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The Demise of the Ultimate Fact Rule in Indiana

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In 1915, the Supreme Court of Indiana affirmed a judgment for the plaintiff in *Hamilton, Harris & Co. v. Larrimer*,[1] a negligence action brought by a pedestrian against an owner and operator of a truck to recover damages for personal injuries. In particular, the court ruled that there was no error in excluding the opinion of a lay witness as to the driving capability of the defendant. Over sixty years later, the Court of Appeals of Indiana reached the opposite result in *Rieth-Riley Construction Co. v. McCarrell*,[2] a case presenting an analogous fact situation.[3] The defendant had contended that a statement made by its foreman prior to trial was inadmissible because the opinion expressed therein embraced an ultimate issue and, therefore, invaded the province of the jury.[4] Rejecting this argument, the court held that "the *per se* exclusion rule has been abrogated, and the trial judge at his discretion, may in an appropriate case, permit such evidence."[5]

As both the supreme court and the court of appeals have subsequently cited the *Rieth-Riley* rule with approval,[6] it is apparent that Indiana has joined a number of other states in permitting opinions by lay witnesses upon ultimate fact issues.[7] This note will examine the development of the ultimate fact rule in Indiana together with its rationale and shortcomings, then will analyze and evaluate the new rule established by the *Rieth-Riley* decision.

DEVELOPMENT OF THE ULTIMATE FACT RULE

According to Wigmore, the notion that lay opinion testimony was inadmissible may have grown from the principle of personal observation[8] which

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[1]183 Ind. 429, 105 N.E. 43 (1915).

[2]____ Ind. App. ____, 325 N.E.2d 844 (1975).

[3]In *Rieth-Riley*, the plaintiff McCarrell sued a road builder for personal injuries he sustained when the car he was driving collided with a piece of pipe laying on a travelled portion of the road.

[4]The trial court allowed the plaintiff's attorney to read to the jury the foreman's prior statement: "Well, I'll reword it in this way then. If I had been driving that automobile and that pipe had popped in front of me like that there would have been nothing I could have done about it." 325 N.E.2d at 851.

[5]*Id.* at 852. To appreciate the significance of this decision, one should note that Indiana has not codified its law of evidence, remaining a common law jurisdiction in that respect.

[6]*See, e.g.*, Williams v. State, ____ Ind. ____, 352 N.E.2d 733 (1976); Enyart v. Blacketor, ____ Ind. App. ____, 342 N.E.2d 654 (1976); Haskett v. Haskett, ____ Ind. App. ____, 327 N.E.2d 612 (1975).

[7]See the following cases and codifications: Grismore v. Consolidated Prod. Co., 232 Iowa 328, 5 N.W.2d 646 (1942); Drahota v. Weiser, 183 Neb. 66, 157 N.W.2d 857 (1968); Rader v. Gibbons and Reed Co., 261 Ore. 354, 494 P.2d 412 (1972); Dewing v. Cooper, 33 Wis. 2d 260, 147 N.W.2d 261 (1967); CAL. EVID. CODE § 805 (West 1966); KAN. STAT. ANN. § 60-456(d) (1976); N.J. EVID. RULE 56(3) (1967).

[8]2 WIGMORE ON EVIDENCE § 657 (3rd ed. 1940).

demanded that witnesses speak from first-hand knowledge rather than from the reports of others.[9] Although skilled witnesses were permitted to give opinions without personal knowledge, the rule initially allowed lay opinions only where an adequate factual basis had been established.[10] Throughout the mid-1800's, Indiana cases[11] followed the rule articulated by the Supreme Court of Indiana in *City of Indianapolis v. Huffer*: "The rule is, that any witness, not an expert, who knows the facts personally, may give an opinion in a matter requiring skill, stating also the facts upon which he bases the opinion."[12]

Eventually, inadmissibility of opinions not supported by a witness' own factual knowledge was extended to lay opinions wherever the witness could adequately present all of the facts to the jury. The Supreme Court of Indiana drew this curious distinction in *Carthage Turnpike Co. v. Andrews*.[13] First, it affirmed the "general rule that non-expert witnesses may give their opinions, if they state, *as far as possible,* the facts and observations upon which they are based."[14] However, calling this a "rule of necessity,"[15] the court reasoned that "[w]hen the case is one in which *all the facts* can be presented to jury, then no opinion can be given, because the jury are as well qualified as the witness to form a conclusion."[16] The court apparently reasoned that once all of the facts were given to the jury, the witness' opinion added nothing and, therefore, was not useful to their deliberations.

After *Carthage Turnpike*, Indiana courts required the per se exclusion of such lay opinion evidence.[17] Nevertheless, numerous exceptions have been recognized where the witness has some special knowledge as to the subject

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[9] 7 WIGMORE ON EVIDENCE § 1917, at 1-3 (3rd ed. 1940).

[10] *See, e.g.*, Parker v. State, 136 Ind. 284, 35 N.E. 1105 (1893); City of Terre Haute v. Hudnut, 112 Ind. 542, 13 N.E. 686 (1887).

[11] *See* Goodwin v. State, 96 Ind. 550 (1884); Yost v. Conroy, 92 Ind. 464 (1883); Sage v. State, 91 Ind. 141 (1883); Colee v. State, 75 Ind. 511 (1881); State v. Newlin, 69 Ind. 108 (1879); Coffman v. Reeves, 62 Ind. 108 (1878); Holten v. Board of Comm'rs, 55 Ind. 194 (1876); Benson v. McFadden, 50 Ind. 431 (1875).

[12] 30 Ind. 235, 237 (1868).

[13] 102 Ind. 138, 1 N.E. 364 (1885).

[14] *Id.* at 142, 1 N.E. at 366-67 (emphasis added).

[15] *Id.* at 142, 1 N.E. at 367.

[16] *Id.* (emphasis added).

[17] *See* McKee v. Hasler, 229 Ind. 437, 98 N.E.2d 657 (1951); Sherfey v. Evansville & T.H. R.R., 121 Ind. 427, 23 N.E. 273 (1889); Albright v. Hughes, 107 Ind. App. 651, 26 N.E.2d 576 (1940); Winski v. Clegg, 81 Ind. App. 560, 142 N.E. 130 (1924); Roper v. Cannel City Oil Co., 68 Ind. App. 637. 121 N.E. 96 (1918); Insurance Co. of Pa. v. Indiana Reduction Co., 65 Ind. App. 330, 117 N.E. 273 (1917); Insurance Co. of N. America and Phoenix Ins. Co. v. Osborn, 26 Ind. App. 88, 59 N.E. 181 (1901).

In *Hamilton, Harris & Co. v. Larrimer,* for example, no special knowledge was demonstrated, so exclusion resulted. A witness to the accident was asked: "Do you know whether or not they stopped as quickly as it could be done?" and responded "I should judge so. I think the young man did very well." The Supreme Court ruled that the trial court correctly sustained the motion to strike the answer since the witness was merely a bystander "who did not pretend to be informed on the subject of the operation of motor trucks." 183 Ind. 429, 432, 105 N.E. 43, 44-45 (1915).

matter. These include testimony as to speed,[18] space or distance,[19] handwriting,[20] age,[21] bodily appearance or condition,[22] quantity or capacity,[23] mental condition,[24] value,[25] and damages.[26]

Eventually, the opinion rule came to be treated as a "somewhat ambiguous and much relaxed rule of evidence,"[27] with admissibility of opinions being largely within the discretion of the courts.[28] Dean McCormick observed that it "may well be described, not as a rule excluding opinions, but as a rule of preference. . . . [m]ore concrete description is preferred to the more

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[18]*See* American Motor Car Co. v. Robbins, 181 Ind. 417, 420, 103 N.E. 641, 642 (1913) (speed of an automobile); Louisville, N.A. & C. Ry. v. Hendricks, 128 Ind. 462, 463, 28 N.E. 58, 58 (1891) (speed of a moving train); Garr v. Blissmer, 132 Ind. App. 635, 644, 177 N.E.2d 913, 917 (1961) (speed of an automobile); Rump v. Woods, 50 Ind. App. 347, 356, 98 N.E. 369, 372 (1912) (pre-collision speed of an automobile); Lake Erie & W. Ry. v. Moore, 51 Ind. App. 110, 123, 97 N.E. 203, 208 (1912) (speed of a train).

[19]*See* Gibson Coal Co. v. Kriebs, 150 Ind. App. 173, 175, 275 N.E.2d 821, 824 (1971) (the extent to which a truck protruded into a highway).

[20]*See* Miller v. Coulter, 156 Ind. 290, 296, 59 N.E. 853, 855 (1901) (witness attesting to genuineness of the testator's signature); Tucker v. Hyatt, 144 Ind. 635, 638, 41 N.E. 1047, 1048 (1895) (witness testifying as to genuineness of the plaintiff's handwriting was competent even though the witness became acquainted with the handwriting since the opening of the trial); Duncan v. Binford, 151 Ind. App. 199, 278 N.E.2d 591, 599 (1972) (genuineness of signature on receipt card acknowledging service of process).

[21]*See* Benson v. McFadden, 50 Ind. 431, 433 (1875) (age of the defendant pleading infancy at the time of making the contract sued on).

[22]*See* Western and S. Life Ins. Co. v. Danciu, 217 Ind. 263, 271-73, 26 N.E.2d 912, 915-16 (1940) (physical condition of a person insured by a life insurance policy); Cleveland, Co., Chi. & St. L. Ry. v. Gray, 148 Ind. 266, 278, 46 N.E. 675, 678 (1897) (whether the plaintiff appeared to be sick or not); New York Cent. R.R. v. De Leury, 100 Ind. App. 140, 148-49. 192 N.E. 125, 129 (1934) (mental and physical condition of an accident victim).

[23]*See* Romona Oölitic Stone Co. v. Shields, 173 Ind. 68, 72, 88 N.E. 595, 597 (1909) (capacity of a derrick used for hoisting stone).

[24]*See* Sanger v. Bacon, 180 Ind. 322, 329, 101 N.E. 1001, 1003 (1913) (mental condition of testator); Swygart v. Willard, 166 Ind. 25, 32-33, 76 N.E. 755, 757 (1906) (soundness of testator's mind); Stumph v. Miller, 142 Ind. 442, 446, 41 N.E. 812, 813 (1895) (feeblemindedness of grantor in a contract for the sale of land); Cline v. Lindsey, 110 Ind. 337, 340-41, 11 N.E. 441, 442-43 (1887) (insanity of testator in a will contest); Guardianship of Carrico v. Bennett, ____ Ind. App. ____, 319 N.E.2d 625, 627 (1974) (competence of a woman to manage her property); Norman v. Norman, 131 Ind. App. 67, 83, 169 N.E.2d 414, 421 (1960) (unsoundness of grantor's mind in a quiet title action).

[25]*See* Southern Sur. Co. v. Calverly, 195 Ind. 247, 255, 143 N.E. 626, 628 (1924) (value of municipal bonds); Walker v. Statzer, 152 Ind. App. 544, 551, 284 N.E.2d 127, 131 (1972) (value of witness' own services); First Bank and Trust Co. v. Tellson, 124 Ind. App. 478, 488, 118 N.E.2d 496, 501 (1954) (value of services); Grave v. Pemberton, 3 Ind. App. 71, 73, 29 N.E. 177, 177-78 (1891) (value of services).

[26]*See* Terre Haute & L. R.R. v. Crawford, 100 Ind. 550, 555 (1885) (cost of filling lots); Charles Stuart Oldsmobile, Inc. v. Smith, ____ Ind. App. ____, 357 N.E.2d 247, 252 (1976) (damages to an automobile); Rogers Cartage Co. v. Peglow, 122 Ind. App. 481, 483-84, 106 N.E.2d 235, 236 (1952) (cost of repairing damages to real estate).

[27]2 JONES ON EVIDENCE § 403, at 750 (5th ed. 1958).

[28]*See* Southern Sur. Co. v. Calverly, 195 Ind. 247, 255, 143 N.E. 626, 628 (1924) (no abuse of discretion was found where the trial court allowed a nonprofessional witness having knowledge of property and its value to testify to the value of municipal bonds); Frederick v. Sault, 19 Ind. App. 604, 605-06, 49 N.E. 909, 910 (1898) (no abuse of discretion was found in the trial court permitting a pianist to testify to the value of a piano).

abstract."[29] Nevertheless, Indiana courts remained adamant in enforcing the opinion rule whenever a witness' testimony concerned an ultimate fact in issue.[30]

Not until recently, in *Rieth-Riley Construction Co. v. McCarrell,*[31] was discretion extended to Indiana trial courts to admit lay opinion testimony where it concerned an ultimate fact in issue. To gain an understanding and appreciation of the new rule announced by *Rieth-Riley,* it is necessary to analyze the rationale behind the exclusion of opinion testimony concerning an ultimate fact.

RATIONALE OF THE ULTIMATE FACT RULE

Commentators have called the ultimate fact rule "a proposition, the validity of which diminishes in proportion to the strictness with which it is applied."[32] Wigmore reasoned that:

> The fallacy of this doctrine is, of course, that it is both too narrow and too broad, measured by the principle. It is too broad, because, even when the very point in issue is to be spoken to, the jury should have help if it is needed. It is too narrow, because opinion may be inadmissible when it deals with something other than the point in issue. Furthermore, the rule if carried out strictly and invariably would exclude the most necessary testimony.[33]

Thus, the per se exclusion under the ultimate fact rule leads to the "absurd result that admissibility varies in inverse proportion to relevancy."[34]

An understanding of the problems associated with the ultimate fact rule cannot be acquired without a working definition of the term "ultimate fact."

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[29]MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE § 11, at 25 (2d ed. E. Cleary 1972).

[30]In effect, an ultimate fact rule was being enforced. *See* Lamb v. York, 252 Ind. 252, 264, 247 N.E.2d 197, 204-05 (1969) (dangerousness of a piece of farm machinery); Southern Ind. Power Co. v. Miller, 185 Ind. 35, 37, 111 N.E. 925, 926 (1916) (whether bad well water was caused by the backing up of a dam); American Tel. and Tel. Co. v. Green, 164 Ind. 349, 354, 73 N.E. 707, 709 (1905) (the authority of an agent to enter into a contract); Johnson v. Anderson, 143 Ind. 493, 494, 42 N.E. 815, 815 (1896) (the public utility of a proposed change in a highway); Brunker v. Cummins, 133 Ind. 443, 446, 32 N.E. 732, 733 (1892) (whether a person could walk between a barrel and a building with safety); Azimow v. Azimow, 146 Ind. App. 341, 350, 255 N.E.2d 667, 673 (1970) (whether a couple held themselves out to the community to be husband and wife); Webb v. Volz, 122 Ind. App. 53, 57, 102 N.E.2d 517, 519 (1951) (the conclusion that a certain vehicle was a stolen car); Cleveland, C., Chi. & St. L. Ry. v. Osgood, 36 Ind. App. 34, 43-44, 73 N.E. 285, 288 (1905) (the proper method of handling and positioning railroad cars).

The phrases "ultimate fact" and "ultimate issue" have been used interchangeably. "Technically, it makes no difference whether it is an ultimate issue or an ultimate fact on which the court allows or disallows the witness to testify, since the submission of an issue to the jury necessarily requires their finding of a fact or a group of facts." Note, *Opinion Testimony and Ultimate Issues: Incompatible?,* 51 KY. L.J. 540, 541 (1963).

[31]___ Ind. App. ___, 325 N.E.2d 844 (1975).

[32]Cowen & Carter, *Some Observations on the Opinion Rule,* in ESSAYS ON THE LAW OF EVIDENCE 164 (Z. Cowen & P. Carter eds. 1956).

[33]7 WIGMORE ON EVIDENCE § 1921, at 18-19 (3rd ed. 1940).

[34]16 N.C. L. REV. 180, 183 (1938).

The court in *Oliver v. Coffman*[35] best articulated the definition, stating that "[a]n ultimate fact is the final or resultant fact that has been reached, by the processes of logical reasoning, from the detailed or probative facts."[36] Thus, ultimate facts must be distinguished from evidentiary facts and conclusions of law. In *Guevara v. Inland Steel Co.*, the court reviewed an Industrial Board finding and explained that:

> Ultimate facts are determined as a result of an inferential process; the evidentiary facts are the premises and the ultimate facts the conclusions. Therefore, an ultimate fact may be determined as a result of a natural connection of one fact with others by a process of reasoning. A conclusion of law differs in that it is made by attaching a rule of law or legal incident to a particular fact proved. It is the process by which the result is attained which is determinative of the distinction in the particular case.[37]

Some examples of ultimate facts include a person's status as employee or independent contractor;[38] the fact "that defendant ran its engine so closely following a freight train as needlessly to endanger life and property;"[39] the amount of damages for breach of a contract for the sale of land;[40] a finding, in a quiet title action, that a party was the owner in fee simple of the realty;[41] that a bid for a public printing contract was the lowest submitted;[42] and the sanity of the defendant in a murder case.[43]

The justification often cited in support of the ultimate fact rule has been that such opinion testimony "usurps the function"[44] or is an "invasion of the province"[45] of the jury.[46] Courts in Indiana generally barred opinion evidence under this theory, using similar language.[47] Despite this apparent support for the exclusion of lay opinions on ultimate issues of fact, courts and commentators have found the principle to be plagued by four problems: (1) the impossibility of drawing meaningful distinctions, (2) undue restrictiveness, (3) illogical results, and (4) difficulties in application.

The ultimate fact rule requires the trial court to draw some impossible

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[35]112 Ind. App. 507, 45 N.E.2d 351 (1942).

[36]*Id.* at 513, 45 N.E.2d at 354.

[37]121 Ind. App. 390, 396-97, 95 N.E.2d 714, 717 (1951).

[38]Coppes Bros. & Zook v. Pontius, 76 Ind. App. 298, 301-02, 131 N.E. 845, 846 (1921).

[39]Pennsylvania R.R. v. Hemmer, 206 Ind. 311, 324, 189 N.E. 137, 138 (1934).

[40]Mortgage Underwriters, Inc. v. Stuckey, 108 Ind. App. 83, 90-91, 27 N.E.2d 111, 114 (1940).

[41]Dickason v. Dickason, 219 Ind. 683, 696, 40 N.E.2d 965, 970 (1942).

[42]Budd v. Board of Comm'rs, 216 Ind. 35, 41, 22 N.E.2d 973, 976 (1939).

[43]Baum v. State, ____ Ind. ____, 345 N.E.2d 831, 834 (1976).

[44]Chicago & A. R.R. v. Springfield & N. R.R., 67 Ill. 142, 145 (1873).

[45]DeGroot v. Winter, 261 Mich. 660, 667, 247 N.W. 69, 73 (1933).

[46]*See, e.g.*, Norvell, *Invasion of the Province of the Jury*, 31, TEX. L. REV. 731 (1953); Note, *Opinion Testimony "Invading the Province of the Jury"*, 20 U. CIN. L. REV. 484 (1951).

[47]*See, e.g*, Lamb v. York, 252 Ind. 252, 264, 247 N.E.2d 197, 205 (1969); McKee v. Hasler, 229 Ind. 437, 468, 98 N.E.2d 657, 670 (1951); American Tel. and Tel. Co. v. Green, 164 Ind. 349, 354, 73 N.E. 707, 708 (1905).

distinctions. First, "fact" testimony had to be separated from "opinion" testimony, a task which Wigmore did not think scientifically possible.[48] Nor was it desirable, from a policy point of view, for a witness to state facts to the exclusion of opinion:

> In many sets of circumstances a witness is in an infinitely better position to draw an inference than are twelve jurymen. In many cases no amount of description (which description would itself anyhow be partially based upon latent inferences) of a complexity of often subconsciously perceived data will serve to make a jury as well qualified to draw an inference as the witness.[49]

Secondly, the judge had to be careful to admit only those opinions that did not concern an ultimate fact in issue. The distinction between ultimate and non-ultimate facts, however, was equally difficult to make. The Supreme Court of Indiana indicated in *DeVaney v. State* that this determination is no easy task:

> The first question one must ask is, what is an "ultimate fact in issue"? This is certainly not clear. There are many definitions found in Black's Law Dictionary, for instance, but they are of little aid. The objective is probably the desire for concrete details upon the crucial matters in the trial. Although this goal is meritorious, its consistent application through excluding opinions on "ultimate facts" approaches impossibility.[50]

Thus, in theory, ultimate facts may be clearly distinguishable from those evidentiary facts from which they are inferred,[51] but in practice, "the distinction may be scarcely appreciable."[52]

Requiring witnesses to state facts rather than opinions ignored the natural tendency of people not to speak "factually." In other words, most witnesses cannot testify without reflecting their own conclusions and opinions in a factual description.[53] Where such testimony concerned ultimate facts, the

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[48]7 WIGMORE ON EVIDENCE § 1919, at 14 (3rd ed. 1940).

[49]Cowen & Carter, *Some Observations on the Opinion Rule,* in ESSAYS ON THE LAW EVIDENCE 164 (Z. Cowen & P. Carter eds. 1956).

[50]259 Ind. 483, 489-90, 288 N.E.2d 732, 736 (1972).

[51]In *DeVaney*, a reckless homicide case, the supreme court established an exception to the ultimate fact rule for expert opinions. On appeal, the defendant contended, *inter alia*, that it was error to permit the State's expert witness to testify as to the point of impact of the defendant's and victim's automobiles. He testified that the collision occurred near the outside edge of the decedent's lane of traffic. This fact was ultimate because it indicated that the defendant's car had been driven across the center line of the road, supporting the charge of reckless driving. DeVaney v. State, 259 Ind. 483, 489, 288 N.E.2d 732, 736 (1972).

[52]Note, *Opinion Testimony and Ultimate Issues: Incompatible?*, 51 KY. L.J. 540, 542 (1963).

[53]As Wigmore observed:

> Furthermore, an examination of the so-called Opinion rule, as applied in its various instances, shows that the opinion-element is, in the very law itself, a merely superficial and casual mark, and not the essential feature. On the one hand, *that which is excluded is not always "opinion"* (in the sense of "inference from observed

threat of exclusion either forced the witness to speak unnaturally or jeopardized an attorney's presentation of the case.

The argument that opinion testimony upon an ultimate issue of fact usurps the function of the jury is also of questionable validity. The Supreme Court of Iowa, in the landmark case of *Grismore v. Consolidated Products Co.*, observed that:

> Jurors and witnesses have separate and distinct functions. It is the duty of the jury to decide issues of fact. A witness could not usurp that function or invade the province of the jury, by his opinion, if he wished. It may accept it wholly, or reject it in toto. If the opinion meets with its approval it should accept it.[54]

Since it is a small step from accepting the witness' opinion on an ultimate fact to finding liability or guilt, the distinction between the functions of witness and jury are bound to be blurred. As the *Grismore* court correctly emphasized, the final determination rests with jury.

The obvious concern expressed by phrases of "usurpation" and "invasion" is the danger of witnesses stating only their opinions, "not because conclusions in themselves are necessarily harmful but because the jury cannot ascertain what happened if it is merely told how to decide the case."[55] Since requirements of relevancy[56] and personal knowledge,[57] in addition to cross-examination, are adequate safeguards, the contention that the witness' opinion would "usurp the function of the jury" is at most a makeweight argument.

Ironically, the ultimate fact rule often deprives the fact-finder of the most helpful testimony. As the Supreme Judicial Court of Maine once remarked:

> [T]he reason for its exclusion . . . would seem to be a very good reason for its admission. Instruction is what the jury want. They would not be bound by it,

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data" or in any other sense), but may be "fact." For example, where the question is whether the hair of the accused is black or yellow, or whether a house which the jury has viewed is three or six stories high, no witness will be listened to, and yet the testimony excluded deals with "facts," not "opinions," whatever may be the sense taken for those terms. On the other hand, *that which is admitted is not always "fact,"* but often "opinion." For example, all hypothetical estimates of skilled witnesses are to be so described. Furthermore, for lay witnesses, all matters of measure, identity, quality, and the like must be considered as no better than "opinions"; and after all, the question whether Doe struck Roe first, or *vice versa*, may become a mere matter of "opinion." In short, the element of inference from observed data is one which plays a great or less part in every witness' testimony, and yet the rule does not exclude it as such. 7 WIGMORE ON EVIDENCE § 1919, at 16 (3rd ed. 1940).

[54]232 Iowa 328, 345-46, 5 N.W.2d 646, 656 (1942).

[55]3 WEINSTEIN'S EVIDENCE ¶ 704[1], at 704-08 (1975).

[56]*See* Lovell v. State, 12 Ind. 18 (1859).

[57]*See* Bennett v. Meehan, 83 Ind. 566 (1882); City of Indianapolis v. Huffer, 30 Ind. 235 (1868).

> any more than by any other testimony, but it would be more or less valuable in enabling them to come to a correct conclusion.[58]

Thus, one would reasonably and logically expect that the test for admitting lay opinions would be "not whether it is on the very issue before the jury, but whether it will aid the jury under the circumstances of the case."[59]

Of course, an opinion could be relevant but unhelpful to the fact-finder; that is, the jury may be equally capable of reaching the same conclusion. Herein may lie the only valid justification for exclusion. In *City of Bloomington v. Holt*,[60] a wrongful death action arising out of an automobile collision, the State's expert witness[61] was permitted to state an opinion as to the speed of the vehicle, but the trial court refused testimony as to "the role of the ice." Affirming exclusion of the latter, the Court of Appeals noted:

> the trial court apparently determined that when the facts of this case were placed before the jury, the jury would be as qualified as the expert to determine whether or not the ice caused the accident. . . . The expert's opinion about such facts as the speed of the car would surely aid the jury in its determination of fact. However, we do not feel that the trial court abused its discretion by deciding that the role of the ice in this accident should be determined by the jury.[62]

Finally, the ultimate fact rule creates several problems of application. In jurisdictions where an exception was carved out to admit expert opinions on ultimate facts,[63] the courts were required to distinguish between testimony on

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[58]Snow v. Boston & M. R.R., 65 Me. 230, 231 (1875).

[59]16 N.C. L. REV. 180, 183 (1938).

[60]____ Ind. App. ____, 361 N.E.2d 1211 (1977).

[61]Although *Holt* involved the admissibility of expert, not lay, opinions, the rulings of the Court of Appeals are nevertheless instructive on the problem of when an opinion is helpful to the jury. It is the nature of the opinion, not the witness, that will control admissibility.

[62]361 N.E.2d at 1218-19.

[63]*See, e.g,* Marigold Coal, Inc. v. Thames, 274 Ala. 421, 149 So. 2d 276 (1962); Oxenberg v. State, 362 P.2d 893 (Alas. 1961); Allied Van Lines, Inc. v. Parsons, 80 Ariz. 88, 293 P.2d 430 (1956); Watson v. Southern Pac. Co., 62 Ariz. 29, 152 P.2d 665 (1944); Lee v. Crittenden County, 216 Ark. 480, 226 S.W.2d 79 (1950); Williams v. Cole, 181 Cal. App. 2d 70, 5 Cal. Rptr. 24 (1960); McNelley v. Smith, 149 Colo. 177, 368 P.2d 555 (1962); Diecidue v. State, 119 So. 2d 803 (Fla. 1960); Cozine v. Hawaiian Catamaran, Ltd., 49 Hawaii 77, 412 P.2d 669 (1966); Hayhurst v. Boyd Hosp., 43 Idaho 661, 254 P.528 (1927); Miller v. Pillsbury Co., 33 Ill. 2d 514, 211 N.E.2d 733 (1965); DeVaney v. State, 259 Ind. 483, 288 N.E.2d 732 (1972); Tovey v. Geiser, 150 Kan. 149, 92 P.2d 3 (1939); Shivers v. Carnaggio, 223 Md. 585, 165 A.2d 898 (1960); *In re* Powers' Estate, 375 Mich. 150, 134 N.W.2d 148 (1965); Piche v. Halvorson, 272 N.W. 591 (Minn. 1937); Eickmann v. St. Louis Pub. Serv. Co., 363 Mo. 651, 253 S.W.2d 122 (1952); Kelley v. John R. Daily Co., 56 Mont. 63, 181 P. 326 (1919); Dovey v. Sheridan, 189 Neb. 133, 201 N.W.2d 245 (1972); Lightenburger v. Gordon, 81 Nev. 553, 407 P.2d 728 (1965); Tobeck v. United Nuclear-Homestake Partners, 85 N.M. 431, 512 P.2d 1267 (1973); General Accident Fire & Life Assurance Corp. v. Krieghbaum, 46 App. Div. 2d 713, 360 N.Y.S.2d 310 (1974); Bruce v. O'Neal Flying Serv., 234 N.C. 79, 66 S.E.2d 312 (1951); Shepherd v. Midland Mut. Life Ins. Co., 152 Ohio St. 6, 87 N.E.2d 156 (1949); Federal Oil & Gas Co. v. Campbell, 65 Okla. 49, 183 P. 894 (1917); Welter v. M & M Woodworking Co., 216 Ore. 266, 338 P.2d 651 (1959); First Methodist Episcopal Church v. Bangor Gas Co., 7 Pa. D. & C. 730 (1956),

ultimate facts and testimony on an issue of law, only the former being admissible.[64] Consequently, where a mixed question of law and fact was presented, problems arose as to whether the opinion stated a factual finding or a legal conclusion.[65]

A second application problem posed by the ultimate fact rule was noted by the court in *Rieth-Riley*. The principle of strict exclusion was "subject to misapplication in that it is easily confused with the generally accepted rule that expert opinion should not be heard on commonplace matters."[66] This problem arose in *Rosenbalm v. Winski*,[67] a wrongful death action brought by the widow of a fireman who was killed when his firetruck collided at an intersection with the defendant's automobile. The Court of Appeals cited the *DeVaney* rule[68] to permit the police officer's opinion on the pre-impact speed of the firetruck, but found it could not support the officer's opinion that it was unsafe for the firetruck to proceed into the intersection. The court explained:

> Where the question posed to the expert injects as an element necessary to the answer, the issue of whether a party was negligent or exercising reasonable care, the question becomes objectionable because in the eyes of the law ordinary men and women are capable of making that assessment based upon their common knowledge and experience. In such instances the holding in DeVaney is not at issue.[69]

In *Rieth-Riley Construction Co. v. McCarrell*,[70] the Court of Appeals sought to relieve Indiana trial courts of the problems inherent in the ultimate fact rule by giving them discretion to permit lay testimony on ultimate facts. For guidance, the court announced a formula to be followed in exercising

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aff'd, 288 Pa. 115, 130 A.2d 517 (1957); State v. Kozukonis, 100 R.I. 298, 214 A.2d 893 (1965); O'Kelley v. Mutual Life Ins. Co., 197 S.C. 109, 14 S.E.2d 582 (1941); Crowe v. Provost, 52 Tenn. App. 397, 374 S.W.2d 645 (1963); Welch v. Shaver, 351 S.W.2d 588 (1961) and *see generally* Norvell, *Invasion of the Province of the Jury*, 31 TEX. L. REV. 731 (1953); Day v. Lorenzo Smith & Son, Inc., 17 Utah 2d 221, 408 P.2d 186 (1965); Gerberg v. Crosby, 52 Wash. 2d 792, 329 P.2d 184 (1958); Fehrman v. Smirl, 20 Wis. 2d 1, 121 N.W.2d 255 (1963); Kreyer v. Farmers' Coop. Lumber Co., 18 Wis. 2d 67, 17 N.W.2d 646 (1962); Krahn v. Pierce, 485 P.2d 1021 (Wyo. 1971).

[64]For an excellent discussion of the functions of court and jury in negligence cases where there are mixed questions of law and fact, see Pittsburgh, C. & St. L. R.R. v. Spencer, 98 Ind. 186, 188-92 (1884).

[65]See Grismore v. Consolidated Prod. Co., 232 Iowa 328, 361, 5 N.W.2d 646, 663 (1942) for a discussion of proper subjects for opinion testimony. For examples of mixed questions of law and fact, see Stoebuck, *Opinions on Ultimate Facts: Status, Trends and a Note of Caution*, 41 DEN. L.C.J. 226, 236-37 (1964).

[66]325 N.E.2d at 852. For articulation of the rule barring expert opinions on commonplace matters, see Indiana B. & W. Ry. v. Hale, 93 Ind. 79, 82-83 (1883).

[67]____ Ind. App. ____, 332 N.E.2d 249 (1975).

[68]In *DeVaney v. State*, the Supreme Court of Indiana held that expert opinions on ultimate facts were admissible. 259 Ind. 483, 490, 288 N.E.2d 732, 737 (1972).

[69]332 N.E.2d 249, 254 (1975).

[70]____ Ind. App. ____, 325 N.E.2d 844 (1975).

such discretion. In measuring the success of the *Rieth-Riley* decision, an examination of that standard is necessary.

EVALUATION OF THE *Rieth-Riley* RULE

Now that Indiana courts have adopted the modern philosophy that "provided all other admissibility requirements are met, an opinion upon an ultimate fact can be given,"[71] a question immediately arises as to the standard to be observed in administering the rule. In *Rieth-Riley*, the court of appeals said:

> Thus, the *per se* exclusion rule has been abrogated, and the trial judge at his discretion, *may in an appropriate case,* permit such evidence. In exercising his discretion, the trial judge should consider the nature of the issue and the offered opinion in light of all the attendant circumstances of the particular case. This court will review such an exercise in judicial discretion only for an abuse thereof.[72]

A careful reading leads one to conclude that the trial judge is given unfettered discretion under the *Rieth-Riley* rule because the guidelines established by the court are uninformative; no indication is given as to when a case becomes "appropriate" for permitting lay opinion evidence on ultimate facts, nor is any explanation provided for applying the "nature of the issue" formula in such a case. Accordingly, one must wonder if the formula provides any real guidance for trial courts faced with the problem of admitting lay opinions on ultimate facts.

The starting point for answering this vexing question is found in the *Rieth-Riley* opinion. Expressing its dissatisfaction with the old ultimate fact rule, the court of appeals indicated the rationale underlying admissibility:

> The strict approach, in our opinion, is unduly restrictive in that it would operate so as to deprive the trier of fact of useful information in situations where opinion testimony on an ultimate fact in issue would be the most desirable or perhaps the only vehicle for relating a particular happening or fact.[73]

Therefore, two considerations are to be taken into account when examining the "nature of the issue and the offered opinion in light of all the attendant circumstances of the particular case." First, courts should permit opinion testimony on ultimate facts so long as it is useful to the determinations of the fact-finder. Although this might suggest an extra step of preliminarily screening witnesses to determine the usefulness of their testimony, the cases indicate

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[71] 325 N.E.2d at 852.

[72] *Id.* at 852-53 (emphasis added).

[73] *Rieth-Riley,* for example, the opinion of the foreman was preferable to a factual description of the movements of the defendant's automobile and the pipe which it struck.

that, in practice, rulings on admissibility generally take place when objections are made to the questioning or the responses of witnesses[74] or to the introduction of their out-of-court statements.[75]

Usefulness or helpfulness are concepts best defined by example. The out-of-court statement admitted by the trial court in *Rieth-Riley* was helpful because as an eyewitness, the foreman was better situated than the jury to perceive the events and conclude whether or not the accident could have been avoided. Likewise, in *Enyart v. Blacketor,*[76] a personal injuries action arising out of a bicycle-automobile collision, the defendant driver was permitted to express the opinion that he did not have time to avoid the accident. The Court of Appeals ruled that the trial court properly exercised its discretion because the opinion "served only to inform the jury of Blacketor's perception of the totality of the circumstances surrounding the collision,"[77] rather than tell the jury how to decide the issue.[78]

Conversely, lay opinions on ultimate facts should be excluded where they fail to aid fact-finding. Perhaps McCormick best explained the rationale for doing so:

> Undoubtedly there is a kind of statement by the witness which amounts to no more than an expression of his general belief as to how the case should be decided or as to the amount of unliquidated damages which should be given. It is believed all courts would exclude such extreme expressions. There is no necessity for this kind of evidence; to receive it would tend to suggest that the judge and jury may shift responsibility for decision to the witnesses; and in any event it is wholly without value to the trier of fact in reaching a decision.[79]

In *Hunter v. State,*[80] a married couple was charged with three counts of child abuse. The Supreme Court held that Bellamy, a defense witness, was properly precluded from answering two questions since they called for a conclusion on the exact issue before the jury. The phrasing of the questions virtually copied the wording of Indiana Code § 35-14-1-2 (1976), asking whether Bellamy had ever seen the defendants willfully inflict "unnecessarily severe corporeal punishment"[81] or "torment, vex or afflict"[82] their adopted son. Rather than elicit a description of instances of physical or mental abuse, these questions

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[74]*See* Hunter v. State, ____ Ind. ____, 360 N.E.2d 588 (1977); Bell v. State, ____ Ind. ____, 366 N.E.2d 1156 (1977); Williams v. State, ____ Ind. ____ , 352 N.E.2d 733 (1976); Enyart v. Blacketor, ____ Ind. App. ____, 342 N.E.2d 654 (1976).

[75]*See* Rieth-Riley Constr. Co. v. McCarrell, ____ Ind. App. ____, 325 N.E.2d 844 (1975).

[76]____ Ind. App. ____, 342 N.E.2d 654 (1976).

[77]342 N.E.2d at 661.

[78]The trial court did, however, give a cautionary instruction to the jury to consider the defendant's interest while weighing his testimony. 342 N.E.2d at 661.

[79]MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE § 12, at 26-27 (2d ed. E. Cleary 1972).

[80]____ Ind. ____, 360 N.E.2d 588 (1977).

[81]360 N.E.2d at 600.

[82]*Id.*

required the witness to decide what was "unnecessarily severe" and what constituted "tormenting." Such determinations were to be made by the jury after considering all the evidence.

The second reason given by the court in *Rieth-Riley* for permitting lay opinions on ultimate facts is the desirability or necessity of such evidence. Apparently, the court recognized that witnesses are not always capable of expressing themselves factually. As long as the opinion is based upon personal observation, the inability of the witness to state "cold facts" from which the jury can infer the ultimate fact may be overlooked. As McCormick observed, courts actually enforce a "rule of preference;"[83] thus, lay opinions upon ultimate facts, where necessary, should be admitted.

Although the Court of Appeals did not explicitly state any limitations upon the rule announced in *Rieth-Riley*, one should heed the warning that the "abolition of the ultimate issue rule does not lower the bars so as to admit all opinions."[84] Traditional requirements and limitations still operate to prevent the wholesale admission of lay opinions. First, the opinion must be based upon facts within the personal knowledge and observation of the witness. For example, in *Bell v. State*,[85] where the defendant was convicted of the second-degree murder of his wife, the State's objection was sustained. On cross-examination, defense counsel asked the only witness to the shooting what she meant by the statement that the gun "just went off."[86] When she replied that the shooting was a tragic accident, an objection was raised, and the trial court struck the answer on the ground that it invaded the province of the jury. The Indiana Supreme Court agreed that this was an improper conclusion since the witness had already testified "that she was not sure exactly what happened."[87] Thus, the opinion that the shooting was a tragic accident could not have been based upon facts within her knowledge. On the other hand, in another second-degree murder case, the supreme court ruled that the proper foundation had been laid for the opinions of the two police officers regarding the sanity of the defendant because both witnesses had met the minimum requirement of having seen and spoken upon one occasion with the defendant.[88]

Nor will opinions upon issues of law be permitted. These are to be decided by the trial court. Although one may hope that courts will not mistake ultimate facts with questions of law, some degree of confusion is likely to exist. This may occur, for example, when a witness testifies that a party was negligent, criminally responsible, or lacked capacity to make a will.[89] To

[83]McCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE § 11, at 25 (2d ed. E. Cleary 1972).

[84]FEDERAL RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES 83 (West 1975) (Advisory Committee Note to Rule 704).

[85]____ Ind. ____, 366 N.E.2d 1156 (1977).

[86]*Id.* at 1158.

[87]*Id.* at 1159.

[88]Baum v. State, ____ Ind. ____, 345 N.E.2d 831 (1976).

[89]*See* Grismore v. Consolidated Prod. Co., 232 Iowa 328, 361, 5 N.W.2d 646, 663 (1942).

avoid labeling opinions on the law as opinions on ultimate facts, one author has suggested that in borderline situations, the witness should be required to define his terms so that his opinion is not taken by the jury as a statement of the law.[90]

Finally, opinions that are unduly prejudicial to the opponent should be excluded. This was a concern in *Enyart v. Blacketor*,[91] where the defendant's opinion that there was nothing he could do to avoid the accident was potentially prejudicial. However, the court of appeals refused to find an abuse of discretion because the trial court's instruction to the jury to consider the interest of the witness in the litigation in weighing his testimony made it unlikely that the opinion would be misused or accorded undue weight.[92]

The Balancing Process

The Indiana cases that have been reported since the *Rieth-Riley* decision give some meaning to the elusive formula of considering "the nature of the issue and the offered opinion in light of all the attendant circumstances of the particular case." The exercise of discretion seems to involve a balancing process. In the criminal cases, the nature of the issue has been given sustantial weight, possibly due to the high standard of proof required and the seriousness of the consequences. In *Strickland v. State*,[93] a first-degree murder case, the witness was asked to express an opinion as to whether the defendant harbored any malice toward the victim. The Supreme Court upheld the State's objection because the question sought a conclusion as to the defendant's state of mind. Citing *Clay v. State*[94] and *Gayer v. State*,[95] the court noted that psychological facts are to be determined by the jury. However, in *Williams v. State*,[96] another first-degree murder case, the Supreme Court approved the questioning of lay witnesses upon issues relating to the insanity defense. Such testimony was held proper under the authority of *Blake v. State*.[97] Putting *Strickland* and *Williams* together, it is apparent that the "nature of the issue" part of the *Rieth-Riley* formula alone can be controlling. In *Williams*, the testimony involved the recounting of observable behavior, together with the witness' impressions of that conduct. A malice inquiry, however, is far more speculative and may require the witness to take a trip through the mind of the defendant.

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[90]Stoebuck, *Opinions on Ultimate Facts: Status, Trends and a Note of Caution*, 41 DEN. L.C.J. 226, 238 (1964).

[91]___ Ind. App. ___, 342 N.E.2d 654 (1976).

[92]342 N.E. at 661.

[93]___ Ind. ___, 359 N.E.2d 244 (1977).

[94]___ Ind. ___, 346 N.E.2d 574 (1976).

[95]247 Ind. 113, 210 N.E.2d 852 (1965).

[96]___ Ind. ___, 352 N.E.2d 733 (1976).

[97]___ Ind. ___, 323 N.E.2d 227 (1975).

The "nature of the offered opinion" and "attendant circumstances of the particular case" portions of the formula involve balancing the considerations of usefulness and necessity, personal knowledge, and prejudice. In *Enyart v. Blacketor*,[98] the Court of Appeals performed this task, noting that a factual basis for the opinion had already been established, that the opinion "served only to inform the jury of Blacketor's perception of the totality of the circumstances surrounding the collision,"[99] and that the court's instruction to the jury made misuse of the opinion unlikely. This type of explicit balancing should serve as the model for all decisions on the admissibility of lay opinions on ultimate facts. Instead, the courts have remained cryptic, by either retaining the language of the invalid ultimate fact rule in cases of exclusion[100] or by paying lip-service to the *Rieth-Riley* rule in cases of admission.[101] If Indiana judges and trial lawyers are to derive any benefit from the reported cases, the opinions must give a clearer explanation of the rulings. Perhaps the strength of the *Rieth-Riley* balancing formula lies in its flexibility, but unless better instruction on its application is given, some doubt as to its workability may be justified.

CONCLUSION

The demise of the ultimate fact rule will probably not have any alarming consequences. Litigating parties and interested witnesses may be tempted to make more self-serving statements in the guise of opinions than would be possible if they were limited to factual statements. However, cross-examination and cautionary instructions to the jury should minimize the danger. Moreover, it is unlikely that any increase in the admissibility of lay opinion testimony will seriously decrease the use of expert witnesses. The *Rieth-Riley* decision did not make lay witnesses any more competent to testify upon matters requiring special skill or training.

The *Rieth-Riley* rule, on the other hand, should yield a number of benefits. When testifying upon ultimate facts issues, lay witnesses will not be forced to make the choice of speaking "factually" or not at all. Rather than attempting highly detailed descriptions which they may be incapable of verbalizing, witnesses will be able to speak on their own terms.

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[98] *See* note 91 *supra*.

[99] 342 N.E.2d at 661.

[100] *See* Bell v. State, ____ Ind. ____, 366 N.E.2d 1156, 1159 (1977) ("A witness will not be allowed to express a conclusion as to the ultimate question to be decided by the jury."); Hunter v. State, ____ Ind. ____, 360 N.E.2d 588, 600 (1977) ("[A] witness will not be allowed to express a conclusion on the ultimate question to be decided by the jury."); Strickland v. State, ____ Ind. ____, 359 N.E.2d 244, 248 (1977) ("[H]e would be expressing an opinion as to an ultimate fact of malice, strictly within the province of the jury to determine from all the evidence.").

[101] *See* Bobbitt v. State, ____ Ind. ____, 361 N.E.2d 1193, 1197 (1977) ("The admission of opinion testimony on an ultimate fact issue is within the discretion of the trial court."); Williams v. State, ____ Ind. ____, 352 N.E.2d 733, 742 (1976) ("The admissibility of lay witness opinion testimony on ultimate fact issues is a matter within the sound discretion of the trial court.").

More importantly, the jury will receive the full benefit of the witness' observations. While abolishing the rule of per se exclusion of lay opinions on ultimate facts, *Rieth-Riley* has provided a far more flexible rule than the rule of *Carthage Turnpike Co. v. Andrews,*[102] where opinion testimony is permitted unless the witness can relate all of the facts upon which the opinion is based. The "nature of the issue" formula, if properly applied, will result in supplying jurors with a view of the matter from those persons who were best situated to perceive the facts and draw inferences therefrom. One commentator has expressed his belief that "the change in attitude toward opinion evidence indicates increased confidence in the capacity of jurors to understand and evaluate it. It also implies greater regard for the ability and integrity of opinion witnesses."[103]

Finally, the *Rieth-Riley* rule should promote greater judicial efficiency and increase the probability of fair trials. Arguments over the definition of an ultimate fact, a useless exercise in semantics, will hardly be missed. Trial courts will be relieved of the task of evading an illogical exclusionary principle in an effort to present the jury with helpful and probative evidence. Instead, vesting judges with broad discretion expresses confidence in their ability to recognize the problems inherent in opinion testimony as well as their awareness of the jury's need for maximum aid in reaching their conclusions.

Of course, the *Rieth-Riley* formula is not without problems. Considering the "nature of the issue and the offered opinion in light of the attendant circumstances of the particular case" is an elusive mandate. Some of the confusion surrounding the formula is merely a reflection of its infancy. For example, the weight to be given to the nature of the issue in a civil action will remain a mystery until an instance of exclusion of an opinion is reported. Furthermore, the cases to date indicate a need for better articulation of the reasoning supporting the various decisions. If the *Rieth-Riley* formula is to have any independent vitality, the reviewing courts must explain the balancing process. Unless trial courts and lawyers are so instructed, the potential benefits of abolishing the rule of per se exclusion may not be realized and the *Rieth-Riley* formula will forever remain obscure.

EDWARD J. LIPTAK

[102]102 Ind. 138, 1 N.E. 364 (1885).

[103]McCormick, *Opinion Evidence in Iowa,* 19 DRAKE L. REV. 245, 274 (1970).