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Opinion Evidence

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OPINION EVIDENCE

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The rule which excludes opinion evidence has caused little difficulty in Canadian and Commonwealth experience. In the United States, however, the rule has been heavily relied upon at trial and on appeal by counsel seeking to limit the scope of opinion evidence. Hence, in that country, the appellate jurisprudence on the subject is large, and the concern for reform great. In Canada, the absence of substantial difficulty results in no pressing need for reform.

The drafters of the Federal Code,[1] and the authors of the accompanying note, like the authors of the Ontario Law Reform Commission's[2] working paper, proceed from the premise that the rule is without foundation in logic or policy. Logically, or perhaps, more accurately, physiologically, as the note says, "there is no clearcut distinction between what a witness states as a fact and [what he states] as an opinion."[3] As for justification of the rule on some basis of policy, the common reason given is that to permit a witness to state his opinion is to allow him to usurp the function of the jury, whose traditional role has been to draw inferences (opinions) from the facts conveyed to it by witnesses. Yet, there are a number of exceptions to the rule that permit lay witnesses to state their opinion (or what is classified as opinion rather than fact), and that allow expert witnesses to give their opinion, without undue concern that the jury's function is being usurped. In these cases it is claimed, perhaps optimistically, that a jury always has the right to accept or reject an opinion expressed by a witness. Another reason given sometimes for the rule is that opinion evidence is irrelevant. Clearly this is not so, for much opinion evidence is relevant and held admissible, and while, no doubt, some opinion evidence does lack probative value, surely a great deal of opinion, which under the present law is inadmissible, does, nevertheless, have probative value. The exclusion of the opinion of an eyewitness that the collision was the fault of the defendant is not because that opinion lacks probative value but for some other reason. Perhaps the reason is a concern that the jury's function not be eroded. If so, the question arises what should be the criterion to guide us as to when such erosion may be permitted?

The traditional statement of the opinion rule is that it represents a straightforward rule of exclusion, with a number of specific exceptions for lay witnesses and an exception for expert witnesses.[4] Rare is the judicial attempt to extract a rationale or principle explaining the rule.

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[1] *Report on Evidence* (Ottawa: Law Reform Commission of Canada, 1975).

[2] *Report on the Law of Evidence* (Toronto: Ontario Law Reform Commission, 1976).

[3] *Supra*, note 1 at 97.

[4] Cross, *Evidence* (4th ed. London: Butterworths, 1974) at 381.

A valid rationale of the rule, offered over twenty years ago by Mr. P. B. Carter, is that the English (and the Canadian) practice excludes opinion evidence unless it is *necessary* to allow it to be given. The necessity is found, in the case of a lay witness, "if the witness cannot owing to the nature of the matter adequately convey to the jury the data from which such inference is made" (particularly when being examined in chief), and in the case of an expert witness, "if he is, owing to his training, more competent to draw the inference in question than is the untrained juryman."[5] However, I do not agree that Mr. Carter and his co-author accurately represent the English (and Canadian) practice, when they say that "inference by the witness is permissible unless it is unnecessary, based on inadequate data, drawn by a mind untrained to draw such an inference, or otherwise misleading."[6] In my view, law and practice justify the converse statement that "inference by the witness is not permissible unless it is necessary, and even then only if it is based on adequate data and is not otherwise misleading."

A. NON-EXPERT WITNESSES

If one accepts my perception of the present law and practice, then the Federal Code does not alter the present exclusionary emphasis as far as lay witnesses are concerned. However, with respect to the rationale of exceptionally permitting a lay witness to "give an opinion or draw an inference," the Code introduces a new notion. Section 67 says that a lay witness "may not give an opinion or draw an inference unless it . . . is helpful to the witness in giving a clear statement or to the trier of fact in determining an issue." In so far as it says that giving an opinion or stating an inference is permitted if it is "helpful to the witness in giving a clear statement," the exception is probably not novel, for these words may be taken to refer to cases where at present, a lay witness is allowed to do so, such as the identity of persons, age, handwriting, speed, and sobriety.[7] Presumably, these words would not authorize a judge to permit a witness to state who was at fault in an accident, because it would not be "helpful to [him] in giving a clear statement" as to what he saw. However, more revolutionary are the words "unless it . . . is helpful . . . to the trier of fact in determining an issue." Thus, the concept of *helpfulness* would be substituted for that of *necessity*. The idea is not new. In 1898, Thayer wrote:

> There is ground for saying that, in the main, any rule excluding opinion evidence is limited to cases where, in the judgment of the court, it will not be helpful to the jury.[8]

The formulation of section 67 is based to a large extent on Rule 701 of the U.S. Federal Rules of Evidence,[9] which states:

> If the witness is not testifying as an expert, his testimony in the form of opinions

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[5] Cowen and Carter, *Essays on the Law of Evidence* (Oxford: Clarendon Press, 1956) at 170.

[6] *Id.* at 167.

[7] As to sobriety, in particular with respect to driving motor vehicles, see, in particular, the discussion in Cross, *supra*, note 4 at 390-91.

[8] Thayer, *A Preliminary Treatise on Evidence* (South Hackensack: Rothman Reprints, 1965) at 525. See also Maloney and Tomlinson, "Opinion Evidence," in *Canadian Criminal Evidence*, ed. Salhany and Carter (Toronto: Butterworths, 1972) at 222-24.

[9] Fed. Rules Evid. Rule 701, 28 *U.S.C.A.*

> or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

The Commission's comment on section 67 does not attempt to justify the change from "necessity" to "helpfulness" other than to say that "this section renders admissible a witness' inference and opinions so long as they are helpful to an understanding of his testimony or the determination of a matter in issue": a sentence which gives no reason for the change, and in addition employs wording similar to the American statute. Since the Federal Code borrows substantially from the American rule, it is informative to examine the note of the American Advisory Committee on the Rules of Evidence, published in the Annotated Federal Rules of Evidence.

> Limitation (b) is phrased in terms of requiring testimony to be helpful in resolving issues. Witnesses often find difficulty in expressing themselves in language which is not that of an opinion or conclusion. While the courts have made concessions in certain recurring situations, necessity as a standard for permitting opinions and conclusions has proved too elusive and too unadaptable to particular situations for purposes of satisfactory judicial administration. McCormick sec. 11. Moreover, the practical impossibility of determining by rule what is a 'fact' demonstrated by a century of litigation of the question of what is a fact for purposes of pleading under the Field Code, extends into evidence also. 7 Wigmore sec. 1919. The rule assumes that the natural characteristics of the adversary system will generally lead to an acceptable result, since the detailed account carries more conviction than the broad assertion, and a lawyer can be expected to display his witness to the best advantage. If he fails to do so, cross-examination and argument will point up the weakness. See Ladd, Expert Testimony, 5 Vand. L. Rev. 414, 415-417 (1952). If, despite these considerations, attempts are made to introduce meaningless assertions which amount to little more than choosing up sides, exclusion for lack of helpfulness is called for by the rule.[10]

Lest there be any doubt as to the debt of the Federal Commission to the American Rule and the American Advisory Committee, the Commission's working paper states:

> Proposed paragraph 2(b) would have the effect of changing the present 'strict necessity' test for determining the admissibility of opinion testimony of lay witnesses to a test of whether the opinion would be helpful to the trier of fact. This should have the advantage of being a criterion which is capable of application and which will permit witnesses to describe facts not only in a manner in which they are accustomed to speaking, but also in a manner which will be most useful to the trier of fact in determining the truth. The adversary system itself will provide safeguards against a witness describing facts in terms which are vague and general, since counsel eliciting them will be aware that more detailed account from his witness will invariably be more persuasive with the trier of fact, and that in so far as he does not bring out the basis for the witness' inferences, the cross-examiner will expose and make the most of any weakness.

What of the reason given by the American Advisory Committee for the change from "necessity" to "helpfulness"? Whatever may be the case in the United States, the Federal Commission has failed to articulate why the Canadian concept of "necessity" (assuming that it is the unarticulated premise of the rule as applied in Canada) has proved to be too elusive or unadaptable as a standard. There has not been voluminous interlocutory litigation as to what is "fact" for the purposes of pleading in Canada. The Canadian experience has not been that at trial or on appeal the distinction between "fact" and "opin-

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[10] *Id.*

ion" has been the subject of difficulty. And what of the suggestion that the adversary system will prevent abuse? The effect of the "helpfulness" concept may result in counsel taking less care to ensure that his witness states what he saw or heard rather than some inference drawn from what he saw or heard. In such cases the testimony will be in terms of inference, and if the inference is wrong, considerable damage may result, if the trier of fact is unable to adequately disassociate statements of fact from opinion in order to ascribe the proper weight to various testimony.

It is not sufficient to say that counsel will elicit the supporting facts from his witness in chief. Careless counsel may not do so. Cunning counsel, knowing that the facts do not support the inference, may not try to do so.

Nor is it sufficient to leave it to cross-examining counsel to expose the absence of factual support. A good cross-examiner will not ask any question unless he knows what the answer will be. If he does not know what facts were perceived by the witness, he will cross-examine at his peril.

Finally, it is not sufficient to say that "helpfulness" may be a ground for exclusion. Without endless *voir dires* it will not be possible to know whether permitting the witness to testify in terms of his opinion or inference will be "helpful" to the trier of fact. If the witness begins an answer in the form of a statement of opinion, the trial judge can stop him, as he can stop him now. But if section 67 becomes law, the only way to determine whether testimony in the form of opinion or inference would be "helpful" would be to exclude the jury while that issue is determined. During the *voir dire* the witness would be asked to give the facts he perceived. The judge would then determine whether difficulty encountered by the witness in describing in detail what he perceived, or some other reason, would make it "helpful" to the trier of fact to hear his evidence in chief in the form of opinion or inference. Compare this with the present situation. The judge stops the witness when the question put to him on its face invites the expression of an opinion, or when the answer begins in the form of an opinion or inference. Counsel, who is examining his own witness, then may try to elicit from the witness what he saw or heard with some precision. If counsel still has difficulty in eliciting from the witness what the witness can say of the matter without the form of the answer being an opinion or inference, the judge may then decide whether it is *necessary* to allow the witness to give his evidence in that manner. No time has been wasted, compared with the procedure which section 67 would require in many instances. The saving of time is a proper consideration.

The English Criminal Law Revision Committee recommended that, in the case of a non-expert, the statute governing evidence in criminal proceedings should provide that:

> a statement of opinion by him on a relevant matter . . . , if made as a way of conveying facts personally perceived by him, is admissible as evidence of what he perceived.[11]

The Committee's comment on this provision is startlingly brief: "Clause 43(2) is a declaratory provision . . . . "

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[11] Criminal Law Revision Committee, *Eleventh Report* (1972; Cmnd. 4991) at 156-57, sec. 43(2).

The English Law Reform Committee, dealing with evidence in civil cases, recommended slightly less sweepingly that:

> the opinion of a non-expert witness on an issue in the proceedings should not be admissible as such, but, subject to the court's having a discretion to exclude it, should be admissible as evidence of the facts perceived by him on which it is based.[12]

However, when Parliament enacted the *Civil Evidence Act 1972*[13] the wording chosen was that recommended by the Criminal Law Revision Committee.

The Ontario Law Reform Commission has likewise recommended a provision as sweeping as that now found in the English *Civil Evidence Act*:

> where a witness in a proceeding is testifying in a capacity other than as a person qualified to give opinion evidence and a question is put to him to elicit a fact that he personally perceived, his answer is admissible as evidence of the fact even though given in the form of an expression of his opinion upon a matter in issue . . . .[14]

The Ontario Commission's reasons for this recommendation are brief and are substantially the same as those given by the Canada Law Reform Commission.

B. EXPERT WITNESSES

There are several issues which require discussion, with respect to expert witnesses.

1. *When Will the Opinion of an Expert be Admissible?*

The rationale with respect to expert witnesses is not of practical importance, for both the present law and the proposed Code broadly allow an expert witness to state his opinion or inference. The commentary to the Code says that section 70 codifies the present law, "but it is made clear that they may testify not only as to matters beyond the understanding of laymen, but whenever it would be helpful." The formula suggested, therefore, goes beyond the "necessity" principle, but in doing so it likely reflects the present law and practice. At present, whenever expertise will assist the trier of fact because the evidence or an issue is so complex or specialised that without such assistance the trier of fact will not be able to appreciate it, the expert's opinion is allowed as it may be said to be "necessary" and "helpful" to allow those who possess such expertise to testify in the form of opinion.

In so far as section 70 permits a witness to be qualified as an expert "by knowledge, skill, experience, training or education," the rule probably

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[12] *Id., Seventh Report* (1970; Cmnd. 4489) at 31. The Law Reform Committee felt that it was desirable to sweep away any obstacle to an eye-witness being permitted to testify as to a fact he has personally perceived "even though given in the form of an expression of his opinion upon a matter directly in issue in the action" (at 4-5). The Committee emphasised that it was not suggesting that, to use an example, "it should be permissible to ask a non-expert witness a direct question as to his opinion of the blameworthiness of the conduct of another person where this is an issue in the action" (at 4). In other words, such questions ought not to be allowed, but answers in the form of such an opinion ought to be allowed.

[13] 1972, c. 30 (U.K.).

[14] *Supra*, note 2 at 153, s. 14.

reflects the present law, which does not limit those who may testify as experts to professional or quasi-professional persons but also encompasses other "skilled" or "experienced" witnesses such as bankers, landowners testifying to land values, and policemen testifying to "point of impact."

One way in which the courts have attempted to limit trial by evidence of the opinion of experts is to say that "opinion evidence may not be given upon a subject-matter within, what may be described as, the common stock of knowledge." The reason is that such evidence would not assist the trier of fact. It would be superfluous. Thus in a decision of the Appellate Division of the Supreme Court of Alberta, an expert witness was asked a question at the trial in terms of an ultimate issue before the court.[15] The accused was charged with murder. The defence of provocation was raised. The trial judge, sitting alone, found that there was no provocation. Section 215(2) of the *Criminal Code*[16] reads as follows:

> A wrongful act or insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purposes of this section if the accused acted upon it on the sudden and before there was time for his passion to cool.

A psychiatrist was called for the defence. In cross-examination, he was asked whether he would say that a normal person, without the accused's particular background, "would not, in your view, have been provoked by the evidence you have heard this morning to have shot the woman in the head?" The answer was "Yes, I would [say so]."[17] The trial judge specifically mentioned this evidence in rejecting the plea of provocation. The majority of the Appellate Division, in a judgment delivered by Clement J.A., held that, in the circumstances, the line of cross-examination was proper because, in examination-in-chief of the psychiatrist, defence counsel had elicited the opinion of the psychiatrist as to the emotional state of the accused (his morbid jealousy).[18] Therefore, in cross-examination, the Crown was entitled to explore the standard with which, by implication, the psychiatrist had compared the accused's emotional condition. In the opinion of Clement J.A., this object had not been exceeded. However, Clement J.A. observed in *obiter* comments, that beyond the limited purpose just stated, the answers of the psychiatrist were "superfluous," since what is involved in the objective test stated in the first branch of section 215(2) is "the intuitive perception of human nature of which judges, and I include appellate judges, are by common law deemed to be capable without the assistance of opinion evidence."[19] He said also: "Nor is expert testimony on general human nature recognized so that an opinion on it is usually inadmissible on the issue to be tried: *Bourne* v. *Swan & Edgar Ltd.*"[20]

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[15] *R.* v. *Clark*, [1975] 2 W.W.R. 385 (Alta. C.A.); [1976] 2 W.W.R. 571 (S.C.C.).

[16] R.S.C. 1970, c. C-34.

[17] *Supra*, note 15 at 396 (Alta. C.A.).

[18] *Id.* at 401 (Alta. C.A.).

[19] *Id.* at 402 (Alta. C.A.).

[20] *Id. Bourne* v. *Swan & Edgar Ltd.*, [1903] 1 Ch. 211 at 224. See also *R.* v. *Chard* (1971), 56 Cr. App. R. 268 at 270 *per* Roskill L.J.; *D.P.P.* v. *Jordan*, [1976] 3 W.L.R. 887 at 892 *per* Lord Wilberforce; and *Clark* v. *Ryan* (1969), 103 C.L.R. 486.

A recent English case in which the proposition as stated by Clement J.A. was elaborated upon is *R.* v. *Turner*.[21] The accused was charged with murder. He admitted killing his girl friend with a hammer, but he testified that he had been provoked by her statement to him that she had been sleeping with two other men, that she could make money in this way, and that the child she was carrying was not his. The defence sought to call a psychiatrist to give his opinion, based on information from medical records, the defendant and his family and friends, that the defendant was not suffering from a mental illness and that he was not violent by nature, but that his personality was such that he was likely to be telling the truth. The defendant had not put his character in issue and the Crown sought to have the psychiatrist's evidence excluded on the ground that it would put the defendant before the jury as having a character and disposition which in the light of his previous record of violence he did not possess. The judge ruled the psychiatric evidence inadmissible. The defendant was convicted. For present purposes, I shall refer only to the proposed evidence that the accused's personality was such that he was likely to have been provoked in the circumstances and likely to be telling the truth. The Court of Appeal held the evidence to be inadmissible. Lawton L.J., delivering the judgment of the court, said that these questions:

> dealt with matters which are well within ordinary human experience . . . jurors do not need psychiatrists to tell them how ordinary folk who are not suffering from any mental illness are likely to react to the stresses and strains of life. It follows that the proposed evidence was not admissible to establish that the defendant was likely to have been provoked. The same reasoning applies to its suggested admissibility on the issue of credibility. The jury had to decide what reliance they could put upon the defendant's evidence. He had to be judged as someone who was not mentally disordered. This is what juries are empanelled to do. The law assumes they can perform their duties properly. The jury in this case did not need, and should not have been offered, the evidence of a psychiatrist to help them decide whether the defendant's evidence was truthful . . . . In coming to the conclusion we have in this case we must not be taken to be discouraging the calling of psychiatric evidence in cases where such evidence can be helpful within the present rules of evidence. These rules may be too restrictive of the admissibility of opinion evidence. The Criminal Law Revision Committee in its 11th Report thought they were and made recommendations for relaxing them: see pp. 266-271. The recommendations "have not yet been accepted by Parliament, and until they are, or other changes in the Law of Evidence are made, this court must apply the existing rules": see *Myers* v. *Director of Public Prosecutions* per Lord Reid. We have not overlooked what Lord Parker C.J. said in *Director of Public Prosecutions* v. *A. and B.C. Chewing Gum Ltd.* about the advance of science making more and more inroads into the old common law principle applicable to opinion evidence; but we are firmly of the opinion that psychiatry has not yet become a satisfactory substitute for the commonsense of juries or magistrates on matters within their experience of life.[22]

It is clear that in the *Turner* case the English Court of Appeal did not purport to lay down a universal rule excluding psychiatric evidence as an aid to the trier of fact in assessing the credibility of a witness. That this is so, is evidenced by the lack of disapproval evinced toward *Lowery* v. *The Queen*.[23] In that case, the Privy Council had approved the admission of the evidence of a psychologist on the issue of credibility. The psychologist had been called

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[21] [1975] Q.B. 834; [1975] 2 W.L.R. 56; [1975]1 All E.R. 70.

[22] *Id.* at 841-43 (Q.B.); 61-64 (W.L.R.); 74-75 (All E.R.).

[23] [1974] A.C. 85; [1973] 3 All E.R. 662.

on behalf of one of two accused to establish that his version of the facts was more probable than that put forward by the other. In the *Turner* case, Lawton L.J. explained that in *Lowery* "the issues were unusual; and the accused to whose disadvantage the psychologist's evidence went had in effect said before it was called that he was not the sort of man to have committed the offence."[24] Thus, Lawton L.J. regarded the *Lowery* case as having:

> been decided on its special facts. We do not consider that it is an authority for the proposition that in all cases psychologists and psychiatrists can be called to prove the probability of the accused's veracity. If any such rule was applied in our courts, trial by psychiatrists would be likely to take the place of trial by jury and magistrates. We do not find that prospect attractive and the law does not at present provide for it.[25]

On the other hand, it is to be remembered that in *Toohey* v. *Metropolitan Police Commissioner,* the House of Lords, in a judgment delivered by Lord Pearce, held that "medical evidence is admissible to show that a witness suffers from some disease or abnormality of mind that affects the reliability of his evidence."[26] That was a case of alleged robbery. The defence was that the complainant's story was an "hysterical invention." The medical evidence adduced by the defence, and held admissible by the House of Lords, indicated that the complainant was hysterical, prone to exaggerate and even to imagine events that had not taken place.

Another recent example is *R.* v. *Hawke,*[27] in which the Ontario Court of Appeal held that the trial judge had erred in not admitting psychiatric evidence tendered by the defence that a principal Crown witness suffered from mental illness including hallucinations. Dubin J.A., delivering the judgment of the court, said that there was:

> no basis for rejecting . . . the evidence of the psychiatrists where their evidence relates to the issue as to whether by reason of a mental illness the evidence may be considered as being unreliable.[28]

This may be taken to be an application of what Lawton L.J. in the *Turner* case described as:

> what have long been thought to be the rules relating to the calling of evidence on the issue of credibility, *viz.* that in general evidence can be called to impugn the credibility of witnesses but not led in chief to bolster it up.[29]

To that generality, *Lowery* must now be regarded as an exception if *Turner* is correct.

These cases illustrate the unwillingness of the courts to regard as necessary the allowing of expert witnesses to give their opinion as to matters within the common stock of knowledge. It is doubtful whether the judges will be more liberal in admitting such evidence as being "helpful" if section 70 of the proposed Federal Code is adopted.

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[24] *Supra,* note 21 at 842 (Q.B.); 61 (W.L.R.); 74 (All E.R.).

[25] *Id.* at 842 (Q.B.); 61 (W.L.R.); 75 (All E.R.).

[26] [1965] A.C. 595 at 609; [1965] 2 W.L.R. 439 at 446; [1965] 1 All E.R. 506 at 512.

[27] (1975), 7 O.R. (2d) 145; 29 C.R.N.S. 1; 22 C.C.C. (2d) 19 (C.A.).

[28] *Id.* at 165 (O.R.); 39 (C.C.C.).

[29] *Supra,* note 21 at 842 (Q.B.); 61 (W.L.R.); 75 (All E.R.).

2. *Should an Expert Witness be Required to Disclose the Basis of his Opinion?*

Before a witness, whether expert or non-expert, is permitted to give his opinion, ought he be required first to disclose the basis of his opinion? In other words, should the counsel examining the witness in chief be required to elicit from his witness the foundation of the opinion, or should he be entitled, if he chooses, simply to elicit the opinion and leave it to cross-examining counsel to take the risk of asking what facts the opinion is based on?

This is a problem not limited to expert witnesses, but I discuss it in the framework of expert evidence because it is in that context that the problem is most likely to arise. The Commission's commentary with respect to section 68 says that counsel examining in chief is unlikely to fail to ask his witness to give the facts on which his opinion is based, "since a party will usually be anxious to elicit all supporting evidence from his own witness." However, counsel, examining in chief, may fail to elicit the basis of the opinion, or he may do so only sketchily and inadequately, either through cunning because the facts do not support the opinion, or because counsel is incompetent or inexperienced.

This is not a problem which appears to have been considered in Canada. In England, Lawton L.J., delivering the judgment of the Court of Appeal in *R.* v. *Turner*, said:

> In our judgment, counsel calling an expert should in examination in chief ask his witness to state the facts upon which his opinion is based. It is wrong to leave the other side to elicit the facts by cross-examination.[30]

It is useful that the drafters of the Federal Code have directed the minds of the Canadian profession to this problem. Probably no better solution to it can be found than to leave the matter unburdened by a hard rule but rather subject to the discretion proposed by section 68.

3. *What May be the Basis of the Expert's Opinions?*

The Federal Code proposes that an expert witness may base an opinion or inference on his personal knowledge, reports by others, and hypothetical questions (section 71). Only the second of these requires consideration at this point, since the other two are well established as the existing law.

The Code defines "reports of others" in section 71(b) as:

> facts made known to him before the hearing, even if such facts are not admitted or admissible in evidence, so long as they are of a kind reasonably relied upon by experts in the field in forming opinions or inferences on the subject.

No provision such as section 71(b) is to be found in the English Criminal Law Revision Committee's Draft Bill, perhaps because in England the view adopted, at least as far as the evidence of land valuers is concerned, is that, in testifying to the value of land, the "comparables" which the witness is prepared to testify to must be proved by admissible evidence (either of the valuer or another witness) or must be omitted.[31]

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[30] *Id.* at 840 (Q.B.); 60 (W.L.R.); 73 (All E.R.). Note also the comment of Dixon J. in *R.* v. *Jenkins: Ex Parte Morrison*, [1949] W.L.R. 277 at 303 that courts cannot be expected to act upon opinions, the basis of which is unexplained.

[31] *English Exporters (London) Ltd.* v. *Eldonwall Ltd.*, [1973] Ch. 415; [1973] 1 All E.R. 726 (Megarry J.).

The matter is, however, dealt with as follows in the U.S. Federal Rule 703:

> . . . [I]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

The annotation says:

> In this respect the rule is designed to broaden the basis for expert opinions beyond that current in many jurisdictions and to bring the judicial practice into line with the practice of the experts themselves when not in court. Thus a physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records, and X-rays. Most of them are admissible in evidence, but only with the expenditure of substantial time in producing and examining various authenticating witnesses. The physician makes life-and-death decisions in reliance upon them. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes.[32]

This attitude is reflected in judgments of the Supreme Court of Canada which have permitted a land appraiser to give his opinion even though it was based on what he had been told by others as to sales of their land,[33] and which have permitted psychiatrists to give their opinion even though it was based in part on material not proved in court.[34]

Thus, in this respect, the Federal Code reflects the existing law in Canada. The result is unsatisfactory from the point of view of the party against whom an expert testifies. Facts may be placed before the trier of fact which are not proved by admissible evidence but which are disclosed by the expert as a basis for his opinion. Juries and even some professional triers of fact may find it difficult to obey the admonition that they are not to regard such a disclosure as evidence of the fact stated. Many such facts will, of course, be inconsequential in relation to the ultimate issue. However, if the fact disclosed is one which is directly relevant to an issue, its disclosure, without proof by

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[32] *Supra*, note 9, Rule 703.

[33] *City of St. John* v. *Irving Oil Co. Ltd.*, [1966] S.C.R. 581; 58 D.L.R. (2d) 404.

[34] *Wilband* v. *The Queen*, [1967] S.C.R. 14; [1967] 2 C.C.C. 6; (1968), 2 C.R.N.S. 29. It is true that the decision in this case concerned a statutory provision that "the court . . . shall hear the evidence of at least two psychiatrists." This made it easier for the Supreme Court of Canada, in a judgment delivered by Fauteux J., at 21 (S.C.R.), to conclude that Parliament had contemplated:

> . . . that the opinion, which the psychiatrists would form and give to assist the Court, would be formed by methods . . . recognized in normal psychiatric procedures.

which, according to the evidence in the case, included "second-hand source information, the reliability, accuracy and significance of which are within the recognized scope of his professional activities, skill and training to evaluate." However, the effect of *Wilband* cannot be limited by its statutory overlay. In *R.* v. *Lupien*, [1970] S.C.R. 263; 9 D.L.R. (3d) 1; 71 W.W.R. 110, Ritchie J., delivering the judgment of the majority of the Supreme Court of Canada on the evidentiary issue, after mentioning *Wilband*, made no distinction based on the statute in that case. Ritchie J. said, at 117 (W.W.R.), that what had been said in *Wilband* "in relation to the hearsay rule applies with equal force to the present circumstances." See also *Ramsay* v. *Watson* (1961), 108 C.L.R. 642: the Australian law is to the same effect as the Canadian.

admissible evidence, may be highly prejudicial to the opposite party. Perhaps a safeguard would be a discretion open to the trial judge to prevent the expert from disclosing such a fact. In the light of *R.* v. *Wray*,[35] it is doubtful that such a discretion is available at present. Section 5 of the Federal Code might afford such a discretion, if the trial judge could be persuaded that such a disclosure's probative value would be "substantially outweighed by the danger of undue prejudice." To avoid the loss of time which a *voir dire* might entail, counsel for the adversary would be in a position to raise an objection to the proposed disclosure of a particular fact if he were in possession, in detail, of the expert's proposed testimony before he testifies. This safeguard may be provided by the notice requirement of section 72, although it is not clear that "the substance of the proposed testimony and a summary of the grounds for each opinion and inference proposed to be given" would include a sufficient degree of detail to obviate the necessity for a *voir dire.*

4. *Should There be a Limitation on the Number of Expert Witnesses?*

Unlike section 7 of the *Canada Evidence Act*,[36] the proposed Federal Code contains no limitation on the number of expert witnesses a party may call. Indeed, neither the Commission's commentary nor its earlier working paper mentions this kind of statutory provision, which is astonishing, given its uniqueness in Canada. One may assume that the apparent decision to abandon such a limitation is a reflection of decreasing cynicism about the partiality of expert testimony.[37]

In view of the provision in section 7 of the *Canada Evidence Act*[38] that the court may grant leave to a party to call more expert witnesses than the number specified, the limitation is of little real significance except in the rare case where the party who desires to call more than that number fails to make a timely application for leave to do so.[39] For all practical purposes, Parliament and legislatures have made the limitation an illusory one, without exciting protest. Consequently, the abolition of the limitation altogether will excite no more comment than the Law Reform Commissions of Canada and Ontario have devoted to it.

5. *Should There be a Statutory Requirement of Disclosure of Experts' Reports?*

The trend in provincial rules of court, applicable in civil cases, is toward a requirement of the exchange of experts' reports before trial. The trend is

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[35] [1971] S.C.R. 272; 11 D.L.R. (3d) 673; [1970] 4 C.C.C. 1; 11 C.R.N.S. 235.

[36] Similar limitations are found in some provincial Evidence Acts: Alberta, s. 27; New Brunswick, s. 23; Ontario, s. 12; Saskatchewan, s. 46; Northwest Territories, s. 10; Yukon, s. 10.

[37] Judicial hostility toward expert testimony was expressed, for example, by Jessel M.R., as noted in *Plimpton* v. *Siller* (1877), 6 Ch.D. 412 at 416. The more recent view is expressed in *More* v. *The Queen*, [1963] S.C.R. 522, at 537-38.

[38] And in the corresponding provincial sections: see, *supra*, note 36.

[39] The cases on this and other questions of interpretation of such statutory limitations are collected in Sopinka and Lederman, *The Law of Evidence in Civil Cases* (Toronto: Butterworths, 1974) at 324-26.

resisted by some negligence lawyers but, by and large, one has the impression that it is gaining the ascendancy.

In criminal cases, the defence bar willingly accepts any proposal that the prosecution disclose such reports, but resists any suggestion that the defence be required to do so. The resistance is principally on the ground that to require the disclosure of defence expert evidence would result in too radical an alteration of the present situation, where the state has unlimited funds for, and powers of, investigation including obtaining expert witnesses, compared with the financial resources and facilities available to the defence.

Section 72 of the Federal Code proposes that, before trial, the substance of the proposed expert testimony and the grounds for his opinion must be disclosed to the adversary. The Ontario Commission goes further. It recommends that, by statute, an expert's written opinion, if disclosed before trial, should itself be admissible, with the leave of the court, and that the expert "shall not" testify except by leave of the presiding judge.

Thus both Commissions side with those who advocate the reduction of surprise as a factor in adversary proceedings. Insofar as civil actions are concerned, it is the recommendation of the Ontario Commission upon which attention is likely to be focussed in the years ahead. As the impact of the Federal proposal is principally in criminal cases, but the discussion, both judicial and extrajudicial, has related largely to the civil sphere, I do not propose to do more here than refer the reader to the summary of recent developments in England and Ontario found in the Ontario Report, and refer again to the caution with which any proposal of mandatory disclosure of experts' reports should be made in respect of criminal cases. The subject invites further study, in conjunction with experiments with pre-trial disclosure on a broad plane in criminal cases.

6. *What Use May be Made of Experts Appointed by the Court?*

The court-appointed expert, as a panacea for the unhappiness often engendered by conflicts in expert testimony, has not been welcomed by the profession. Provision has been made for some time, in the rules of court of most jurisdictions, for the appointment of an "independent expert" or "court expert" on the application of a party or on the motion of the court itself.[40]

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[40] See Alberta Rule 218: "in any case where independent technical evidence would appear to be required (including the evidence of an independent medical practitioner) . . . ." Before 1968 there was no such provision but Rule 281 provided that the court might order "any cause, matter or issue to be tried . . . by a judge sitting with assessors . . ." The latter power, once statutory in Ontario, was repealed and likely does not exist as an inherent power: *Phillips* v. *Ford Motor Co. of Canada Ltd.*, [1971] 2 O.R. 637 at 663, 18 D.L.R. (3d) 641 at 667 *per* Evans J.A. The present Ontario Rule 267, narrower than the Alberta rule, limits the power of the court to "obtain the assistance of merchants, engineers, accountants, actuaries, or scientific persons, the better to enable it to determine any matter of fact in question . . . ." Alberta Rule 218(7) already provides that the "court may make . . . further and other directions respecting the carrying out of the instructions by the court expert, including the making of experiments and tests." The rules in the various Canadian jurisdictions are discussed thoroughly up to 1963 by Schiff in *The Use of Out-of-Court Information in Fact Determination at Trial* (1963), 41 Can. B. Rev. 335.

As the commentary to the Federal Code observes, the present power is "rarely used." Section 73 proposes essentially the same power and procedure as is now found in the rules of court. It is not limited as to areas of expertise from which the court may seek help, as is the present Ontario rule. Nor is it limited, as the Ontario rule is by judicial interpretation, by the restriction of the expert's role to that of an interpreter of evidence adduced by others.[41] There being no express limit in section 73 of the expert's function or powers, presumably he may express his opinion not only on the basis of evidence adduced by others, but also on the basis of his own investigations.

The Ontario Commission has also recommended legislation substantially similar to the Alberta rule. Its recommendation is based on the following comment in the Annotation to the U.S. Federal Rule 706:

> The practice of shopping for experts, the venality of some experts, and the reluctance of many reputable experts to involve themselves in litigation, have been matters of deep concern. Though the contention is made that court appointed experts acquire an aura of infallibility to which they are not entitled . . . the trend is increasingly to provide for their use. While experience indicates that actual appointment is a relatively infrequent occurrence, the assumption may be made that the availability of the procedure in itself decreases the need for resorting to it. The ever-present possibility that the judge may appoint an expert in a given case must inevitably exert a sobering effect on the expert witness of a party and upon the person utilizing his services.[42]

Unless the bar and the bench develop some frequency of the use of court-appointed experts, it seems doubtful that "the ever-present possibility" would encourage restraint and caution on the part of experts any more than, at present, the very distinct possibility of opposing expert testimony does. Nevertheless, the Court should have the power recommended by the Canadian and Ontario Commissions, if only because it may be useful, occasionally, in the interest of justice. The dangers of exercising such a power are summarised in the following passage in the Ontario Report:

> . . . the parties' experts are forced to testify in the face of the testimony of another expert who bears 'the accolade flowing from a judicial appointment'. As DeParq, commenting on a similar provision in the Uniform Rules, said:
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> > Although the rules purport to allow the parties to call other experts of their own, they might just as well save their money. The testimony of the court-

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[41] In *Philips* v. *Ford Motor Co. of Canada, id.* at 660-61 (O.R.); 664-65 (D.L.R.), Evans J.A. said:

> [I believe] that the purpose of such appointment is solely to assist the Judge in understanding the evidence. I do not conclude that the trial Judge had any difficulty in understanding the evidence. . . . The most that Mr. McCaffrey was entitled to do was to assist in determining the facts from the evidence. The drawing of inferences, the deciding of issues, the interpretation of the so-called phenomenon and the reaching of conclusions are all matters within the exclusive jurisdiction of the trial Judge and cannot be delegated. I do not think that a court can say, in effect, 'I believe that this accident resulted from some unusual circumstances and I propose to call in an expert to assist me in discovering the cause.' . . . While Rule 267 permits the Court to obtain the assistance of experts in such way as it thinks fit, such assistance must be restricted to the purpose of better enabling the Court to determine from the evidence adduced the questions of fact in issue.

[42] *Supra*, note 2 at 164.

> appointed expert will be accepted as gospel, while any other expert testimony will be sound and fury, signifying nothing.

This may or may not be true, but the parties may feel that the court's appointed expert is in a preferred evidentiary position to one called by a party.

In England, despite similar rules of the Supreme Court permitting the appointment of independent court experts on the application of the parties, the power is seldom used. Lord Denning, M.R. commented in *Re Saxton*:

> Neither side has applied for the court to appoint a court expert. It is said to be a rare thing for it to be done. I suppose that litigants realize that the court would attach great weight to the report of a court expert: and are reluctant thus to leave the decision of the case so much in his hands. If his report is against one side, that side will wish to call its own expert to contradict him and then the other side will wish to call one too. So it would only mean that the parties would call their own experts as well. In the circumstances the parties usually prefer to have the judge decide on the evidence of experts on either side, without resort to a court expert.[43]

In considering proposals of the kind found in section 73, concern has sometimes been expressed that, if the trial judge is sitting alone, he may give undue weight to the opinion of the expert he has selected, and that a jury might do the same if it learns or suspects that a particular expert witness is one whom the judge has selected. To avoid these risks, consideration might be given to a provision that the selection be from a panel agreed to by the parties or by a judge other than the judge presiding at trial.

C. THE ULTIMATE ISSUE

A question which applies to both lay and expert witnesses who are permitted to give opinion evidence, is whether an opinion may be expressed on the very issue which the trier of fact is to decide. This issue is frequently called "the ultimate issue." (There may, of course, be more than one such issue in a case.) At present, when non-expert witnesses are permitted to testify in terms of opinion, they are often allowed to do so with respect to the ultimate issue. Thus, lay witnesses can say "that is the man I saw rob the bank," or "he was drunk — so drunk he couldn't drive," or "that's his handwriting," even though these opinions are expressed in terms of an ultimate issue in the case.

In *R.* v. *Fisher*,[44] Aylesworth J.A. delivered the judgment of the Ontario Court of Appeal. The Supreme Court of Canada was to be in substantial agreement with his judgment.[45] Aylesworth J.A. stated:

> In many instances opinion evidence is received upon the very issue the Court has to decide, as for example, where the issue is the materiality of a representation in an application for insurance: *York* v. *Yorkshire Ins. Co.*, [1918] 1 K.B. 662; *Sun Ins. Office et al* v. *Roy*, [1927] S.C.R. 8 at 13; or where the issue in a marine case is proper seamanship: *Fenwick* v. *Bell* 174 E.R. 825, or in malpractice actions against professional men: *Davy* v. *Morrison*, [1932] O.R. 1 at 9. In *Rex* v. *Mason* (1911), 7 C.A.R. 67, the defence to a charge of murder was that the deceased had committed suicide and a doctor who had heard the evidence was asked whether it was his opinion that the fatal wound was inflicted by someone other

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[43] *Id.* at 162. Footnotes omitted.

[44] [1961] O.W.N. 94; 34 C.R. 320.

[45] *Fisher* v. *The Queen*, [1961] S.C.R. 535; 130 C.C.C. 1; 35 C.R. 107.

> than the deceased. The Court of Criminal Appeal held that his answer was admissible as an opinion based on an assumed state of facts. In *Rex* v. *Holmes*, [1953] 2 All E.R. 324, the same Court decided that a doctor called in support of the accused's plea of insanity might be asked in cross-examination whether the prisoner's conduct after the crime indicated that he knew the nature of his act and that it was wrong, although these are, of course, the very points which determine the applicability of the rules in *M'Naghten's* case. The decision in the *Holmes* case has been approved in the British Columbia Court of Appeal in *Regina* v. *Mathews*, (1953) 17 C.R. 241. There are numerous other examples of the admission of opinion evidence upon the very point in issue.[46]

In *R.* v. *Lupien*,[47] the accused was charged with attempted gross indecency with another male. The trial judge rejected evidence of a psychiatrist, tendered on behalf of the accused, whose testimony was expected to be to the effect that the accused's normal personality and his defence mechanisms would cause him to reject homosexual advances and that he would not knowingly have engaged in them. One of the grounds for rejecting the testimony was the view of the trial judge that the evidence that the psychiatrist was expected to give "comes too close to the very thing the jury had to find on the whole of the evidence." Although the accused's conviction was upheld by the majority of the members of the Supreme Court of Canada, the Court did state that the trial judge erred in rejecting that evidence. With respect to the ground of rejection, that the evidence tendered may be said to have usurped the function of the jury, Hall J. said:

> It is a question where the line between admissibility and inadmissibility is to be drawn. If the evidence was relevant to the defence being put forward on behalf of Lupien, and I think it was, then it was admissible and the learned trial judge erred in rejecting it.
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> It is true, as Davey C.J.B.C. points out in his dissent, that the answer which the psychiatrist was expected to give 'comes too close to the very thing the jury had to find on the whole of the evidence.' I do not think that this is a valid reason for rejecting the evidence.[48]

The proposed Federal Code, section 69, states:

> Testimony in the form of an opinion or inference otherwise admissible may be received in evidence notwithstanding that it embraces an ultimate issue to be decided by the trier of fact.

Thus, if to any extent it can be said that at present the law countenances as a general rule that a witness giving opinion evidence may not do so in terms of the ultimate issue, section 69 would abolish the rule. Since, as is evident from the authorities cited, it is doubtful that there is any such rule today, section 69 cannot be taken to change the law significantly.

The proposed Code is in accord with recent English legislation and the recommendations of the Ontario Law Reform Commission. In 1970, the English Law Reform Committee recommended that:

> the opinion of an expert witness on a matter within his field of expertise should

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[46] *Supra*, note 44 at 341-42 (C.R.). The *Holmes* case was approved by Ritchie J. in *Bleta* v. *The Queen*, [1964] S.C.R. 561 at 566.

[47] *Supra*, note 34.

[48] *Id.* at 279 (S.C.C.); 13 (D.L.R.); 205 (C.C.C.).

> be admissible notwithstanding that it involves the expression of the witness's opinion upon an issue in the proceedings.[49]

The *Civil Evidence Act 1972*[50] reflects the Committee's recommendation:

> 3.(1) Subject to any rules of court made in pursuance of Part I of The Civil Evidence Act 1968 or this Act, where a person is called as a witness in any civil proceedings, his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence.

The Ontario Commission recommends that the Evidence Act provide as follows:

> Where a witness in a proceeding is qualified to give opinion evidence, his evidence in the form of opinions or inferences is not made inadmissible because it embraces an ultimate issue of fact.[51]

D. CONCLUSION

By and large, the issues raised by the Federal Code's provisions as to evidence of opinion have not been of difficulty in Canada. The proposed provisions would not significantly alter the law except in two respects. One is the authority which the Code would give for the admission of evidence of the opinion of a lay witness when it is "helpful . . . . to the trier of fact." More consideration should be given to the consequences of such a provision. The other is the disclosure of the report of a defence expert witness in a criminal case. That suggestion should be approached with care.

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[49] *Supra*, note 11 at 31.

[50] *Supra*, note 13.

[51] *Supra*, note 2, s. 15. Its wording is similar to that of the American provision, *supra*, note 9, Rule 704.