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Limitations on the Use of Expert Testimony in Missouri

M. Douglas Harpool

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COMMENTS

LIMITATIONS ON THE USE OF EXPERT TESTIMONY IN MISSOURI

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I. INTRODUCTION: ASSISTING THE JURY WITH EXPERT TESTIMONY

As the subject matter of civil litigation becomes more technical and complex,¹ the importance of expert testimony as a tool in litigation will likely increase. The need for a complete and thorough understanding of the permissible uses of such testimony will also increase, as expert testimony grows in importance. Further, the need to evaluate restrictions on the use of expert testimony, in light of potential harms and benefits, and the purpose of the restrictions, also expands.

This Comment will review some of the limitations Missouri courts have placed on the use of expert testimony.² Upon examination, it becomes clear that many of the traditional limitations cannot be justified on the basis for which expert testimony is allowed: to assist the jury.³ Rather, many courts have justified the limitations based on a fear of expert witnesses and the influence they could have on juries.

As a general rule, expert testimony is admitted when it is necessary

1. Litigation in many areas can become extremely complex. Some recent cases have been found to be so complicated that they were not allowed to be tried before a jury. *See* I.L.C. Peripherals v. IBM, 458 F. Supp. 423, 447 (N.D. Cal. 1978) (antitrust litigation); *Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. 59, 65-66 (S.D.N.Y. 1978) (antitrust litigation); *In re United States Fin. Sec. Litigation*, 75 F.R.D. 702, 714 (S.D. Cal. 1977) (securities litigation), *rev'd*, 609 F.2d 411 (9th Cir. 1979); *In re Boise Cascade Sec. Litigation*, 420 F. Supp. 99, 105 (W.D. Wash. 1976) (securities litigation).

2. The admissibility of expert testimony in federal courts differs in some respects from its admissibility in Missouri state courts. Admissibility of expert testimony in the federal courts is controlled by FED. R. EVID. 701-706. The primary distinction in the use of expert testimony between the two systems is that hypothetical questions are not required in federal courts. *See* FED. R. EVID. 705, Notes of Advisory Committee.

3. *Housman v. Fiddymont*, 421 S.W.2d 284, 289 (Mo. En Banc 1967); *Schears v. Missouri Pac. R.R.*, 355 S.W.2d 314, 321 (Mo. En Banc 1962); *Giambelluca v. Missouri Pac. R.R.*, 320 S.W.2d 457, 463 (Mo. 1959); *Summers v. Tavern Rock Sand Co.*, 315 S.W.2d 201, 206 (Mo. 1958); *Benjamin v. Metropolitan St. Ry.*, 133 Mo. 274, 288-89, 34 S.W. 590, 593 (1896). *See also* FED. R. EVID. 702.

to assist the jury in making conclusions based on the facts.⁴ As the Missouri Supreme Court noted in *Young v. Wheelock*,⁵ "One test of whether opinions of experts should be received 'is whether the court or jury will be aided by receiving such evidence.'" ⁶ Despite the Missouri Supreme Court's statement in *Parlow v. Dan Hamm Drayage Co.*⁷ that "the essential test of the admissibility of expert opinion evidence is whether or not it will be helpful to the jury,"⁸ courts often have ruled on the propriety of allowing expert testimony without reference to this test.⁹ Instead, these courts have discussed more narrow considerations such as the educational training of the alleged expert,¹⁰ the complexity of the subject matter of the testimony,¹¹ and the requirements of a hypothetical question.¹² While these considerations are relevant, case law indicates that too much emphasis has been placed on these secondary questions and the ultimate test of whether the testimony will assist the jury often remains unconsidered.

Limitations on the use of expert testimony can be divided into three groups:¹³ (1) limitations based on the qualifications of the expert; (2) limitations based on the subject matter of the testimony; and (3) limitations based on the foundation of the testimony. An examination of these categories will provide a framework of analysis for attorneys in preparing for litigation and also should serve as a tool in evaluating the limitations on the use of expert testimony traditionally used by Missouri courts.

II. QUALIFICATION OF EXPERT WITNESSES

The admission of the opinion of an expert witness is allowed as an exception to the rule that a witness only can testify to facts.¹⁴ The excep-

4. See *Housman v. Fiddymment*, 421 S.W.2d 284, 289 (Mo. En Banc 1967); *Young v. Wheelock*, 333 Mo. 992, 1007, 64 S.W.2d 950, 957 (1933); *Benjamin v. Metropolitan St. Ry.*, 133 Mo. 274, 288-89, 34 S.W. 590, 593 (1896).

5. 333 Mo. 992, 64 S.W.2d 950 (1933).

6. *Id.* at 1007, 64 S.W.2d at 957.

7. 391 S.W.2d 315 (Mo. 1965).

8. *Id.* at 326.

9. *Harp v. Illinois Cent. R.R.*, 370 S.W.2d 387, 391 (Mo. 1963).

10. See *Cohen v. Archibald Plumbing & Heating Co.*, 555 S.W.2d 676, 681 (Mo. App., K.C. 1977); *Skelton v. General Candy Co.*, 539 S.W.2d 605, 614 (Mo. App., St. L. 1976); *Dolan v. D.A. Lubricant Co.*, 416 S.W.2d 40, 43-44 (Mo. App., K.C. 1967).

11. See *Housman v. Fiddymment*, 421 S.W.2d 284, 289 (Mo. En Banc 1967); *Ponciroli v. Wyrick*, 573 S.W.2d 731, 735 (Mo. App., St. L. 1978); *Holtmeyer v. Scherer*, 546 S.W.2d 29, 34 (Mo. App., St. L. 1976).

12. See *Harp v. Illinois Cent. R.R.*, 370 S.W.2d 387, 391 (Mo. 1963); *Sneed v. Goldsmith*, 343 S.W.2d 345, 351-52 (Mo. App., Spr. 1961).

13. A fourth possible category of limitations would include traditional evidentiary objections including relevancy, materiality, hearsay, and speculation. These objections will not be directly discussed in this Comment. Objections pertaining to the speculative nature of particular testimony and to some hearsay problems are related to the foundation requirements discussed in text accompanying notes 89-141 *infra*.

14. See *Housman v. Fiddymment*, 421 S.W.2d 284, 289 (Mo. En Banc 1967); *Harp v. Illinois Cent. R.R.*, 370 S.W.2d 387, 391 (Mo. 1963); *Schears v. Missouri Pac. R.R.*, 355 S.W.2d 314, 321 (Mo. En Banc 1962); *McKinley v. Vize*, 563 S.W.2d 505, 508 (Mo. App., St. L. 1978).

tion is made when necessary¹⁵ to aid the jury's understanding of the issues. Therefore, before the opinion of a witness is admissible, the offering party must qualify the witness as an expert.¹⁶ An expert witness is one "who possesses superior knowledge respecting a subject about which persons having no particular training are incapable of forming an accurate opinion."¹⁷ This superior knowledge can be obtained by the witness in many ways, but typically is gained through education,¹⁸ training,¹⁹ or experience.²⁰ Whether a witness qualifies as an expert is left to the discretion of the trial court.²¹

The question of who qualifies as an expert must be considered in light of the subject matter at issue.²² An expert on one subject will not be allowed to state an opinion on another subject on which he is not an expert.²³ A question calling for such an answer would be objectionable because it calls for an opinion of the witness on a subject in which he does not possess superior knowledge.²⁴

When a witness possesses sufficient knowledge on a subject matter to qualify him as an expert, challenges to his credentials based on his relative expertise (*i.e.*, in comparison to other experts) are limited to arguments concerning the weight that the jury should give the testimony.²⁵

15. See cases cited note 4 *supra*.

16. See Harp v. Illinois Cent. R.R., 370 S.W.2d 387, 391 (Mo. 1963); Schears v. Missouri Pac. R.R., 355 S.W.2d 314, 321 (Mo. En Banc 1962); Skelton v. General Candy Co., 539 S.W.2d 605, 614 (Mo. App., St. L. 1976).

17. Giambelluca v. Missouri Pac. R.R., 320 S.W.2d 457, 463 (Mo. 1959).

18. See Sampson v. Missouri Pac. R.R., 560 S.W.2d 573, 587-88 (Mo. En Banc 1978) (economist); Holtmeyer v. Scherer, 546 S.W.2d 29, 34 (Mo. App., St. L. 1976) (physicist); Griffin v. Evans Elec. Constr. Co., 529 S.W.2d 172, 178 (Mo. App., K.C. 1975) (doctor).

19. See Crystal Tire Co. v. Home Serv. Oil Co., 525 S.W.2d 317, 323-24 (Mo. En Banc 1975) (fire prevention specialist); West v. Jack Cooper Transp. Co., 372 S.W.2d 642, 644 (Mo. App., K.C. 1963) (police officer), *rev'd on other grounds*, 381 S.W.2d 872 (Mo. En Banc 1964).

20. See State *ex rel.* State Highway Comm'n v. Kimmell, 435 S.W.2d 354, 357 (Mo. 1968) (real estate salesman); McConnell v. Pic-Walsh Freight Co., 432 S.W.2d 292, 299 (Mo. 1968) (fire chief); Cohen v. Archibald Plumbing & Heating Co., 555 S.W.2d 676, 681-82 (Mo. App., K.C. 1977) (fireman); Skelton v. General Candy Co., 539 S.W.2d 605, 614 (Mo. App., St. L. 1976) (parking lot attendant); Kim Mfg., Inc. v. Superior Metal Treating, Inc., 537 S.W.2d 424, 428-29 (Mo. App., K.C. 1976) (business experience); Langdon v. Koch, 435 S.W.2d 730, 732-33 (Mo. App., Spr. 1968) (used car salesman).

21. See Parlow v. Dan Hamm Drayage Co., 391 S.W.2d 315, 325 (Mo. 1965); Yocum v. Kansas City Pub. Serv. Co., 349 S.W.2d 860, 864 (Mo. 1961); Summers v. Tavern Rock Sand Co., 315 S.W.2d 201, 206 (Mo. 1958); Skelton v. General Candy Co., 539 S.W.2d 605, 614 (Mo. App., St. L. 1976); Langdon v. Koch, 435 S.W.2d 730, 733 (Mo. App., Spr. 1968).

22. For a discussion of the subject-matter limitations placed on expert testimony, see text accompanying notes 37-45 *infra*.

23. On subjects outside his field of expertise, the expert is treated as any other witness and is prohibited from stating his opinion. See cases cited note 11 *supra*.

24. See notes 16 & 17 and accompanying text *supra*.

25. See McConnell v. Pic-Walsh Freight Co., 432 S.W.2d 292, 299 (Mo. 1968); Cohen v. Archibald Plumbing & Heating Co., 555 S.W.2d 676, 681-82 (Mo. App., K.C. 1977); Griffin v. Evans Elec. Constr. Co., 529 S.W.2d 172, 178 (Mo. App., K.C. 1975).

Medical expert testimony is exemplary; even though there are many specialties within the profession, the courts generally have considered a doctor to be a qualified expert in any of the specialties.²⁶ As was stated by the Kansas City Court of Appeals in *Griffin v. Evans Electrical Construction Co.*,²⁷ "[T]he extent of training, experience and competence of a medical expert in the field in which he testifies goes to the weight to be given to and not the admissibility of his testimony in that area, and thus becomes a matter for the trier of the facts."²⁸ It is difficult to measure the amount of knowledge that a witness must possess to qualify as an expert witness. Similarly, it is difficult to determine when an expert in one field is qualified to testify in a related field or to determine what areas of expertise are relevant to an issue.

Courts should resolve these difficult questions by inquiring into whether the witnesses' testimony would assist the jury. After all, the expert witness is allowed to give his opinion because it helps the jury. The expert is exempted from the personal observation limitation on witnesses because the expert assists the jury through his expertise and experience. A lay witness, in contrast, assists the jury by testifying to what he has personally observed. Under a modified analysis of expertise, if the opinion testimony of the alleged expert would assist the jury in making its decision, then the expert should be allowed to testify (*i.e.*, the witness should be found sufficiently expert). On the other hand, if the opinion of the witness is based on irrelevant²⁹ or insufficient information,³⁰ or if the opinion is unnecessary to the jury's determination³¹ (as adjudged by the trial court), then the expert should not be allowed to testify. The focus under this test would be on whether the witness' testimony could assist the jury, not on the education or the number of years of experience that the witness has. Of course, the training and education of a witness, as well as his experience,

26. See, *e.g.*, *Swope v. Printz*, 468 S.W.2d 34, 40 (Mo. 1971); *Griffin v. Evans Elec. Constr. Co.*, 529 S.W.2d 172, 178 (Mo. App., K.C. 1975); *Pate v. St. Louis Indep. Packing Co.*, 428 S.W.2d 744, 750 (Mo. App., St. L. 1968); *Sanguinett v. May Dep't Stores Co.*, 228 Mo. App. 1161, 1170-71, 65 S.W.2d 162, 166 (St. L. 1933).

27. 529 S.W.2d 172 (Mo. App., K.C. 1975).

28. *Id.* at 178.

29. For example, where the expert's opinion is based on facts other than those presented in the case at bar, the opinion is based on irrelevant facts. See text accompanying notes 94-100 *infra*. See also *Odum v. Cejas*, 510 S.W.2d 218, 222 (Mo. App., Spr. 1974).

30. The expert's opinion in this instance would be essentially conjecture. See *Craddock v. Greenberg Merc., Inc.*, 297 S.W.2d 541, 548 (Mo. 1957). See also *Sampson v. Missouri Pac. R.R.*, 560 S.W.2d 573, 587-88 (Mo. En Banc 1978); *McDonald v. Missouri-Kansas-Texas R.R.*, 401 S.W.2d 465, 469-70 (Mo. 1966); *Harp v. Illinois Cent. R.R.*, 370 S.W.2d 387, 391 (Mo. 1963).

31. The evaluation would be an assessment of the relevance, cumulativeness, and content of the testimony in light of the issues involved and the knowledge which the jury would have to draw conclusions in the absence of the admission of expert testimony.

would influence the trial court's determination of admissibility by increasing the likelihood that the witness' opinion would assist the jury.³²

Emphasizing the ability of the witness to help the jury rather than evaluating a possible expert in terms of a threshold level of competence, would facilitate an attorney's evaluation of whether the witness would be permitted to testify. Attorneys would do well to frame arguments for or against expert status for a witness around the witness' ability to assist the jury, rather than solely upon the qualifications of the witness. Such an emphasis can minimize the effect of the cautious attitude that courts have taken toward expert witnesses. Language used by the Missouri Supreme Court in *Superior Ice & Coal Co. v. Belger Cartage Service, Inc.*³³ points out this cautious attitude: "Expert witnesses are generally selected by the parties from their known opinions on the subject in respect to which they are called to testify, and therefore, in view of the important functions they perform, their evidence should be admitted with great caution."³⁴

This attitude taken by the courts appears to be founded in the manner in which expert witnesses are selected. The attorney is forced to take lay witnesses as they are found. He may choose to use or not use a lay witness and he may do so based on the witness' testimony; even so, the pool from which the attorney makes his selection of witnesses necessarily will be limited. Expert witnesses, while limited in number by the subject matter at issue and the party's financial resources, are available in greater numbers. The experienced attorney has a pool of experts from which to choose in every case. If one expert in the pool cannot meet the attorney's needs, often another will. This nature of control over the testimony of the expert is lacking with respect to lay witnesses who simply happen to be present at an incident which becomes the subject of litigation. It seems that this element of control is at the root of the cautious attitude of the courts.³⁵ If emphasis in determining who qualifies as an expert were placed upon the ability of the witness to assist the jury, fears of the courts could be relieved and many potential abuses of expert testimony could be avoided.

32. The knowledge possessed by the expert would be one factor that could influence the determination of whether the testimony would assist the jury.

33. 337 S.W.2d 897 (Mo. 1960).

34. *Id.* at 906 (quoting *Cole v. Empire Dist. Elec. Co.*, 331 Mo. 824, 833, 55 S.W.2d 434, 438 (1932)).

35. Because experts are selected on the basis of their known opinions and because the same pool of experts is available to attorneys in every case they handle in a certain area (or of a certain variety), the cautious attitude may be well founded. Query whether a significant increase in litigation in a certain field coupled with an overall increased reliance on expert testimony could result in a career expert witness. If so, would that be desirable? If the testimony of the expert is based on accurate data and the opinion is given "honestly," has harm occurred where the jury adopts the expert's opinion? These questions certainly are not easily answered, yet answering them may be necessary to properly evaluate the desirability of increased reliance on expert testimony. Some have suggested court-appointed experts as a desirable alternative. See C. McCORMICK, LAW OF EVIDENCE §§ 16-17 (2d ed. 1972). See also FED. R. EVID. 706.

With emphasis placed on the ability of the witness to assist the jury by adding to the body of information from which it can draw in rendering its decision, the arguments over how much superior knowledge³⁶ is enough to qualify for expert status can be avoided. Furthermore, the determination by the trial court of when expert testimony will be allowed then will be based on a criterion directly related to the purpose for allowing expert testimony. Attorneys can use the test both in assessing a witness' likelihood of being allowed to testify as an expert and in forming their arguments for or against a witness' expert status. Finally, the abuses of expert testimony feared by the courts can be minimized by emphasizing specifically what the witness can *add to the trial*, and de-emphasizing a witness' training or experience *prior to trial*.

III. THE SUBJECT MATTER OF EXPERT TESTIMONY

The admissibility of expert testimony on an issue depends on the ability of the jury to understand the issue without the aid of an expert.³⁷ Expert testimony will not be admitted when the jury can reach an accurate conclusion on the facts without the aid of an expert witness.³⁸ Conversely, if an ordinary and reasonable jury will be unable to comprehend an issue without the assistance of expert testimony, expert testimony often is required.³⁹ When issues of fact fall between the instances in which expert testimony is required and those in which it is prohibited, expert testimony is permitted but not required.⁴⁰

The line separating situations in which expert testimony is permitted and those in which it is prohibited or required has not been clearly drawn in Missouri.⁴¹ In general, the determination of when an issue is suitable

36. That is, how much education, training, or experience qualifies a witness as an expert? See cases cited notes 18-20 *supra*.

37. See *Housman v. Fiddymont*, 421 S.W.2d 284, 289 (Mo. En Banc 1967); *Harp v. Illinois Cent. R.R.*, 370 S.W.2d 387, 391 (Mo. 1963); *Schears v. Missouri Pac. R.R.*, 355 S.W.2d 314, 321 (Mo. En Banc 1962); *Superior Ice & Coal Co. v. Belger Cartage Serv., Inc.*, 337 S.W.2d 897, 906 (Mo. 1960); *Giambelluca v. Missouri Pac. R.R.*, 320 S.W.2d 457, 463 (Mo. 1959). See also *Cole v. Empire Dist. Elec. Co.*, 331 Mo. 824, 833, 55 S.W.2d 434, 438 (1932); *Benjamin v. Metropolitan St. Ry.*, 133 Mo. 274, 288-89, 34 S.W. 590, 593 (1896); *McKinley v. Vize*, 563 S.W.2d 505, 508 (Mo. App., St. L. 1978); *Dolan v. D.A. Lubricant Co.*, 416 S.W.2d 40, 43-44 (Mo. App., K.C. 1967).

38. See *Sampson v. Missouri Pac. R.R.*, 560 S.W.2d 573, 586 (Mo. En Banc 1978); *Capra v. Phillips Inv. Co.*, 302 S.W.2d 924, 930 (Mo. En Banc 1957); *Young v. Wheelock*, 333 Mo. 992, 1007-08, 64 S.W.2d 950, 957 (1933); *Wood v. Metropolitan St. Ry.*, 181 Mo. 433, 449-50, 81 S.W. 152, 156 (1904); *Gavisk v. Pacific R.R.*, 49 Mo. 274, 275-76 (1872); *Ponciroli v. Wyrick*, 573 S.W.2d 731, 735 (Mo. App., St. L. 1978).

39. See *Pedigo v. Roseberry*, 340 Mo. 724, 734, 102 S.W.2d 600, 606 (1937); *Young v. Wheelock*, 333 Mo. 992, 1007-08, 64 S.W.2d 950, 957 (1933); *Ponciroli v. Wyrick*, 573 S.W.2d 731, 735 (Mo. App., St. L. 1978).

40. See *Pedigo v. Roseberry*, 340 Mo. 724, 734, 102 S.W.2d 600, 606 (1937).

41. See text accompanying notes 57-63 *infra*.

for expert testimony is made by the trial court.⁴² A significant amount of discretion is given the trial judge in this regard.⁴³ Missouri decisions have indicated that expert testimony is not admissible where a juror is capable of rendering an intelligent decision without expert assistance.⁴⁴ If the language of these decisions is taken literally, then the jury's inability to understand an issue can be called a prerequisite to the use of expert opinion evidence. As will be discussed later, some question exists as to whether such a literal interpretation is warranted.⁴⁵

The Missouri Supreme Court first alluded to the prerequisite that a juror must be incapable of rendering an intelligent decision without expert assistance before the expert's testimony will be allowed in *Benjamin v. Metropolitan Street Railway*:⁴⁶

The witnesses, as a general rule, must state facts, from which the jurors are to form their opinion. But when the facts are all stated, upon a subject of inquiry, if an intelligent opinion cannot be drawn there from by inexperienced persons, such as constitute the ordinary jury, an exception is made to the general rule⁴⁷

A recent decision by the Missouri Supreme Court, *Sampson v. Missouri Pacific Railway*,⁴⁸ stated the rule more clearly: "The opinion of expert witnesses 'should never be admitted unless it is clear that the jurors themselves are not capable, for want of experience or knowledge of the subject, to draw correct conclusions from the facts proved.'"⁴⁹

A number of subjects have been held to be inappropriate for expert testimony because they were within the knowledge and abilities of the average jury. These include: whether a fire started in combustible materials can burst into flames after smoldering for many hours;⁵⁰ whether a ramp on which the plaintiff fell was the cause of the fall;⁵¹ whether barricades used around construction work were adequate to protect children who might be in the area from being injured;⁵² whether a wrist previously broken would still exhibit weakness two weeks after the cast was removed;⁵³

42. See *Housman v. Fiddymont*, 421 S.W.2d 284, 289 (Mo. En Banc 1967); *Parlow v. Dan Hamm Drayage Co.*, 391 S.W.2d 315, 325 (Mo. 1965); *Yocum v. Kansas City Pub. Serv. Co.*, 349 S.W.2d 860, 864 (Mo. 1961); *Superior Ice & Coal Co. v. Belger Cartage Serv., Inc.*, 337 S.W.2d 897, 906 (Mo. 1960).

43. See cases cited note 21 *supra*.

44. See cases cited notes 37 & 38 *supra*.

45. See text accompanying notes 57-63 *infra*.

46. 133 Mo. 274, 34 S.W. 590 (1896).

47. *Id.* at 288, 34 S.W. at 593.

48. 560 S.W.2d 573 (Mo. En Banc 1978).

49. *Id.* at 586 (emphasis added) (quoting *Housman v. Fiddymont*, 421 S.W.2d 284, 289 (Mo. En Banc 1967)).

50. *Superior Ice & Coal Co. v. Belger Cartage Serv., Inc.*, 337 S.W.2d 897, 906 (Mo. 1960).

51. *McClure v. Koch*, 433 S.W.2d 589, 595 (Mo. App., St. L. 1968).

52. *Anderson v. Cahill*, 485 S.W.2d 76, 80 (Mo. 1972).

53. *Ponciroli v. Wyrick*, 573 S.W.2d 731, 735 (Mo. App., St. L. 1978).

and the point of impact between two vehicles involved in a collision.⁵⁴ In *Housman v. Fiddymont*,⁵⁵ expert testimony concerning the point of impact between two vehicles was held not admissible because questions concerning impact "do not involve an application of the principles of physics, engineering, mechanics or other technical fields of science requiring specialized information. These questions could be determined by jurors possessed of the knowledge of ordinary men of the time."⁵⁶

It seems unlikely that a court would literally enforce the rule that expert testimony cannot be admitted unless it is clear that the jury cannot comprehend the subject matter. Such a rule assumes that whether the jury is capable of arriving at a correct conclusion may be determined absolutely. It seems more realistic to recognize that in some instances a jury *may* be able to reach a correct conclusion entirely on its own but that with the aid of expert testimony, the likelihood of a correct decision and the quality of understanding that the jury has for the subject matter would increase. The admission of expert testimony probably was not intended to be limited to those instances in which there was no possibility that the jury could draw a correct conclusion. A literal interpretation of the subject matter limitations would create only two categories of subject matters: those on which expert testimony is *prohibited* and those on which expert testimony is *required*.

A 1937 opinion of the Missouri Supreme Court, *Pedigo v. Roseberry*,⁵⁷ sets forth three categories of subjects for purposes of determining the admissibility of expert testimony. Expert testimony on subjects in the first category is *prohibited*, such testimony on subjects in the second category is *permitted*, and expert testimony on subjects in the third category is *required*.⁵⁸

Expert testimony is prohibited when the subject matter at issue is "within the experience and knowledge common to mankind in general."⁵⁹ On these subjects the jury is said to be as competent as the witness to draw a conclusion based on the evidence. Under *Pedigo*, expert testimony on second-category subjects is permissible if it will aid the jury in its conclusions.⁶⁰ Expert testimony is required on subjects in the third *Pedigo* cate-

54. *Housman v. Fiddymont*, 421 S.W.2d 284, 290-91 (Mo. En Banc 1967); *Butler v. Crowe*, 540 S.W.2d 940, 942 (Mo. App., K.C. 1976); *Penn v. Hartman*, 525 S.W.2d 773, 778 (Mo. App., St. L. 1975). *But see* *Schneider v. Prentzler*, 391 S.W.2d 307, 310 (Mo. 1965); *Jones v. Smith*, 372 S.W.2d 71, 78 (Mo. 1963); *Ryan v. Campbell "66" Express, Inc.*, 304 S.W.2d 825, 828 (Mo. En Banc 1957); *Holtmeyer v. Scherer*, 546 S.W.2d 29, 34 (Mo. App., St. L. 1976). *See also* Comment, *Expert Testimony in Missouri on Point of Impact in Automobile Accidents*, 33 Mo. L. REV. 645 (1968).

55. 421 S.W.2d 284 (Mo. En Banc 1967).

56. *Id.* at 291-92. *See also* *Holtmeyer v. Scherer*, 546 S.W.2d 29, 34 (Mo. App., St. L. 1976).

57. 340 Mo. 724, 102 S.W.2d 600 (1937).

58. *Id.* at 734, 102 S.W.2d at 606.

59. *Id.*

60. *Id.*

gory. These subjects are beyond the "general experience and common knowledge of mankind."⁶¹ Scientific experience or training, or other expertise is said to be indispensable to a proper determination of issues involving these subject matters.⁶² The existence of three categories of subject matter—prohibited, permissible, and required—seems more realistic than attempting to utilize the two absolute classifications—prohibited and required—set forth by some Missouri decisions.⁶³ Further, the three-category system better achieves the purpose of expert testimony; it allows testimony on subjects in the middle category when it will aid the jury. The language in *Pedigo* seems to support the view that the narrow rule stated in some Missouri decisions, setting forth only two categories of expert testimony, should not be relied upon literally in determining the suitability of a subject matter for expert testimony.

Even when the expert is permitted to testify, the content of his testimony still may be restricted. Several justifications for subject matter limitations exist. These justifications are based not only on a dislike of personally selected expert witnesses,⁶⁴ but also on the opinionated nature of expert testimony.

Expert testimony often contains the expert's conclusion based on the facts of the case. When this occurs, the expert plays a role similar to that of the jury. This is especially true when the testimony of the expert concerns the ultimate issue of the lawsuit.⁶⁵ The similarity of function between an expert witness and the jury led many courts to limit the testimony of an expert witness to statements of opinion.⁶⁶ At one time, the courts refused to allow experts to state conclusions, especially on the ultimate issue of the lawsuit.⁶⁷ The rationale of the courts apparently was that testimony by an expert as to his conclusion would invade the province of the jury. A 1904 decision of the Missouri Supreme Court, *Taylor v. Grand Avenue Railway*,⁶⁸ noted that "[t]o the trained legal mind there is a very essential difference between permitting an expert to give an opinion and permitting him to draw a conclusion. The one is the province of a witness—the other is, in the first instance the special prerogative of the jury."⁶⁹

61. *Id.*

62. *Id.*

63. See text accompanying notes 46-49 *supra*.

64. See note 35 and accompanying text *supra*.

65. An example is where an expert testifies that the plaintiff's injuries were caused by the incident and causation is the only question at issue.

66. See *State v. Hyde*, 234 Mo. 200, 251-52, 136 S.W. 316, 331-32 (1911); *Roscoe v. Metropolitan St. Ry.*, 202 Mo. 576, 595-96, 101 S.W. 32, 37 (1907); *Taylor v. Grand Ave. Ry.*, 185 Mo. 239, 255-57, 84 S.W. 873, 877-78 (1904). *But see* *Wood v. Metropolitan St. Ry.*, 181 Mo. 433, 449-52, 81 S.W. 152, 156-57 (1904).

67. See *Gillmore v. Atwell*, 283 S.W.2d 636, 639 (Mo. 1955); *Mahany v. Kansas City Rys.*, 286 Mo. 601, 620-21, 228 S.W. 821, 826 (1921); *Henson v. Kansas City*, 277 Mo. 443, 455-56, 210 S.W. 13, 17 (1919); *Deiner v. Sutermeister*, 266 Mo. 505, 521-22, 178 S.W. 757, 761 (1915); *Frangos v. Hartford Accident & Indem. Co.*, 203 S.W.2d 894, 897 (Mo. App., St. L. 1947). See also *FED. R. EVID.* 704.

68. 185 Mo. 239, 84 S.W. 873 (1904).

69. *Id.* at 256-57, 84 S.W. at 878.

The fallacy of the "province of the jury" objection was recognized long ago in Missouri case law,⁷⁰ but the objection has proven to be difficult to lay aside. Litigants and courts still utilize the phrase in discussing the permissible uses of expert testimony.⁷¹ In fact, courts continue to rely on the objection in rendering decisions.⁷² Examination of modern limitations on the subject matters on which expert testimony can be admitted reveals that the limitations are derived from rules based on the fear that experts invade the province of the jury.⁷³

Recognizing the invalidity of the argument that allowing an expert witness to testify to his conclusion invades the province the jury, the St. Louis Court of Appeals in *McKinley v. Vize*⁷⁴ stated summarily:

The *province* of the jury is to hear all the evidence, including opinion evidence, to weigh it all, and to decide the issues. Thus an opinion, which is evidence, cannot invade the province of the jury in a strict sense, and this is so "even though the opinion is upon the very issue to be decided," and for that reason "an objection that an expert opinion invades the province of the jury is not a valid one."⁷⁵

While the testimony of an expert clearly cannot invade the province of the jury because the jury may still disbelieve and must evaluate all testi-

70. *State v. Paglino*, 319 S.W.2d 613, 623 (Mo. 1958); *City of St. Louis v. Kisling*, 318 S.W.2d 221, 225 (Mo. 1958); *Stephens v. Kansas City Gas Co.*, 354 Mo. 835, 849, 191 S.W.2d 601, 607 (1946); *Mann v. Grim-Smith Hosp. & Clinic*, 347 Mo. 348, 353, 147 S.W.2d 606, 608 (1941); *Cole v. Uhlmann Grain Co.*, 340 Mo. 277, 297, 100 S.W.2d 311, 322 (1937); *Wood v. Metropolitan St. Ry.*, 181 Mo. 433, 449-50, 81 S.W. 152, 156 (1904); *Gillespie v. Terminal R. Ass'n*, 204 S.W.2d 598, 604 (Mo. App., K.C. 1947).

71. *Sampson v. Missouri Pac. R.R.*, 560 S.W.2d 573, 586 (Mo. En Banc 1978); *Phillips v. Shaw*, 381 S.W.2d 768, 771 (Mo. 1964); *McKinley v. Vize*, 563 S.W.2d 505, 510 (Mo. App., St. L. 1978).

72. *Gillmore v. Atwell*, 283 S.W.2d 636, 638 (Mo. 1955); *Baptiste v. Boatmen's Nat'l Bank*, 148 S.W.2d 743, 744 (Mo. 1941); *Mahany v. Kansas City Rys.*, 286 Mo. 601, 620, 228 S.W. 821, 826 (1921); *Frangos v. Hartford Accident & Indem. Co.*, 203 S.W.2d 894, 897 (Mo. App., St. L. 1947).

A possible reason for some of these decisions is that they concern expert testimony on legal conclusions. While discussion of an "invasion of the province of the jury" would be misguided, the exclusion of the testimony might be proper under a factual conclusion-legal conclusion distinction. See *Fields v. Luck*, 44 S.W.2d 18, 20-21 (Mo. 1931); cases cited note 84 *infra*.

73. *Sampson v. Missouri Pac. R.R.*, 560 S.W.2d 573, 586 (Mo. En Banc 1978); *Phillips v. Shaw*, 381 S.W.2d 768, 771 (Mo. 1964); *Harp v. Illinois Cent. R.R.*, 370 S.W.2d 387, 391 (Mo. 1963); *Schears v. Missouri Pac. R.R.*, 355 S.W.2d 314, 321 (Mo. En Banc 1962); *Superior Ice & Coal Co. v. Belger Cartage Serv., Inc.*, 337 S.W.2d 897, 906 (Mo. 1960); *Ponciroli v. Wyrick*, 573 S.W.2d 731, 735 (Mo. App., St. L. 1978). See also *Henson v. Kansas City*, 277 Mo. 443, 455-56, 210 S.W. 13, 17 (1919); *Deiner v. Sutermeister*, 266 Mo. 505, 521-22, 178 S.W. 757, 761 (1915); *State v. Hyde*, 234 Mo. 200, 256-57, 136 S.W. 316, 333 (1911); *Roscoe v. Metropolitan St. Ry.*, 202 Mo. 576, 595, 101 S.W. 32, 37 (1907); *Wood v. Metropolitan St. Ry.*, 181 Mo. 433, 451, 81 S.W. 152, 157 (1904); *Benjamin v. Metropolitan St. Ry.*, 133 Mo. 274, 288-89, 34 S.W. 590, 593 (1896); *Gavisk v. Pacific R.R.*, 49 Mo. 274, 276-77 (1872).

74. 563 S.W.2d 505 (Mo. App., St. L. 1978).

75. *Id.* at 510.

mony, the fears upon which the objection was originally founded cannot be so easily dismissed, and thus merit discussion.

Modern limitations imposed by the courts on the subject matter of expert testimony still relate to fears of intrusion by experts on the role of the jury. This was indicated in *Harp v. Illinois Central Railroad*.⁷⁶ "As an exception to the general rule that a witness may not express an opinion, an expert witness may do so when qualified as such and *when the subject matter is not of such common knowledge to invade the province of the jury.*"⁷⁷ Thus, while modern courts have abandoned the *opinion* versus *conclusion* distinction courts once used to protect the jury's role from invasion by expert witnesses, the use of subject matter limitations to accomplish the same result are still permissible.⁷⁸

It can be argued that even if an expert witness technically cannot invade the province of the jury, juries may be prone to allow experts to do so, and that juries might be inclined to adopt the opinions of expert witnesses as their own, without any analysis or separate evaluation of the facts.⁷⁹ Whether or not juries actually tend to adopt the opinions of experts, proper instructions from the court could decrease the likelihood that a jury passively would do so.⁸⁰

Arguments which allege that the jury blindly will accept the opinions of expert witnesses presuppose the existence of expert testimony only on one side of the lawsuit. In cases where more than one party offers expert testimony on an issue, the jury would be forced to make at least an assessment of the credibility of the experts. Finally, even if juries tend to adopt blindly the opinions of expert witnesses, it is questionable whether this justifies the type of subject matter limitations presently utilized. A jury would seem more likely to adopt the expert's opinion when the subject matter is difficult and the jurors have no basis to reach a conclusion of

76. 370 S.W.2d 387 (Mo. 1963).

77. *Id.* at 391 (emphasis added).

78. *Sampson v. Missouri Pac. R.R.*, 560 S.W.2d 573, 586 (Mo. En Banc 1978). See also cases cited note 73 *supra*.

79. See *Roscoe v. Metropolitan St. Ry.*, 202 Mo. 576, 595, 101 S.W. 32, 37 (1907). The fear of blind acceptance is exemplified historically by a now overruled restriction on the use of expert testimony to prove causation. Under the old rule, experts were allowed to testify that a personal injury *might* be caused by an event but not that the injury *was* so caused. The rule was based on a fear that the jury would accept the testimony on causation without independently assessing the testimony unless the term "might" was interjected. See *State v. Hyde*, 234 Mo. 200, 256-57, 136 S.W. 316, 333 (1911). But see *Wood v. Metropolitan St. Ry.*, 181 Mo. 433, 451, 81 S.W. 152, 157 (1904). See also *Expert Testimony on Causation in a Wrongful Death Case: Should "Reasonable Medical Certainty" be Necessary to Make a Submissible Case?*, 36 Mo. L. Rev. 127 (1971). On the issue of causation, experts are now required to testify with reasonable certainty. See *James v. Sunshine Biscuits, Inc.*, 402 S.W.2d 364, 373 (Mo. 1966); *Kinealy v. Southwestern Bell Tel. Co.*, 368 S.W.2d 400, 404 (Mo. 1963).

80. See, e.g., Mo. APPROVED INSTR. Nos. 2.01-03, 3.01 (Supp. 1980). Query whether an instruction specifically addressing expert witnesses and explaining their role to the jury would be desirable. See *Pedigo v. Roseberry*, 340 Mo. 724, 734, 102 S.W.2d 600, 606 (1937).

their own. If so, then the courts' subject matter limitation is backwards, for it prohibits expert testimony only when the propensity of a jury to bypass its own evaluation is the lowest, *i.e.*, when the subject matter is not difficult.⁸¹

One limitation on the subject matter of expert testimony (beyond the assistance to the jury test) appears justifiable. That limitation was derived from the now abandoned *opinion* versus *conclusion* distinction.⁸² The distinction now drawn is between an expert testifying to factual conclusions and an expert testifying to legal conclusions.⁸³ Even today, an expert witness generally is not allowed to testify to a legal conclusion.⁸⁴ As might be expected, it is sometimes difficult to distinguish between legal conclusions and factual ones.⁸⁵ For example, on some international conflict of laws questions, experts are allowed to testify as to the law of foreign countries.⁸⁶ In these instances, however, the law of the foreign jurisdiction is treated as a *factual question*, for the jury to decide.⁸⁷

If the courts abandon strict limitations on the subjects on which expert testimony is admissible based on the complexity of the issue involved, then the problem of determining the scope of those limitations can be avoided. In place of those limitations courts can inquire as to the ability of each witness to assist the jury. Such an emphasis is consistent with the purpose for which expert testimony is allowed. Further, outmoded objec-

81. If a fear of the jury blindly adopting an expert's opinion as its own were the real basis for limiting the subjects on which experts can testify, then the limitation should restrict testimony on those subjects for which blind acceptance is most likely. Arguably the fear of blind acceptance makes more sense as a justification for the court-imposed limitation when it is balanced with the value of the testimony offered. On difficult subjects the testimony can be said to be of such value as to outweigh the fear of blind acceptance. Such may not be true of less difficult subject matters. To the extent that the propensity for a jury to accept blindly an expert's opinion decreases as the subject matter becomes less difficult, the validity of blind acceptance as a rationale for court-imposed limitations seems dubious.

82. See notes 66-69 and accompanying text *supra*.

83. It is sometimes difficult to determine which questions are factual and which are legal. It would seem that in most instances, opinions must necessarily combine law and fact. Three subject matters causing the greatest problems in distinguishing between law and fact are capacity, causation, and insanity. Cases which have struggled with the concept of capacity include *McGrail v. Schmitt*, 357 S.W.2d 111 (Mo. 1962); *Gillmore v. Atwell*, 283 S.W.2d 636 (Mo. 1955); *Baptiste v. Boatmen's Nat'l Bank*, 148 S.W.2d 743 (Mo. 1941); *Fields v. Luck*, 44 S.W.2d 18 (Mo. 1931); and *Farrel's Adm'r v. Brennan's Adm'x*, 32 Mo. 328 (1862). See also note 72 *supra*. For a discussion of the causation issue, see note 79 *supra*. The problems associated with application of "legal" standards of insanity by nonlegally oriented experts are well known to prosecutors and criminal defense lawyers.

84. *City of St. Louis v. Kisling*, 318 S.W.2d 221, 225 (Mo. 1958); *Stephens v. Kansas City Gas Co.*, 354 Mo. 835, 848-49, 191 S.W.2d 601, 606 (1946); *Mann v. Grim-Smith Hosp. & Clinic*, 347 Mo. 348, 353, 147 S.W.2d 606, 608 (1941); *Cole v. Uhlmann Grain Co.*, 340 Mo. 277, 297, 100 S.W.2d 311, 321-22 (1937); *Farrel's Adm'r v. Brennan's Adm'x*, 32 Mo. 328, 334 (1862).

85. See note 83 *supra*.

86. *Robertson v. Stead*, 135 Mo. 135, 143, 36 S.W. 610, 611 (1896).

87. *Id.* at 144, 36 S.W. at 612.

tions to the use of expert testimony, based on the province of the jury, would be put to rest. Finally, emphasizing the ability of the witness to assist the jury would protect the judicial system from the abuses upon which the province of the jury objections were originally founded.⁸⁸

IV. THE FOUNDATION OF EXPERT TESTIMONY

Most witnesses testify to facts known to them by personal observation.⁸⁹ Expert witnesses, however, are allowed to testify to their opinions based on facts observed by them,⁹⁰ by other witnesses,⁹¹ or based on a combination of the two.⁹² When expert witnesses base their opinions on facts observed by others, or upon any fact not personally observed, these facts must be presented to the expert by means of a hypothetical question.⁹³

Before a fact can be included in a hypothetical question, there must be an evidentiary basis for assuming the existence of the fact.⁹⁴ Courts often have stated that "[f]acts upon which an expert's opinion is based, must measure up to legal requirements of substantiality and probative force."⁹⁵ It is error to include in a hypothetical question any fact that is not supported by the record.⁹⁶ For example, in *Craddock v. Greenberg*

88. These fears relate to the manner in which expert witnesses are selected and a fear that the jury tends to accept expert opinions without independently considering all the evidence. For a discussion of these fears, see text accompanying notes 33 & 34 *supra* (selection) and notes 79-81 and accompanying text *supra* (blind acceptance).

89. See *Housman v. Fiddymont*, 421 S.W.2d 284, 289 (Mo. En Banc 1967); *Benjamin v. Metropolitan St. Ry.*, 133 Mo. 274, 288-89, 34 S.W. 590, 593 (1896).

90. *Harp v. Illinois Cent. R.R.*, 370 S.W.2d 387, 391 (Mo. 1963); *Schears v. Missouri Pac. R.R.*, 355 S.W.2d 314, 321 (Mo. En Banc 1962); *Sneed v. Goldsmith*, 343 S.W.2d 345, 351 (Mo. App., Spr. 1961).

91. *Hornberger v. St. Louis Pub. Serv. Co.*, 353 S.W.2d 635, 641 (Mo. 1962); *Craddock v. Greenberg Merc., Inc.*, 297 S.W.2d 541, 548 (Mo. 1957); *Gavan v. H.D. Tousley Co.*, 395 S.W.2d 266, 270 (Mo. App., St. L. 1965); cases cited note 90 *supra*.

92. *Dolan v. D.A. Lubricant Co.*, 416 S.W.2d 40, 43 (Mo. App., K.C. 1967). See also cases cited note 91 *supra*.

93. *Klaesener v. Schnucks Mkts., Inc.*, 498 S.W.2d 555, 559 (Mo. 1973); *Harp v. Illinois Cent. R.R.*, 370 S.W.2d 387, 391 (Mo. 1963); *Schears v. Missouri Pac. R.R.*, 355 S.W.2d 314, 321 (Mo. En Banc 1962); *Craddock v. Greenberg Merc., Inc.*, 297 S.W.2d 541, 548 (Mo. 1957); *Gavan v. H.D. Tousley Co.*, 395 S.W.2d 266, 270 (Mo. App., St. L. 1965); *Sneed v. Goldsmith*, 343 S.W.2d 345, 351 (Mo. App., Spr. 1961).

94. *Sampson v. Missouri Pac. R.R.*, 560 S.W.2d 573, 586 (Mo. En Banc 1978); *Crystal Tire Co. v. Home Serv. Oil Co.*, 525 S.W.2d 317, 324 (Mo. En Banc 1975); *Davies v. Carter Carburetor, Div. ACF Indus., Inc.*, 429 S.W.2d 738, 750 (Mo. 1968); *Hunter v. St. Louis S.W. Ry.*, 315 S.W.2d 689, 696 (Mo. 1958); *Heppner v. Atchison, T. & S.F. Ry.*, 297 S.W.2d 497, 506 (Mo. 1956); *Winters v. Sears, Roebuck & Co.*, 554 S.W.2d 565, 573 (Mo. App., St. L. 1977); *Gavan v. H.D. Tousley Co.*, 395 S.W.2d 266, 270 (Mo. App., St. L. 1965).

95. *Gavan v. H.D. Tousley Co.*, 395 S.W.2d 266, 270 (Mo. App., St. L. 1965). Similar statements appear in *Meier v. Moreland*, 406 S.W.2d 97, 101 (Mo. 1966); *Craddock v. Greenberg Merc., Inc.*, 297 S.W.2d 541, 548 (Mo. 1957); *Dolan v. D.A. Lubricant Co.*, 416 S.W.2d 40, 43 (Mo. App., K.C. 1967). See also cases cited note 84 *supra*.

96. *Harp v. Illinois Cent. R.R.*, 370 S.W.2d 387, 390 (Mo. 1963); *Hornberger v. St. Louis Pub. Serv. Co.*, 353 S.W.2d 635, 641 (Mo. 1962); *Dorsey v. Muilenburg*,

Mercantile, Inc.,⁹⁷ it was error for an expert witness to assume that an explosion took place, absent positive testimony that an explosion actually occurred. In *Sampson v. Missouri Pacific Railway*,⁹⁸ the court indicated that expert testimony on loss of future wages was admissible only when based on the "use of facts in reasonable calculations,"⁹⁹ and not when formed from "speculation and conjecture."¹⁰⁰

While the use of hypothetical questions has been criticized,¹⁰¹ it appears that their purpose, revealing the facts upon which the expert bases his opinion, is justifiable under the assistance to the jury test. If the jury is to evaluate fairly the expert's testimony, knowledge of the basis of the testimony is essential. It is arguable, of course, that the purpose of the hypothetical question can be realized better through cross-examination of the expert as to the basis of his opinion.¹⁰²

The evidentiary basis required for facts assumed by an expert witness can be supplied by a number of sources. It can be supplied by the personal observation of other witnesses,¹⁰³ by substantial circumstantial evidence,¹⁰⁴ by photographs,¹⁰⁵ x-rays,¹⁰⁶ or other physical evidence,¹⁰⁷ by cross-examination,¹⁰⁸ or by the testimony of another expert witness if the opinion of the other expert is in evidence.¹⁰⁹ Further, rational inferences drawn from the testimony may be included in the hypothetical.¹¹⁰ Whether a sufficient evidentiary basis exists to include a fact in a hypothetical question is a legal question to be decided by the trial court.¹¹¹ The trial judge is given discretion in making this determination.¹¹²

Just as some facts cannot be included in a hypothetical question, some

345 S.W.2d 134, 139 (Mo. 1961); *Craddock v. Greenberg Merc., Inc.*, 297 S.W.2d 541, 548 (Mo. 1957); *Ortiz v. Ortiz*, 465 S.W.2d 662, 663 (Mo. App., K.C. 1971).

97. 297 S.W.2d 541 (Mo. 1957).

98. 560 S.W.2d 573 (Mo. En Banc 1978).

99. *Id.* at 589.

100. *Id.*

101. *See, e.g.*, C. McCORMICK, LAW OF EVIDENCE § 16 (2d ed. 1972).

102. *Id.* § 17. *See* FED. R. EVID. 705, Notes of Advisory Committee.

103. *See* cases cited note 91 *supra*.

104. *Heppner v. Atchison, T. & S.F. Ry.*, 297 S.W.2d 497, 506 (Mo. 1956).

105. *Chambers v. City of Kansas City*, 446 S.W.2d 833, 838 (Mo. 1969); *Skelton v. General Candy Co.*, 539 S.W.2d 605, 614 (Mo. App., St. L. 1976).

106. *Dolan v. D.A. Lubricant Co.*, 416 S.W.2d 40, 43 (Mo. App., K.C. 1967).

107. *Penn v. Hartman*, 525 S.W.2d 773, 778 (Mo. App., St. L. 1975); *Ortiz v. Ortiz*, 465 S.W.2d 662, 663 (Mo. App., K.C. 1971); *Anderson v. Electric Storage Battery Co.*, 433 S.W.2d 73, 75 (Mo. App., K.C. 1968).

108. *Dillenschneider v. Campbell*, 350 S.W.2d 260, 266 (Mo. App., K.C. 1961).

109. *Hornberger v. St. Louis Pub. Serv. Co.*, 353 S.W.2d 635, 641 (Mo. 1962); *Lineberry v. Robinett*, 446 S.W.2d 481, 485 (Mo. App., K.C. 1969).

110. *Schmitt v. Pierce*, 344 S.W.2d 120, 130 (Mo. En Banc 1961); *Winters v. Sears, Roebuck & Co.*, 554 S.W.2d 565, 573 (Mo. App., St. L. 1977).

111. *Conlon v. Roeder*, 418 S.W.2d 152, 159 (Mo. 1967); *Schmitt v. Pierce*, 344 S.W.2d 120, 130 (Mo. En Banc 1961); *Cohen v. Archibald Plumbing & Heating Co.*, 555 S.W.2d 676, 681 (Mo. App., K.C. 1977); *Skelton v. General Candy Co.*, 539 S.W.2d 605, 614 (Mo. App., St. L. 1976); *Sides v. Mannino*, 347 S.W.2d 391, 395 (Mo. App., St. L. 1961).

112. *See* cases cited note 111 *supra*.

facts *must* be included.¹¹³ While every fact in evidence need not be included in a hypothetical,¹¹⁴ some facts are so essential that failure to include them in a hypothetical will constitute error.¹¹⁵ For example, in *Odum v. Cejas*,¹¹⁶ a medical malpractice action concerning the postoperative care received by a patient, plaintiff's counsel utilized a lengthy hypothetical question in examining an expert witness. In spite of the question's length, it was held to be "substantially and materially incomplete and inadequate,"¹¹⁷ because it failed to include the fact that the postoperative care had included maintenance of adequate urinary drainage, which the court found, under the circumstances, to be the "essence of postoperative care."¹¹⁸ Thus, if the omission of a fact from a hypothetical would render the expert's response to that question irrelevant to the facts upon which the jury must render its decision, then it is error to omit that fact from the hypothetical.¹¹⁹ The error may be cured, however, where the omitted fact is elicited on cross-examination.¹²⁰

A variety of tests or standards have been used by Missouri courts in determining which facts must be included in a hypothetical question. In *Winter v. Sears, Roebuck & Co.*,¹²¹ the St. Louis Court of Appeals indicated that "the facts essential to . . . [the expert's] opinion must be assumed in the question."¹²² In *Odum*, the Springfield Court of Appeals held that "a question of this character must fairly hypothesize the material facts reasonably relevant to, and justly presenting, the questioner's theory of

113. *Klaesener v. Schnucks Mkts., Inc.*, 498 S.W.2d 555, 559 (Mo. 1973); *Winters v. Sears, Roebuck & Co.*, 554 S.W.2d 565, 573 (Mo. App., St. L. 1977); *Odum v. Cejas*, 510 S.W.2d 218, 222 (Mo. App., Spr. 1974); *West v. Jack Cooper Transp. Co.*, 372 S.W.2d 642, 649 (Mo. App., K.C. 1963), *rev'd on other grounds*, 381 S.W.2d 872 (Mo. En Banc 1964).

114. *Schmitt v. Pierce*, 344 S.W.2d 120, 130 (Mo. En Banc 1961); *Hunter v. St. Louis S.W. Ry.*, 315 S.W.2d 689, 696 (Mo. 1958); *Golden v. National Utils. Co.*, 356 Mo. 84, 90-92, 201 S.W.2d 292, 295-96 (1947); *Skelton v. General Candy Co.*, 539 S.W.2d 605, 614 (Mo. App., St. L. 1976); *Dolan v. D.A. Lubricant Co.*, 416 S.W.2d 40, 43 (Mo. App., K.C. 1967); *Gavan v. H.D. Tousley Co.*, 395 S.W.2d 266, 270 (Mo. App., St. L. 1965); *Sneed v. Goldsmith*, 343 S.W.2d 345, 351 (Mo. App., Spr. 1961).

115. See cases cited note 114 *supra*. See also text accompanying notes 113-29 *infra*, discussing which facts rise to a level of essentiality.

116. 510 S.W.2d 218 (Mo. App., Spr. 1974).

117. *Id.* at 222.

118. *Id.*

119. In other words, does the existence of the omitted fact make the question at issue different from the one upon which the expert expressed an opinion? If so, then the expert's opinion can be considered irrelevant to the issue the jury is to decide. See *Ponciroli v. Wyrick*, 573 S.W.2d 731, 735 (Mo. App., St. L. 1978).

120. *Dillenschneider v. Campbell*, 350 S.W.2d 260, 267 (Mo. App., K.C. 1961), indicates that the evidentiary basis for facts assumed in a hypothetical can be provided by cross-examination. It also appears that calling an expert's attention to an omitted fact on cross-examination would have the effect of curing the defective hypothetical if the expert testifies that the omitted fact would not change his opinion. See *West v. Jack Cooper Transp. Co.*, 372 S.W.2d 642, 649 (Mo. App., K.C. 1963), *rev'd on other grounds*, 381 S.W.2d 872 (Mo. En Banc 1964).

121. 554 S.W.2d 565 (Mo. App., St. L. 1977).

122. *Id.* at 573.

the case."¹²³ The Missouri Supreme Court, in *Klaesener v. Schnucks Markets, Inc.*,¹²⁴ stated that a hypothetical must include "substantially all of the material facts relating to the subject on which the judgment of the witness is sought."¹²⁵ Literally applied, the language of the tests in each of the above cases does not necessarily yield similar results. In fact, the quotations illustrate how difficult it would be to formulate any single test which could be utilized to determine which facts are essential to a hypothetical.

The unifying concept used by Missouri courts, which tends to harmonize the decisions, is the assistance to the jury test. Such a standard is often utilized by the courts in determining the propriety of a hypothetical question.¹²⁶ In *Hunter v. St. Louis Southwestern Railway*,¹²⁷ the Missouri Supreme Court explained:

The questioner may frame his hypothetical on his own theory and may not necessarily include all of the material facts shown in evidence. The questioner may elicit an opinion on any combination or sets of facts he may choose, if the question propounded fairly hypothesizes facts the evidence tends to prove and fairly presents the questioner's theory so that the answer will be of assistance to the jury on the issue.¹²⁸

The determinative factor in assessing the necessity of including a fact in a hypothetical question is whether omission of the fact would deprive the expert's answer to the question of its value to the jury. In other words, the determination would be whether omission of a particular fact would cause the set of facts upon which the expert stated his opinion to be so different from the facts of the case at issue that the opinion of the expert would be of no assistance to the jury in reaching a conclusion on the issues. For example, in *Odum v. Cejas*,¹²⁹ it could be said that the expert's opinion on postoperative care which did not assume adequate urinary drainage was essentially irrelevant to postoperative care which included adequate urinary drainage. Therefore, the question was improper because any answer to it could not assist the jury in determining the case at issue.

Litigants should be aware of two mechanisms Missouri courts have adopted that serve to alleviate some of the consequences of improperly

123. 510 S.W.2d at 222.

124. 498 S.W.2d 555 (Mo. 1973).

125. *Id.* at 559.

126. *Parlow v. Dan Hamm Drayage Co.*, 391 S.W.2d 315, 326 (Mo. 1965); *Phillips v. Shaw*, 381 S.W.2d 768, 771 (Mo. 1964); *Stipp v. Tsutomu Karasawa*, 318 S.W.2d 172, 174 (Mo. 1958); *Summers v. Tavern Rock Sand Co.*, 315 S.W.2d 201, 206 (Mo. 1958); *Hunter v. St. Louis S.W. Ry.*, 315 S.W.2d 689, 696 (Mo. 1958); *Holtmeyer v. Scherer*, 546 S.W.2d 29, 34 (Mo. App., St. L. 1976); *Sneed v. Goldsmith*, 343 S.W.2d 345, 351 (Mo. App., Spr. 1961).

127. 315 S.W.2d 689 (Mo. 1958).

128. *Id.* at 696 (emphasis added).

129. 510 S.W.2d 218 (Mo. App., Spr. 1974). For a discussion of the facts of *Odum*, see text accompanying notes 116-18 *supra*.

drawn hypothetical questions. First, the trial court is given significant discretion in determining which facts need to be included in a hypothetical.¹³⁰ So great is the discretion that answers to inadequately drawn hypotheticals may sometimes be allowed by the trial judge.¹³¹ As has been noted often by the supreme court, " 'trial courts may exercise a sound discretion . . . and the omission of some facts or a violation of the general rules does not necessarily preclude an answer.' "¹³² Second, Missouri courts have held that before error in the drawing of a hypothetical question will be preserved for appeal, the party must object specifically to the question and indicate which facts should or should not be included.¹³³ Because the objecting party must be specific as to his objection, the offering party will have the opportunity to amend his hypothetical question by adding or deleting facts.¹³⁴

Besides drawing a factual conclusion based on other evidence, an expert may testify to personal observation. When an expert witness testifies from personal observation he need not testify from a hypothetical question.¹³⁵ Frequently, however, hearsay problems will arise when the expert attempts to state the basis for his opinion. The problems arise when the expert has based his opinion on a fact communicated to him by a third party. When the opinion of an expert is based on information which to him is hearsay, the proper procedure is to submit independent evidence of the fact and then to submit that fact to the expert in the form of a hypothetical question.¹³⁶

The most common instance in which the hearsay problem arises occurs when a treating physician is testifying to the cause or the severity of

130. See cases cited note 111 *supra*.

131. See cases cited note 111 *supra*.

132. Conlon v. Roeder, 418 S.W.2d 152, 159 (Mo. 1967) (quoting Schmitt v. Pierce, 344 S.W.2d 120, 130 (Mo. En Banc 1961)). See also cases cited note 111 *supra*.

133. Conlon v. Roeder, 418 S.W.2d 152, 159 (Mo. 1967); Harp v. Illinois Cent. R.R., 370 S.W.2d 387, 396 (Mo. 1963); Dorsey v. Muilenburg, 345 S.W.2d 134, 138 (Mo. 1961); Schmitt v. Pierce, 344 S.W.2d 120, 130 (Mo. En Banc 1961); McKinley v. Vize, 563 S.W.2d 505, 510 (Mo. App., St. L. 1978); Skelton v. General Candy Co., 539 S.W.2d 605, 614 (Mo. App., St. L. 1976); Lindsey v. P.J. Hamill Transfer Co., 404 S.W.2d 397, 400 (Mo. App., St. L. 1966); Denney v. Spot Martin, Inc., 328 S.W.2d 399, 402 (Mo. App., Spr. 1959). See also Stipp v. Tsutomu Karasawa, 318 S.W.2d 172, 175 (Mo. 1958) (discusses offer of proof requirements and their justifications in relation to expert testimony); Sides v. Mannino, 347 S.W.2d 391, 396 (Mo. App., St. L. 1961) (erroneous ruling apparently required to be "harmful" before appeal can be successful).

134. Cohen v. Archibald Plumbing & Heating Co., 555 S.W.2d 676, 682 (Mo. App., K.C. 1977). See also cases cited note 111 *supra*.

135. Sneed v. Goldsmith, 343 S.W.2d 345, 351 (Mo. App., Spr. 1961). See also Harp v. Illinois Cent. R.R., 370 S.W.2d 387, 390-91 (Mo. 1963); Dolan v. D.A. Lubricant Co., 416 S.W.2d 40, 43 (Mo. App., K.C. 1967); Gavan v. H.D. Tousley Co., 395 S.W.2d 266, 270 (Mo. App., St. L. 1965).

136. Davies v. Carter Carburetor, Div. ACF Indus., Inc., 429 S.W.2d 738, 750-51 (Mo. 1968); Schears v. Missouri Pac. R.R., 355 S.W.2d 314, 321 (Mo. En Banc 1962); Griffin v. Evans Elec. Constr. Co., 529 S.W.2d 172, 178 (Mo. App., K.C. 1975); Ortiz v. Ortiz, 465 S.W.2d 662, 663 (Mo. App., K.C. 1971); Anderson v. Electric Storage Battery Co., 443 S.W.2d 73, 75 (Mo. App., K.C. 1968).

a patient's injuries. Frequently his opinion will be based on statements made to him by the patient concerning the cause of the accident or the patient's medical history. Missouri courts traditionally have allowed the expert to testify with respect to statements made by the patient regarding present physical symptoms, but have refused to allow the expert to state the information he obtained from the patient regarding past history or causation.¹³⁷ The often stated rule was noted by the Missouri Supreme Court in *Davies v. Carter Carburetor, Division of ACF Industries, Inc.*:¹³⁸

A physician, in stating his expert opinion on a patient's condition, may testify to what he personally observed and also to what the patient said (an exception to the hearsay rule) concerning his present, existing symptoms and complaints. However, he may not base his opinion upon or testify to statements of the patient with respect to past physical conditions, circumstances surrounding the injury or the manner in which the injury was received.¹³⁹

The rule is justified under the assistance to the jury analysis if the hearsay rules are valid. Assuming that hearsay is not trustworthy evidence,¹⁴⁰ then the opinion of an expert based on such evidence would also be untrustworthy, and thus not a desirable type of assistance for the jury. A patient's statements to his treating physician regarding his present medical condition, however, have been excepted from the hearsay rule because such statements are allegedly more trustworthy.¹⁴¹ Therefore, an expert is allowed to formulate his opinion upon such statements without causing his opinion to be untrustworthy and of no assistance to the jury.

Unlike the subject matter limitations the courts have imposed on expert testimony, the restrictions on expert testimony which deal with its foundation are logically founded in the purpose of expert testimony. The basis upon which an expert testifies, the requirements regarding hypothetical questions, and the application of hearsay restrictions to the expert when giving his reasons for his opinion all serve to assure that the expert testimony admitted assists the jury. While some may argue that the hypothetical question is unnecessary, or that a patient's statements regarding the cause of his injuries are trustworthy, each of the requirements is, at least theoretically, justifiable under the assistance to the jury analysis.

137. *Davies v. Carter Carburetor, Div. ACF Indus., Inc.*, 429 S.W.2d 738, 750 (Mo. 1968); *Harp v. Illinois Cent. R.R.*, 370 S.W.2d 387, 392-93 (Mo. 1963); *Schears v. Missouri Pac. R.R.*, 355 S.W.2d 314, 322 (Mo. En Banc 1962); *Hunter v. St. Louis S.W. Ry.*, 315 S.W.2d 689, 695-96 (Mo. 1958). *But see Erbes v. Union Elec. Co.*, 353 S.W.2d 659, 667 (Mo. 1962).

138. 429 S.W.2d 738 (Mo. 1968).

139. *Id.* at 751 (quoting *Holmes v. Terminal R.R. Ass'n*, 363 Mo. 1178, 1188, 257 S.W.2d 922, 926 (1953)). *See* cases cited note 137 *supra*.

140. That is, it is not the type of evidence one would want a jury to rely on.

141. This is because the statements are made to a physician in order to receive treatment. *See* C. McCORMICK, *LAW OF EVIDENCE* § 292 (2d ed. 1972).

V. CONCLUSION

Because of limitations that have been placed on the use of expert testimony, the use of the assistance to the jury test alone provides little guidance as to the admissibility of expert testimony.

By adopting narrow limitations on expert testimony and restricting qualification of witnesses as experts, by limiting the subject matters upon which experts can testify, and by limiting the foundation upon which experts can testify, the courts have sometimes lost sight of the real purpose of expert testimony. That purpose is to assist the jury in rendering a correct verdict. While the considerations evaluated by the courts under many of these limitations are by no means irrelevant and in fact are important, the courts, by discussing the limitations in isolation from the purpose of expert testimony, have rendered unnecessarily restrictive and confusing decisions.

In the future, courts would do well to construe traditional limitations in light of the assistance to the jury test. Under such an approach, the courts would construe the limitations so that the admission of expert testimony is prevented only when expert testimony would be of little or no assistance to the jury. While such an approach may not lead to more liberal admission of expert testimony, it would certainly emphasize the purpose for which expert testimony is allowed. Further, such an approach would require attorneys to demonstrate to the court what an expert had to offer in the way of assistance to the jury, and thereby minimize potential abuses of expert testimony.

The assistance to the jury test clearly should become the focus of the courts' inquiry into the admissibility of expert testimony. The issues now discussed by the courts in considering limitations imposed on the use of expert testimony should be discussed only in reference to whether such matters deprive the testimony of its beneficial value to the jury. In that way, the purpose of expert testimony would best be fulfilled and protected.

M. DOUGLAS HARPOOL