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EVIDENCE*

HARRY P. THOMSON, JR.**

I. THE TEST OF PROBATIVE FORCE

The supreme court applies traditional language to the law of evidence with varying results from case to case. These cases can be reconciled only if the premise is adopted that all of the basic law of evidence can be reduced to the single test of probative force. Simply stated this test requires that evidence, to be admissible, must be of sufficient force so that if believed it logically tends to prove or disprove a fact or issue necessary to a decision of the case before the court. In recent decisions, the supreme court appears to be measuring the admissibility of evidence by the test of probative force. The court uses formalized rules or exceptions to rules to explain its decisions. But it appears clear from the recent decisions that the court is following the basic philosophy of determining admissibility by whether or not evidence has probative force on a material fact or issue.

II. EXPERT WITNESSES AND OPINION EVIDENCE

*Kinealy v. Southwestern Bell Telephone Co.*¹ is required reading for the lawyer plagued with the problem of proving causation by an expert witness. This decision delineates the difference between the expert's statement of possibility and probability. The expert was a geologist who testified in detail concerning the technical subject of the cause of landslides. The closest he came to applying his scholarly knowledge to the particular facts of the case was the expression that "it was extremely likely" that defendant's activities in excavating a ditch caused the landslide which damaged plaintiff's property. Further testimony developed that without specific soil tests, the geologist could not state with reasonable certainty that the excavation of the ditch was the cause of the landslide. This reduced the

*This article contains a discussion of selected Missouri court decisions reported in volumes 357 through 370 of South Western Reporter, Second Series.

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1. 368 S.W.2d 400 (Mo. 1963).

probative force of his testimony to that of a scientific possibility and nothing more. The court stated:

Other possible causes for the landslides for which the company would not be liable, several of which appear to have been as likely as the one assigned, were not excluded as causative factors. Where the evidence does not exclude all other causes and where no layman could know or have any reasonable basis for an inference as to cause, opinion of experts that a certain occurrence or condition might or could produce a certain result is no more than an assurance that such a result is scientifically possible, and does not alone constitute substantial evidence that such occurrence or condition would cause it. . . . That the circumstantial evidence is consistent with the theory that the cutting of the ditches caused the land falls is not sufficient. The circumstances in evidence must prove this as a reasonable *probability* and the jury may not be permitted to reach this conclusion by 'theorizing upon assumed factual premises outside of and beyond the scope of the evidence.'²

In *Kinealy* the court held that to make a submissible case or show causation, the expert must go further than the mere stating of a scientific possibility. He must testify that it is his professional opinion, based on the data available to him, that the result in question most probably came from the cause claimed by plaintiff. Under the language of this decision, it should make no difference whether the expert testifying is a geologist, physician, engineer, chemist, architect, metallurgist, or any other type of expert. While the opinion of such experts as to scientific possibility may be admissible to establish that certain end results can occur from any given set of facts, the opinion of mere possibility alone does not have sufficient probative force on the issue of causation to make a submissible case. To supply causation the expert must go further and testify that based upon the facts before him a certain condition is the most probable result of those facts.

A contrasting court of appeals decision is *Hay v. Ham*.³ The testimony of a physician was ruled admissible and competent on the limited issue of the physical condition of plaintiff. Defendant contended that an expert opinion was necessary to show causation of the condition described by the physician. The physician had limited his testimony to a diagnosis and

2. *Id.* at 404.

3. 364 S.W.2d 118 (K.C. Mo. App. 1962).

description of plaintiff's condition at the time of an examination immediately before trial. The Kansas City Court of Appeals held that in view of other facts and circumstances in the case, the physical condition of plaintiff described by the expert could have resulted only from the automobile collision in question. Consequently the causative factor was supplied and the expert's opinion as to causation was unnecessary.

In the writer's opinion the *Hay* decision treads on dangerous ground. The description by plaintiff, or any other layman, of a physical condition using technical terms may not be founded upon sufficient scientific knowledge. It is one thing to say that lay testimony establishes that plaintiff sustained injuries as a result of a collision. It is an entirely different matter to allow lay testimony to establish causation between an occurrence and plaintiff's physical condition as subsequently diagnosed by a physician. This danger could be avoided if a proper hypothetical question were used.

Before testimony of any witness, expert or otherwise, is admissible, he must have sufficient knowledge that his testimony has probative force on a fact or issue before the court. This has been so often stated that little difficulty is encountered with respect to lay witnesses. Apparently lawyers sometimes forget that the same requirement applies to expert witnesses. Not only must the expert be qualified by superior training and knowledge of the subject on which he is testifying, but the facts which form the basis of his opinion, whether supplied by the expert's own observation or by a hypothetical question, must be adequate and of sufficient similarity to the facts actually introduced in evidence as to have probative force. Thus, in *Begley v. Connor*⁴ it was held that the trial court did not abuse its discretion by excluding testimony of plaintiff's expert on stopping distances when it was not established that the wetness of the pavement was the same when the expert examined it as at the time of the accident. The supreme court remarked that the plaintiff probably could have cleared up the factors which caused the evidence to be excluded.

When properly qualified and a sufficient factual basis is established by the expert's actual observation or by a hypothetical question, the opinion of the expert will not be excluded merely because he has knowledge of additional inadmissible facts or hearsay so long as the opinion is not based on the inadmissible facts. Indeed, once the record contains sufficient facts to

4. 361 S.W.2d 836 (Mo. 1962).

cloak the expert's opinion with probative force, that opinion will not be excluded merely because he may have knowledge based on inadmissible evidence. As stated in *Reifsteck v. Miller*,⁵ unless affirmatively shown to the contrary it will be presumed that the expert's opinion is based solely on those facts which have been properly admitted into evidence so that the expert's opinion itself is admissible.

III. EVIDENCE WHICH IS NOT OF SUFFICIENT RELEVANCE TO MEET THE TEST OF PROBATIVE FORCE

Offered evidence may be qualified as being within the direct knowledge and observation of the witness, but may still be inadmissible unless it validly and logically tends to establish a fact or prove or disprove an issue before the court. In *Walton v. United States Steel Corp.*⁶ defendant attempted to prove that plaintiff was its statutory employee under the Missouri Workmen's Compensation Law⁷ by offering evidence that at some of defendant's plants in different localities, other employees engaged in similar operations. The supreme court held that this testimony was properly excluded upon plaintiff's objection that it was "irrelevant." The language of the *Walton* opinion⁸ clearly illustrates that the supreme court was concerned with whether the evidence of operations that employees engaged in at other localities actually tended to prove or disprove the issue before the court in determining its relevancy. Thus we are back to the test of probative force.

In other instances the supreme court has discussed the best evidence rule as not being applicable to collateral issues when the determining factor is again whether the evidence tends to prove or disprove a fact or issue necessary to a determination of the case. In *State ex rel. Bush v. Elliott*,⁹ plaintiff attempted to secure the coverage limits of defendant's liability insurance policy through interrogation. Plaintiff argued that he was entitled to do this for purposes of the voir dire examination and that the insurance policy itself was the best evidence of the financial interest of the insurer. In an exhaustive opinion the court pointed out that the only purpose of determining the name of the insurance carrier was to judge the qualifica-

5. 369 S.W.2d 229 (Mo. 1963).

6. 362 S.W.2d 617 (Mo. 1962).

7. § 287.010, RSMo 1959.

8. *Supra* note 6, at 625.

9. 363 S.W.2d 631 (Mo. En Banc 1963).

tions of prospective jurors. The insurance policy and the coverage limits did not tend to prove or disprove any disputed fact or issue necessary for a determination of the case itself. This would appear to be a sound basis for the court's decision that this information was beyond the scope of discovery as it did not tend to establish admissible evidence rather than merely placing the label of a collateral issue on the evidence.

In *Reyburn v. Spires*¹⁰ one of the issues to determine was whether a judgment debtor was indebted to plaintiff before the entry of a default judgment. The court held that the petition upon which the default judgment was based was not admissible in the present proceedings to prove the facts alleged in that petition. The default judgment proved only that the judgment debtor owed the plaintiff from the date of the judgment. The petition on which the default judgment was based did not necessarily have probative force to prove every fact alleged in that petition including the prior evidence of the debt. This was an instance where the proffered evidence simply was not of sufficient strength to stand by itself to prove the fact in dispute.

*Boehm v. St. Louis Public Service Co.*¹¹ can be rationalized on the basis of the public records exception to the hearsay rule. But this and similar decisions concerning hospital records illustrate that the true measure is the probative force of the business entry. In *Boehm* the hospital record contained a notice that defendant driver did not know whether he was unconscious or not; that he was rational but slightly confused; and that he had an alcoholic breath. None of these notations were necessary for medical treatment of the defendant driver. This portion of the hospital record was held admissible under the Uniform Business Records Act.¹² Again the basis of the statute, and the admissibility of this type of evidence, is that in the ordinary affairs of men such business records not made for the purpose of litigation are recognized as having probative force. The admissibility of this type of notation on a business or hospital record cannot be justified by merely stating that it is an exception to the hearsay rule. If this is the sole reason given, the logical inquiry is, why the exception?

10. 364 S.W.2d 589 (Mo. 1963).

11. 368 S.W.2d 361 (Mo. 1963).

12. § 490.680, RSMo 1959.

IV. JUDICIAL NOTICE

The doctrine of judicial notice is one of the best examples of the application of the test of probative force. There is no other justification for the doctrine of judicial notice and there is no other basis for prediction of what state of facts will be noticed judicially by a court as being proved or accepted as true.

In *State v. Division 1287 of Amal. Ass'n. of Motor Coach Emp.*,¹³ a King-Thompson case, the court stated that it may not assume ignorance of what everybody knows.¹⁴ There the court was discussing what could and did happen to inhabitants of a metropolitan area in the event transportation services stopped. But people and even courts differ as to "what everybody knows." The writer suggests that when in doubt, prove the particular facts.

Of course there is no problem with respect to the court's files and previous proceedings before the court in the same case.¹⁵ Even here a careful lawyer may desire to call to the court's attention the previous proceedings or that portion of the court's own files which is desired to be noticed.

At the other end of the spectrum the court has taken judicial notice that traffic noise from trucks going up an incline may be heard for a considerable distance in every direction, and that annoyance from such noise is shared by all who reside in the neighborhood.¹⁶ And the court has taken judicial notice that it may be necessary both to slacken the speed and at the same time swerve an automobile to avoid a collision.¹⁷

The breadth and scope of judicial notice is illustrated by the notice taken in the following court of appeals decisions. In *Rapp v. Industrial Commission*,¹⁸ the population of two Missouri towns from the latest United States census records; in *Mitchell v. Newsom*¹⁹ the habits, characteristics, and instincts of dogs; in *Copher v. Barbee*,²⁰ that customers in self-service stores handle and move items displayed for sale and there are many pos-

13. 361 S.W.2d 33 (Mo. En Banc 1962).

14. *Id.* at 42.

15. *Wessels v. Smith*, 341 S.W.2d 104 (Mo. 1962).

16. *State ex rel. State Highway Comm. v. Turk*, 366 S.W.2d 420 at 422 (Mo. 1963).

17. *Rephlo v. Weber*, 367 S.W.2d 557 at 561 (Mo. 1963).

18. 360 S.W.2d 366 (Spr. Mo. App. 1962).

19. 360 S.W.2d 247 (St. L. Mo. App. 1962).

20. 361 S.W.2d 137 (Spr. Mo. App. 1962).

sible causes for explosions of bottles containing carbonated beverages; in *Hay v. Ham*,²¹ that the millions of motor vehicles operating daily on highways constitute one of the deadliest and most destructive agencies in present society; in *State ex rel. Gibson v. Missouri Board of Chiropractic Examiners*,²² that an item is obtainable by the public without a prescription does not mean that it is not a medicine or a drug; and in *Boyer v. Gearhart's Estate*,²³ the value of nursing and housekeeping services by a member of the family.

V. SELF-SERVING DECLARATIONS

In *Mitchell v. Robinson*²⁴ the supreme court again declared that the rule excluding self-serving declarations is a part of the hearsay rule. The real basis for the exclusion of self-serving declarations, whether properly considered as hearsay or not, is the fact that they have little or no probative force. In *Mitchell* the court was faced with the problem of whether the admission of such improper evidence was prejudicial so as to require a reversal. It was concluded that where there was direct evidence on the same facts and issues as those included in the self-serving declarations, it was not reversible error. The writer suggests that a different result may well have been reached had there not been direct and proper evidence other than the self-serving declarations which, in the court's opinion, tended to establish the facts included within the purview of the self-serving declarations.

VI. BUSINESS RECORDS

To be admissible as business records, documents must be identified as those made in the ordinary course of business by a person regularly charged with the duties of making such records. In *Chailland v. Smiley*²⁵ the supreme court, as it has before, clearly indicated that it will not go to ridiculous lengths to require identification. X-rays were held admissible when produced by the record librarian of a hospital and identified by a doctor as X-rays ordered by him and taken at his direction even though he was not personally present when such X-rays were made. The quantum of proof

21. *Supra* note 3.

22. 365 S.W.2d 773 (K.C. Mo. App. 1963).

23. 367 S.W.2d 1 (St. L. Mo. App. 1963).

24. 360 S.W.2d 673 (Mo. 1962).

25. 363 S.W.2d 619 at 630 (Mo. En Banc 1963).

was sufficient to protect the identity of the business record. The writer believes that each case must stand upon a reasonable interpretation of identity requirements. If in *Chailland* there had been any evidence that would cast doubt as to the identity of the X-rays, the court would probably have required additional proof.

The proper use of police reports to prove admissions of parties or to refresh the memory of the testifying officer was the subject of two decisions by the supreme court. In *Thomas v. Wade*²⁶ it was held that the police report itself was qualified under the Uniform Business Records Act.²⁷ It was made in the regular course of business of the police department by an employee of the department in his course of duty at or near the time of the act or event recorded. The court emphasized that the mere identification of the record made admissible only that portion containing evidence which would be competent if testified to in person or otherwise directly proved. The plaintiff raised the objection that there was no proof that the officer who made the report actually heard the witness make the statement contained therein which was read to the jury. The officer admitted that he had no independent recollection of what statements were made to him during the course of the investigation of the automobile striking the plaintiff. He testified that the record produced contained all of the information pertinent to the accident. That was as far as he could go. The court held that under the circumstances this was sufficient because the statement, to be recorded, had to be made to the officer or in his presence. Again the statement in the business record, considered in the context of the surrounding circumstances, had sufficient probative force to be admissible.

For lack of probative force, a different result was obtained in *Olsten v. Susman*.²⁸ Plaintiff attempted to introduce admissions contained in a police report. Defendant, who had purportedly made the admissions, denied them. The officer by whom plaintiff sought to establish the authenticity of the report had no personal knowledge of the statements made by the parties, took no part in making the report, did not know who made it, and did not know that the information therein was accurate. The admissions were held properly excluded. The writer doubts that there was much question that the police report in *Olsten* was actually a part of the records of the

26. 361 S.W.2d 671 (Mo. En Banc 1962).

27. §§ 490.660-.690 RSMo 1959.

28. 362 S.W.2d 612 (Mo. 1962).

police department made in the ordinary course of business. Where the police report failed, regardless of any technical requirements of the Uniform Business Records Act,²⁹ was that the affirmative testimony of the identifying officer indicated that the report was so unreliable that it had no probative force whatsoever.

VII. WITNESS TESTIMONY

A party is not bound by conflicting evidence from his own witnesses. If a party, or one of his witnesses, testifies to a set of facts upon which there is no conflicting testimony or evidence in his case, the party is bound by such evidence. However, the supreme court takes a realistic view of this situation, recognizing the fallability of humans and that identical testimony is seldom given with respect to any single set of facts. In *Bell v. Pedigo*³⁰ the court held that plaintiff was not bound by her witness's evidence as to the distance of a truck from the point of collision at the time the witness first observed the truck. The witness's estimate was held not to be inconsistent with the theory of plaintiff's case. Therefore it did not destroy what was otherwise a submissible case for the jury. To reach this conclusion, the Court had to disregard a part of the witness's testimony which was inconsistent with more favorable testimony from other witnesses.

In *Whaley v. Zervas*³¹ defendant admitted in her deposition that she could not estimate the speed of plaintiff's approaching truck when defendant pulled into the intersection. Defendant submitted an instruction on contributory negligence. Plaintiff contended that defendant's admission as to inability to judge the speed of plaintiff's truck absolutely barred the defense that plaintiff's contributory negligence in failing to keep a vigilant lookout was a proximate cause of the accident. The court held that defendant's own testimony did not necessarily eliminate plaintiff's negligence as a cause of the collision. This was not a question of conflicting evidence, but of the separation of evidence as to conflicting theories of how the collision occurred.

VIII. CONCLUSION

The law of evidence is evolutionary in nature. It develops by definition, clarification, and determination by case decision. There have been no abrupt

29. *Supra* note 12.

30. 364 S.W.2d 613 (Mo. 1963).

31. 367 S.W.2d 611 (Mo. 1963).

departures from the normal course of the evolutionary process in the law of evidence during the period covered by this article. It is helpful when considering the current decisions and their application to future factual situations to apply the test of probative force. Otherwise the valid results which may be obtained from case to case, even under the application of the same formalized rule, remain unexplained.