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# Evidence - Competency of Experts - Effect of Disclaimer by the Witness

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in the instant case errored in blindly following the general rule without investigating the reason behind it. Inconsistency is the sole basis for the rule, because an inconsistent determination by the same jury necessarily reflects some defect in its function. Here there was no determination by the jury as to the defendant's guilt and thus there was no inconsistency.

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EVIDENCE — COMPETENCY OF EXPERTS — EFFECT OF DISCLAIMER BY THE WITNESS — The defendant was convicted of indecently molesting a child; such conviction primarily based on evidence given by an educated and experienced laboratory technician. The trial court admitted her as an expert witness and received her opinion that a slide prepared from a smear taken from the child's body contained human sperm. The technician stated that she felt the organism could have been nothing else but human sperm, but she also stated that she did not feel qualified to say whether it was human sperm or not. The Supreme Court of South Dakota in reversing the conviction *held,* two justices dissenting, that the admission of such testimony constituted prejudicial error. The dissent considered the evidence to be admissable and non-prejudicial; its weight and value to be determined by the jury. *State v. Percy,* 117 N.W.2d 99 (S.D. 1962).

A witness is established as expert and is qualified to give an opinion when it is shown that he has special knowledge, skill, experience, or training necessary to give an understanding answer to the subject of inquiry.[1] Without this special knowledge of the particular subject matter, the purported expert opinion would be a mere guess or conjecture.[2] It is expected that such testimony will aid the trier in the search for truth.[3] Neither special professional license[4] nor experience with identical circumstances[5] is required.

It is a general rule that the determination of a witness' qualification and competency to speak is within the province

1. State v. Riiff, 73 S.D. 467, 44 N.W.2d 126 (1950).
2. Gaddy v. Skelly Oil Co., 364 Mo. 143, 259 S.W.2d 844 (1953).
3. Woyak v. Konieske, 237 Minn. 213, 54 N.W.2d 649 (1952); State v. Nelson, 103 N.H. 478, 175 A.2d 814 (1961).
4. Cordero v. State, 164 Tex. Crim. 160, 297 S.W.2d 174 (1956).
5. Carbone v. Warburton, 11 N.J. 418, 94 A.2d 680 (1953).

of the trial court.[6] Such a decision is reversible on appeal only where there is a clear abuse of discretion[7] or where the decision is erroneous as a matter of law.[8] Questions as to the degree of expertness should go to the weight and not to the sufficiency of the evidence.[9]

Where a witness is reasonably established as having the qualifications of an expert his testimony can be considered in such light even though he disclaims being an expert.[10] If the evidence shows that a witness is qualified, even with a disclaimer it is proper to submit the evidence for what it is worth.[11] The question of an individual's actual competency as an expert witness is to be determined by the trial court on the basis of evidence brought forth; not on the witness' self-estimation of ability.[12] If the witness disclaims qualification and refuses to give an opinion, dismissal of the witness by the trial court is a proper requirement,[13] as apart from other cases where in spite of the disclaimer the witness does give testimony.[14]

North Dakota recognizes the broad discretion of the trial court in determining whether a witness is qualified to testify as an expert,[15] and allows the admission of expert testimony in spite of disclaimer.[16]

In the principal case reversal was based on disclaimer of

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6. People v. Symons, 20 Cal. Rptr. 400 (Cal. 1962); Boylan v. Board of Comm'rs. of Cass County, 105 N.W.2d 329 (N.D. 1960); State v. Barry, 11 N.D. 428, 92 N.W. 809 (1902).

7. Cohen v. Travelers Ins. Co., 134 F.2d 378 (7th Cir. 1943); State v. Riiff, 73 S.D. 467, 44 N.W.2d 126 (1950). A lower court ruling as to qualifications will not be disturbed unless there is **no** evidence that the witness had qualifications of an expert.

8. Bratt v. Western Airlines, 155 F.2d 850 (10th Cir. 1946); Ottertail Power Co. v. Malme, 92 N.W.2d 514 (N.D. 1958).

9. People v. Kendrick, 56 Cal. App. 2d 71, 363 P.2d 13, 14 Cal. Rptr. 13 (1961).

10. City of Bismarck v. Casey, 77 N.D. 295, 43 N.W.2d 372 (1950) Although the witness disclaimed himself as an expert as to the question before the court being cross-examined, the determination of the lower court which admitted his testimony was affirmed.

11. Walker v. Scott, 10 Kan. App. 413, 61 Pac. 1091 (1900). "The fact that the witness disclaimed being an expert will not preclude his testimony as such, where the evidence of circumstances show that he possessed the requisite qualifications."; Yates v. Garrett, 19 Okla. 449, 92 Pac. 142 (1907). . . . (S)ome of the witnesses . . . disclaimed that they were experts, yet, when taken as a whole, their testimony shows they had had sufficient experience . . . it was proper and right for the court to admit their testimony for what it was worth. . . ."

12. See Dobbs v. State, 191 Ark. 236, 85 S.W.2d 694 (1935); Glover v. State, 129 Ga. 717, 59 S.E. 816 (1907).

13. Reimers v. Petersen, 237 Iowa 550, 22 N.W.2d 817 (1946).

14. Glover v. State, 129 Ga. 717, 59 S.E. 816 (1907); Yates v. Garrett, 19 Okla. 449, 92 Pac. 142 (1907).

15. Boylan v. Board of Comm'rs. of Cass County, 105 N.W.2d 329 (N.D. 1960); State v. Barry, 11 N.D. 428, 92 N.W. 809 (1902).

16. City of Bismarck v. Casey, 77 N.D. 295, 43 N.W.2d 372 (1950).

the witness. Evidence showed she had sufficient qualifications to be deemed an expert, and she did give an express opinion. It is submitted that a similar result in North Dakota would be unlikely. To disallow the testimony in the principal case would seem to be an overstep of proper judicial review. The true question involved was the degree of expertness of the witness, and as such it was a valid issue to be submitted to the jury. The appellate court should not have so impaired the proper exercise of discretion exercised in the lower court.

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INDICTMENT AND INFORMATION — VIDELICET — WILL USE OF VIDLEICET DISPENSE WITH NECESSITY OF STRICTLY PROVING AVERMENT MADE THEREUNDER? — The defendant was a licensed package dealer in intoxicating liquors. A statute provided that: "No licensee shall sell any intoxicating liquor: (a) To any person under the age of twenty-one years . . . ."[1] The information on which defendant was prosecuted alleged that he "unlawfully sold intoxicating liquor, to wit: one quart of Stillbrook whiskey." The trial court instructed the jury that the only question for them to decide was whether or not defendant sold intoxicating liquor to the minor and thus, in effect, it was not necessary to find that he, in fact, sold *Stillbrook whiskey.* Defendant was convicted and appealed. In reversing the decision the Supreme Court of South Dakota *held,* one justice dissenting, that the state need not have alleged that the liquor was Stillbrook whiskey; but having done so, it became a matter of essential description and must be proved. *State v. Sudrala,* 116 N.W.2d 243 (S.D. 1962).

In the quoted portion of the information above the alleged fact preceded by the words "to wit" is said to be "laid under a videlicet."[2] That technical name is also given to "that is to say"[3] and "namely."[4]

At common law the allegation of a fact under a videlicet

1. S.D.C. § 5.0226(2) (1939).
2. People v. Shaver, 367 Ill. 339, 11 N.E.2d 400 (1937); Luka v. Behn, 225 Ill. App. 105 (1922).
3. Garrison v. City of Shreveport, 179 La. 605, 154 So. 622 (1934).
4. Taney County v. Empire Dist. Elec. Co., 361 Mo. 572, 235 S.W.2d 271 (1951). (The frequently used "viz." is an abbreviation of videlicet).