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Expert Opinion and the Ultimate Issue Doctrine - Shivers v. Carnaggio

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Comments and Casenotes

Expert Opinion And The Ultimate Issue Doctrine

Shivers v. Carnaggio[1]

A housewife who received a back injury when a taxicab in which she was riding was struck in the rear by an automobile brought suit with her husband against both drivers and the taxicab company. Plaintiffs recovered a small judgment and appealed, claiming *inter alia,* that they were unduly hampered in presenting their evidence because their medical experts, a general practitioner and an orthopedic specialist, were not permitted to state the percentage by which they thought the plaintiff was disabled as a result of her injury. The trial court, in striking the reference to *percentage of disability,* explained that the medical witnesses could "refer to a *degree of limitation* in percentages."[2] The Maryland Court of Appeals held the reference proper and reversed and remanded the case for a new trial, finding an abuse of the trial court's discretion.

It was the defendant-appellee's contention that the function of the medical expert is limited to the determination of the extent to which a person has lost the motion of a particular portion of his body, and cannot be enlarged to allow such expert to give an opinion as to the effect of such immobility on the habits and activities of the patient, for such evidence as to disability would invade the province of the jury. The Court of Appeals rejected this and ruled that a physician who has, in addition to his medical knowledge, familiarity with the activities and occupation of his patient, may express an opinion as to the extent to which the loss of motion or anatomical disability will cause economic disability.[3]

Two related problems are involved in this decision. The first (covered in this Note) is whether the opinion rule forbids expert opinion as to an ultimate issue; and the second (covered in an ensuing companion Note) is whether, as a matter of testimonial qualification, the medical expert is

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[1] 223 Md. 585, 165 A. 2d 898 (1960).

[2] Emphasis supplied. The lower court stated to the medical witness: "[L]et me caution you not to refer to percentages such as you previously mentioned. * * * If you want to refer to a degree of limitation in percentages, that is all right, but not as you have previously attempted to do." *Id.*, 587.

[3] *Supra*, n. 1, 588.

competent to discuss the topic of disability to perform a particular job.

The Maryland Court of Appeals says in the *Shivers* decision that, subject to the trial judge's sound discretion, any expert opinion testimony is admissible if it will be of value to the jury. That an expert opinion may touch upon an ultimate issue apparently no longer matters. This case confirms a modern trend, observable in Maryland and elsewhere, toward liberalization of the opinion rule. The early Maryland cases ruled inadmissible expert opinion evidence bearing upon an ultimate issue in the proceedings, on the theory that this invaded the province or usurped the function of the jury.[4]

Typical of the older cases is *McClees v. Cohen*,[5] a suit in trespass against a dentist for the wrongful extraction of two teeth. Exception was taken to the refusal of the trial court to allow the dentist's counsel to ask his expert witness if in his opinion the defendant "exercised the ordinary skill that an ordinary skilled dentist would exercise." The Court of Appeals affirmed the trial court, holding that to accept such testimony would be to allow the witness to usurp the function or invade the province of the jury. It should be noted here that these expressions "usurp" and "invade" are not to be taken literally; but as McCORMICK points out, they do suggest the danger that the jury may forego its own analysis of the facts and bow to the opinion of an influential witness.[6]

[4] Some earlier cases excluding testimony on an ultimate issue are: Baltimore Belt R. Co. v. Sattler, 100 Md. 306, 59 A. 654 (1905), where expert testimony was held inadmissible to show amount of damage caused by smoke and vapors from passing railroad; Hanrahan v. City of Baltimore, 114 Md. 517, 80 A. 312 (1911), where the question asked was if "due care" was used in locating a sewer; Baltimore C. & A. Ry. Co. v. Moon, 118 Md. 380, 84 A. 536 (1912); Capital Traction Co. v. Contner, 120 Md. 78, 87 A. 904 (1913), where a lay witness was not allowed to express his opinion whether motorman of streetcar could have stopped before accident; Commonwealth Bank v. Goodman, 128 Md. 452, 464, 97 A. 1005 (1916), where the witness was not permitted to say whether a bank teller in paying out money was "justified"; Western Md. R.R. Co. v. Jacques, 129 Md. 400, 99 A. 549 (1916), where question concerned the amount of damage to lumber; McClees v. Cohen, 158 Md. 60, 148 A. 124 (1930), where question was whether dentist used ordinary skill. See also Bode v. Coal Co., 172 Md. 406, 191 A. 685 (1937); Blinder v. Monoghan, 171 Md. 77, 188 A. 31 (1936); Barber v. Knipp & Sons, 164 Md. 55, 163 A. 862 (1933); Griffith v. Pullman Co., 142 Md. 514, 121 A. 362 (1923). But *Cf.* Consol. Gas Co. v. Smith, 109 Md. 186, 72 A. 651 (1909) which did allow the expert testimony, but only after distinguishing Baltimore Belt R. Co. v. Sattler, *supra*. Some of these cases may also have involved a more tenable objection: that the expert was giving an opinion which included a conclusion of law, *e.g.*, that certain conduct was negligent. See 2 MORGAN, BASIC PROBLEMS OF EVIDENCE 195 (1957).

[5] 158 Md. 60, 148 A. 124 (1930).

[6] McCORMICK, EVIDENCE (1954) § 12.

The early Maryland position is stated in *Baltimore Belt R. Co. v. Sattler:*

> "There is a general concurrence of authority and decisions in support of the proposition that expert testimony is not admissible upon a question which the Court or jury can themselves decide upon the facts; or stated in other words, if the relation of facts and their probable results can be determined without special skill or study, the facts themselves must be given in evidence and the conclusions or inferences drawn by the jury. * * *
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> *It is not desirable to enlarge the limits within which expert testimony is admissible, and whenever the ultimate fact to be proved is, from the nature of the issue, especially confided to the jury, such evidence should be rigidly excluded."*[7]

While the first sentence of the above quotation would be recognized as still applicable today, the Court of Appeals has certainly repudiated the italicized portion of the statement representing the strict early Maryland position.

Relying upon the more recent decisions, Judge Hammond in the *Shivers* opinion points out that several Maryland cases[8] have indicated an agreement with WIGMORE and MCCORMICK, both of whom reject the soundness of the ultimate issue rule.[9] By hypothesis, the expert, whenever he is properly permitted to give his opinion, is doing something for the jury which it could not so well do for itself. To this extent, the province of the jury is "invaded" and its function "usurped" whether or not the opinion happens to touch the ultimate issue. There is little reason for denying expert opinion on an ultimate issue if its necessity on other issues is admitted. In either case the jury is given considerable help, but remains free to assess the proper weight of the testimony. Furthermore, the rule may be

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[7] 100 Md. 306, 333-334 (1905). Emphasis added.

[8] Judge Hammond cites: Insurance Co. v. Berlin, 185 Md. 404, 45 A. 2d 90 (1945); Casualty Insurance Co. v. Zajic, 175 Md. 368, 1 A. 2d 903 (1938); Travelers Insurance Co. v. Needle, 171 Md. 517, 189 A. 216 (1937); Prudential Insurance Co. v. Brookman, 167 Md. 616, 175 A. 838 (1934).

[9] See 7 WIGMORE, EVIDENCE (3d ed. 1940) § 1921 where it is stated: "When all is said, it remains simply one of those impracticable and misconceived utterances which lack any justification in principle." Also see MCCORMICK, EVIDENCE (1954) § 12, where the author states: "It is believed, however, that this general rule is unduly restrictive, is pregnant with close questions of application, and often unfairly obstructs the party's presentation of his case."

baffling to all concerned and for this reason difficult to apply; it is by no means clear exactly how close to a central question an issue must be to be ultimate. Too often it does nothing but hinder the presentation of the true circumstances of the case.

The four cases cited by Judge Hammond[10] show the shift in the thinking of the Court of Appeals in regard to the ultimate issue doctrine.[11] In *Casualty Ins. Co. v. Zajic*,[12] an attending physician was permitted to give his opinion that the plaintiff had permanently lost the use of his entire left hand and foot within the meaning of a provision of the insurance policy, and was disabled from continuing his work. In the *Brookman, Needle,* and *Berlin* cases[13] medical witnesses were allowed at the trial to state that the insured were totally disabled under the applicable provisions of the policies, and in each case on appeal the argument was rejected that this brought before the jury an opinion on the ultimate issue which was for the jury to decide. In each of these cases the Court of Appeals merely held there was no *reversible* error; and in the *Needle* case, the Court pointed out that the form of the questions propounded may be the object of some criticism — though not amounting to reversible error.

A more appropriate case evidencing the change in Maryland thought on the expert opinion problem is *Langenfelder v. Thompson*.[14] This case involved a personal injury suit in which a doctor was asked his opinion as to the cause of the plaintiff's injury. His answer was: "The accident in all probability."[15] An objection on the ground that this opinion invaded the province of the jury was overruled. The Court quoted at length from an opinion of Judge Van Devanter in *United States Smelting Co. v. Parry*[16] where it was said that the rule restricting opinion testimony on an ultimate issue was never intended to close any reasonable avenue to the truth and that the modern trend is to give as wide a scope as possible in the investigation, leaving to the trial judge a discretion in determining what testimony has a tendency to establish the ultimate facts and to reject testimony having no legitimate bearing

[10] *Supra*, n. 8.

[11] See the extensive annotation in 111 A.L.R. 603 (1937) on "Expert Testimony as to Disability."

[12] 175 Md. 368, 1 A. 2d 903 (1938).

[13] *Supra*, n. 8.

[14] 179 Md. 502, 20 A. 2d 491 (1941).

[15] *Id.*, 504.

[16] 166 F. 407 (8th Cir. 1909).

or tending to prejudice the minds of the jurors. A witness possessed of special skill or training may give an opinion when it will aid the jury, "the true test being, not the total dependence of the jury upon such testimony, but their inability to judge for themselves as well as is the witness."[17]

This principle was later followed in *Empire State Ins. Co. v. Guerriero*,[18] a suit on certain fire insurance policies covering "explosions" in which a heating expert was allowed to categorize an occurrence as an explosion.[19] Citing and quoting from *Langenfelder v. Thompson*,[20] the Court held the expert testimony as to the cause of the occurrence admissible since special training and skill was necessary to the formation of a rational conclusion.[21]

Now with the *Shivers* decision perhaps finally fixing the Maryland position, the opinion rule, in regard to expert testimony, by one competent to speak on the matter, should become merely a rule of preference operating to exclude relevant testimony only on the ground that it can be conveniently presented in a form more easily understood by a jury.[22] The *Shivers* case places the admissibility of such

[17] *Id.*, 411.

[18] 193 Md. 506, 69 A. 2d 259 (1949).

[19] The Court stated:

"If the facts can be intelligently understood by the jury and they can form a reasonable opinion from the facts for themselves, there is no reason to admit the opinion evidence of anyone. However, when the question involved is such that jurors of ordinary judgment and experience are incompetent to draw their own conclusions from the facts presented and intelligently decide the question before them, without the aid of expert testimony, this opinion testimony is a notable exception to the well known rules of evidence. This exception should be applied with the greatest caution and discrimination. . . ."

Id., 514.

[20] *Supra*, n. 14.

[21] Also see Starr v. Oriole Cafeteria, 182 Md. 214, 34 A. 2d 335 (1943) in agreement with the principle stated.

[22] It is not clear what effect the *Shivers* doctrine, dealing solely in the area of expert testimony, may have upon the application of the ultimate issue rule to lay testimony.

The lay opinion rule originally purported to require lay witnesses to confine their testimony to facts, and to obstain from expressions of belief, impressions, or opinions. A clear cut distinction between fact and opinion is in fact impossible, and even if distinction were possible, it would not provide a sensible basis for a rule excluding opinion evidence. See 7 WIGMORE, EVIDENCE (3d ed. 1940) § 1919. As MCCORMICK, EVIDENCE (1954) § 11 puts it: "It is believed that the standard actually applied by the trial judges of today approaches more nearly the principle espoused by Wigmore, namely that the opinion should be rejected only when it is superfluous in the sense that it will be of no value to the jury." This view is illustrated by Enoch Co. v. Johnson, 183 Md. 326, 330, 37 A. 2d 901 (1944) where the trial judge's admission of the plaintiff's statement, "It looked like to avoid or keep from hitting that automobile that he swung over and hit me," was approved on the ground that it was not a "conclusion" but an "impression based on facts relating to an accident which the witness experienced." The plaintiff's statement is plainly not observed

testimony up to the sound discretion of the trial judge. If this testimony has no legitimate bearing on the question at issue, if it will unduly prejudice the minds of the jurors, if the witness lacks the necessary special training or experience, or if his opinion is not necessary to aid the jury in reaching a correct conclusion, the testimony will be excluded. But to have a set rule of law, that an opinion on an ultimate issue to be considered by the jury is inadmissible, is impractical and too often obstructs a party's presentation of the true facts of his case. The opinion must of course be solidly based on satisfactory data — the quality of which can always be brought out on cross examination.[23]

DONALD NEEDLE

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fact; it includes an inference as to the driver's mental processes, whether it is tagged "conclusion" or "impression."

Whether this modern trend will extend in Maryland to liberalizing the old rule excluding lay opinion on the ultimate issue remains to be seen. The older cases in point have consistently adhered to the view that an opinion or conclusion of a non-expert witness which is determinative of an ultimate issue should be excluded as being an invasion of the province of the jury. Some representative cases excluding lay testimony on an ultimate issue are: Tall v. Steam Packet Co., 90 Md. 248, 44 A. 1007 (1899), where question was asked if steamboat captain could have prevented altercation by acting more promptly; Western Union Telegraph Co. v. Ring, 102 Md. 677, 62 A. 801 (1906), where the question concerned the amount of damage to certain trees; Fletcher v. Dixon, 107 Md. 420, 68 A. 875 (1908), where question concerned whether it was safe for the plaintiff to drive a particular horse; Weilbacher v. J. W. Putts Co., 123 Md. 249, 91 A. 343 (1914), where question was asked an experienced painter if the suspension of a stage above a sidewalk made the use of the sidewalk dangerous (possibly expert, rather than lay testimony); County Comrs v. Bel Air Sub. Imp. Assn., 134 Md. 548, 107 A. 348 (1919), where lay testimony was held inadmissible as to whether certain work was done according to the requirement of a contract; Bode v. Coal Co., 172 Md. 406, 191 A. 685 (1937), where the question concerned the point at which an automobile had been damaged. No Court of Appeals case in the last 25 years has been found which excluded lay opinion on the ultimate issue. The reasoning in the instant case would seem as compelling when applied to lay opinion as to expert, once the practical necessity of conveying the necessary information to the jury in opinion form, if it is to be conveyed at all, is conceded.

[23] WIGMORE, *op. cit. supra*, n. 9, § 1929 quite aptly sums up the situation when he states:

> "[A] single erroneous ruling upon the single trifling answer of one witness out of a dozen or more in a trial occupying a day may overturn the whole result and cause a double expense of time, money, and effort; and we perceive the absurdly unjust effects of the rule. Add finally the utter impossibility of a consistent application of the rule, and the consequent uncertainty of the law, and we understand how much more it makes for injustice rather than justice. It has done more than any one rule of procedure to reduce our litigation towards a state of legalized gambling."