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PEOPLE V. WARD: TOWARD A RECONSTRUCTION OF EXPERT TESTIMONY IN ILLINOIS

Robert G. Spector*

The Illinois Supreme Court, in People v. Ward, adopted a new evidentiary rule governing expert opinions. The Rule is based on Federal Rule 703 and allows the expert to form an opinion based on matters not in evidence. In this Article, Professor Spector considers what types of inadmissible data may be relied on by the expert and whether exclusionary rules should bear on the application of the Rule. Suggestions for implementation also will be made.

[A] psychiatrist is considered qualified to give testimony on mental conditions, but a court overrides the psychiatrist's professional judgment as to the proper tools for use in diagnosing those conditions. There appears to be no support for this anomaly in either medical or legal precedent.¹

Unfortunately, abundant support for this "anomaly" does exist in legal precedent. The legal system's use of expert advice always has been tempered by severe restrictions upon how that advice may be presented in a courtroom. Courts have declared that an expert's opinion must not "invade the province of the jury;"² must not be a "guess or conjecture;"³ must, in some cases, be

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1. *People v. Noble*, 42 Ill.2d 425, 435, 248 N.E.2d 96, 102 (1969).

2. *See, e.g., Armstrong Paint & Varnish Works v. Continental Can Co.*, 308 Ill. 242, 139 N.E. 395 (1923). At one point in time an extensive case literature existed on the problem of identification of the ultimate issue in a case. Those cases held it was improper to ask a witness whether a person could have seen or heard the danger causing the accident. *Chicago, M. & St. P. Ry. v. O'Sullivan*, 143 Ill. 48, 32 N.E. 398 (1892). However, it was proper to ask whether a person could have heard a warning bell. *Barnett v. Chicago City Ry.*, 167 Ill.App. 87 (1st Dist. 1912). This objection received its final death knell in *Merchant Nat'l Bank v. Elgin, J. & E. Ry.*, 49 Ill.2d 118, 273 N.E.2d 809 (1971), where the supreme court allowed expert testimony on the question of whether a railroad crossing was safe. The court noted that since the trier of fact is not required to accept the expert's opinion, the opinion could not possibly invade the province of the jury. Thus, for example, in a malpractice case it is now perfectly correct for an expert to testify that the defendant's acts constituted negligence. *McCallister v. del Castillo*, 18 Ill.App.3d 1041, 310 N.E.2d 474 (4th Dist. 1974).

3. *See, e.g., Marshall v. First American Nat'l Bank*, 91 Ill.App.2d 47, 53, 233 N.E.2d 430, 434 (5th Dist. 1968), quoting *Kane v. Metropolitan Life Ins. Co.*, 310 Ill.App. 524, 530, 34 N.E.2d 732, 735 (1st Dist. 1941).

based on assumptions stated in hypothetical questions;⁴ and may not be based upon the opinion of another expert.⁵

In addition, an opinion could not be based on matters which were not in evidence or were not introducible into evidence.⁶ If the expert's opinion was based on facts not in evidence, the opinion was deemed valueless; if the trier of fact could not find the "facts" the expert used, it could not believe an opinion based on those "facts."⁷ This reasoning, of course, is fallacious. Virtually all opinions are based on knowledge that cannot be proved independently at trial.⁸ The traditional rule's main purpose, however, was to prevent the introduction of hearsay information at trial through the expert's opinion.

The cost of accomplishing this purpose has been great. Both experts and lawyers have criticized⁹ the traditional restrictions for reducing the elicitation of expert testimony to a turgid and stilted performance.¹⁰ Substantial time and effort is wasted in presenting various witnesses whose sole purpose is placing into evidence the data considered by the expert. As a result, the technical problems underlying the law suit often are left unresolved.¹¹

4. See, e.g., *People v. Hester*, 39 Ill.2d 489, 237 N.E.2d 466 (1968).

5. Any contention that this was the rule in Illinois was dispelled by *People v. Noble*, 42 Ill.2d 425, 248 N.E.2d 96 (1969).

6. C. McCORMICK, EVIDENCE §15, at 34 (2d ed. 1972) [hereinafter cited as McCORMICK]; *Mineral Point R.R. v. Keep*, 22 Ill. 9 (1859); *Pritchett v. Steinker Trucking Co.*, 108 Ill. App.2d 371, 247 N.E.2d 923 (4th Dist. 1969).

7. McCORMICK, *supra* note 6, §15, at 34.

8. Rheingold, *The Basis of Medical Testimony*, 15 VAND. L. REV. 473 (1962) provides: Thus, a doctor, in testifying on the cause of a patient's condition, for example, might refer and rely upon what he had observed in examining the patient, upon what the patient has told him of his symptoms, and upon the results of medical tests performed upon the patient. He might add to the information which he has learned in medical texts, and even material that has come to him as part of the ensuing litigation.

9. Hulbert, *Psychiatric Testimony in Probate Proceedings*, 2 LAW & CONTEMP. PROB. 448 (1935); Roberts, *Some Observations on the Forensic Psychiatrist*, 1965 WIS. L. REV. 240 (1965).

10. This is particularly true of the hypothetical question method of eliciting testimony. While originally an ingenious device permitting experts who had no first-hand knowledge to aid the fact-finder, it has become a time-consuming process which has been abused. The method has been characterized as "the most horrific and grotesque wen on the fair face of justice." L. HAND, NEW YORK BAR ASSOCIATION LECTURES AND LEGAL TOPICS 1921-22 (1922).

11. Rules of evidence, developed years ago and applicable supposedly to all witnesses, absorbed with questions of admissibility and not with proof, persuasion, and the discovery of truth are being imposed in many jurisdictions to

People v. Ward: A TENTATIVE STEP

The Illinois Supreme Court has taken a step toward a more realistic approach regarding what is permissible as the basis of an expert opinion. In *People v. Ward*,¹² the defendant, charged with murder, raised the defense of temporary insanity. In rebuttal, the state called a psychiatrist, the director of the Psychiatric Institute of the Circuit Court of Cook County, who testified that in his opinion the defendant was sane at the time of the homicide. The factors relied upon by the psychiatrist in formulating this opinion included: psychological results compiled by a psychologist connected with the Psychiatric Institute, an examination of the defendant supervised by the testifying psychiatrist but actually conducted by another psychiatrist, and reports from other institutions concerning the defendant's behavior while an inmate of those institutions. No attempt was made by the prosecution to introduce this material into evidence.

The defendant was convicted and this verdict was affirmed by the appellate court.¹³ Although the defendant had not objected to the opinion at the trial, and actually had urged that the reports underlying the psychiatrist's opinion be admitted, the supreme court proceeded to discuss the question whether the psychiatrist's opinion could be based on non-admitted factors.¹⁴ The court noted that the factors used by the psychiatrist normally would not have been admissible.¹⁵ Prior Illinois cases had held that it

prevent that free and full use of basic facts necessary to reach a correct and just solution of a case involving a medical issue.

Rheingold, *supra* note 8, at 475.

12. 61 Ill.2d 559, 338 N.E.2d 171 (1975).

13. *People v. Ward*, 19 Ill.App.3d 833, 313 N.E.2d 314 (1st Dist. 1974).

14. The *Ward* opinion is open to several different interpretations. For example, the data relied upon by the psychiatrist would have been admissible had it been offered with the proper witnesses. See *People v. Noble*, 42 Ill.2d 425, 248 N.E.2d 96 (1969). Thus, *Ward* could be construed as holding only that the expert's opinion is admissible when the data underlying the opinion would have been admissible if properly offered, and if the defendant failed to object. Under this reading, the second part of the opinion discussing the admissibility of an opinion based on non-admissible data is dicta.

15. ILL. SUP. CT. R. 236b provides that hospital and medical records are not admissible under the business records exception to the hearsay rule. Rule 236b applies only to civil cases. ILL. REV. STAT. ch. 38, §115-5(c)(1) (1975) applies to criminal cases. *People v. Gauer*, 7 Ill.App.3d 512, 288 N.E.2d 24 (2d Dist. 1972). It should be noted that the rule and statute only provide that medical and hospital records are inadmissible as business records. It does not make the data contained in records completely inadmissible. Thus, in *Ward* if the psychologist had been present in court, he could have testified about the psychological

was error to predicate an expert's opinion of sanity on records not admitted into evidence.¹⁶

The court observed the trend in some jurisdictions away from the rule that an expert must base an opinion on data admissible in evidence,¹⁷ and noted that the newly enacted Federal Rule of Evidence 703 is contrary to the traditional rule.¹⁸ The court quoted Rule 703 and its commentary with approval. Following the Federal Rule, the court concluded that because the factors used by the psychiatrist are factors normally utilized by psychiatrists in arriving at an opinion on sanity, the opinion was admissible even though the underlying factors were not testified to directly by those administering the tests.¹⁹

The breadth of the court's holding remains unsettled. At one point the court seems to indicate that the holding may be restricted to opinions regarding sanity based on the type of factors present in the *Ward* case itself.²⁰ However, the better view would

tests given the defendant. The psychiatrist could then have given an opinion based on the psychologist's in-court testimony. The difficulty in *Ward* was that the psychologist's testimony was contained in a non-admissible hospital record.

It should be noted also that hospital records may be admitted under other exceptions to the hearsay rule such as past recollection recorded, *Wolf v. Chicago*, 78 Ill. App.2d 337, 223 N.E.2d 231 (1st Dist. 1966), or as admissions, *Stewart v. DuPlessis*, 42 Ill. App.2d 192, 191 N.E.2d 622 (1st Dist. 1963).

16. Specifically, the court refers to *People v. Black*, 367 Ill. 209, 10 N.E.2d 801 (1937) in which the defendant raised an insanity defense. On rebuttal, the state called a qualified psychiatrist to testify that the defendant was sane. The psychiatrist admitted that his opinion was based, among other things, upon the reports of social workers, psychiatric and medical examinations, and psychological tests made and conducted by others. The court held the admission of the opinion to be prejudicial error. See also *Louisville, N. A. & Co. Ry. v. Shires*, 108 Ill. 617 (1884). Insofar as the *Black* case differs from *Ward*, the *Black* opinion has been overruled. 61 Ill.2d at 568, 338 N.E.2d at 177.

17. See, e.g., *People v. Sugden*, 35 N.Y.2d 453, 323 N.E.2d 169 (1974). However, a relaxation of the rule has occurred in a few Illinois cases which have permitted an expert to base an opinion on data not actually in evidence so long as this data would have been admissible in evidence. See, e.g., *People v. Gillespie*, 24 Ill.App.3d 567, 321 N.E.2d 398 (2d Dist. 1974); *Rivera v. Rockford Machine & Tool Co.*, 11 Ill.App.3d 641, 274 N.E.2d 828 (1st Dist. 1971).

18. FED. R. EVID. 703 [hereinafter cited as RULE 703] provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. *If 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.* (emphasis added by the *Ward* court)

19. 61 Ill.2d at 567, 338 N.E.2d at 176.

20. For these reasons we are of the opinion that insofar as *People v. Black* applies to the admission of expert medical opinion as to an accused's sanity

be that the *Ward* opinion adopted Rule 703. In quoting the Rule, the court italicized and emphasized the second sentence²¹ which is not limited to sanity or even to medical expert opinion. Because non-medical as well as medical experts normally rely on non-evidentiary data in arriving at an opinion, there is no reason to distinguish between the two with regard to what may constitute the basis of their opinions.

The adoption of Rule 703 expands the data which can be used to form expert opinions. However, in an attempt to promote other considerations, the law of evidence may restrict the use of certain data even though a given profession considers it reliable.²² This Article first will examine the types of data which may be used by the expert under the new Rule.²³ It will then consider whether exclusionary rules should be applied to exclude opinions based on data which the expert considers reliable but the legal community does not favor. Finally, it will consider methodology and suggestions for the implementation of Rule 703.

based, in part, on medical or psychological records compiled by others, which are not admitted into evidence, that decision is no longer to be given effect.

Id.

21. See note 18 *supra*.

22. This problem is raised by the adoption of Rule 703. Under the traditional rule, the data used by the expert in arriving at an opinion had to be admissible into evidence. When that data was introduced the court would, upon proper objection, consider the data in light of relevancy standards, the best evidence rule, and other exclusionary policies. If the data need not be introduced, the question arises whether the trial judge should apply those rules to the basis of an expert's opinion.

23. There is a type of data to which the traditional rule never applied. All experts must be qualified as such in order to render an opinion. *Mahlstedt v. Ideal Lighting Co.*, 271 Ill. 154, 110 N.E. 795 (1915). This is normally accomplished by reciting the education and experience of the witness in the particular field. However, much of the information obtained by the witness that made him an expert is not provable at trial. Further, it is axiomatic that the expert relies on this prior education and experience in arriving at an opinion. Of course, it would be ridiculous to attempt to say that all educational and experiential background factors must be provable at trial. Were that the case, no one would ever be able to render an expert opinion, and practically all courts have so recognized. See the cases cited in Rheingold, *supra* note 8.

The only time the traditional rule was thought to be applicable was when an expert referred to some specific past event in his experience as part of the basis of his opinion. Here it seems that Rule 703 would clearly allow the use of this past incident over any hearsay objection. Experts always compare present situations with past situations. The isolation of individual past situations is simply classifying the general past experience, which itself is already an acceptable basis.

APPLICATION OF 703 TO CERTAIN TYPES OF DATA

Admissible Data

One aspect of Rule 703 is often overlooked. Properly applied, the Rule should save a considerable amount of trial time. The Rule not only allows the expert to rely on inadmissible data, it also permits him to base an opinion on data which although admissible is not offered in evidence. Thus it no longer will be necessary to call a large number of witnesses whose sole function is to present the data to the trier of fact in preparation for the expert's opinion.²⁴ As was done in *Ward*, the expert simply may give his opinion with the tremendous corresponding savings of trial time and effort.

Medical Records

Much of the data upon which an expert relies can be classified as hearsay. It is information received out of court and not subject to cross-examination. Because of this lack of cross-examination, some courts have refused to allow an expert to base an opinion on specific out-of-court information.²⁵

Under one analysis, there is no problem in allowing the expert to rely on out-of-court information. This line of reasoning correctly points out that the basis of an expert's opinion cannot be considered hearsay. Out-of-court statements are only hearsay when offered for the truth of the matter asserted in the statement.²⁶ The information relied upon by the expert is not offered for its truth, but rather to explain how the expert arrived at his opinion.²⁷

However, most courts have recognized that when basis information is presented to the fact-finder through the expert's testimony hearsay dangers are present even though the information is technically not hearsay.²⁸ The question then is the extent to

24. Advisory Committee's Comment to FED. R. EVID. 703.

25. See, e.g., *Jenson v. Elgin, J. & E. Ry.*, 24 Ill.2d 383, 182 N.E.2d 211 (1962).

26. FED. R. EVID. 801(c); McCORMICK, *supra* note 6, §246, at 584.

27. Several courts and commentators have agreed with this statement. *Tierney v. Charles Nelson Co.*, 19 Cal.App.2d 34, 64 P.2d 1150 (1937); J. WIGMORE, EVIDENCE §1720 (3d ed. 1940); Ray, *Testimony of Physician as to Plaintiff's Injuries*, 26 TUL. L. REV. 60 (1951).

28. See, e.g., *American Luggage Works, Inc. v. United States Truck Co.*, 158 F. Supp. 50 (D. Mass. 1937). The information forming the basis of a hypothetical question is

which Rule 703 allows an expert to use this hearsay-type information.²⁹ Rule 703 should allow the expert to use most hearsay-type data, if the data is of a type that other experts in the field use and rely upon in arriving at conclusions and inferences.

Of particular interest to Illinois is that the Rule allows the expert to use hospital and medical records in arriving at an opinion.³⁰ Although Illinois does not view medical records as inherently untrustworthy,³¹ they are not considered sufficiently reliable to be regularly admissible as business records. Despite being viewed as unreliable for legal purposes, it is undisputed that hospital and medical records are essential to experts for purposes of diagnosis and treatment. A doctor relies on x-rays and the interpretation of an x-ray by a radiologist. A surgeon relies on reports from other doctors as to a patient's ability to undergo surgery. Doctors rely on statements in medical records from nurses and others regarding the patient's progress and reaction to medicines. Therefore, under Rule 703, a doctor or other medical professional now should be permitted to use statements or writings from other medical professionals in arriving at an opinion. Indeed, the point is probably specifically covered by *People v. Ward*³² which allowed a psychiatrist to use statements by a psychologist in arriving at an opinion.³³

normally presented, in an acceptable form, to the fact-finder, at another time during the trial. When the information is used as the basis of an expert's opinion, it will have to be accompanied by an instruction indicating the purpose for which this information is to be considered, provided it is not considered hearsay. The possibility that a jury would be able to follow such an instruction seems to be remote. See Advisory Committee's Note to FED. R. EVID. 803(4).

29. Of course, if the information already qualifies as an exception to the hearsay rule, there is no problem.

30. See note 15 *supra*. Illinois has differed from most states as to the admissibility of hospital and medical records as business records. While admissible in other jurisdictions, they are inadmissible in Illinois.

31. Medical records may, under certain circumstances, be admissible as past recollection recorded or as an admission.

32. 61 Ill.2d 559, 338 N.E.2d 171 (1975).

33. Much of what has been said concerning hospital and medical records also applies to police records. The same rules that exclude hospital and medical records as business records also apply to police records. See note 15 *supra*. However, insofar as experts would normally rely on data contained in police records in arriving at an opinion, Rule 703 would apply. The pertinent query would be directed to the type of data contained in the police record. The fact that the data was contained in a police record should not mean that an expert may not use it. Thus, there is a distinction between the past history of a defendant contained in police files when used by a psychiatrist to arrive at an opinion on sanity, and the report of a witness to an auto accident contained in a police accident report.

Such an interpretation of Rule 703 does not mean that statements from one medical professional to another are trustworthy enough to be admissible as an exception to the hearsay rule. The Fifth Appellate District seems to have misconstrued *Ward* in that respect. In *Smith v. Williams*,³⁴ an attending hospital physician testified that he sent the plaintiff to have a conference with a staff psychiatrist. He then relied on the psychiatrist's report in prescribing medicine for the plaintiff. The psychiatrist's report was part of the basis of the physician's opinion at trial.

The court held that under *Ward* the psychiatrist's report to the physician was admissible as an exception to the hearsay rule. While such a result may be desirable, it does not follow from the *Ward* opinion. There is a clear distinction between data that is trustworthy enough to qualify as an exception to the hearsay rule, and data that is inadmissible but usable by experts in arriving at an opinion because it is relied upon by experts in the field.

Statements Made to Testifying Physicians

Illinois has a long history of distinguishing between statements made to a treating and a testifying physician for purposes of admissibility as an exception to the hearsay rule. For example, a plaintiff who has been injured in an automobile accident may go to a physician for purposes of treatment. That physician is allowed to testify as an expert at trial because as a treating physician he has first-hand knowledge of the patient's medical problems. While part of his information has been obtained from the patient, that information is admissible as an exception to the hearsay rule.³⁵

34. 34 Ill.App.3d 677, 339 N.E.2d 10 (5th Dist. 1975).

35. A statement made by a patient to his doctor is admissible on the theory that the patient, in his desire to be cured, will not fabricate stories. *Grieske v. Chicago City Ry.*, 234 Ill. 564, 85 N.E. 327 (1908). Insofar as the statements are necessary for treatment and diagnosis, they may relate to the cause of the accident and the manner in which it occurred. *Shell Oil Co. v. Industrial Comm'n*, 2 Ill.2d 590, 119 N.E.2d 224 (1954); *Cuneo Press Co. v. Industrial Comm'n*, 341 Ill. 569, 173 N.E. 470 (1936). Whether this rule extends to statements made to the physician by the patient's parents is unsettled in Illinois. *Compare Welter v. Bowman Dairy Co.*, 318 Ill.App. 305, 47 N.E.2d 739 (1st Dist. 1943) (admissible), *with Behles v. Chicago Transit Auth.*, 346 Ill.App. 220, 104 N.E.2d 635 (1st Dist. 1952) (inadmissible).

Statements made to lay persons do not fall within the exception. Indeed, a lay person cannot even testify as to the substance of a statement of pain and suffering. *Lauth v. Chicago Union Traction Co.*, 244 Ill. 244, 91 N.E. 431 (1910).

However, before trial, the plaintiff may consult another physician solely for the purpose of having that physician testify as an expert at trial. This second physician normally may not render an opinion based on any statements made to him by the patient.³⁶ He must give his opinion as an answer to a hypothetical question since he is considered to have no personal knowledge of the underlying medical problems.³⁷

Statements made to testifying physicians were barred by the hearsay rule on the grounds that they were untrustworthy. It was felt that the patient, envisioning a large damage award, would probably exaggerate his symptoms to the testifying physician.³⁸ The guarantee of trustworthiness of statements to treating physicians, *i.e.*, the desire to be cured, is not present in statements to testifying physicians.

Under Rule 703, statements to testifying physicians still are inadmissible in Illinois as an exception to the hearsay rule. However, testifying physicians should be able to use them in arriving at an opinion.³⁹ Although it may be true that a patient has an

36. A testifying physician can only testify to objective symptoms, and not subjective symptoms, unless the physician testifies via the hypothetical question route. *People v. Hester*, 39 Ill.2d 489, 237 N.E.2d 466 (1968). This distinction between objective and subjective symptoms has led to some absurd and irreconcilable cases. Thus, an inability to flex finger muscles is a subjective symptom. *Barnes v. Chicago City Ry.*, 147 Ill.App. 601 (1st Dist. 1909). However, the flexing of the knees and feet is an objective symptom. *Hirsch v. Chicago Consol. Traction Co.*, 146 Ill.App. 501 (1st Dist. 1909).

37. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

Statements made for the purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

FED. R. EVID. 803(4).

The Advisory Committee Comments on this section noted that:

Conventional doctrine has excluded from the hearsay exception, as not within its guarantee of truthfulness, statements to a physician consulted only for purposes of enabling him to testify. While these statements were not admissible as substantive evidence, the expert was allowed to state the basis of his opinion, including statements of this kind. The distinction thus called for was one most unlikely to be made by juries. . . . This position is consistent with the provision of Rule 703 that the facts on which an expert testimony is based need not be admissible in evidence if of a kind ordinarily relied upon by experts in the field.

38. *Jensen v. Elgin, J. & E. Ry.*, 24 Ill.2d 383, 182 N.E.2d 211 (1962).

39. This would require overruling some Illinois cases to the contrary. *See, e.g., People v. Hester*, 39 Ill.2d 489, 237 N.E.2d 466 (1968), where the opinion of a testifying psychiatrist was held inadmissible because based on interviews with the patient.

interest in presenting only favorable data to the physician, the physician is trained to take the bias of the patient into account. Much of the data necessary for a diagnosis can be supplied only by the patient, particularly in psychiatric diagnoses. Because this data is heavily relied upon by experts in the field, the physician should be allowed to use it in arriving at an opinion. Any difficulty with the information conveyed to the expert, as well as the expert's own bias, can be brought out on cross-examination of the expert.⁴⁰

Scientific Tests and Devices

Experts may utilize certain scientific test results, techniques, and statistics in their practice. Often the expert has no first-hand knowledge as to the accuracy of the tests or statistics. For example, a doctor may have a chemist perform certain tests on blood or tissue. An architect may have a metallurgist perform tests on material. At trial, the expert presents an opinion based on the test results or statistics which may not have been admitted and in some cases may be inadmissible. Because these tests are generally acceptable in the scientific community, clearly they could form part of the basis of an opinion even if not offered into evidence.

The use of statistics by experts is illustrated by the case of *People v. Gillespie*.⁴¹ In that case the defendant was indicted for robbery. There were no eye-witnesses. As part of an entirely circumstantial evidence case, the state introduced blood samples taken from the scene of the crime, from the defendant's car, and from the defendant. Upon analysis, the blood in all cases proved to be type A with a positive rheumatoid arthritis factor. The state then called a serologist who testified that statistics indicated that only 2.7 per cent of the Black population would have blood of that classification.⁴² The expert had no independent knowledge as to

40. Of course, it may be difficult for a jury to follow the instruction that a judge probably would have to give at this point. It would have to be told that the information conveyed to the physician could be used only for the purpose of showing how the expert arrived at his opinion but not as substantive evidence. The jury's difficulty in making this distinction would point to the adoption of Federal Rule of Evidence 803(4) as the most desirable method of reform in this area.

41. 24 Ill.App.3d 567, 321 N.E.2d 398 (2d Dist. 1974).

42. The *Gillespie* case is unique in several ways. It is practically the only case in which

the accuracy of the statistics, which had been circulated by a pharmaceutical company that supplied blood.

The court resolved the problem by declaring that the pharmaceutical statistics were independently admissible by analogy to mortality tables⁴³ and learned treatises.⁴⁴ This argument was buttressed by the court's observation that since the company had an interest in supplying accurate information in order to stay in business, these statistics could be considered trustworthy. Under Rule 703 it probably is not necessary for the court to go so far. The serologist had testified that these statistics were generally relied upon by serologists. Thus, the requisites of Rule 703 would be satisfied and the serologist could use the statistics in arriving at an opinion.

Hypnosis

While the blood type data of *Gillespie* may be independently admissible into evidence, there is some "scientific" data that usually is not admissible. Information obtained through hypnosis

blood-typing has been used as an inculpatory factor. See ILL. REV. STAT. ch. 106½, §1 (1975). It is also practically the only case where percentages have been used as a method of identifying a particular person or item.

There has been considerable discussion recently regarding the probity of using probability theory as a method of identification. All courts have rejected its use, usually on the grounds that there was no proof of the existence of the individual probabilities and that there was no basis to show that the individual probabilities were mutually independent. See *People v. Collins*, 68 Cal.2d 319, 438 P.2d 33, 66 Cal. Rptr. 497 (1968). The *Collins* court also pointed out that the balancing of numerical and non-numerical probabilities was extremely difficult for the average juror and defense counsel.

Most of the problems were avoided in *Gillespie*. First, the expert testified only as to the existence of certain blood-types in percentage form. He did not attempt to give an opinion from the percentages as to the robber's identity. Second, there appeared to be independent proof of the per cent of the population containing that particular blood-type. That independent proof was the pharmaceutical figures noted in the text. Third, it was clear from scientific studies that the factors were mutually independent.

However, there is still much to criticize in terms of the relationship of the testimony to the defendant and to the sample population. As many commentators have pointed out, mere comparison with a random man is relevant to identity, but alone it will not give a probability of identity. See, e.g., Braun & Kelly, *Playing the Percentages and the Law of Evidence*, 1970 ILL. L. F. 23; Dodd, *The Scope of Blood Grouping in the Elucidation of Problems of Paternity*, 9 MED. SCI. & LAW 56 (1969); Finkelstein & Fairley, *A Bayesian Approach to Identification Evidence*, 83 HARV. L. REV. 489 (1970); Sweet & Elvins, *Human Bloodstains: Individualization by Cross Electroimmunodiffusion*, 192 SCIENCE 1012 (1976).

43. *Henderson v. Harness*, 184 Ill. 520, 56 N.E. 786 (1900).

44. FED. R. EVID. 803(18).

is illustrative of this category. A psychiatrist in arriving at an opinion on the sanity of an individual may obtain certain information from that individual by hypnosis. Generally, statements obtained from a subject under hypnosis are not admissible into evidence.⁴⁵ Scientific opinion is divided on the trustworthiness of the techniques used for obtaining the statements and on the trustworthiness of the statements once obtained. This lack of scientific agreement generally would be enough to exclude such statements if offered into evidence.⁴⁶ However, an increasing number of psychiatrists employ hypnosis as part of their treatment.⁴⁷ Should this increasing reliance mean that a psychiatrist could use such statements as part of the basis of an opinion? Again it seems as if the psychiatrist should be allowed to do so. Rule 703 does not require that all experts utilize the technique before this particular expert may use it. It only requires that experts in a particular field, *e.g.*, psychiatry, would reasonably rely on the technique. The increasing use of hypnosis as a method of treatment and of obtaining information for purposes of treatment should be sufficient for the purposes of Rule 703. Indeed, if

45. Most courts confronted with the question of the admissibility of opinion testimony based upon statements induced under hypnosis have analyzed it either as analogous to statements obtained through the use of the polygraph and truth drugs, *see, e.g.*, *People v. Hiser*, 267 Cal.App.2d 47, 72 Cal. Rptr. 906 (1968), or on the basis of supposed unreliability of statements made by a hypnotic subject. *See, e.g.*, *Greenfield v. Commonwealth*, 214 Va. 710, 204 S.E.2d 414 (1974). *But see People v. Modesto*, 59 Cal.2d 722, 382 P.2d 33, 31 Cal. Rptr. 225 (1963) (admissibility rests within the sound exercise of discretion by the trial judge); *State v. Harris*, 214 Ore. 224, 405 P.2d 492 (1965); *Harding v. State*, 5 Md.App. 230, 246 A.2d 302, *cert. denied*, 395 U.S. 949 (1968).

Not surprisingly, the controversy regarding the admissibility of expert opinion premised upon hypnotically-induced statements reflects the unsettled state of the credibility of hypnosis existing in the scientific areas of knowledge. Although the practice of hypnosis is perhaps as ancient as human history, and the phenomena exhibited by subjects under hypnotic influence is well-catalogued, the nature and source of hypnosis itself remains a mystery to scientists as well as lawyers. *See generally* D. CHEEK & L. LECRON, *CLINICAL HYPNOTHERAPY* (1968); E. FROMM & R. SHOR, *HYPNOSIS RESEARCH, DEVELOPMENTS AND PERSPECTIVES* (1972).

46. *Cf. People v. King*, 266 Cal.App.2d 437, 72 Cal. Rptr. 478 (1968). However, a respectable opinion indicates that such lack of agreement should go to the weight of the testimony as opposed to its admissibility. MCCORMICK, *supra* note 6, §203, at 491.

47. *See, e.g.*, D. CHEEK & L. LECRON, *CLINICAL HYPNOTHERAPY* (1968); E. FROMM & R. SHOR, *HYPNOSIS RESEARCH, DEVELOPMENTS AND PERSPECTIVES* (1972); Brunn, *Retrograde Amnesia in a Murder Suspect*, 10 AM. J. CLIN. HYPNOSIS 209 (1968); Conn, *Is Hypnosis Really Dangerous?*, 20 INTERNAT'L J. CLIN. & EXPER. HYPNOSIS 61 (1972); and Hartland, *An Alleged Case of Criminal Assault Upon a Married Woman Under Hypnosis*, 16 AM. J. CLIN. HYPNOSIS 188 (1974).

the trial judge found as a preliminary question under Rule 104(a),⁴⁸ that an acceptable number of psychiatrists rely on hypnosis for purposes of treatment, then an opinion using information so obtained should be admissible.⁴⁹

Polygraphs

A more extreme situation concerns the use of the polygraph or lie detector. Virtually all courts agree that the polygraph has not achieved sufficient trustworthiness for its results to be admitted into evidence.⁵⁰ Assume, however, that a psychiatrist wishes to test certain statements made to him by the patient and suggests that the patient undergo a polygraph test. The psychiatrist then uses the results of the test to evaluate the patient's statements and to form an opinion as to the patient's sanity.

It appears that Rule 703 would not cover such a situation. There is nothing in psychiatric literature indicating that lie detectors are an acceptable or reasonable means for evaluating patients' statements. The only indications of reliability are given by a different field, *i.e.*, the polygraph operators themselves. Their agreement is not sufficient to render polygraph results acceptable for psychiatrists' use. There would have to be some indication of their increased use and reliance by psychiatrists in order for polygraph results to be acceptable as the basis of an expert opinion on sanity.⁵¹

48. FED. R. EVID. 104(a) provides:

Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court . . . In making its determination it is not bound by the rules of evidence except those with respect to privileges.

The procedure is the same in Illinois. *People v. Guido*, 321 Ill. 397, 152 N.E. 149 (1926).

49. How many is an acceptable number is something best left to the trial court's discretion. The only thing that is clear is that the expert must show that experts other than himself also rely on the same technique.

50. *See, e.g.*, *State v. Valdez*, 91 Ariz. 274, 371 P.2d 894 (1962); Skolnick, *Scientific Theory and Scientific Evidence: An Analysis of Lie-Detection*, 70 YALE L.J. 694 (1961). However, one recent case has admitted polygraph results. *United States v. Riddling*, 350 F. Supp. 90 (E.D. Mich. 1972).

51. This does not mean, however, that the expert's opinion is inadmissible. If the use of the polygraph is only incidental and not essential to the psychiatrist's opinion, the references to it could simply be stricken. This would be particularly true if the psychiatrist independently arrived at the same result as the polygraph. The mere use of the polygraph does not make the opinion inadmissible *per se*. It would only do so when the polygraph results are essential to the finding of the expert.

AUXILIARY EXCLUSIONARY POLICIES

Adoption of Rule 703 raises the question whether other exclusionary rules should militate against allowing an expert to use certain types of data, even if the trial judge finds that such data generally is relied upon by experts in the field. This problem did not arise under the traditional rule. Under Rule 703, however, data may be communicated to the trier of fact when the expert testifies as to the basis of his opinion. This data, if introduced substantively, might be subject to an exclusionary rule. The question raised is whether the data also should be excluded when it is part of the basis of an expert's opinion.

Prejudice

One of the most common reasons for excluding otherwise probative data is that the probative value of the evidence is outweighed by its prejudicial effect.⁵² Thus, courts commonly exclude evidence of the defendant's past crimes unless the probative value of the evidence for issues other than the defendant's character is clearly established.⁵³

Should an expert be allowed to use such information in forming an opinion? For example, could a psychiatrist use the defendant's past criminal record as a factor in determining the defendant's sanity. Here there is no question whether the data is the type psychiatrists rely on in arriving at an opinion on sanity. The problem presented is whether the fact-finder can be trusted not to misuse the data and to convict the defendant on the ground that the data shows the defendant to be a person who ought to be incarcerated regardless of guilt or innocence of the crime charged.⁵⁴ This exclusionary rule should not necessarily prevent

52. FED. R. EVID. 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

For an exhaustive treatment of this concept, see Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 SO. CAL. L. REV. 220 (1976). For an analysis of how the concept operates in one area see Spector, *Impeachment Through Past Convictions: A Time for Reform*, 18 DEPAUL L. REV. 1 (1968).

53. See, e.g., FED. R. EVID. 404(b).

54. An Illinois case raising this question is *People v. Graham*, 25 Ill.App.3d 853, 323 N.E.2d 441 (3d Dist. 1974). The state's psychiatrist testified that he had received a report

the expert from using the data. Admissibility usually is determined by balancing the probative value of the evidence against the undue prejudice arising from the evidence. Thus, the need for the expert's opinion must be balanced against the possibility of prejudice to the defendant.

It is axiomatic that the probative value of a piece of evidence rises or falls depending on the purpose for which it is introduced. Thus a piece of evidence may be admissible for one purpose but not for another.⁵⁵ This doctrine of alternative admissibility is the cornerstone of relevancy and is essential to the operation of the evidence system.⁵⁶ The jury is instructed for what purpose it may use the evidence, and it is generally assumed that it is capable of following those instructions. The present problem is merely one more example of a case in which the jury should be instructed to use the evidence only for the basis of the expert's opinion and not as substantive evidence of guilt or innocence.⁵⁷

Illegally Obtained Evidence

Some evidence is excluded, not because it is prejudicial, but because it was obtained illegally, in violation of the United States Constitution.⁵⁸ Should constitutional considerations require the exclusion of an expert opinion based on data that would be excluded for constitutional reasons if offered substantively? Certainly violation of the Fourth Amendment or the *Miranda* rules does not foreclose use of the data for all purposes.⁵⁹ In determining

of the "charges and happenings." The court felt that it was clear in this case that the expert had used only that part of the report that was brought out by witnesses at trial. In addition, the defendant did not cross-examine the expert to determine whether he had used any other part of the report. It is unclear what the result would have been had the expert used the defendant's past criminal record in arriving at his opinion.

55. *People v. Pfanschmidt*, 262 Ill. 411, 104 N.E. 804 (1914).

56. *See James, Relevancy, Probability and the Law*, 29 CAL. L. REV. 689 (1941).

57. This does not mean, of course, that the opinion based on the defendant's record is always admissible. Ordinarily the balance should be struck in favor of admissibility. However, there may be cases where the probative value of the expert's opinion is very low and the prejudicial effect of the opinion based on the defendant's past record is very high. In these cases it would appear that the trial judge has the discretion under Rule 403 to exclude the evidence.

58. *See, e.g., Mapp v. Ohio*, 367 U.S. 643 (1961); *Miranda v. Arizona*, 384 U.S. 436 (1966).

59. *Cf. Harris v. New York*, 401 U.S. 222 (1971), where a statement taken in violation of the *Miranda* standards was admitted to impeach a testifying defendant.

whether to admit an expert's opinion based on such data a court should consider the following factors:

[One] factor will be whether the doctor's opinion can be given without revealing the illegally obtained information to the jury, or stultifying cross-examination. Another matter to be considered is whether the deterrence value of the rule of exclusion is not greatly affected, as, for example, if the violation was not deliberately designed to obtain information for the expert. The importance of the issue and of the expert needs to be considered. A certain psychiatrist may be a critical witness on a sanity issue while an accidentologist may not be.⁶⁰

Thus, the conclusion here is the same as that reached in considering prejudicial evidence. The trial judge has the discretion to exclude if the dangers inherent in the reason for the exclusionary rule outweigh the need and probative value of the expert's opinion.

Other Exclusionary Rules

Occasionally a writing is excluded from evidence because it is not an original and the proponent of the writing cannot account for the original's absence.⁶¹ This "best evidence" objection should not prevail when directed against the basis of an expert opinion. Any questions of accuracy that would arise because the expert considered data contained in a carbon copy of a report could be brought out on cross-examination.

Other exclusionary policies relate to the foundation necessary to admit "real evidence" as opposed to testimony. The proponent of the item must establish a chain of custody for the item before it is admissible. This assures the fact-finder that the item introduced is the same as is in controversy.⁶² In addition, if the condition of an item is relevant, the proponent must show that it is in the same condition now as it was at the time of the incident.⁶³ Traditionally, these rules were thought to apply to the basis of an expert opinion. Therefore, if an opinion was based upon examina-

60. 3 J. WEINSTEIN & R. BERGER, WEINSTEIN'S EVIDENCE ¶ 703-16 (1975).

61. FED. R. EVID. 1002; E. B. Conover & Co. v. Baltimore O. S. W. R.R., 212 Ill.App. 29 (3d Dist. 1918).

62. People v. Berkman, 307 Ill. 492, 139 N.E. 91 (1923).

63. Chicago Term. Trans. R.R. v. Korando, 129 Ill.App. 620 (1st Dist. 1906).

tion of an object, it was necessary to show that the object was the one in question and that its condition was unchanged.

It would seem that Rule 703 leaves unchanged the chain of custody requirement. An expert opinion must still be relevant. It is not relevant until it can be shown that the opinion was based upon an examination of the item in question. Independent evidence of that fact still is necessary.

However, the "no change of condition" requirement may be modified by Rule 703. If it can be shown what changes have taken place and if the expert can take those changes into account, the opinion should be allowed. The court at the preliminary question stage would have to determine whether the item is so changed that any expert opinion would be valueless, or whether the change would have only a minor effect upon the ability of the expert to give an opinion. If the latter, any changes in condition can go to weight as opposed to admissibility.⁶⁴

Untrustworthy Data

The Comment to Rule 703, in discussing the type of data reasonably relied upon by experts in the particular field, indicates that this language would not warrant admitting an opinion of an accidentologist concerning the point of impact based on bystanders' reports. There is some question as to the rationale of the Advisory Committee's Comment. Under one interpretation, the Committee simply could be noting that accidentologists do not rely on statements of bystanders. Therefore, if such an expert purports to do so, he is attempting to use data not relied upon by experts in the field. The difficulty with this interpretation is that if the bystander testified in court before the expert, the expert could use that testimony along with other data in arriving at an opinion. Thus, it is data that accidentologists sometimes use. However, if the bystander does not testify, the accidentologist may not include his statement among the data the accidentologist considers.

This suggests that the Advisory Committee feared that expert opinions will be substituted for eyewitness testimony. Eye-

64. Cf. *Gieke v. Chicago Great W. R.R.*, 289 Ill.App. 45, 6 N.E.2d 690 (1st Dist. 1937), where the court noted that if the change in condition did not affect the probative value of the item, it would be admitted.

witness testimony is important, but it is subject to influences relative to the background of the witness. These background factors can be brought out on cross-examination, but only if the eyewitness testifies. Thus, the Advisory Committee Comment may indicate that cross-examination of eyewitness testimony is necessary because the winnowing of the information through the mental process of the expert does not sufficiently guarantee trustworthiness of the testimony.

If this is the case, then a possible further limitation is placed on the data usable by the expert. That is, even if the data is relied upon by experts in the field, the court may find that the data is legally untrustworthy unless the witness supplying the data is available for cross-examination. In considering this question, the court should balance the need of the expert to rely on this data against the hearsay dangers inherent in uncross-examined testimony. Thus, for example, it has long been recognized that medical professionals must use statements from lay people in order to render treatment adequately. The medical profession considers such statements to be reliable.⁶⁵ The same is true regarding the use of background data supplied by lay people in condemnation valuation cases.⁶⁶ In these areas the need clearly outweighs any hearsay dangers. On the other hand, there may be situations in which the court may consider the hearsay dangers so great that it would not admit the opinion unless the person who conveyed the data to the expert is available for cross-examination. This situation might arise, for example, when the expert utilized data contained in a business record supplied by a person with no business duty to report accurately,⁶⁷ a business report prepared for litigation,⁶⁸ or a police file prepared for trial.⁶⁹ Other examples will have to await future litigation.

65. See text accompanying notes 39-40 *supra*.

66. See, e.g., *District of Columbia Redev. Land Agency v. 61 Parcels of Land*, 235 F.2d 864 (D.C. Cir. 1956).

67. Courts have interpreted statutes admitting business records as an exception to the hearsay rule to require that the information be supplied by a person with a business duty to report accurately. See, e.g., *Johnson v. Lutz*, 253 N.Y. 124, 170 N.E. 517 (1930).

68. See *Palmer v. Hoffman*, 318 U.S. 109 (1943); *McCORMICK*, *supra* note 6, §308, at 723. This view seems to have been adopted by Federal Rule of Evidence 803(6) which would not admit records of regularly conducted activities when "the source of information or the method of circumstances of preparation indicate lack of trustworthiness."

69. See *United States v. Ware*, 247 F.2d 698 (7th Cir. 1957).

METHODOLOGY AND SUGGESTIONS

It is clear under the Federal Rules of Evidence that the questions whether the data used by the expert is relied upon by other experts in the field and whether any other exclusionary rules apply to that data, are preliminary questions for the judge. If the basis of the opinion is appropriate, then the opinion will go to the fact-finder; if not, it will be excluded.

This puts the trial judge in a somewhat anomalous position. The judge must decide whether the expert made use of reliable data in a field that *ex hypothesi* the judge knows nothing about.⁷⁰ Normally, the testifying expert will have to be relied upon for a determination of what data is usable. In case of doubt, however, other experts could be called and learned treatises consulted to cast light on whether the data used by this expert is of the type relied on by experts in the field. If the question is a close one, the judge should admit the opinion and any further questions as to the data used by the expert should go to the weight to be given the expert's opinion.

Thus, the adoption of Rule 703 allows greater flexibility in the use of expert opinions. In that it re-rationalizes and simplifies the entire area, *People v. Ward* is an excellent first step toward reforming the rules of expert testimony in Illinois. Unfortunately it is only one step. Taken in isolation the adoption of Rule 703 raises certain questions.

Rule 703 is one section of a complete restructuring of the rules concerning expert testimony in the Federal Rules of Evidence. It is bolstered by several other sections, in particular Rule 705⁷¹ and Federal Rule of Civil Procedure 26(b)(4).⁷² Together these rules

70. The judge has the same difficulty in passing on the preliminary question under Federal Rule 803(4). Statements to a physician are admissible if reasonably related to diagnosis and treatment. To a large extent, the judge will have to rely on the physician's statement of the relationship.

71. FED. R. EVID. 705 provides:

The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

72. FED. R. CIV. P. 26(b)(4) provides:

(4) *Trial Preparation: Experts.* Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

assure adequate presentation of the basis of an opinion, should it be required by the fact-finder, and assure adequate cross-examination of the expert by providing for discovery of expert witnesses. However, absent these safeguards, what will guarantee that the basis of the expert's opinion is reliable if an expert is allowed to base an opinion on matters not in evidence and not subject to cross examination?⁷³

The reliability of the basis of the expert's testimony supposedly is assured by the second sentence of Rule 703, which restricts the expert to data reasonably relied upon by experts in his particular

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

The Federal Rules of Criminal Procedure do not provide for extensive discovery of experts, but do provide for discovery of "examinations and tests." FED. R. CRIM. P. 16(a)(1)(D). While this offers less information than would be obtained through Civil Rule 26(b)(4), it enables a defense attorney to anticipate the data an expert might use in formulating an opinion.

73. This problem becomes acute when the expert relies on descriptive reports of others. There is no way to cross-examine those reports and severe hearsay dangers may arise. Cross-examination could disclose: what information the witness intends to convey to the trier of fact by the witness' language; the sincerity of the witness; the extent to which what the witness testifies to is the product of his own memory or the adoption of the experience of others; the extent to which what the witness testifies to corresponds with what was actually capable of perception. E. MORGAN, *SOME PROBLEMS OF PROOF* 142-43 (1956). As the Illinois Supreme Court noted, "[T]he hearsay statements may be true without the related facts being correct." *People v. McCoy*, 44 Ill.2d 458, 256 N.E.2d 449 (1970).

field. Presumably, then, if the expert used data other experts would not rely upon, the opinion would be inadmissible.⁷⁴

This, however, may not be an adequate guarantee of reliability. At the time the *Ward* case was decided there was some confusion as to whether Illinois provided for discovery of expert witnesses.⁷⁵ Without discovery an expert could have been called and given an opinion never before heard by the opposing attorney. The result would have been ineffective cross-examination of the expert opinion and its underlying factors.

Fortunately, the Illinois General Assembly recently passed a statute providing for extensive discovery of expert witnesses.⁷⁶ This reflects the federal position contained in Federal Rule of Civil Procedure 26(b)(4).⁷⁷ The expert's deposition can now be taken early in the litigation and extensively analyzed before trial. Thus, when the expert testifies at trial his testimony can be exhaustively critiqued. This removes all objections of unfair surprise and lack of cross-examination, in addition to illuminating the technical problems presented by the lawsuit.

One reform that is needed is a change in the manner of presenting expert testimony. With the adoption of Rule 703, there is no longer a need for the hypothetical question. The original purpose of the question was to elicit the basis of the expert's opinion in a non-objectionable manner. Now the expert's opinion no longer

74. This may answer the contention raised in the preceding note. The Supreme Court Advisory Committee noted that Rule 703 would not warrant admitting the opinion of an "accidentologist" based on statements of bystanders. Presumably this is because of the hearsay dangers inherent in the uncross-examined statement of an eyewitness.

75. ILL. REV. STAT. ch. 110, §58(3) (1975) only provided that a party furnish the names and addresses of persons he intends to call at trial. However, Sup. Ct. R. 201b(1) (1975) permitted discovery of "persons having knowledge of the relevant facts." It was unclear whether experts were covered by these provisions or not. See *Hurby v. Chicago Transit Auth.*, 11 Ill.2d 255, 142 N.E.2d 81 (1957).

76. The General Assembly passed Public Act 79-1434, approved September 1976, amending ILL. REV. STAT. ch. 110, §58(3) as follows:

A party shall not be required to furnish the names or addresses of his witnesses, except that upon motion of any party disclosure of the identity of expert witnesses shall be made to all parties and the court in sufficient time in advance of trial so as to insure a fair and equitable preparation of the case by all parties. (emphasis added)

This brings civil practice in line with the Supreme Court Rules regulating discovery in criminal cases. ILL. REV. STAT. ch. 110A, §412(a)(i) and (iv) provides for the discovery of expert witnesses, their reports and tests, and the substance of their statements.

77. See note 73 *supra*.

must be based solely on admissible evidence. Thus, there is no reason to retain this confusing and often abused practice.

Federal Rule 705⁷⁸ leaves the manner of presentation of the opinion to the discretion of the trial court judge. This provides the trial judge with the means to simplify the conduct of the trial in addition to making the experts more understandable to the fact-finder. Some version of Rule 705 should be adopted by Illinois.

Indeed, we can hopefully envision that the direct examination of an expert, after being qualified, can proceed as follows:

Q: Doctor, do you have an opinion based upon a reasonable degree of medical certainty as to the extent of permanent disability suffered by the plaintiff as a result of this automobile accident?

A: Yes.

Q: What is your opinion?

A: She is totally permanently disabled.

Q: Thank you doctor, that is all.⁷⁹

It is submitted that most members of the bench and bar would joyfully welcome this reform.

78. See note 71 *supra*.

79. *Hearings on Proposed Federal Rules of Evidence Before the Special Subcomm. on Reform of Federal Criminal Law of the House Comm. on the Judiciary*, 93d Cong., 1st Sess., ser. 2, at 355-56 (Supp. 1973).