UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 20 | Number 1 Article 15

12-1-1941

Evidence -- The Opinion Rule -- Use of Hypothetical Question as Basis of Expert Opinion

E. W. Cole Jr.

portance to warrant federal control. This determination would be especially difficult in multi-party states. It seems evident that even the minority party primary has some effect on the general election.[39] The extension of protection to primaries equivalent to election because of the character of local politics, while denying protection to the minority party primaries, might be arbitrary discrimination in violation of the due process and equal protection clauses of the Constitution.[40] And though one party may have dominated a state for many years, and so brought its primaries under federal protection, a political upheaval might put the other party in power and its candidates in office, even though its primaries had not been under federal supervision. These questions must be resolved by future legislation or judicial decree. This decision, the court being divided four to three on the question of statutory construction, stands in danger of being overruled unless more definite laws are passed. Specific statutes would eliminate the idea of judicial legislation and greatly lighten the burden which the instant case places on the judiciary. Therefore it is submitted: (1) An appropriate Federal Primary Control Act should be enacted settling the difficulties inherent in the application of the instant case. (2) Full protection of the public in elections demands, in the event such legislation is passed, that the court shall not find it repugnant to the Constitution when applied to minority party primaries not integral parts of the election by law, but shall take the further necessary step of holding that federal control may extend to *all* primaries where a federal office is involved.

JOHN T. KILPATRICK, JR.

Evidence—The Opinion Rule—Use of Hypothetical Question as Basis of Expert Opinion

The *P*'s intestate was thrown to the center of the highway when the auto in which she was riding as a passenger failed to make a turn in the road and struck a bridge abutment. One of the *D* motor lines' trucks was immediately behind the car. *P*'s contention is that the truck ran over the girl's body, thereby contributing to her death. The *D* contends that its truck passed to the left of the prone figure. On trial, the *D* motor lines offered testimony of a physician who had examined the girl, and proposed to ask him the following question:

[39] See concurring opinion of Mr. Justice Pitney in Newberry v. United States, 256 U. S. 232, 275, 41 Sup. Ct. 469, 480, 65 L. ed. 913, 928 (1921).

[40] Defendants raised this point in their petition for rehearing. (Rehearing denied Oct. 14, 1941, 10 LAW WEEK 3125); Brief in support of petition for rehearing, p. 8, United States v. Classic, 61 Sup. Ct. 1031, 85 L. ed. Adv. Ops. 867 (1941).

"Dr. T, from your examination of the body of Mildred Catherine Hester, before her death, as you have testified, and the examination of the injuries such as you have found, do you have an opinion satisfactory to yourself as to whether or not any of those injuries were caused by the body coming into contact with the Horton Motor Company's truck?"

The answer, as reported out of the hearing of the jury, was:

"I do not believe that any of her injuries were sustained by being struck by the Horton Motor Lines' truck."

The trial judge excluded the question and answer, presumably on the ground that it was opinion evidence invading the province of the jury. Thereafter, the jury found for the *P* and rendered a substantial verdict against the trucking concern, the driver of the truck, and the driver of the wrecked car. On appeal by the *D* motor lines; *held*[1] that the exclusion of the proposed question and answer constituted reversible error.[2]

The instant case raises two problems which will be dealt with in this note: (1) The extent of the rule against invading the province of the jury in cause and effect cases—cases where given a particular hurt, expert opinion evidence is offered as to the contributing causes. (2) The permissible wording of such a question, opinion evidence being admissible.

Among the foremost of the exclusionary rules of evidence is the so-called "opinion" rule. The substance of it and the original foundation of the rule, to use Wigmore's terminology, is the requirement of "Testimonial Knowledge". The witness must know from a factual basis whereof he speaks, and must not be merely hazarding a guess.[3] In addition, the rule is held to cover the inferences drawn by witnesses who have had personal observation.[4] A recognized exception exists where the witness has some special skill or experience which would aid the tribunal in arriving at its conclusions from the operative facts and the subject is one that requires special knowledge, skill, experience, or training.[5] However, there has been a tendency to limit the scope of this exception by, in turn, grafting an exception on it. That is, American courts have shown an inclination to exclude even the opinion of expert witnesses, on the issue or issues which ultimately go to the jury.[6]

[1] Hester v. Motor Lines, 219 N. C. 14 S. E. (2d) 794 (1941).

[2] Even though, previously, the Doctor was permitted to testify that the girl's injuries were produced by her striking the concrete roadbed.

[3] 2 WIGMORE, EVIDENCE (3d. ed. 1923) §§657, 557. RESTATEMENT, CODE OF EVIDENCE (Tent. Draft No. 4, 1933) §501.

[4] WIGMORE, EVIDENCE (student's Textbook 1935) §127.

[5] RESTATEMENT, CODE OF EVIDENCE (Tent. Draft No. 4, 1933) §502; 2 WIGMORE, EVIDENCE (3rd ed. 1940) 557; State v. Hightower, 187 N. C. 300, 121 S. E. 616 (1926); State v. Bowman, 78 N. C. 509 (1878).

[6] Keefe v. Amour & Co., 258 Ill. 28, 101 N. E. 252 (1913); Yost v. Conroy,

The theory followed is that such testimony would usurp the function of the jury.

While it is difficult to harmonize the decision in this state where the jury-province rule has been applied, the North Carolina court has consistently paid lip service to it. Our court, however, in a majority of the cases, has indicated that the rule's objection is avoided (and expert opinion evidence is admissible): (1) If the opinion is based upon facts admitted or found, as contrasted with facts which are controverted;[7] (2) if all the surrounding facts are known to the expert from personal observation;[8] or (3) if, where the facts are controverted, the opinion is presented as the answer to a hypothetical question, even though the question may present the identical problem as the ultimate issue for the jury.[9]

In the cases placed by the court in the third category, a considerable emphasis is directed to the wording of the hypothetical question.[10] It

92 Ind. 464 (1883); United States v. Steadman, 73 F. (2d) 704 (C. C. A. 10th, 1934).

[7] *See*, Summerlin v. Carolina & N. W. R. Co., 133 N. C. 550, 555, 45 S. E. 898, 900 (1903) where the court suggested that even in this instance the question should be hypothetical because the jury must still pass upon the credibility of the witness.

[8] At this point the cases are difficult to follow. The proposition was clearly sustained in the following cases: George v. Winston-Salem Southbound Ry., 215 N. C. 773, 95 S. E. 2d 373 (1939); Keith v. Gregg, 210 N. C. 802, 188 S. E. 849 (1936); Shaw v. National Handle Co., 188 N. C. 222, 124 S. E. 325 (1924); State v. Hightower, 187 N. C. 300, 121 S. E. 616 (1923) (the court did suggest in this case that the better practice would have been to question the expert in hypothetical form); Ferebee v. Norfolk & So. Ry., 167 N. C. 290, 83 S. E. 360 (1914). But the distinction between cases where the court has required the use of the hypothetical question and the cases above cited is slight. In each of the cases cited in footnote 10 *infra*—cases where the hypothetical question was required—it is submitted that the expert based his opinion as much upon personally observed facts as the experts testifying in the cases listed here—category (2). What seems to bother the court in these latter cases is not so much whether the opinion was based upon observed facts, but whether the witness's opportunity of observation sufficiently put him in command of the circumstances that he should be permitted to give a definite opinion as to the producing cause of the injury. This is to say that, if the expert did not examine the injured party until a considerable time after the accident, such as was true in the *Summerlin* case, 133 N. C. 550, 45 S. E. 898, there is a strong possibility that other factors could have produced or aggravated the injury. Apparently, the court wishes this possibility of error brought to the attention of the jury at the time the jury receives the opinion.

[9] State v. Carr, 196 N. C. 129, 144 S. E. 698 (1928); Hill v. Louisville Ry., 186 N. C. 475, 119 S. E. 884 (1923); Plummer v. Seaboard Airline, 176 N. C. 279, 96 S. E. 1032 (1918); Lynch v. Rosemary Mfg. Co., 167 N. C. 98, 82 S. E. 6 (1914); Herring v. Atl. Coastline Ry. Co., 160 N. C. 252, 74 S. E. 8 (1912); Parrish v. High Point Ry. Co., 146 N. C. 125, 59 S. E. 348 (1907); State v. Wilcox, 132 N. C. 1120, 44 S. E. 625 (1903); Summerlin v. Carolina & N. W. R. Co., 133 N. C. 550, 45 S. E. 898 (1903); State v. Cole, 94 N. C. 959 (1886); State v. Bowman, 78 N. C. 509 (1878).

[10] See particularly: Summerlin v. Carolina & N. W. R. Co., 133 N. C. 550, 45 S. E. 898 (1903); Parrish v. High Point Ry. Co., 146 N. C. 125, 59 S. E. 348 (1907); Herring v. Atl. Coastline Ry. Co., 160 N. C. 252, 74 S. E. 8 (1912); State v. Bowman, 78 N. C. 509 (1878).

is said that the question should contain a statement of facts which might have been testified to by witnesses or which may be found by the jury from the evidence.[11] "The party propounding the question may, it is true, so array the facts in the question as to present fully his contention in regard to them, provided there be evidence legally sufficient to sustain a finding of them by the jury. The proper form of the question is: If certain facts assumed in the question to be established by the evidence should be found by the jury, what would be the witness's opinion upon the facts thus found of the matter involved and to which the inquiry is directed?"[12] Some cases have stressed the point that the question should conclude with a clause: "might these factors have produced this result",[13] or "could the injury have been caused by these factors".[14] However, this requirement has not been consistently applied. In later cases, generally, the wording of the hypothetical question was examined less technically then in the earlier cases.[15]

Judged by these standards, the action of the trial judge in the principal case in excluding the question submitted was entirely correct, as the record shows the question did not follow the prescribed lines, and the issue of the truck striking *P*'s intestate was a fundamental issue in the case against the motor lines. However, it is submitted that the position taken by the appellate court is the more sensible one.

The theory behind the use of the hypothetical question is sound. A means is provided by which the trier of fact may determine the value of the opinion by comparing and evaluating the facts in its premises with the facts as ultimately found from all the evidence.[16] Yet, sound as it may seem theoretically, many abuses have been committed in its name. There is always a tendency on the part of the courts (this is true in this state)[17] to adopt one form of wording as a formula—a breach of which constitutes reversible error. In addition, clever lawyers often conceal the real significance of the evidence by unduly emphasizing certain data. Often they are able to distort the expert's opinion in such a manner that his answer to a complicated question may not express his actual opinion to the actual facts.[18] Because of these abuses,

[11] See note 12 *infra*.
[12] Summerlin v. Carolina & N. W. R. Co., 133 N. C. 550, 45 S. E. 898 (1903).
[13] Parrish v. High Point Ry. Co., 146 N. C. 125, 58 S. E. 348 (1907).
[14] Herring v. Atl. Coastline Ry. Co., 160 N. C. 252, 74 S. E. 8 (1912). It is submitted that this requirement springs from the same proposition as was discussed in footnote 9 *supra*.
[15] The court has been more ready to say that an expert is basing his opinion upon sufficient personal observation. George v. Winston-Salem Southbound Ry. Co., 215 N. C. 773, 95 S. E. (2d) 373 (1939); Keith v. Gregg, 210 N. C. 802, 188 S. E. 849 (1936).
[16] Rosenthal, *The Development of the Use of Expert Testimony* (1935) 2 LAW AND CONTEMP. PROB. 403.
[17] See cases cited in footnote 9 *supra*.
[18] See 2 WIGMORE, EVIDENCE (3rd ed. 1940) §686.

most authorities advocate that the expert witness be permitted to give his opinion without the use of a hypothetical question.[19] It is their contention that cross-examination could be successfully employed to bring out the exact facts upon which the opinion is based, and that therefore there is no need for posing a time-consuming hypothetical question as a preliminary to the opinion.

As for the rule excluding evidence which the court deems as usurping the province of the jury, it seems unreasonable that the admissibility of expert opinion should be dependent on any such meritless and nebulous standard. As pointed out in a previous case comment in this REVIEW:[20] "Evidence of the very point in issue would seem to be of the highest pertinency. Thus a strict application of the rule leads to the absurd result that admissibility varies in inverse proportion to relevancy". This policy is often defended in that it is said to be necessary to prevent the jury from giving unmerited weight to such an opinion instead of giving the question that independent consideration to which a party is entitled in a jury trial. However, this argument is difficult to follow for, by hypothesis, the subject is one with which the jury is incapable of dealing. It is submitted that a more productive approach would be simply to ask whether, under the circumstances of the case, the opinion would aid the jury in arriving at a sound decision.

E. W. COLE, JR.

Labor Law—Applicability of Anti-Racketeering Act to Certain Practices of Labor Unions

Convicted under the Federal Anti-Racketeering Act,[1] defendant, a truck drivers' union in New York City, appealed to the federal circuit court. Evidence was that the union sought to control all hauling in New York City; that it posted members on the edge of the city, who attempted to commandeer incoming trucks, drive them within the city, and do any necessary loading and unloading; that various breaches of the peace and acts of violence resulted when the truck operators resisted the labor unions; that in most cases the union men exacted up to $9.42 (a day's wages) from each incoming truck, regardless of the length of time involved in driving or "standing by";[2] and that the union

[19] 2 WIGMORE, EVIDENCE (3d ed. 1940) §686; RESTATEMENT, CODE OF EVIDENCE (Tent. Draft No. 4, 1933) §509; *Tentative Draft of Model Expert Testimony Act*, 11.
[20] Note (1938) 16 N. C. L. REV. 180.

[1] 48 Stat. 979 (1934), 18 U. S. C. A. §420a-e (Supp., 1940).
[2] As the name implies, a stand-by is a local union member who is present at a particular job-site and is paid a full salary, because of pressure exerted on the employer by a labor union, but who does practically no work, due to the