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Psychiatric Challenge of Witnesses

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not show sufficient direct and particular financial interest.[61] No other case appealed since 1940 involving religion and the public schools has raised the question of *Bible* reading.[62] Eventually the Court will be called upon to decide whether there is a permissible area in which the *Bible* may be used in the public schools under the first amendment. Whether the Court will be guided by the reasoning of one group of state cases or the other, or will devise a new approach, cannot be predicted; but when the question is presented to the Court it will have been ground out through the processes herein described.

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PSYCHIATRIC CHALLENGE OF WITNESSES

Although insane[1] persons were incompetent as witnesses at early common law,[2] the modern view is that the effect of mental illness upon competency is a preliminary question for the court[3] in the absence of contrary statutory direction.[4] An insane person is generally said to be a competent witness if he can understand the sanctions imposed to elicit the truth and can correctly recount the occurrence which is the subject of his testimony.[5] Some courts exclude evidence of insanity offered for purposes of impeachment[6] but most courts admit such

61. Doremus v. Board of Educ., 342 U.S. 429 (1952) (three dissenting justices felt that the merits of the case should have been considered).

62. Zorach v. Clauson, 343 U.S. 306 (1952) (dismissed time program sustained); McCollum v. Board of Educ., 333 U.S. 203 (1948) (released time program held unconstitutional).

1. Insanity is a purely legal concept, having different definitions in its different applications. OVERHOLSER, THE PSYCHIATRIST AND THE LAW 61 (1953). Therefore, for the purposes of this paper, the term will be considered to include any mental illness materially affecting competency or credibility.

2. Livingston v. Kiersted, 10 Johns. 362 (N.Y. 1813); 2 WIGMORE, EVIDENCE § 492 (3d ed. 1940) (hereinafter cited as WIGMORE); 58 AM. JUR., *Witnesses* § 118 (1948).

3. Worthington v. Mencer, 96 Ala. 310, 11 So. 72 (1892); MCCORMICK, EVIDENCE § 62 (1954) (hereinafter cited as MCCORMICK); 2 WIGMORE § 487; 58 AM. JUR., *Witnesses* § 118 (1948).

4. Most state statutes concerning the effect of insanity upon competency have been held to be merely declaratory of the common law. Holler v. Dickey Clay Mfg. Co., 157 Kan. 355, 139 P.2d 846 (1943); MCCORMICK § 62; MORGAN, BASIC PROBLEMS IN EVIDENCE 78 (A.L.I. 1954) (hereinafter cited as MORGAN); 58 AM. JUR., *Witnesses* § 119 (1949). However, Texas and Indiana have construed their statutes more strictly. See Annot., 148 A.L.R. 1147 (1944), 26 A.L.R. 1499 (1923). And for a state-by-state treatment, see 2 WIGMORE § 488.

5. District of Columbia v. Armes, 107 U.S. 519 (1882); Bowdle v. Detroit St. Ry., 103 Mich. 272, 61 N.W. 529 (1894); MCCORMICK § 45; MORGAN 78; 2 WIGMORE § 492; 58 AM. JUR., *Witnesses* § 118 (1948); Annot., 148 A.L.R. 1141 (1944), 26 A.L.R. 1493 (1923). For a criticism of this test, see MCCORMICK § 62.

6. People v. Dye, 81 Cal. App. 2d 952, 185 P.2d 624 (1947); State v. Driver, 88 W. Va. 479, 107 S.E. 189 (1921); see State v. Mohr, 99 N.J.L. 124, 122

evidence,[7] treating medical and lay testimony with equal respect[8] because of the refusal of the earlier cases to consider insanity as exclusively within the province of experts.[9]

The recent advances in psychiatry, or the medical study of the mind,[10] have led to an increasing use of the testimony of psychiatrists to challenge adverse witnesses on the grounds of insanity, in spite of the fact that the legal term "insanity" has no psychiatric significance.[11] The general respect for the medical profession, coupled with the reluctance of most medical people to speak in nonmedical terms, permits psychiatrists to be led—willingly or not—to more dogmatic positions than non-psychiatrists on the question of whether a witness' mental

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Atl. 837 (1923). The evidence is generally excluded if it does not relate to mental condition either at the time of trial or at the time of the occurrence testified to. Peckham v. United States, 210 F.2d 693 (D.C. Cir. 1953) (psychiatric treatment twenty months earlier); People v. Harrison, 18 Cal. App. 288, 123 Pac. 200 (1912) (insane two years earlier); State v. Hayward, 62 Minn. 474, 65 N.W. 63 (1895) (general mental aberations, occurrence and duration not specified); State v. Spotted Hawk, 22 Mont. 33, 55 Pac. 1027 (1899) (evidence, including army discharge, tending to show feeble-mindedness and amorality). The statement of a general rule concerning the mental condition of girls in period of maturation was excluded in State v. Pelser, 182 Iowa 1, 163 N.W. 600 (1917).

7. Insanity at the time of the occurrence testified to is sometimes treated as a factor affecting credibility. Holcomb v. Holcomb, 28 Conn. 179 (1859), noted in 2 WIGMORE § 493; MCCORMICK § 45; 58 AM. JUR., *Witnesses* § 699 (1948). However, the usual concern is solely with capacity during trial. 2 WIGMORE § 483; and see MCCORMICK § 45; Annot., 15 A.L.R. 932 (1921).

8. Medical witnesses (not psychiatrists): McAllister v. State, 17 Ala. 434 (1850); People v. Cowles, 246 Mich. 429, 224 N.W. 387 (1929); Ellarson v. Ellarson, 198 App. Div. 103, 190 N.Y. Supp. 6 (3d Dep't 1921); State v. Pryor, 74 Wash. 121, 132 Pac. 874 (1913). Concerning mental capacity, see Jeffers v. State, 145 Ga. 74, 88 S.E. 571 (1916); Alleman v. Stepp, 52 Iowa 626, 3 N.W. 636 (1879); State v. Armstrong, 232 N.C. 727, 62 S.E.2d 50 (1950). Lay witnesses: Holcomb v. Holcomb, 28 Conn. 179 (1859); Rivara v. Ghio, 3 E.D. Smith 264 (N.Y.C.P. 1854). As to mental capacity, see Jones v. State, 165 Miss. 810, 146 So. 138 (1933); McClure v. Fall, 42 S.W.2d 821 (Tex. Civ. App. 1931), *aff'd*, 67 S.W.2d 231 (1934); Kellner v. Randle, 165 S.W. 509 (Tex. Civ. App. 1914); Wren v. Howland, 33 Tex. Civ. App. 87, 75 S.W. 894 (1903); Bouldin v. State, 87 Tex. Crim. 419, 222 S.W. 555 (1920). Wigmore states the test of testimonial capacity on this issue to be whether the impeaching witness has had "an *opportunity, by observation* of the conduct of the one whose mental condition is in issue, to learn something upon the subject and to form a belief worth listening to." 3 WIGMORE § 689.

9. See the extended discussion in 7 WIGMORE §§ 1933-38.

10. Since the psychiatrist conceives mind and body to be one entity, he must study the body as well as the mind. Hence, his considerations must include medical factors. MENNINGER, PSYCHIATRY 5 (1948); Note, *Psychiatric Evaluation of the Mentally Abnormal Witness*, 59 YALE L.J. 1324, 1331 (1950).

11. EWEN, MENTAL HEALTH (1947). The claim that the psychiatrist has something special to contribute on the issues of competency and credibility is based upon the psychiatric notion that people suffering from certain types of mental disease are able to distort the truth in a highly convincing manner, so that they may testify more persuasively than persons free from extreme mental disorders. For generalized discussions of the mentally diseased witness, see GUTTMACHER & WEIHOFEN, PSYCHIATRY AND THE LAW (1952); OVERHOLSER, THE PSYCHIATRIST AND THE LAW (1953). For an excellent short consideration, see Note, 59 YALE L.J. 1324, 1326-31 (1950). Such testimony would be especially crucial when given, for example, by a purported eye-witness to a crime or other occurrence, as in State v. Taborsky, 142 Conn. 619, 116 A.2d 433 (1955).

condition will affect his tendency or ability to tell the truth.[12] For these reasons, a consideration of some of the evidentiary problems arising out of the use of psychiatrist's testimony seems proper. The psychiatric concepts upon which such testimony is based have been discussed elsewhere, and little could be added on that subject.[13]

The problems raised by the psychiatric basis for challenge have been divided into two groups: those resulting from the particular stage of the lawsuit at which challenge is made, and those raised by the varying amounts and accuracy of information upon which psychiatric testimony may be based. "Credibility" and "competency" will be used in the normal evidentiary sense, although some psychiatrists may not agree with lawyers as to the distinctions.[14]

TIME OF CHALLENGE

A. Before the Witness Testifies.

The challenge of a witness' competency before he testifies[15] raises a question for the court,[16] but the applicability of the exclusionary rules to evidence offered to overcome the general presumption of testimonial capacity[17] has not been made clear by the decisions.[18] Although no cases have been found which discuss what constitutes acceptable evidence of mental incompentency,[19] such matters apparently are left

12. For an interesting psychiatric treatment of the phenomenon of lying, pointing out its wide prevalence and the consequent question as to a satisfactory definition, see Karpman, *Lying, a Minor Inquiry into the Ethics of Neurotic and Psychopathic Behavior*, 40 J. CRIM. L., C. & P.S. 135 (1949).

13. Karpman, *supra* note 12; Lipton, *The Psychopath*, 40 J. CRIM. L., C. & P.S. 584 (1950); Roche, *Truth Telling, Psychiatric Expert Testimony and the Impeachment of Witnesses*, 22 PENN. B.A.Q. 140 (1951); Note, 19 TENN. L. REV. 361 (1946); Note, 59 YALE L.J. 1324 (1950); GUTTMACHER & WEIHOFEN, *op. cit. supra* note 11; OVERHOLSER, *op. cit. supra* note 11.

14. A mentally incompetent witness theoretically *cannot* tell the truth; a witness who is able to tell the truth but for some reason does not is said to be unworthy of credibility. However, some psychiatrists believe that the previous environmental experiences predetermine all future conduct. MENNINGER, PSYCHIATRY, 50-88 *passim* (1948). Hence, a "sane" witness who lies does so because of his previous experiences, which have inclined him away from telling the truth. Of course, the psychiatrist recognizes varying degrees of mental disorder, and would agree that some persons would be more likely to tell the truth than others.

15. As to challenge of competency *after* the witness testifies, see text *infra*, "C. After the Trial is Over."

16. See note 3 *supra*.

17. State v. Barker, 294 Mo. 303, 242 S.W. 405 (1922); MORGAN 78-79; WIGMORE §§ 484, 497; 58 AM. JUR., *Witnesses* § 122 (1948).

18. Although Wigmore contends that the rules of evidence are not strictly enforced in the hearing to pass on the competency of a witness, 2 WIGMORE § 487, the reported cases do not support this position. Maguire and Epstein, *Rules of Evidence in Preliminary Controversies as to Admissibility*, 36 YALE L.J. 1101 (1927).

19. Wigmore attributes the absence of discussion on this point to a modern tendency to refuse to distinguish between insanity affecting testimonial capacity and that affecting credibilty. 2 WIGMORE § 501. See People v. Lambersky, 410 Ill. 451, 102 N.E.2d 326 (1951). The cases apparently give wide range to the discretion of the trial court, reversing only for refusal to permit

largely to the discretion of the trial judge.[20] Lay testimony concerning the effect of mental illnesses on the proposed witness' ability to tell the truth would seem proper, but the light weight of such testimony might convince the court that its presentation is not worth while. Expert testimony would seem much more desirable because of its greater weight.

The present widely prevalent practice is to have witnesses sworn as a group at the beginning of the trial[21] and to challenge competency for the first time when the witness is called to the stand.[22] Under these conditions delay of the trial would certainly result if a challenge to competency based on expert testimony were first made at this point, especially if more than one or two witnesses were challenged. In the latter circumstance, a second problem would arise: challenges of witnesses other than key witnesses might be considered an attempt to inject issues into the case which are so remote as to be irrelevant. However, these difficulties do not seem so insurmountable as to preclude the use of psychiatrists' testimony as the basis of a sincere challenge of opposing witnesses. A pre-trial discovery of the identity of an opponent's proposed witnesses, as is now possible under Rule 33 of the Federal Rules of Civil Procedure, would permit an effective pre-trial challenge. And the filing of a witness list, followed by a list of witnesses to be challenged by the opponent, would permit the court to have the opinions of its own experts as well as those of the parties. However, lest such collateral matters occupy an undue amount of a court's valuable time, the present extremely heavy presumption of competency[23] should prevail.

B. After the Witness Testifies, But During Trial.

Impeachment, the challenge to credibility during the trial after the witness testifies, is aimed at discrediting his testimony in the mind of the finder of fact. In other words, the challenge attempts to convince the finder that for some reason the witness' testimony has not been a

attempts to disqualify. Metropolitan Life Ins. Co. v. James, 228 Ala. 383, 153 So. 759 (1934); People v. Harrison, 18 Cal. App. 288, 123 Pac. 200 (1912); People v. Hudson, 341 Ill. 187, 173 N.E. 278 (1930); Swango v. Commonwealth, 276 Ky. 467, 124 S.W.2d 768 (1939); Bowdle v. Detroit St. Ry., 103 Mich. 272, 61 N.W. 529 (1894); Livingston v. Kiersted, 10 Johns. 362 (N.Y. 1813); Saucier v. State, 156 Tex. Crim. 301, 235 S.W.2d 903 (1950); Coleman v. Commonwealth, 25 Gratt. 865 (Va. 1874); Reg. v. Hill, 5 Cox C.C. 259, 5 Eng. L. & Eq. 547 (Ct. Crim. App. 1851); see State v. Mohr, 99 N.J.L. 124, 122 Atl. 837 (1923).

20. Wigmore finds the decisions not clear as to what degree of evidence is necessary in order to compel a determination by the trial judge. "It may be supposed that a mere *objection raised* and a claim to have a 'voir dire' examination would suffice. Moreover the *offering of any extrinsic evidence* whatever would suffice . . . ." 2 WIGMORE § 497.

21. McCORMICK § 70.

22. McCORMICK § 70; 2 WIGMORE § 486.

23. Sources cited in note 17 *supra*.

true representation of the occurrence concerning which he testified. In the most famous case involving psychiatric testimony, the two perjury trials of Alger Hiss, the defense attempted at both trials to impeach the principal witness for the prosecution, Whittaker Chambers, by the testimony of two psychiatrists. Although the evidence was excluded at the first trial,[24] it was admitted at the second.[25] Contrary to popular belief, the latter ruling is not particularly novel or startling. Some courts have admitted the testimony of laymen offered to impeach a witness, not on the grounds of faulty memory,[26] which may or may not be a product of mental illness, but on the ground that the witness' mental condition might affect the reliability of his testimony. For example, in the early case of *Rivara v. Ghio*,[27] a New York court held that a witness should have been permitted to testify concerning the mental condition of another witness in an attempt at impeachment. The court noted that although a witness, non compos mentis, was at that time incompetent to testify, evidence of prior insanity should have been admitted for purposes of impeachment. However, there was no indication that the impeachment would be solely on the grounds of past rather than present insanity. And in the comparatively recent case of *Jones v. State*,[28] it was held that the trial court committed error in refusing testimony of a layman to the effect that a witness was not mentally capable of understanding the solemnity of an oath. Although no challenge had been made to the witness' compentency, if the excluded evidence were true, the challenge should have been made before the witness testified.[29] The Texas Court of Civil Appeals has consistently admitted lay testimony on the question of mental condition offered for purposes of impeachment.[30]

Cases in which similar testimony by doctors was permitted are legion.[31] For example in *State v. Pryor*,[32] a trial court was reversed for

24. The offer at the first Hiss trial is reported in N.Y. Times, July 1, 1949, p. 1, col. 2.

25. United States v. Hiss, 88 F. Supp. 559 (S.D.N.Y. 1950) (memorandum opinion solely on admissibility of the evidence), commented on in Jones, *Admission of Psychiatric Testimony in Alger Hiss Trial*, 11 ALA. LAW. 212 (1950).

26. Ability to remember is generally considered a necessary element of testimonial capacity. See note 5 *supra*. However, it has been held that a faulty memory may be a ground for impeachment. Alleman v. Stepp, 52 Iowa 626, 3 N.W. 636 (1879); Wren v. Howland, 33 Tex. Civ. App. 87, 75 S.W. 894 (1903). Also of interest is Goodwin v. Goodwin, 20 Ga. 600 (1856), holding such testimony improper as an invasion of the province of the jury.

27. 3 E. D. Smith 264 (N.Y.C.P. 1854).

28. 165 Miss. 810, 146 So. 138 (1933).

29. Note 5 *supra*.

30. McClure v. Fall, 42 S.W.2d 821 (Tex. Civ. App. 1931), *aff'd*, 67 S.W.2d 231 (1934); Kellner v. Randle, 165 S.W. 509 (Tex. Civ. App. 1914); Wren v. Howland, 33 Tex. Civ. App. 87, 75 S.W. 894 (1903).

31. *E.g.*, Ingalls v. Ingalls, 257 Ala. 521, 59 So. 2d 898 (1952); McAllister v. State, 17 Ala. 434 (1850); People v. Cowles, 246 Mich. 429, 224 N.W. 387 (1929); Ellarson v. Ellarson, 198 App. Div. 103, 190 N.Y. Supp. 6 (3d Dep't 1921); Lord v. Beard, 79 N.C. 5 (1878); State v. Pryor, 74 Wash. 121, 132 Pac.

its exclusion of medical testimony to the effect that the prosecuting witness was suffering from hysteria at the time an alleged abortion took place. And in *Derwin v. Parsons*,[33] the court found no error in the admission of testimony by "experts" to the effect that women afflicted with a disease suffered by the witness often have hallucinations concerning the conduct of men toward them, although there was no evidence that the witness was suffering from such hallucinations. The trial court in *People v. Cowles*[34] allowed medical practitioners to testify without objection that a statutory rape prosecutrix was a pathological liar, sex pervert, and nymphomaniac. The state supreme court held that it was error on the part of the court to exclude further evidence offered to prove the witness' condition.

In the only case found involving the testimony of a psychologist, the court refused to admit either her testimony or that of a doctor to the effect that a statutory rape prosecutrix was mentally incompetent and had a tendency to lie. Evidence of the symptoms present in the witness was allowed, as was evidence of the personality type which these symptoms would indicate. But the classification of the prosecutrix as a personality type by the impeaching witness was forbidden.[35]

As noted, it was only in recent years that psychiatric testimony began to appear in court rooms for purposes of impeachment. In all of the discovered cases such testimony was admitted. An extreme example is *Fries v. Berberich*,[36] in which a psychiatrist was permitted to testify that a person involved in an automobile accident would not under any circumstances become afflicted with retrograde amnesia covering the period immediately preceding the accident. The defendant driver, who had testified that he was so afflicted, suffered a verdict. It is, of course, impossible to determine the extent to which the psychiatric testimony influenced the finder of fact. In *State v. Wesler*,[37] a prosecution for carnal knowledge and abuse, the admission of psychiatric testimony to impeach the two prosecuting witnesses at the trial was summarily approved by the court.

Those cases involving testimony by laymen discussed above do not represent mere contradictions of one witness by another but outright

874 (1913). See also Jeffers v. State, 145 Ga. 74, 88 S.E. 571 (1916) (admitting testimony concerning witness' mental age); State v. Pelser, 182 Iowa 1, 163 N.W. 600 (1917) (excluding testimony concerning mental conditions of girls in period of maturation); Alleman v. Stepp, 52 Iowa 626, 3 N.W. 636 (1879) (admitting testimony concerning effect of witness' impaired mind on his memory); State v. Armstrong, 232 N.C. 727, 62 S.E.2d 50 (1950) (admitting testimony concerning witness' mental age).

32. Note 31 *supra*.

33. 52 Mich. 425, 18 N.W. 200 (1884).

34. Note 31 *supra*.

35. State v. Driver, 88 W. Va. 479, 107 S.E. 189 (1921).

36. 177 S.W.2d 640 (Mo. App. 1944).

37. 137 N.J.L. 311, 59 A.2d 834 (Sup. Ct. 1948), *aff'd per curiam*, 61 A.2d 746 (1948), commented on in 39 J. CRIM. L., C. & P.S. 750 (1949).

attacks on credibility, although couched in terms of mental, rather than moral, abnormality. Statements of opinion by nonexpert witnesses are generally looked upon with disfavor,[38] but lay opinions on the question of insanity are a well-settled exception.[39] In view of these rules, admission of lay opinions as to testimonial capacity should not be surprising. However, since many jurisdictions refuse to admit testimony offered to contradict an impeaching witness,[40] there is the danger that a convincing but mentally diseased witness will testify that a principal witness, an "enemy" of the challenger, did not tell the truth.[41]

The testimony of the general practitioner[42] is less dubious than that of a layman but still not so desirable as that of the expert who has concluded an adequate examination of the witness.[43] A refusal or inability to relate what most people would believe to be the truth, both as a symptom and as a consequence of mental disorder, is within training and study of the expert, and he certainly should be qualified to testify as to the probability that the witness will tell the truth. However, the possibility of error on his part places on opposing counsel a burden of rigorous cross-examination.

The possible liberal admission of such expert testimony often gives rise to a warning that a "battle of the experts" will result. One argument on this point, to the effect that experts would ultimately be substituted for fact-finders, may be answered by pointing out that judges and juries often resolve inconsistencies in other forms of expert testimony and that it would not be unreasonable to assume that they could resolve conflicts in psychiatric testimony equally well.[44] Another argument, especially pertinent to the present discussion, is that to admit such testimony freely would result in occupying too much of the court's time with a collateral issue. However, nothing would prevent the court's limiting the number of such witnesses.

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38. The difference between "opinion" and "fact" in an evidentiary sense is, of course, one of degree. For discussions of the so-called opinion rule and all of its implications, see MCCORMICK §§ 10-12; MORGAN 191-97; 7 WIGMORE §§ 1917-29; 20 AM. JUR., *Evidence* § 765 (1939); 32 C.J.S., *Evidence* §§ 438 *et seq.* (1942).

39. Holcomb v. Holcomb, 28 Conn. 179 (1859); Rivara v. Ghio, 3 E. D. Smith 264 (N.Y.C.P. 1854); 7 WIGMORE §§ 1933-34; 20 AM. JUR., *Evidence* § 852 (1939); 32 C.J.S., *Evidence* § 507 (1942).

40. Wigmore points out that to permit such practice would lead to an endless parade of witnesses on a collateral matter. 3 WIGMORE § 894. And see MORGAN 71.

41. This danger was dramatically illustrated in State v. Taborsky, *infra* note 45.

42. The term "general practitioner" is here used to include all non-psychiatrist members of the medical profession, and not in the technical connotation used by the profession.

43. As to what constitutes an adequate examination, see discussion of "Bases of Challenge" in text *infra*.

44. See Note, 59 YALE L.J. 1324, 1338 (1950).

C. After the Trial is Over.

In the recent case of *State v. Taborsky*,[45] a new trial was granted to a defendant under sentence of death for murder, after the conviction had been affirmed by the state court of last resort, when it was discovered that at the time of the trial the principal witness for the state was suffering from a mental disability which made him prone to lie aggressively against the defendant.[46] In granting a new trial the court commented that "if the [trial] court, after a proper consideration of the evidence as to [the witness'] sanity, were to admit his testimony, the evidence of his mental condition before, at and after the occurrence of [the crime], and at the time of the trial would be available for the jury to use in passing on his credibility."[47] Upon a second trial, the defendant was acquitted.[48]

Any challenge of a witness after completion of the trial would be useful only as a basis for a motion for a new trial on the ground that the witness' incompetency or lack of credibility, unknown at the time of the trial,[49] would materially affect the ultimate result in the case by changing the weight rather than the mere quantity of the evidence.[50] Courts are extremely reluctant to grant new trials on the ground of newly discovered evidence,[51] which seems proper in view of the time and expense involved in a trial. At least one jurisdiction holds this ground sufficient in civil cases only.[52] But if it subsequently appears that a key witness was suffering from a severe mental condition affecting competency at the time of the trial, the better view would seem to be that there must be a new trial, especially in capital criminal cases. The discretion of the courts[53] should prove adequate assurance that such a rule would not appreciably endanger the finality of judgments generally.

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45. 142 Conn. 619, 116 A.2d 433 (1955).

46. The overt manifestations of the condition did not appear until after the conclusion of the trial, and there was a disagreement among the psychiatrists who testified as to the state of advancement of the condition at the time of the trial. 116 A.2d at 436-37.

47. 116 A.2d at 437. *But see* People v. Brown, 289 P.2d 880 (Cal. App. 1955); Coleman v. Commonwealth, 25 Gratt. 865 (Va. 1874).

48. Chicago Tribune, Oct. 15, 1955, p. 19, col. 1.

49. The moving party must show that he was unaware of the evidence at the time of the trial, and that he could not have discovered the evidence by the exercise of due diligence in order to sustain a motion for a new trial. Fredricksen v. Luthy, 72 Idaho 164, 238 P.2d 430 (1951); 39 AM. JUR., *New Trial* §§ 159, 160 (1942); 66 C.J.S., *New Trial* §§ 103, 104 (1950).

50. Taylor v. Ross, 150 Ohio St. 448, 83 N.E.2d 222 (1948); 39 AM. JUR., *New Trial* § 156 (1942); 66 C.J.S., *New Trial* § 113 (1950).

51. Taylor v. Ross, *supra* note 50; 39 AM. JUR., *New Trial* § 156 (1942); 66 C.J.S., *New Trial* § 101 (1950).

52. State v. Lee, 80 Iowa 75, 45 N.W. 545 (1890) (interpreting a state statute providing a statutory new trial).

53. A motion for a new trial is generally addressed to the sound discretion of the trial judge and will be reversed only for a clear abuse of such discretion. 66 C.J.S., *New Trial* § 201 (1950) and sources cited in note 50 *supra*.

The question would be more difficult when only the credibility of a key witness is challenged. Obviously, if the mental condition alleged were of mild effect on credibility, a new trial would not seem necessary. On the other hand, if the condition is of such severity as materially to affect credibility, but not so severe as to render the witness incompetent, a new trial would probably be advisable.[54] Again, the best possible answer—admittedly inexact—would seem to be reliance on the discretion of the trial court.

The qualifications of the challenger on a motion for new trial should be as high, if not higher, than those required for a challenge to competency.[55] Otherwise, dissatisfied litigants and crusaders might be permitted to clog the courts with lay "experts" engaged, with various motives, in attempts to salvage lawsuits or save "innocent" lives. Different policy considerations may well give rise to different rules in civil and criminal cases.

BASES FOR CHALLENGE

What degree of knowledge is necessary in order for a person to testify that a witness is psychiatrically inclined not to tell the truth? Since the lay witness must always testify from his own knowledge,[56] opposing counsel may be counted upon to insure that such an opinion has some foundation in fact. However, the expert is in a different position. First, because he is an expert his testimony may carry more than its true weight in the mind of the finder of fact. And secondly, he may answer questions based on assumed conditions—the much-discussed hypothetical question.

When the expert testifies from his own knowledge, opposing counsel should insure that such knowledge is reasonably complete and not the result of hasty or cursory examination. In the Alger Hiss case,[57] one psychiatrist testified on the basis of the witness' conduct in court during the trial and on writings of the witness previously read by the psychiatrist.[58] Since the process of complete psychoanalysis may take as long as two hundred and fifty hours,[59] the validity of such testimony would seem open to question. Although it may be possible after a short examination to form an accurate expert opinion of an individual's mental condition as it may affect his ability and desire to tell the

54. The Connecticut court in the *Taborsky* case was not clear as to whether the witness' competency or his credibility was affected by his mental condition. The answer apparently is that the determination was for the trial court on the new trial.

55. See text preceding material supported by notes 21 and 22 *supra*.

56. Cleveland Terminal & Valley R.R. v. Marsh, 63 Ohio St. 236, 58 N.E. 821 (1900); MCCORMICK § 10; 2 WIGMORE §§ 650 *et seq.*

57. Discussed *supra*, notes 24 and 25.

58. GUTTMACHER AND WEIHOFEN, *op. cit. supra* note 11, at 364.

59. *Id.* at 7.

truth,[60] questions put to a witness on the stand, usually undirected and immaterial insofar as mental condition is concerned, hardly seem an adequate basis for the formulation of an opinion. Even if, as one writer has suggested,[61] the psychiatrist were to direct the examination of the witness, it is doubtful that the examination could be sufficiently thorough without consuming an undue amount of the court's time.

Nor does the hypothetical question seem a sound device. In addition to being subject to abuse by the posing of confusing and often contradictory assumptions,[62] it casts upon the jury the burden of determining the truth or falsity of the hypothesis upon which the question is based.[63] Thus the jury, given the barest of tools, is asked to form a psychiatric opinion of the witness—a task not lightly undertaken by a trained psychiatrist.[64] In view of these problems, the ultimate determination as to what constitutes an adequate mental examination may well be left to the psychiatrists. But effective cross-examination of the psychiatrist by opposing counsel should provide a considerable degree of control.

It has been suggested that a pre-trial examination of the proposed witness is advisable, where necessary, as a prerequisite to testifying.[65] The objection that this procedure would unduly delay the trial of a case should be overcome by proper pre-trial procedures; but a serious question would arise as to the power of the court to compel a mere witness, not a party, to submit to such an examination in view of the resultant invasion of privacy and possible self-incrimination.[66]

Finally, assuming a thorough pre-trial examination of the witness as the basis for an expert opinion aimed at disqualification or impeachment, the question arises as to the extent to which the psychiatrist may be compelled to reveal particular facts which his examination may have disclosed. An expert qualified to state his conclusions as testimony must reveal the particular facts upon which he bases his opinion, assuming that the facts have been revealed to him by his

60. Some psychoanalysts believe that complete psychoanalysis can be completed in a period as short as six weeks. *Id.* at 8.

61. Note, 59 YALE L.J. 1324, 1334 (1950).

62. For an extreme example, see HULBERT, *Psychiatric Testimony in Probate Proceedings*, 2 LAW & CONTEMP. PROB. 448, 455 (1935), quoted in GUTTMACHER AND WEIHOFEN, *op. cit. supra* note 11, at 225.

63. MORGAN 197; 2 WIGMORE § 680.

64. GUTTMACHER AND WEIHOFEN, *op. cit. supra* note 11, at 7-8.

65. Note, 59 YALE L.J. 1324, 1339 (1950). Several jurisdictions have required such an examination when a criminal defendant seeks to avail himself of the defense of insanity, and have held that such an examination does not violate the privilege against self-incrimination. Ingles v. People, 92 Colo. 518, 22 P.2d 1109 (1933); Commonwealth v. Musto, 348 Pa. 300, 35 A.2d 307 (1944); State v. Coleman, 96 W. Va. 544, 123 S.E. 580 (1924); all cited, together with other cases in GUTTMACHER AND WEIHOFEN, *op. cit. supra* note 11, at 286.

66. For a suggestion that the results of such an examination ought to be privileged, see sources cited in note 71, *infra*.

examination,[67] either as a predicate for the stating of the conclusion[68] or upon cross-examination.[69] Although the psychiatrist may not be required to reveal his discoveries in any but very broad terms, since his conclusions are based upon a mass of individually insignificant facts,[70] rigorous adverse cross-examination could conceivably result in revealing facts irrelevant to the case but extremely damaging and even incriminating to the witness. In view of the spirit and intent of the psychiatric interview, this result would be highly undesirable. An extension of the much maligned doctor-patient privilege[71] would seem an advisable shield in these circumstances, especially if, as suggested above,[72] psychiatric examination were made a prerequisite to the receipt of testimony from a questioned witness. In those instances in which reluctance on the part of the patient to talk freely is overcome by the use of narcotics and hypnotics,[73] compelling the psychiatrist to reveal the facts thus learned might well violate the privilege against self-incrimination.[74]

Present rules, together with an extension of the doctor-patient privilege, would, therefore, seem sufficient to prevent subversion of psychiatric testimony into an indirect and scientific third-degree.

CONCLUSION

Psychiatric examination is another, improved method for discovering the truth. However, it is certainly not infallible, and its limits should be recognized. Insofar as its use might jeopardize any of the basic safeguards of personal liberty established by common law, it should be rigidly controlled. It should be used only as a tool in the search for truth and not as a substitute for the judgment of a court

67. This will be the case except when the psychiatrist is posed a hypothetical question.

68. MCCORMICK § 14; 58 AM. JUR., *Witnesses* § 844 (1948).

69. Adams v. Ristine, 138 Va. 273, 122 S.E. 126 (1924); MCCORMICK § 14; 58 AM. JUR., *Witnesses* § 844 (1948).

70. Obviously two hundred fifty hours of interview, *supra* note 59, cannot produce too many individually important facts when the ultimate diagnosis is based upon the entire series of interviews.

71. This privilege is purely statutory and exists in about two-thirds of the American jurisdictions. MCCORMICK § 101; MORGAN 109; 8 WIGMORE § 2380. Presently the privilege covers only information obtained in the course of diagnosis and contemplation of treatment. MCCORMICK § 102; MORGAN 110-11; 8 WIGMORE § 2382. But Guttmacher and Weihofen cite two instances in which the desired extension has been made: an unreported Illinois trial court ruling and KY. REV. STAT. ANN. § 319.110 (Baldwin 1948). Actually the Kentucky statute concerns clinical psychologists rather than psychiatrists. GUTTMACHER AND WEIHOFEN, *op. cit. supra* note 11, 269-70 (refers to case only), previously published in substance in Comment, 28 IND. L.J. 32, 33, 36 (1952). Tennessee also established such a privilege in 1953. TENN. CODE ANN. § 63-1117 (1956).

72. See text supported by note 65 *supra*.

73. This procedure is referred to in GUTTMACHER AND WEIHOFEN, *op. cit. supra* note 11, at 105.

74. This privilege is discussed at length in MCCORMICK §§ 120-36; and 8 WIGMORE §§ 2250-84. See also MORGAN 127 *ff*.

as to the competency of a witness, or the determination of a jury as to the credibility of a witness. There is a very real danger that the successes of medicine will be so unduly stressed as to obscure the failures, and that individual rights may fall victim to the sanctity of science. Psychiatric testimony carries both dangers. Its use should be widespread, subject to continuous and rigid scrutiny by both counsel and court.

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