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## Testimony in Virginia on the Ultimate Fact in Issue

JAMES W. PAYNE, JR.

In a series of recent decisions the Court of Appeals has rejected opinion evidence for the reason, among others, that the opinion related to the ultimate fact in issue, or for the synonymous reason that it invaded the province of the jury. These decisions relate to opinion testimony offered by lay witness and expert alike, although an objection to expert testimony on the ground that it relates to the ultimate fact in issue is normally weaker in force than the same objection when it is advanced to rule out lay testimony. When the expert testifies, by hypothesis, the lay judge or juror is substantially less able to draw an appropriate inference, specialized knowledge based on education or experience being required. My notation of cases is intended to be illustrative only—not exhaustive. In *Ramsey v. Commonwealth*, 200 Va. 245, 105 S.E. 2d 155 (1958), a special agent for the National Board of Fire Underwriters was not permitted to offer an opinion that a given fire was of incendiary origin, the court stating that expert opinion was not needed in the case (i.e., that the jury could decide from the facts in evidence), and that the opinion invaded the province of the jury on the ultimate facts in issue.

In *Newton v. City of Richmond*, 198 Va. 869, 875, 96 S.E. 2d 775, 780 (1957), the testimony of a medical expert to the effect that a person whose blood he had analyzed was “not fit to operate an automobile” was held improper as an “invasion of the jury’s province.” Here it is difficult to see that the expert testimony amounted to more than an opinion on a mixed question of law and fact, and the court’s decision might well be explained on this basis alone.

In *Jones v. Commonwealth*, 202 Va. 236, 117 S.E. 2d 67

(1960), a lay witness was not permitted to testify that the defendant in a criminal prosecution "didn't act like he was out of his mind" at about the time of the commission of the crime involved. Here, the court, without elaboration or reference to cases apparently contra, simply stated the general rule that a witness can testify to facts only and not to opinions or conclusions based on those facts. It is certainly a bit more than conceivable that the court was influenced by the rather notorious unreliability of lay opinion to the effect that a given person is or was sane, such unreliability making the opinion peculiarly misleading. In this connection, too, it should be borne in mind that Virginia refuses to treat evidence as relevant unless it "tends in an appreciable degree to prove a material fact." The emphasis should be on the word "appreciable".

The decision in *Venable v. Stockner*, 200 Va. 900, 108 S.E. 2d 380 (1959), gives trouble. Here the plaintiffs, the Stockners, brought an action for injuries sustained as a result of a collision between their automobile and a tractor-trailer owned by defendant Venable and driven by his employee, Laws. Plaintiffs contended that the tractor-trailer was partially on the wrong side of the road at the time of the accident and offered Mr. Snyder as an expert witness on this point. The court states at pp. 903-905:

The Stockners offered as a witness Ralph H. Snyder of Oklahoma City, Oklahoma, who testified that he had had twenty-five years experience as a 'safety engineer, accident analyst.' He first went to the scene on June 5, 1957, the day before the trial commenced and a year and a half after the accident. He examined the marks on the pavement, the photographs which had been taken of these, the photographs of the damaged vehicles, and from these undertook to reconstruct the accident and express an opinion as to how it had occurred. He was examined at length in the absence of the jury and the Stockners offered to prove by him that from his examination of the scene and the photographs he was able to determine the

point of the impact, the angle of the impact, the manner in which the vehicles had collided, and the fact that at the moment of the impact the left side of the tractor-trailer protruded at least a foot and a half across the center line into the lane of the Stockner car.

In the absence of the jury the trial court ruled that this witness could express an opinion as to the angle, but not as to the point, of the impact, or the fact that at the moment of the impact the tractor was encroaching upon the lane of the Stockner car. This latter fact, it ruled, was 'the ultimate fact in the case' to be determined by the jury.

\* \* \* \* \*

We agree with the contention of Venable and Laws . . . that none of the stated testimony of this witness was admissible. It is well settled that expert evidence concerning matters of common knowledge or those as to which the jury are as competent to form an accurate opinion as the witness is inadmissible.

\* \* \* \* \*

Hence, in the present case the testimony of the witness, Snyder, invaded the province of the jury . . . the witness was invited to express an opinion on the very issue to be decided by the jury.

Certainly the court does not hold that Mr. Snyder is not an expert in accident analysis. The record shows that Mr. Snyder was accepted as a qualified expert without question in the trial court. Records No. 4906, 4907 at p. 141. The MODEL CODE OF EVIDENCE rule 402 (1942) states:

A witness is an expert witness and is qualified to give expert testimony if the judge finds that to perceive, know or understand the matter concerning which the witness is

to testify, requires special knowledge, skill, experience or training and that the witness has the requisite special knowledge, skill, experience or training.

The Model Code adds that the question of qualification is within the province of the trial judge and that his decision will not be reversed unless it is clearly erroneous as a matter of law. *Ibid.* See also: *Bratt et al v. Western Air Lines, Inc.*, 155 F. 2d 850 (10th Cir., 1946) and cases cited there.

It was argued in the trial court and held in the appellate court that expert testimony was not needed in this case. Yet this would seem to be the very kind of case in which expert testimony is most needed. We have clumps of debris on the highway, gouge marks, and badly mashed cars. Any jury might easily be confused or misled by such a common supposition as that the point of impact is the point where debris may be concentrated. Aside from this possible point of confusion, any jury might well have difficulty in determining the angle of impact and the point of impact on the highway from the evidence noted. If the opinion of a qualified expert would aid in decision, the writer contends that the opinion should come in.

In *Dickerson v. Town of Christiansburg*, 201 Va. 342, 111 S.E. 2d 292 (1959), in a prosecution for driving under the influence, two police officers testified that defendant was driving his car from side to side; that when apprehended he was unsteady on his feet; that he was unable to talk; and that a bottle of whiskey was found in his car. There was other evidence that defendant suffered from a physical disability which might well account for his behavior. It was held that the trial court erred in permitting the officers to express an opinion that defendant was intoxicated for the reason that such an opinion usurped the jury's function on the only fact in issue. Again, this is a case involving a detailed description of relatively simple facts by the officers involved so that it could be said that opinion testimony was unnecessary—i.e., that the jury was perfectly capable of drawing an inference or making a decision on the basis of the facts in evidence.

Thus, again, the opinion of the Court of Appeals may well rest on this circumstance.

In *Webb v. Commonwealth*, 204 Va. 24, 129 S.E. 2d 22 (1963), the defendant was indicted for embezzling her employer's funds. At the trial of the case one Whiteside testified for the Commonwealth that the "'effect' of the two deposit slips prepared by the defendant . . ., which contained unrecorded receipts on the books was that . . . 'they had to replace funds from other customers which had been removed.'" *Id.* at p. 33. The court adds: "The witness's answer went beyond merely stating what the books showed. It had the effect of stating a conclusion that the unrecorded receipts were used to replace funds converted by the defendant to her own use, which is the very issue in this case." *Id.* at p. 33. The court states the following rule in rejecting such testimony: "It is generally held that while an expert witness may be permitted to express his opinion relative to the existence or nonexistence of facts not within common knowledge, he cannot give his opinion upon the precise or ultimate fact in issue, which must be left to the jury or the court trying the case without a jury for determination." *Id.* at p. 33. Actually, the court's decision in this case may be based on three facts without resort to the puzzling formula prohibiting an opinion on the ultimate fact in issue. First, the court apparently treats the testimony of the witness as a conclusion regarding the legal issue in the case. Second, the court suggests that the facts were such that a jury could draw an inference or form a conclusion as readily as the witness; and third, the witness's statement was in the realm of the kind of surmise or conjecture which was not calculated to be helpful to the jury.

Finally, in the earlier but leading case of *Mitchell v. Commonwealth*, 141 Va. 541, 565, 127 S.E. 368, 376 (1925), a bank officer was prosecuted for making entries designed to conceal the true state of his account. The Court of Appeals said that a witness, expert or not, could not testify that the effect of these entries would be to conceal the true state of the defendant's account, since such testimony would amount to an opinion on the very fact to be tried by the jury. Again, the

court noted, too, that the facts were such that expert opinion was not needed to enable the jury to form its conclusion.

By way of comment on the cases noted thus far, it is true that where feasible, or perhaps possible, a witness is required to give testimony in the form of statements of fact and not statements of opinion. It is also true—and equally true—that if the witness observes facts or, in the case of a non-eyewitness expert, assumes them; if he is capable of forming an opinion based on those facts; and if the facts are such that they cannot be described adequately to the jury, the witness will generally be allowed to state his opinion. This rule is a simple matter of convenience in some cases, and a matter of necessity in many others if we are to arrive at something approximating the truth. This rule amounts to a paraphrase of Virginia's so-called "collective facts doctrine." See, e.g., *Mohler v. Commonwealth*, 132 Va. 713, 727, 111 S.E. 454 (1922). It might also be noted that the tendency of our courts to insist upon facts or more detailed testimony increases as the testimony of the witness approaches those matters or facts upon which a case may hinge. McCormick, *Evidence*, § 12 (1954).

It seems unfortunate to me if we have, perhaps, permitted the opinion rule, and more specifically, the rule prohibiting opinions on so-called "ultimate" or "dispositive" facts to harden into a rigid exclusionary rule. In the first place, there is an enormous logical problem involved in distinguishing between statements of fact and statements of opinion. In *United States v. Petrone*, 185 F. 2d 334 (2nd cir., 1950) the court, composed of Learned Hand, Chief Judge, and Swan and Frank, states:

In this circuit we have several times taken another view: that is, that the question is at most one of discretion, turning upon how the judge thinks the truth may best be extracted from the particular witness who chances to be on the stand. Made obligatory, not only may the canon become a substantial obstacle to developing the truth, but it presupposes a logical solecism: for our per-

ceptions—even our most immediate sense perceptions—are always ‘conclusions’. The question ought always to be whether it is more convenient to insist that the witness disentangle in his own mind—which, much more often than not, he is quite unable to do—those constituent factors on which his opinion is based; or to let him state his opinion and leave to cross examination a searching inquisition to uncover its foundations. Yet such is the inveterate habit in American courts of treating rules of evidence as though they were sacred tables, that it is apparently impossible to substitute the view that they should be lightly held as wise admonitions for the general conduct of the trial. See also: McCormick, *Evidence* § 11 (1954). 7 Wigmore, *Evidence*, § 1919 (3d. ed. 1940).

In the second place, the rule that opinion evidence on the ultimate question for the trier of facts is not admissible tends to confusion and to eliminate much cogent and reliable testimony.

Where an expert is needed, the circumstance that the jury must decide the ultimate questions of fact is certainly no reason for depriving them of the benefit of such testimony. If an expert is on the stand then, by hypothesis, the jury cannot decide or easily draw many of the inferences from evidential facts to those material facts that will decide the case. This decision has been made by the trial judge together with the decision that the expert is qualified to draw these crucial inferences. If the opinion evidence will aid the jury, it is even more important that they have the benefit of the opinion on ultimate facts, since these decide a case and since a mistake here means an erroneous result or decision. In applying any rigid rule excluding opinion evidence on the decisive facts, we discard evidence that is more cogent than the evidence which we receive on evidentiary facts—and we do so chiefly because it is more pertinent or cogent. It has not been held in Virginia, or generally elsewhere, that direct eyewitness testimony as to an ultimate or decisive fact is inadmissible simply because it happens to be offered to prove such a fact,



but logically, if opinion testimony is rejected solely because it relates to the ultimate fact in issue, we should likewise reject eyewitness testimony as to such facts. Please remember, now, we are considering the kind of opinion testimony that would ordinarily be received, but is rejected solely because it relates to ultimate facts.

The rule (if it is a rule) under discussion can be traced back to a group of early decisions in which courts employed the phrase: "That is the question which the jury must decide" when the courts were rejecting opinions that would not tend to aid the jury in understanding their problem or in arriving at the truth. See *Hooper v. General Motors Corp.*, 123 Utah 515, 260 P. 2d 549 (1953). (Concurring opinion by Wade.) This is a familiar rule applicable to all opinion evidence, and it is a viewpoint once espoused by the Virginia court in discussing the admissibility of an opinion on an ultimate fact in issue. In *Virginia Ry. & Power Co. v. Burr*, 145 Va. 338, 133 S.E. 776 (1926), the court quoted with approval from Wigmore and applied the following standard:

The second corollary to the general principle of knowledge is that the result of the witness's observation need not be positive or absolute knowledge. Such a degree of knowledge cannot be demanded even in theory; it suffices if he had an opportunity for personal observation, and did get some impressions from the observation . . . if there was actual personal observation of the pertinent fact, (the witness) may testify as to the impression which he then gained from his personal observation. What the courts repudiate then is a mere guess, an exercise of the imagination, a suspicion, a conjecture, offered in the place of personal observation; it is from this point of view only that a belief or opinion or impression is not to be received. *Id.* at 352, 353.

Other phrases often used to reject opinion testimony on the ultimate fact in issue are that such testimony "usurps the function of the jury" or "invades the province of the jury."

Wigmore states that these phrases are no more than mere bits of empty rhetoric. 7 Wigmore, *Evidence*, § 1920 (3d ed. 1940). He then adds the argument that the witness could not "usurp" the function of the jury if he desired because the jury may still reject his opinion and accept some other view. *Ibid.* No legal power can compel them to accept the witness's opinion against their own.

I must confess that there is one situation in which I have considerable sympathy with the objection that the opinion of a given witness "usurps the function of the jury" or "invades the province of the jury." This is in a case where the witness expresses an opinion as to the law or an opinion on a mixed question of law and fact. Thus, a witness could not offer an opinion directly on such legal questions as damages, negligence, testamentary capacity, and the like. In these and similar instances the witness would be assuming an unarticulated legal standard and applying this standard to the facts observed by him to reach a legal conclusion. It is true, in our adversary system, that it is peculiarly within the province of the jury to apply the law, as received from the judge, to the facts found to exist and that no witness can or should perform this function for them.

Finally, I express the hope that, despite the language employed in most of the illustrative Virginia cases, Virginia still has no rigid rule prohibiting opinion testimony regarding an ultimate fact in issue. For the most part, these cases can be decided (and perhaps were decided) on other grounds. There is certainly language in the decisions which justifies this hope.