.*

an opinion by a lay witness must be "necessary to the due administration of justice."<sup>7</sup>

The question of admissibility also arises when an opinion of either a lay or an expert witness touches on an ultimate issue. This note defines the phrase ultimate issue, explains the basic problems confronting the courts with respect to opinion testimony on these issues, outlines the existing legal doctrines in this field of law, summarizes the present trend and advances a recommendation. Lay and expert opinions are discussed conjointly.

### *Ultimate Issues Defined*

An ultimate issue is "either such an issue as within itself is sufficient and final for the disposition of the entire case or one which in connection with other issues will serve such end."<sup>8</sup> Thus, it is a question which is essential to the plaintiff's right of action or the defendant's ground of defense.

Some courts refer to opinion testimony on an ultimate fact,<sup>9</sup> rather than on an ultimate issue. Sometimes the two phrases are used interchangeably.<sup>10</sup> They have even been combined, *e.g.*, the ultimate fact issue.<sup>11</sup> Technically, it makes no difference whether it is an ultimate issue or an ultimate fact on which the court allows or disallows a witness to testify, since the submission of an issue to the jury necessarily requires their finding of a fact or a group of facts. In one instance the court is considering the question the jury will be asked and in the other it is noting the answer the jury will be called upon to find.

Ultimate issues, then, are counterparts of ultimate facts. But what makes an ultimate fact "ultimate"? How is it distinguishable from other facts? The law generally recognizes two types of facts—evidentiary and ultimate. Evidentiary facts are those subsidiary facts introduced to prove ultimate facts.<sup>12</sup> Ultimate facts are the logical conclusions deduced from these evidentiary facts; the latter form the premises and the former become the conclusions. A conclusion of law has been

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<sup>7</sup> *Baltimore & O. R.R. v. Schultz*, 43 Ohio 270, 1 N.E. 324, 332 (1885). Professor McCormick agrees that an opinion of a law witness should not be admissible as a matter of right, but he objects to the requirement of necessity. He proposes that courts should sanction the admission of lay opinions on grounds of "expediency or convenience." McCormick, p. 23.

<sup>8</sup> Black, *Law Dictionary* 965 (4th ed. 1951).

<sup>9</sup> See, *e.g.*, *Dreeben v. Sidor*, 254 S.W.2d 908, 910 (Tex. Civ. App. 1952).

<sup>10</sup> *Ibid.*

<sup>11</sup> *Luling Oil & Gas Co. v. Edwards*, 32 S.W.2d 921, 924 (Tex. Civ. App. 1930).

<sup>12</sup> *Texas Employers Ins. Ass'n v. Reed*, 150 S.W.2d 858, 862 (Tex. Civ. App. 1941).

recognized in at least one jurisdiction as a third type of fact.<sup>13</sup> Conclusions of law are those legal deductions which, the facts being given, are drawn without further evidence. The interplay and distinctions among these three types of facts are explained in the following example:

The result reached by a presumption of law may be a *fact* equally with that attained by a deduction of the same *fact* from the existence of other and evidentiary facts. It is the *process* by which the result is attained which is or may be different, and the tribunal through which such result is reached that differs, rather than the result itself. An act, deed, circumstance, or event is none the less a *fact* because reached as a conclusion of law.

Suppose A. sues B. for services performed. The latter pleads payment. Here payment becomes the ultimate fact to be established. B. proves that he employed a large number of men, and was accustomed to make weekly payments; that A. was observed among others at the time and place where payment was made; that a considerable period has elapsed since A. left the employ of B., during which time the former made no claim: these are circumstances from which, as evidentiary facts, a jury may presume the ultimate fact of payment; but the presumption is one of *fact*, and not of law. Again, suppose the same case, but that the time prescribed by the statute of limitations in bar of the action has run. The law steps in, and presumes payment. The result reached may be the same, but it is reached by a different process.<sup>14</sup>

In this example the lines separating these different types of facts seem to be clear and distinct. In most actual cases, however, the distinctions may be scarcely appreciable. In these instances, only a proper analysis of the legal controversy can determine what constitutes an ultimate fact. Furthermore, the litigation of a single cause often will require the jury to find more than one ultimate fact. In an action for damages for injuries sustained by the defendant's negligence, for example, the complete ultimate issue, for which ultimate facts must be found, is made up of four subsidiary issues, *i.e.*, the fact alleged, whether the same be negligence, whether such negligence be the proximate cause of the injury and the amount of the damages.<sup>15</sup>

### *The Basic Problems*

A judge may have to make two determinations when an objection is raised that certain testimony is inadmissible because it is merely the witness opinion. He must first decide whether the testimony is actually an opinion or a fact. If an opinion, then he must decide whether it

<sup>13</sup> *Levins v. Rovegno*, 71 Cal. 273, 12 Pac. 161, 162 (1886).

<sup>14</sup> *Id.*, 12 Pac. at 163.

<sup>15</sup> This appeared as dictum in *North v. Atlas Brick Co.*, 76 Tex. 210, 13 S.W.2d 59, 61 (1929).

should be admissible as an exception to the general rule. A proper disposition of the first problem may appear to be elementary, but those who have sought an answer have not been able to find any distinct line separating opinions and facts. McCormick writes that "the terms 'fact' and 'opinion' denote merely a difference of degree of concreteness of descriptions" <sup>16</sup> Two other writers take the position that every statement may be said to be a statement of fact when compared with a more general statement on the same subject.<sup>17</sup> By way of explanation they say:

[I]n comparison with the statement "X was not mentally competent to execute a will" the statement "X was insane" is a statement of fact. In comparison with the statement "X was insane" the statement "X acted peculiarly" is a statement of fact. In comparison with the statement "X acted peculiarly" the statement "X had a vacant stare" is a statement of fact.<sup>18</sup>

Yet in each instance the judge must separate facts from opinions. No case has been found in which the judge failed to decide the nature of the testimony. The final decision on this question is left to his discretion.

The second problem will arise only if the testimony is denominated opinion. If so, what requirements must be satisfied before the general rule bows to the exception? Suppose that in the judge's belief this opinion is necessary to the due administration of justice. Will the testimony then be admissible? Maybe so, maybe not. Much depends on whether the opinion is on an ultimate issue.

As a practical matter, if the opinion is on some remotely relevant fact there probably will be no objection. But as the opinion becomes more relevant, naturally there will be more attempts to prevent the admission of this testimony. Generally speaking, the more relevant the testimony, the more courts will tend to require the witnesses to testify to details and refrain from inferences.<sup>19</sup>

But what view will be taken if the testimonial opinion is directly on an ultimate issue? Basically, there are two considerations. Since it is the function of the jury to answer ultimate issues by finding the ultimate facts, an opinion on these issues or facts would invade their province. On the other hand, if the testimony is refused admission the jury would not have been fully informed on all relevant issues.

Much judicial wrangling has arisen concerning whether opinion testimony on an ultimate issue is admissible. With respect to expert

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<sup>16</sup> McCormick, p. 24.

<sup>17</sup> King and Pillinger, *Opinion Evidence in Illinois* 10 (1942).

<sup>18</sup> *Ibid.*

<sup>19</sup> McCormick, pp. 24-25.

opinions of this type, one judge has written that "it would be difficult to find a subject in law in which there has been more judicial confusion and quibbling." <sup>20</sup> The cases holding this testimony to be inadmissible usually state that it usurps the function<sup>21</sup> or invades the province<sup>22</sup> of the jury and summarily dismiss the matter. The proponents of its admissibility contend, on the other hand, that it makes no difference if an opinion happens to be on an ultimate issue because the more relevant the testimony, the more it will assist the jury in making a proper disposition of the case.<sup>23</sup> Wigmore further asserts that it is a "mere bit of empty rethoric" to say an opinion on an ultimate fact or issue will usurp the jury's function because a witness could not do this even if he desired.<sup>24</sup>

### *Existing Legal Doctrines*

The judicial views on the question of whether a witness' opinion on an ultimate issue is admissible can be grouped into four categories. The most conservative view is that a witness cannot state an opinion if it is on an ultimate issue.<sup>25</sup> Although these courts purportedly refuse to admit opinions that bear on ultimate issues, these same courts allow this testimony on issues of sanity,<sup>26</sup> handwriting<sup>27</sup> and causation<sup>28</sup> in cases where these are clearly ultimate issues. Either these courts improperly perceive the characteristics of an ultimate matter in all situations or the anomaly is explicable.

Deviating slightly from the aforementioned, the second view refuses to allow opinion testimony on ultimate issues unless it is deemed necessary in the judge's discretion.<sup>29</sup> Frequently, the same result will be reached regardless of which view is followed. This is because opinion testimony on such ultimate issues as sanity, handwriting and causation often is deemed necessary by courts following this second view. A comparison of two cases serves to point out this similarity. In a case following this second-mentioned view, the court allowed an expert to voice an opinion on the issue of causation by saying, "if special or expert

<sup>20</sup> *Grismore v. Consolidated Prod. Co.*, 232 Iowa 328, 5 N.W.2d 646, 655 (1942).

<sup>21</sup> *Chicago & Alton R.R. v. Springfield & N.W. R.R.*, 67 Ill. 142, 145 (1873).

<sup>22</sup> *DeGroot v. Winter*, 261 Mich. 660, 247 N.W. 69, 71 (1933).

<sup>23</sup> 1 *Greenleaf* 551 (16th ed. 1899); McCormick, p. 26; 7 Wigmore, *Evidence* §1921 (3d ed. 1940).

<sup>24</sup> 7 Wigmore, *Evidence* 17 (3d ed. 1940).

<sup>25</sup> *E.g.*, *Birmingham Elec. Co. v. Farmer*, 251 Ala. 148, 36 So. 2d 343 (1948); *State v. Carr*, 196 N.C. 129, 144 S.E. 698 (1928).

<sup>26</sup> *E.g.*, *State v. Alexander*, 179 N.C. 759, 103 S.E. 383 (1920).

<sup>27</sup> *E.g.*, *Hedgepeth v. Coleman*, 183 N.C. 309, 111 S.E. 517 (1922).

<sup>28</sup> *E.g.*, *Birmingham Elec. Co. v. Farmer*, 251 Ala. 148, 36 So. 2d 343 (1948).

<sup>29</sup> *National Life & Acc. Ins. Co. v. Follett*, 168 Tenn. 647, 80 S.W.2d 92 (1935).

knowledge is necessary for the proper determination of the cause of a condition, we see no reason why such evidence should not be admitted

"<sup>80</sup> In a case adhering to the first-mentioned view, the court allowed an expert to give his opinion on causation by simply stating that "since he was an expert, there was nothing in his testimony which invaded the province of the jury."<sup>81</sup>

A third view allows opinion testimony on ultimate issues but restricts its form by requiring that it clearly sound like an opinion and not assume the qualities of a conclusion. Kentucky is a jurisdiction that follows this rule.<sup>82</sup> In a recent decision<sup>83</sup> the Kentucky court had to rule on the question of whether it was proper for an electrician, who qualified as an expert, to testify that the cause of a fire was a short circuit in a meter. The court answered by stating:

Clearly the trial court was correct in excluding this "opinion testimony" as it was the very question the jury would have been called upon to decide had the case reached it. It would have been competent to ask the witness if in his opinion the defect he found

<sup>80</sup> National Life & Acc. Ins. Co. v. Follett, 168 Tenn. 647, 80 S.W.2d 92, 96 (1935).

<sup>81</sup> Birmingham Elec. Co. v. Farmer, 251 Ala. 148, 36 So. 2d 343, 346 (1948).

<sup>82</sup> The following synthesis of cases outlines the development of this rule in Kentucky. In Aetna Life Ins. Co. v. Bethel, 140 Ky. 609, 131 S.W. 523 (1910), an expert witness was asked to give his opinion of what produced auto-intoxication in the victim. It had previously been established that this caused the death. He gave his answer as to what in his judgment was the cause. The court stated that the question and answer were objectionable because the witness was asked to give a conclusion, and his answer was couched in that form.

Later, in Taylor Coal Co. v. Miller, 168 Ky. 719, 182 S.W. 920 (1916) and Madison Coal Co. v. Altimire, 215 Ky. 283, 284 S.W. 1068 (1926), the court followed the *Bethel* case in not allowing conclusions on ultimate issues. However, in Crampton v. Dame, 224 Ky. 507, 6 S.W.2d 686 (1928) and Manns Exr v. Leyman Motor Co., 234 Ky. 639, 28 S.W.2d 956 (1930), expert opinions, which clearly sounded as such, were allowed in evidence.

The Kentucky appellate court was again presented with the question of whether to allow a witness to give an opinion in the form of a conclusion on an ultimate issue in *Gibson v. Crawford*, 259 Ky. 708, 83 S.W.2d 1 (1935). Rather than following the strict letter of the rule in the *Bethel* case, the court equivocated by saying that it "had rather these questions had been in better form, but is not the opinion of an expert after all his conclusion from the facts stated to him?" *Gibson v. Crawford*, *supra* at 721, 83 S.W.2d at 7. The court satisfied itself that the testimony should be admissible by saying that the error, if any, was not prejudicial.

The language used in the *Gibson* case seemed to recognize similarity between testimonial opinions and conclusions and the futility in attempting to distinguish them. The court seemed to be breaking away from the rule set forth in the *Bethel* case.

But the next time the court was faced with this question, the rule of the *Bethel* case was followed. In *Darlington v. Owens County Rural Elec. Co-op. Corp.*, 299 S.W.2d 599 (Ky., 1956), the court cited the *Bethel* case, ignored the language of the *Gibson* case and held that it was correct to sustain an objection to a question which asked a witness to give an opinion in the form of a conclusion on an ultimate issue. The *Darlington* holding is current law.

<sup>83</sup> *Darlington v. Owen County Rural Elec. Co-op. Corp.*, 299 S.W.2d 599 (Ky. 1956).

in the meter *could* have caused the fire, but not that it *did* cause the fire. (Emphasis added.)<sup>34</sup>

Obviously, the courts following this view take a compromising position.<sup>35</sup> They allow a slight encroachment on the jury's function, but attempt to preserve that function in part by restricting the form of the testimony. This position has been adversely criticized because it deprives the jury of knowing how definite the witness feels about his position.<sup>36</sup>

The fourth and most liberal view is that a witness may give an opinion on an ultimate issue in any form depending upon his degree of certainty. This view is represented by a recent Illinois decision in which the court overruled a line of cases by stating, "the form of the answer, when in terms of 'what did' or 'what might' have caused the injury and death, is immaterial." (Emphasis added.)<sup>37</sup> If this position is adopted, there is the inherent possibility that the jury will place too much emphasis on a conclusion, and the witness, in effect, will be deciding the final outcome of the litigation. Nevertheless, it seems better to allow this possibility than to leave the jurors floundering in uncertainty as to the degree of the witness' positiveness. This encroachment on the office of the jury has been termed "reasonable."<sup>38</sup>

### *The Present Trend*

Frequently, new trends in a particular field of law are difficult, if not impossible, to determine. This can be attributed to several factors, one being that most courts are reluctant to change policies swiftly, if ever, even if other policies are conceived which are clearly more desirable. This reluctance has been criticized as being one of the greatest obstacles in the path of justice.<sup>39</sup> In his criticism, one writer compares the legal and medical professions by saying:

If a new [disease] preventive is discovered in Connecticut, it is inconceivable that Texas and many other states, would not get any benefit from this new contribution to science.

But let the courts of any [state] devise an improved "legal antiseptic"—as they wisely have done in certain important matters—and other states, near by and far away, will go their way for years in the ancient manner as though an impassible Chinese wall kept them from all improvements.<sup>40</sup>

<sup>34</sup> *Id.* at 600.

<sup>35</sup> Another compromising position was recognized in *Shepherd v. Midland Mut. Life Ins. Co.*, 152 Ohio 6, 87 N.E.2d 156 (1949), in which the court indicated that it would allow opinions of experts on ultimate issues in some instances, but would not allow those of lay witnesses.

<sup>36</sup> 1960 U. of Ill. L.F. 457.

<sup>37</sup> *Clifford-Jacobs Forging Co. v. Industrial Commn*, 19 Ill. 2d 236, 166 N.E.2d 582, 587 (1960).

<sup>38</sup> 1960 U. Ill. L.F. 457.

<sup>39</sup> Osborne, *The Mind of the Juror* 72 (1937).

<sup>40</sup> *Ibid.*



Many courts continue to adhere to the view which severely restricts the use of opinion testimony. McCormick states that this is the "orthodox" view of the many courts who depend only on the encyclopedias which repeat the formulas of the older cases.<sup>41</sup> Slowly, however, this concept is being abandoned in favor of the sounder view that the mere coincidence with an ultimate issue is no ground for excluding opinion testimony. This view is being taken by textwriters and statute drafters, and some jurisdictions have reversed cases with contrary holdings.

Two of the leading textwriters in this field—Wigmore and McCormick—urge that it should make no difference that an opinion happens to be on an ultimate issue. Wigmore asserts that there is no reason for the existence of a rule that precludes this type of opinion testimony because "no legal power, not even the judge's order, can compel [the jury] to accept the witness' opinion against their own."<sup>42</sup> McCormick approvingly cites Wigmore's view.<sup>43</sup> Neither of them discusses whether the form of the opinion should be considered in determining its admissibility. Since they are so definite about their positions, it seems that the form would make no difference.

The drafters of the *Uniform Rules of Evidence* have included a provision which allows opinion testimony on ultimate issues. It provides that "testimony in the form of opinions is not objectionable because it embraces the ultimate issue or issues to be decided by the trier of the fact."<sup>44</sup> The Federal Rules of Civil Procedure<sup>45</sup> do not have a specific provision for the admissibility of opinion testimony. They do provide, however, that the judge should consider the rules and statutes governing federal and state courts, and "in any case, the statute or rule which favors the reception of the evidence [shall] govern."<sup>46</sup> Since the federal rule, as announced in the cases, is to allow opinion testimony on ultimate issues,<sup>47</sup> this type of evidence is admissible in federal courts regardless of the position taken by the state courts of the respective jurisdictions.<sup>48</sup>

Several states have adopted the liberal view of admitting opinion testimony on an ultimate issue. Iowa is an example of a jurisdiction

<sup>41</sup> McCormick, p. 23.

<sup>42</sup> 7 Wigmore, *Evidence* 18 (3d ed. 1940).

<sup>43</sup> McCormick, p. 26.

<sup>44</sup> *Uniform Rules of Evidence* 56(4). The Model Code of Evidence, rule 401 (1942), is in agreement with the Uniform Rules. It provides that "a witness may state all relevant inferences, whether or not embracing ultimate issues" unless the judge finds that he is incapable of drawing such inferences or the witness can communicate what he has perceived with equal accuracy and adequacy.

<sup>45</sup> 28 U.S.C. Appendix (1958).

<sup>46</sup> Fed. R. Civ. P. 43(a).

<sup>47</sup> E.g., *Detroit, T.&I. Ry. v. Banning*, 173 F.2d 752 (6th Cir. 1949).

<sup>48</sup> *Peoples Gas Co. v. Fitzgerald*, 188 F.2d 198 (6th Cir. 1951).

which has reversed itself and accepted this view. As recently as 1930, the court refused to allow opinion testimony on an ultimate issue by saying:

[W]hile an expert may be permitted to express his opinion, or even his belief, he cannot testify to the ultimate fact that must be determined by the jury.<sup>49</sup>

Later the Iowa court took an entirely opposite stand by stating:

[T]he fact that the matter inquired about is a vital and controlling fact in a trial, or is even the ultimate fact, which the jury are to pass upon and determine, is no reason why the opinion should not be received.<sup>50</sup>

Many other courts, in varying degrees, have recently discarded the former view.<sup>51</sup>

### *Recommendation*

The best approach is to allow a witness to testify on any relevant point, with testimony couched in any form, irrespective of whether the testimony is a fact or an opinion. This would allow the witness to express an opinion on an ultimate issue in the form of a conclusion, if he is definite about his position. Only in this manner will the jury be fully informed on all pertinent matters and be prepared to render a sound verdict. To overcome the objection that this will be a usurpation of the jury's function, however, the witness should be required to state in full the data upon which his testimony is founded.<sup>52</sup> Then the jury will be better prepared to gauge the soundness of the testimony and give it what weight they deem it deserves.<sup>53</sup>

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<sup>49</sup> *State v. Steffon*, 210 Iowa 196, 230 N.W. 536, 538 (1930).

<sup>50</sup> *Gnsmore v. Consolidated Prods., Inc.*, 232 Iowa 328, 5 N.W.2d 646, 655 (1942).

<sup>51</sup> See, e.g., *Woyak v. Komeske*, 237 Minn. 213, 54 N.W.2d 649 (1952); *Dowling v. L. H. Shattuck, Inc.* 91 N.H. 234, 17 A.2d 529 (1941); *Schweiger v. Solbeck*, 191 Ore. 454, 230 P.2d 195 (1951); *Hooper v. General Motors Corp.*, 123 Utah 515, 260 P.2d 549 (1953).

<sup>52</sup> Uniform Rule of Evidence 57 provides that the judge *may* require this information. This recommendation changes this from a discretionary procedure to one that is mandatory.

<sup>53</sup> Some writers have contended that it is unnecessary to require divulgence of this data because it will be elicited on cross-examination in attempting to debase the witness opinion. There remains the possibility, however, that the cross-examiner may purposely avoid this line of questioning if he suspects the opinion to be well-founded. In this situation the jury would have heard no more than a bare opinion and would be unable to knowledgeably give it weight. The mandatory requirement that this data must be given during the examination-in-chief assures that the jury will not have to rely on the cross-examination to supply them with this information.