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Any witness is competent to give testimony who possesses minimum powers of observation, recollection and narration.[1] The liberal evidentiary rules prescribing what this minimum shall be, however, permit the introduction of many witnesses whose powers of observation, recollection and narration[2] are far below normal.[3] For example, challenges to competency have failed to bar testimony by an inmate of a home for feeble-minded,[4] by an epileptic girl with immature mental development,[5] and by a seriously insane inmate in a mental hospital.[6] Because evidence of mental deficiency in competency hearings is not considered by the

1. 2 WIGMORE, EVIDENCE § 478 (3d ed. 1940).
2. The ability to communicate is seldom a problem necessitating the use of experts since poor speaking or hearing abilities can be detected by a lay jury easily.
3. State v. Wildman, 145 Ohio 379, 61 N.E.2d 790 (1945).
4. People v. Lambersky, 410 Ill. 451, 102 N.E.2d 326 (1951).
5. State v. Williams, 111 Utah 379, 180 P.2d 551 (1947).
6. District of Columbia v. Arms, 107 U.S. 519 (1883).

jury,[7] the party opposing the witness must find other methods if the extent of his low intelligence or poor memory is to be presented to the jury for their use in evaluating the weight the witness' testimony should be given.[8] Cross-examination and the use of extrinsic evidence to discredit[9] are the two methods by which the nature of the deficiency can be shown to the jury. Normally, opposing counsel is permitted considerable latitude in cross-examining witnesses,[10] which frequently enables him to demonstrate the witness' deficiency in testimonial powers.[11] The real problem arises when the opposing counsel attempts to disclose similar witness inadequacies by extrinsic evidence. Whether this method may be used to discredit and, if permitted, the limitations on its use, are questions about which there remains doubt.

Lay witnesses can normally testify to impaired intelligence or poor memory for the purpose of discrediting a witness if the deficiency is so serious that it amounts to insanity. Thus lay witnesses were allowed to testify that a suspect witness had an "imbecile mind and memory"[12] and that a witness was mentally deficient when the testimony was offered with evidence of prior committal to a mental institution.[13] The courts have, on the other hand, almost uniformly refused to permit a lay witness to testify to mental deficiency below normal yet not amounting to insanity,[14] even though the "mind has been affected for a number of years with a degree of imbecility to the extent *almost* of insanity."[15] The rationale for excluding such evidence was pointed out in a Colorado decision.

> Men differ in grades of intelligence as blades of grass in

7. 3 JONES, EVIDENCE § 815 (5th ed. 1958). Nor can the jury decide the question of a witness' competency. Competency is solely for the court.

8. "The modern tendency is to avoid treating insanity as a cause of total incompetency as a witness, and to leave the defect in question to have whatever weight it deserves as discrediting the witness' powers of observation, rcollection, or communication." Taborsky v. State, 142 Conn. 619, 629, 116 A.2d 433, 437 (1955).

9. As a method of discrediting a witness, evidence of low intelligence or poor memory differs from normal impeachment (bias, interest, prior inconsistent statements or general community reputation for veracity). The latter shows motive or tendency to be untruthful; the former shows varying degrees of inability to describe accurately, although not such a degree as to render incompetent. Using the term impeachment to describe both creates no problem unless impeachment is construed to mean only untruthfulness; if used in its general sense of discrediting a witness, it covers both areas.

10. Allen v. State, 60 Ala. 19 (1877); Ah Tong v. Earl Fruit Co., 112 Cal. 679, 45 Pac. 7 (1896).

11. But the existence of low intelligence or varying degrees of poor memory is not always easily determined from appearances by the attorney or a lay jury. OVERHOLSER & RICHMOND, HANDBOOK OF PSYCHIATRY 51 (1947).

12. Rivara v. Ghio, 3 E.D. Smith (N.Y.) 264 (1854).

13. Ellarson v. Ellarson, 198 App. Div. 103, 190 N.Y.S. 6 (3d Dep't 1921).

14. Blanchard v. People, 70 Colo. 555, 203 Pac. 662 (1922); Goodwyn v. Goodwyn, 20 Ga. 600 (1856).

15. Phillips v. Short, 2 Harr. (Del.) 339 (1841).

> appearance. The utter unreliability of such testimony is at once apparent, when we remember that every man's opinion of the intelligence of others is largely controlled by the quality of his own. To his neighbors John Smith may have seemed a man of average intelligence, though Herbert Spencer may have deemed him a fool.[16]

The courts have recognized that a lay witness can not measure adequately the degree of subnormal intelligence or memory power or give the extent to which the impairment affects the witness' testimonial reliability. The distinction which has been drawn by the courts would seem to mean that lay witnesses can testify only in the most obvious cases, *i.e.,* where a witness is almost incompetent but where the courts feel bound to admit the witness because he is the only one available or because his impairment is recognized and his testimony easily weighed by the jury.[17]

On the other hand, the North Carolina Supreme Court permitted lay testimony of "memory below medium" in *Isler v. Dewey,*[18] even though the witness' defect did not amount to insanity. Although the court in that case restricted its discussion first to attacks on credibility of makers of wills and deeds—an area where lay testimony might be admissible because of the common law tradition to permit lay opinions of decedent's mind in will contests—it expanded the language later to include any person whose memory was *naturally* weak, saying:

> . . . his testimony will naturally have less weight with a jury than if his memory was sound and unimpaired. To prove of a witness that his memory is weak, is a legitimate way of impeaching his testimony, and the opinions of those who knew him may be resorted to for that purpose.[19]

Dicta in an early Indiana case[20] indicates that the Indiana Supreme Court would have permitted such testimony if the question had been presented to them at the time, regardless of the presence or absence of sanity. Because of the strong majority of courts which disapprove the admission of lay testimony and the scientific inability of a lay witness to

16. Blanchard v. People, 70 Colo. 555, 203 Pac. 662 (1922).

17. A lay witness' testimony on low intelligence or poor memory might be admissible as a part of the foundation laid for asking a psychologist a hypothetical question on whether such intelligence testimony, coupled with his court room observations of the suspect witness, would render the witness' testimony unreliable.

18. 75 N.C. 466 (1876). Similar testimony was admitted in State v. Witherspoon, 210 N.C. 647, 188 S.E. 111 (1926), and Bouldin v. State, 87 Tex. Crim. 419, 222 S.W. 555 (1920).

19. *Id.* at 467.

20. Carpenter v. Dame, 10 Ind. 94 (1858).

detect varying degrees of mental impairment between the normal and the completely insane,[21] the Indiana court would probably exclude the evidence today.[22]

Broad language used by some of the courts in rejecting lay testimony has been carried over to influence the admissibility of expert testimony offered to discredit. For example, the court, in *Bell v. Rinner*,[23] failed to confine its opinion to the issue and used general language to indicate disapproval of expert as well as lay testimony:

> Moreover, if it be conceded that the credibility of a witness is to be graded in proportion to his strength of intellect, the tribunal before which he testifies can better estimate his capacity, and the weight to which his testimony is entitled, by his manner, and by his statements on cross-examination, than can, ordinarily, be done by the testimony and conflicting opinions of other witnesses, as to the extent of his mental powers, or the degree of his intelligence.[24]

A similar rule was reiterated in *Blanchard v. People*[25] where the state attempted to impeach a defense witness in a forgery prosecution. The appellate court reversed the conviction because the state's witnesses were allowed to testify about a defense witness' "low order of intelligence." This case has twice been said to stand for the rule that evidence on intellectual deficiency of a witness is inadmissible,[26] an interpretation which appears erroneous.[27]

The California courts have consistently refused to admit expert testimony[28] on subnormal intelligence and have followed the reasoning

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21. The use of the word "insanity" in the cases appears to be a broad way to define intelligence so low or memory so poor as to render a witness untrustworthy for all but the most elementary testimony. The word "insantiy" does not mean insanity in the psychiatric sense. This paper does not propose to examine the question of whether psychiatric evidence showing tendencies to be untruthful is admissible. For discussions on this subject, see Note, 13 RUTGERS L. REV. 330 (1958), or Comment, 59 YALE L.J. 1324 (1950).

22. The lay witness is not competent to determine the degree of intellectual disability and the relation such disability has on the powers required to make a testimonial assertion reliable.

23. 16 Ohio St. 45 (1864).

24. *Id.* at 47.

25. 70 Colo. 555, 203 Pac. 662 (1922).

26. "The claim of insanity, that is, gross inadequacy amounting to mental deficiency, was required in order to attack credibility by reason of lack of intelligence." Redmount, *The Psychological Basis of Evidence Practices: Intelligence*, 42 MINN. L. REV. 559, 567 (1958). See also, Note, 13 RUTGERS L. REV. 330 (1958).

27. See footnotes 34 and 54 *infra* and accompanying text.

28. People v. Champion, 193 Cal. 441, 225 Pac. 278 (1924); People v. Dye, 81 Cal. App. 2d 952, 185 P.2d 624 (1947); People v. Harrison, 18 Cal. App. 288, 123 Pac. 200 (1912). These cases relied heavily upon the California statute setting out the ways to

of the majority of cases excluding lay testimony.[29] Pennsylvania[30] and West Virginia[31] have also excluded expert testimony offered to impeach the testimonial ability of opposing witnesses.[32]

Most of the cases indicating that expert testimony should be excluded, for one reason or another, should be accorded little precedent value. One of the leading cases, almost one hundred years old, was decided long before the development of modern psychology.[33] Another has been misinterpreted and too much reliance placed upon the general language used by the court.[34] Finally, similar evidence of subnormal intelligence has been offered to support conclusions of sexual perversion, habitual lying or the lack of veracity of a witness.[35] The attorneys in the latter cases attempted to impute psychiatric effects to psychological causes where no such relation exists.[36] There is no psychological proof that subnormal mental abilities cause untruthfulness.

There is a great deal of direct case support for the proposition that expert testimony is admissible in various situations. Medical testimony pointing out the intellectual deficiency of a witness has been admitted most frequently in criminal cases. In one case, the court asked:

> What could be more effective for the purpose than to impeach the mentality or the intellectual grasp of a witness? If his interest, bias, indelicate way of life, insobriety and general

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impeach. CAL. CIV. PROC. CODE §§ 2051-52. They looked at impeachment more in its traditional sense as tending to attack veracity. The first case is explainable, in part, because the expert was asked about the suspect witness' "proclivity for theft." This would appear to be an attempt to introduce specific facts in lieu of general community reputation, which is inadmissible, and would support the court's reluctance to allow the other testimony. Moreover there is no causal connection between low intelligence and proclivity for theft.

29. See text accompanying footnotes 12-15 *supra*.

30. Commonwealth v. Myers, 5 Pa. D. & C. 410 (1924).

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

32. The general language of these two cases is not supported by the way in which the question was presented and neither case is strong support for the position that expert discrediting testimony is inadmissible. See text accompanying footnotes 35 and 36 *infra*.

33. Bell v. Rinner, 16 Ohio St. 45 (1864).

34. Blanchard v. People, 70 Colo. 555, 203 Pac. 662 (1922). The court expressly reserved its opinion on whether evidence given by experts or evidence of low intelligence about a witness whose testimony involved very complex transactions would be admissible. See footnote 54 *infra* also.

35. Commonwealth v. Myers, 5 Pa. D. & C. 410 (1924); State v. Driver, 88 W. Va. 479, 107 S.W. 189 (1921).

36. The only theory on which such an interpretation could have been supported is that low intelligence tends to create emotional disturbances within the mentally deficient child and that the effect which the physician testified to is explained by the resulting neurosis or psychosis. That psychiatric problems may be aggravated because of low intelligence is supported by authority. See NOYES & KOLB, MODERN CLINICAL PSYCHIATRY 335 (5th ed. 1959).

> bad reputation in the community may be shown as bearing upon his untrustworthiness of belief, why not his imbecility, want of understanding, or moronic comprehension, which go more directly to the point?[37]

On this and similar reasoning, physicians have been allowed to testify that the mental development of a prosecuting witness in a rape case was "considerably below the average;"[38] that a co-indictee turned state's witness in an arson prosecution was a moron with the mind of a nine or ten year old child;[39] and that the state's eyewitness to a homicide was a low-class moron, with the mind of a nine year old.[40]

Teachers, too, may be permitted to qualify as experts and give testimony on their pupils' lack of intelligence when the child's credibility is sought to be impeached. To qualify as an expert, the teacher would need special training in psychology, which many of them receive. Their testimony as experts would be restricted, of course, to children's intelligence and memory powers. A Wexler Intelligence Scale for Children score, and testimony by a teacher[41] to the effect that a nine year old alleged sodomy victim was easily dominated, could be made to believe anything, and could not remember events of an eight hour day without prompting were said to be admissible within the discretion of the trial court.[42] Testimony by a third grade teacher[43] that a twelve year old prosecuting witness in an attempted rape prosecution was two years behind in school work and "subnormal mentally" was indicated in dicta also to be admissible[44] to impeach the child's credibility.[45]

The admission of similar testimony in civil proceedings has been favorably commented upon by only one court. Although the issue was the competency of a sole eyewitness to an automobile accident, the court

37. State v. Armstrong, 232 N.C. 727, 728-29, 62 S.E.2d 50, 51 (1950).
38. Jeffers v. State, 145 Ga. 74, 88 S.E. 571 (1916).
39. People v. Hudson, 341 Ill. 187, 173 N.E. 278 (1930).
40. State v. Armstrong, 232 N.E. 727, 62 S.E.2d 50 (1950).
41. In this particular case, the teacher was headmaster at a boys school for the blind. Probably he was trained in psychological testing since he administered the test about which the testimony centered.
42. Mangrum v. State, 227 Ark. 318, 299 S.W.2d 80 (1957).
43. Normally, an elementary school teacher has considerably less psychological training, it is supposed, than a teacher at a school for the blind. Testimony by such a teacher, in fact, may be little more than lay testimony, depending on the extent of the teacher's actual training and study in the discipline.
44. State v. Teagor, 222 Iowa 391, 269 N.E. 348 (1936).
45. Some of the cases indicate that unless a challenge to competency is made or a competency hearing is held, the opposing party may not introduce expert testimony to discredit. State v. Teagor, 222 Iowa 391, 269 N.W. 348 (1936); Bell v. Rinner, 16 Ohio St. 45 (1864). There would appear to be no valid reason for requiring such an attack before allowing expert testimony since the theory upon which the testimony is introduced is that the inadequacies are not sufficient to exclude.

indicated that medical testimony classifying plaintiff's witness as a low-grade moron with a mental age of seven should have been allowed to impeach his credibility. Defendant offered his evidence only to attack competency and by his failure to introduce it to impeach, forced the court to affirm plaintiff's verdict.[46] The courts will probably be more reluctant to admit evidence of low intelligence in civil cases than in criminal prosecutions.

Whether evidence of low intelligence should be admitted to discredit a witness depends on whether there is a correlation between the low intellect and the adequacy of testimonial powers and the degree of precision with which this correlation can be measured. That there is a correlation, the psychologists agree. "Intelligence" includes the processes of perception, conception, attention, memory, imagery, ideation, judgment, reasoning and inventiveness.[47] A witness whose intelligence is subnormal must consequently possess subnormal testimonial powers in one form or another.

The fact that lay witnesses can not differentiate between degrees of intelligence and correlate intelligence with degrees of testimonial power is the primary reason why their testimony is not permitted. By using a few of the many tests available[48] psychologists,[49] as trained observers, are able to determine the degree of subnormality, perhaps not to the extent of absoluteness[50] but certainly adequate to provide the jury with a valuable tool for evaluating testimony given by a suspect witness. The psychologist is much more adequately equipped to measure low intelligence or poor memory and show its relation to the deficiency in testimonial powers than is the cross-examiner. Any witness scoring less than 65 on the Wechsler-Bellevue Intelligence Scale, for example, can be expected to possess less than the normal testimonial powers. Such a person, it has been shown, can not be expected to make a good economic adjustment to life, may possess defective judgment, and will probably be easily

46. McCrary v. Ogden, 267 S.W.2d 670 (Mo. Sup. Ct. 1954).

47. TREDGOLD, MENTAL DEFICIENCY 52 (9th ed. 1956); Redmount, *The Psychological Basis of Evidence Practices: Intelligence*, 42 MINN. L. REV. 559, 587 (1958).

48. *E.g.*, Sanford-Binet Test for children and the Wechsler-Bellevue Intelligence Scale for Adults are the two best known. GUTTMACHER & WEIHOFEN, PSYCHIATRY AND THE LAW 180 (1952).

49. Psychologists have been admitted as experts in other situations. *E.g.*, Watson v. State, 161 Tex. Crim. 5, 273 S.W.2d 879 (1954) (testified to sanity). They would evidently be qualified to testify as experts on intelligence.

50. The tests' conclusiveness is limited by certain emotional and environmental factors on the part of the subject. These can, however, be taken into account by a competent test administrator if he has the opportunity to observe the subject during the test and interview him and others for his case history. GUTTMACHER & WEIHOFEN, PSYCHIATRY AND THE LAW 180 (1952); Redmount, *The Psychological Basis of Evidence Practices: Intelligence*, 42 MINN. L. REV. 559, 580 (1958).

led.[51] He may be a poor observer and his interpretations, based on reasoning, will frequently be unsatisfactory.[52] If the possession of a particular testimonial power is more important to his testimony than others, *e.g.*, memory, a special test designed to measure this single faculty may be administered[53] and the results will be even more determinative than those of the general intelligence examination.

The fact that a witness has a low measurable intelligence is not enough in itself to discredit his testimony. The party seeking to discredit the witness must show that his low intelligence or poor memory directly negatives reliability on the particular set of facts about which the witness testifies. Although a witness has subnormal intelligence, the evidence which he proposes to give may require only a bare minimum of testimonial skills. For example, questioning a witness as to "Who struck you?" may require nothing more than the answer "He did." Or a witness, whose deposition[54] is taken at the scene of an accident, may be able to relate the facts of the injuries long before the facts are blurred by his faulty memory. At times, a more complex set of testimonial skills may be needed, as when a witness testifies that a party executed a will and a number of intertwining trusts, testifies about the contents of the instruments, and testifies about the maker's intent. In the latter example almost any subnormality would cast doubt upon the witness' ability to report accurately; more complex knowledge would be required to show that a witness' testimony in the other examples could not be relied upon.

Using tests and observations and, perhaps, lay testimony given in court about the suspected witness' environment and past conduct as foundation for the expert's testimony,[55] the psychologist can determine accurately the degree of subnormal intelligence or poor memory and relate

51. GUTTMACHER & WEIHOFEN, PSYCHIATRY AND THE LAW 180 (1952). See also NOYES & KOLB, MODERN CLINICAL PSYCHIATRY 324 (5th ed. 1959).

52. Mack, *Forensic Psychiatry and the Witness—A Survey*, 7 CLEV.-MAR. L. REV. 302, 312 (1958).

53. *E.g.*, the Wechsler Memory Scale, when properly administered, is very reliable. Redmount, *The Psychological Basis of Evidence Practices: Memory*, 50 J. CRIM. L., C. & P.S. 249, 259 (1959).

54. That the witness' testimony was recorded by deposition would go far to preclude the use of expert testimony, particularly if it were the powers of memory which the opposing party sought to attack. Rather than show testimonial powers so poor that the witness could not remember from the time of the accident to the trial, the opposing party would have to show that he could not remember from accident to deposition, perhaps a day later. Blanchard v. People, 70 Colo. 555, 203 Pac. 662 (1922), pointed this out. Partly for this reason, the precedent value of the case to support a rigid exclusionary rule is weakened.

55. See footnote 17 *supra*. In one case where expert testimony was admitted, the court also admitted lay testimony. People v. Hudson, 341 Ill. 187, 173 N.E. 278 (1930). Although the court did not give a reason for doing so, the case might be valuable as a precedent for the admission of lay evidence as a foundation upon which the expert can base his opinion.

it to the testimonial skills required for particular testimony. This expert evidence should be admitted at any time when the witness' credibility is vital to the outcome of the case. Psychologists, however, are infrequently offered as discrediting witnesses.[56] The courts have had to determine generally whether similar evidence is admissible when given by physicians and teachers. To the extent that non-psychologists are trained to measure and observe the degree of subnormal intelligence or memory, their evidence would appar to be as valuable as that of the psychologist, particularly when the testimony to be discredited requires complex testimonial skills.[57] If the court is not satisfied with the physician's or teacher's psychological training, the evidence should be treated exactly like lay testimony and excluded. Offered in proper cases, the evidence of psychologists and those trained in the field can be of great value to the jury in their evaluation of the weight to be given a witness' testimony.