Marquette Law Review

Volume 52
Issue 4 *Winter 1969*

Article 10

1969

Criminal Law: Evidence: Use of a Hypothetical Question

Leslie J. Mlakar

sulted who can draw and attend execution of a codicil or a new will making such bequest. The final alternative is to advise the client at the outset to seek independent counsel.

Conclusion

In *Collentine,* the Wisconsin Supreme Court goes further than other jurisdictions by departing from the traditional notions of rebuttable presumptions with regard to undue influence in cases of attorneys-beneficiaries and by establishing a conclusive presumption which invalidates the entire will. In doing this, the court may have upset the delicate balance between ethical limitations and practical flexibility in that the line of demarcation beyond which the presumption of unprofessional conduct becomes conclusive is not clearly drawn.

MICHAEL C. ELMER

Criminal Law: Evidence—Use of a Hypothetical Question— In the case of *Rice v. State,*[1] the Wisconsin Supreme Court was confronted with the nature and use of the hypothetical question in a criminal trial, on both the direct examination of the defense's expert witness and on the cross-examination of the state's expert witness. The defendant was accused of first degree murder. A statement of the facts and circumstances leading to the shooting and death of the victim is necessary to understand the import of the hypothetical questions which were asked during the trial.

After a series of fights between the deceased and certain patrons of defendant Rice's bar, Rice and the deceased became involved in an altercation which resulted in the deceased being hit about the head a few times. The deceased was then carried out of the tavern and laid on a concrete area outside the bar. Rice then took a shotgun from behind the bar and walked to where the deceased was lying and shot him in the face. A post mortem examination of the deceased was conducted by a pathologist at the hospital. The pathologist testified at trial that he concluded, from the autopsy that he had performed, that the cause of death was "trauma and blood loss essentially due to [a] shotgun blast which destroyed the lower half of the face."[2] The evidence introduced during the trial showed that in the fights which had occurred prior to the shooting, the deceased had been beaten about the head in one or more of them. The evidence also disclosed that during one of these fights the deceased had struck his head on the corner of a table. The pathologist testified on direct examination that the trauma and blood loss resulted in a cardio-vascular collapse which caused the death of the deceased. The pathologist had drawn his conclusions as

[1] 38 Wis. 2d 344, 156 N.W.2d 409 (1968).
[2] *Id.* at 349, 156 N.W.2d at 412.

to the cause of death from the information he had received when the deceased was brought to the hospital. The only information available to the pathologist, however, was the fact that the deceased had been shot in the face. The pathologist knew nothing of the fights prior to the shooting.

On cross-examination of the pathologist, the defense counsel attempted to elicit a concession from the doctor that his autopsy would have been different if he had known of the series of fights in which the deceased had been struck about the head. The trial court sustained the state's objection to this question on the basis that there was no foundation in the record on which to predicate such a question.

The defense counsel then posed a hypothetical question to the pathologist which referred to all of the alleged events leading up to the death of the deceased, and in conclusion asked the pathologist if he would have performed a pathological examination of the brain if he had known of these events. The court again sustained the state's objection to the question, stating that "[T]he hypothetical basis of the question is too complex to have included all the elements testified to in the record so that it might be considered impossible for the doctor-pathologist to have an answer [*i.e.*, a competent opinion] under the evidence that hasn't been satisfactorily established for the question."[3] During the pathologist's testimony he did admit that the cardio-vascular collapse could have resulted from a brain injury.

The defense counsel on direct examination of its own expert witness again attempted to use the same hypothetical question it had used on cross-examination of the state's expert witness. The trial court again sustained the state's objection to the question, ruling that no competent opinion could be rendered without some reference to the force of the blows to the head.

On appeal, the Wisconsin Supreme Court held that, (1) the trial court abused its discetion in limiting the scope of the defendant's cross-examination of the state's medical expert; and, (2) the trial court erred in limiting the defendant's direct examination of its own medical expert.[4]

Scope of Cross-Examination

Prior to this case the rule had been that:

> [G]reat liberty and latitude are allowed in cross-examination of expert witnesses. However, the applications of this rule are often directed to such matters as the education of the expert

[3] *Id.* at 351, 156 N.W.2d at 412.

[4] Even though the court found error, it did not reverse the conviction. The court concluded that it was impossible to believe that death resulted from some other cause, deciding that any errors in the trial did not affect any of the substantial rights of the defendant. The court also said that the errors were not prejudicial to the defendant and that the evidence in the trial was sufficient to sustain a verdict of first degree murder.

> witness, his practical experience, the extent of his observation outside his own work, as well as other cognate matters bearing directly on his ability as an expert. Upon such examination, hypothetical questions may go outside the record for the purpose of testing the skill of the witness.[5]

This rule can be classified as the "half-open door" type of cross-examination,[6] *i.e.,* the cross-examination extends to any matters except the cross-examiner's own case.

The defense attorney in *Rice,* however, was not only testing the skill and knowledge of the expert witness in his cross-examination of him, but was also attempting to attack the opinion of the expert as to the cause of death. The court, citing *Delap v. Liebenson,*[7] stated that:

> When it comes to cross-examination of such expert witnesses, however, the rule is not so limited, and, within the field of the trial court's reasonable discretion, questions may properly be framed assuming quite a different state of facts than those appearing in the record for the purpose of testing the knowledge and skill of such witness and the weight to be given to his testimony.[8]

It is a well-established principle that there should be a wide latitude allowed in the cross-examination of a witness in a criminal trial.

> Opportunity should be allowed for a thorough and sifting cross-examination which should be neither unduly restricted nor abridged and must be allowed a range as wide as the direct examination. Cross-examination should be allowed to extend to anything which is relevant to show the improbability of the direct evidence.
>
> A wide latitude is permitted especially in capital cases. The court should never interpose except when there is a manifest abuse of the right of cross-examination as to facts in issue or relevant to the issue.
>
> It is sometimes stated that reasonable cross-examination must be allowed. This, however, in practice generally amounts to the same privilege as the allowance of the wide latitude, since without such range, the examining party has not been allowed the reasonable exercise of his right to cross-examine.[9]

This wide latitude in cross-examination is particularly necessary in a murder trial when the expert witness has given, on direct examination, his opinion as to the cause of death. The hypothetical question is the only way the defendant's counsel can attack the conclusion

---

[5] Simpson v. State, 32 Wis. 2d 195, 206, 145 N.W.2d 206, 211 (1966) (footnotes omitted). *See also* Shurpit v. Breh, 30 Wis. 2d 388, 141 N.W.2d 266 (1966); Delap v. Liebenson, 190 Wis. 73, 208 N.W. 937 (1926); Annot., 71 A.L.R.2d 6 (1960); 2 B. JONES, EVIDENCE § 437, (5th ed. 1958).

[6] C. MCCORMICK, EVIDENCE § 21 (1954) [hereinafter cited as MCCORMICK]...

[7] 190 Wis. 73, 208 N.W. 937 (1926).

[8] *Id.* at 82, 208 N.W. at 941 (emphasis supplied by the *Rice* court).

[9] 3 F. WHARTON, CRIMINAL EVIDENCE § 861, at 242 (12th ed. 1955).

of the expert witness. The hypothetical question need not include all the facts on the record, but the expert must not be questioned on a situation having no foundation in the facts presented. He may, however, be questioned on the facts which the cross-examiner claims he proved, provided such examination is confined to the possible or probable range of the facts. "A hypothetical question need not assume as proved all facts which the evidence in the case tends to prove, but only those which tend to be proved and on the basis of which the correct answer is sought."[10] In the civil cases of *Zoldoske v. State*,[11] and, more recently, *Sharp v. Milwaukee & Suburban Transport Corp.*,[12] the court applied the rule which the *Rice* court applied to criminal cases. In the *Sharp* case the court said, "[A] hypothetical question need not state all the facts in evidence in the case 'but only those needed to allow the expert to provide a correct answer on the theory advocated by the questioner's side of the case.' "[13]

This rule, coupled with the reasoning that, "The purpose of a hypothetical question is to give the jury the benefit of an expert opinion upon one or another of several situations which may be found to exist in the evidence,"[14] brings the *Rice* decision into perspective. In *Rice* there were two conflicting theories as to the cause of death. The state contended that death was caused by the gunshot to the face. The defendant contended, however, that the death could have been caused by a brain injury sustained by the deceased in a fight prior to the shooting.

> [W]here there are conflicting theories in a case and evidence to support each theory, counsel in propounding a hypothetical question to an expert may select any hypothesis fairly supported by the evidence and call for the conclusion of the expert witness upon the basis of the facts stated in the hypothetical question.[15]

The purpose of the defense counsel's question to the state's medical expert was not only to elicit from him the possibility of a cause of death different from that which he stated on direct, but also to impeach his opinion and to affect the weight which the jury would give to his testimony.[16] The impeachment of the medical expert's opinion would be

---

[10] Kreyer v. Farmers' Co-operative Lumber Co., 18 Wis. 2d 67, 77, 117 N.W.2d 646, 652 (1962).
[11] 82 Wis. 580, 52 N.W. 778 (1892).
[12] 18 Wis. 2d 467, 118 N.W.2d 905 (1962).
[13] *Id.* at 477, 118 N.W.2d at 910. *See also* Kreyer v. Farmers' Co-operative Lumber Co., 18 Wis. 2d 67, 117 N.W.2d 646 (1962); Balthazor v. State, 207 Wis. 172, 240 N.W. 776 (1936).
[14] Kreyer v. Farmers' Co-operative Lumber Co., 18 Wis. 2d 67, 77, 117 N.W.2d 646, 652 (1962).
[15] Balthazor v. State, 207 Wis. 172, 191, 240 N.W. 776, 783 (1932). *See also* State v. Cohen, 31 Wis. 2d 97, 142 N.W.2d 161 (1966).
[16] *See*, WIS. JURY INSTRUCTIONS—CRIMINAL, No. 200 and No. 205. These are the jury instructions given when expert testimony is used and when the expert testifies to certain questions which have been proposed by the use of a hypo-

accomplished by showing what his normal procedure would be in the situation propounded by the cross-examiner The pathologist's admission that he would have done a pathology of the brain had he known of the prior fight would diminish the weight which the jury would have given to his opinion on direct examination as to the cause of death.

There is one drawback to the court's expansion of the scope of cross-examination. The court, it seems, has abrogated the half-open-door type of cross-examination and has unconsciously adopted the traditional English rule of wide-open cross-examination. This rule allows the cross-examiner to pose questions not only about subjects brought out in direct examination, but about any subject relevant to any of the issues of the case, including any facts and opinions which relate solely to the cross-examiner's own case and defenses.[17]

To determine whether the court has in fact opened the door the whole way and allowed a wide-open type of cross-examination, it is necessary to view the decision in the light of the three main functions of cross-examination: "(1) to shed light on the credibility of the direct testimony; (2) to bring out additional facts related to those elicited on direct examination, and (3) in states following the wide-open rule, to bring out additional facts which tend to elucidate any issue in the case."[18] These functions must then be measured against a standard of relevancy. There is no doubt that in the second function the standard of relevancy applied is the same as on direct examination. Nor is there any question as to which standard is used in the wide-open type of cross-examination. The standard of relevancy is the same as that used for direct examination. But as to the first function—that of testing credibility—it seems that a different standard of relevancy must be applied, since the purpose of the cross-examination is different from that of direct examination.

> "The test of relevancy [in impeachment of the witness' credibility] is not whether the answer sought will elucidate any of the main issues, but whether it will to a useful extent aid the court or jury in appraising the credibility of the witness and assessing the probative value of the direct testimony."[19]

This test of relevancy is the one used in the half-open-door type of cross-examination when the cross-examiner is attempting merely to impeach the witness by establishing discrepancies or inconsistencies in his testimony. But as said before, this standard is not applied when the wide-open type of cross-examination is used. In the wide-open type

---

thetical question. These instructions explain to the jury the weight which should be given to the testimony of the expert witness based on a hypothetical question.

[17] McCORMICK, § 21.

[18] *Id.* § 29, at 54.

[19] *Id.* at 55.

of cross-examination the standard of relevancy applied is the same as that applied on direct examination.[20] Therefore, if it can be determined what test of relevancy the court applied, it is possible by inductive reasoning to determine what type of cross-examination the court is allowing.

Even though the *Rice* court states that

> "[Q]uestions may properly be framed assuming quite a different state of facts than those appearing in the record for the purpose of testing the knowledge and skill of such witness *and the weight to be given to his testimony.*"[21]

it does not follow the rule. If the court had determined that the question was for impeachment purposes, it should have applied as the test of relevancy *not whether the answer sought would elucidate any of the material issues,* but whether it would to a useful extent aid the court or jury in appraising the credibility of the witness and assessing the probative value of the direct testimony. If this standard of relevancy had been applied, the hypothetical question would not have been permissible, because the main purpose of the question was *to elucidate one of the material defensive issues of the case, i.e.,* the cause of death. Once the court deemed the question permissible, the only conclusion which can be drawn is that the court applied the standard of relevancy which is applied on direct examination. Therefore, the scope of cross-examination must be the wide-open type, *i.e.,* the traditional English rule.

By permitting this type of cross-examination, the court allows the defendant to put on his case in chief under the guise of impeachment. This is contrary to the normal order of proof in the trial and consequently permits the defendant to complete his defense before the state can finish with its proof.

The ability of the cross-examiner to put on his case in chief before the state has finished brings about another problem. If the court does not exercise some discretion in controlling the hypothetical question of the cross-examiner, the jury may become confused. It cannot be denied that the hypothetical question is a very effective means of presenting an opinion of the expert to the jury, but it may be abused by the cross-examiner. A clever advocate may word the question in such a way that the expert may be barred from giving his exact opinion in the case. A misleading answer may be educed when the expert is forced to answer the question in the context in which it is framed. This tends to bring about confusion in the minds of the jury in determining precisely what weight should be given to the testimony. Consequently, the

---

[20] McCormick, § 29, at 55.

[21] 38 Wis. 2d 344, 354, 156 N.W.2d 409, 414 (1968).

jury may be prohibited from receiving the best opinion the expert could have given.

Direct Examination of the Expert

The *Rice* decision also expanded the use of the hypothetical question on direct examination of the defense's expert witness. Use of the hypothetical question propounded to the expert was not permitted because the question called for speculation on the part of the witness as to the severity of the blows to the victim's head. The supreme court, however, said that the description of the blows was sufficient to support an inference from which the doctor could formulate an opinion as to whether or not such head injuries could have caused the death. In a civil trial, when the hypothetical question requires an answer based on conjecture, the question will not be allowed. The supreme court in *Rice,* however, would not apply this rule to criminal trials. The reason for allowing the question is that in a criminal trial there is a different burden of proof than in a civil trial. In a civil trial, of course, the plaintiff has the burden of establishing a claim. But in the absence of affirmative defenses, the defendant in a criminal trial has no burden of proof whatsoever because of the presumption of innocence. The issue on the burden of proof presented in a criminal trial is not whether the defendant disproved his commission of the crime charged but whether the state proved his commission of it beyond a reasonable doubt.

The question propounded on direct examination was basically the same as that asked on cross-examination, *i.e.,* it contained both controverted facts and also omitted certain facts. The supreme court applied the same reasoning in allowing the question on direct examination as it applied in allowing it on cross-examination. The basis for this reasoning was that even though the hypothetical question may omit certain facts, such facts can be elicited by cross-examination.[22] Since any problem can be cleared up by cross-examination and redirect, the opinions based on conflicting inferences and those based on questions which have omitted certain material facts now become questions for the jury. The jury must decide the weight to be accorded to the expert's opinion. Thus, the court is now allowing the use of hypothetical questions on direct by giving the questioner a narrower foundation on which to ask his question.

---

[22] Rausch v. Buisse, 33 Wis. 2d 154, 146 N.W.2d 801 (1966). In this case the court stated that "[A] party has a right to an opinion of an expert witness on the facts which that party claims to be the facts of the case. This rule is subject to the limitation that the questions which unfairly select part of the established facts or which omit material parts should be rejected. However, the normal rule is that any disadvantage to the defendant by the hypothetical question should be remedied on cross-examination." *Id.* at 169, 146 N.W.2d at 809.

Conclusion

It seems that the court in *Rice* has inadvertently eliminated the rule that restricts the scope of cross-examination and by implication has adopted Rule 105 of the Model Code of Evidence.[23] This rule makes the scope of cross-examination a matter of the trial court's discretion. Adoption of Rule 105 should allow an orderly trial without placing a restriction on the extent of the witness' admissible testimony on either direct or cross-examination. The rule also preserves our partisan witness form of advocacy. Such preservation is necessary because the adoption of the wide-open type of cross-examination would in effect eliminate the normal rules of evidence as to the foundation for competency, the partisan witness rule and the order of trial. The state's witness becomes a witness for both the prosecution and the defense.[24]

LESLIE J. MLAKAR

Torts—Negligence—Recovery for Emotional Trauma: In *Dillon v. Legg*,[1] a mother brought a negligence action against the driver of an automobile that struck and killed her infant daughter. She alleged that because she had witnessed the accident, and because she had feared for the safety of her child, she sustained great emotional disturbance, shock, and injury to her nervous system. The trial court granted summary judgment in favor of the defendant. The issue presented on appeal to the state supreme court was whether tort liability may be predicated on emotional trauma and attendant bodily illness that have been induced by apprehension of negligently caused danger or injury to a closely related person. In a 4 to 3 decision, the supreme court recognized the mother's cause of action.

With one exception,[2] the courts since 1930 have denied recovery un-

[23] MODEL CODE OF EVIDENCE rule 105 (1942):

> The judge controls the conduct of the trial to the end that the evidence shall be presented honestly, expeditiously and in such form as to be readily understood, and in his discretion, among other things . . .
>
> . . . .
>
> (h) to what extent and in what circumstances a party cross-examining a witness may be forbidden to examine him concerning material matters not inquired about on a previous examination by the judge or by the adverse party . . . .

[24] In *Neider v. Spoehr*, 41 Wis. 2d 610, 165 N.W.2d 171 (1969), a civil case handed down after the *Rice* decision, the supreme court ruled that the scope of cross-examination was a matter of the trial court's discretion. In *Boller v. Cofrances*, 42 Wis. 2d 170, 166 N.W.2d 129 (1969), another civil case, the court expressly adopted Rule 105(h) of the Model Code of Evidence. The court indicated that the rule should be applied in both civil and criminal trials.

[1] 68 Cal. 2d 766, 441 P.2d 912, 69 Cal. Rptr. 72 (1968)

[2] In Rasmussen v. Benson, 133 Neb. 449, 275 N.W. 674 (1937), *aff'd on rehearing*, 135 Neb. 232, 280 N.W. 890 (1938), the plaintiff was sold poisoned feed for his dairy cows. He suffered a mental breakdown and eventual death induced by his fear for the safety of those to whom he had sold milk. The high degree of care imposed on those who handle poison, as well as a product liability aspect, diminishes the applicability of the case to automobile fact situations.