Missouri Law Review

Volume 31
Issue 1 *Winter 1966*

Article 9

Winter 1966

Evidence Admissibility--One Simple Test

Harry P. Thomson Jr.

Thomas J. Leittem

EVIDENCE ADMISSIBILITY—ONE SIMPLE TEST

HARRY P. THOMSON, JR.*
THOMAS J. LEITTEM**

I. THE PROBATIVE FORCE TEST

Evidence is admissible when it is of sufficient force that it logically tends to prove or disprove a fact or issue necessary to a decision of the particular case, unless such evidence is excluded by a rule of law or policy not primarily concerned with the probative force of evidence. This probative force test is the basic requirement for the admissibility of evidence. It is not a new test or a principle. It was referred to by Thayer as early as 1898.[1] It has been discussed by Wigmore,[2] McCormick,[3] Fisch,[4] Morgan,[5] and other authorities.

This basic test has been buried and forgotten under volumes of discourse on logical relevancy, legal relevancy, conditional relevancy, materiality, hearsay and its exceptions, judicial notice and the whole gamut of historical formalized rules of evidence. Some progress is being made through efforts of modern writers to correlate and explain the formalized rules of evidence developed in the last three centuries. A clear expression and resurrection of the basic reason for the admissibility of evidence is long overdue.

II. RECOGNITION OF EXCLUSIONARY RULES AND POLICIES NOT BASED ON PROBATIVE FORCE

An effort to resolve the confusion was made by one of the authors in 1963 in a statement of the probative force test and an analysis of its use by the appellate courts of Missouri.[6] As stated there the probative

*Partner, Shughart, Thomson & Kilroy, Kansas City, Missouri, LL.B. 1939, University of Missouri.
**Partner, Shughart, Thomson & Kilroy, Kansas City, Missouri, LL.B. 1948, Boston College.

1. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW, ch. VI (1898).
2. 1 WIGMORE, EVIDENCE §§ 9-12 (3d ed. 1940).
3. MCCORMICK, EVIDENCE pp. 320-21 (1954).
4. FISCH, NEW YORK EVIDENCE § 3 (1959).
5. MORGAN, BASIC PROBLEMS OF EVIDENCE ch. 4 (1963).
6. Thomson, *Evidence,* 28 MO. L. REV. 539 (1963).

force test required only that evidence to be admissible must be of sufficient force that, if believed, it logically tends to prove or disprove a fact or issue necessary to a decision of the case before the court.[7] However, to express the test of admissibility completely, the authors have concluded that a provision must be made for rules of law or policies which exclude otherwise admissible evidence on grounds not primarily concerned with its probative force. Therefore, we have added to the test, as previously stated the clause, "unless such evidence is excluded by a rule of law or policy not primarily concerned with the probative force of evidence."

As originally formulated, the probative force test provided that any evidence meeting the test was admissible. Obviously, this is not so. For example, there is a constitutional guarantee against self-incrimination. The testimony of a witness might well meet the probative force test but still be excluded under the Fifth Amendment. Certain communications are absolutely privileged by statute, such as those between client and attorney. The Dead Man Statute and other statutes exclude evidence. Sometimes evidence is excluded not by constitutional guarantees or statute, but as a matter of well-recognized and established policy.

One such policy area involves collateral issues. Otherwise admissible evidence may open up collateral issues to an extent that confusion would be created in deciding the main issue being tried. In such cases the court must exercise discretion primarily on the basis of whether the admission of the evidence is directly pertinent to the issue to be decided. In exercising that discretion the court is not concerned principally with whether the evidence meets the probative force test; it may well do so and yet be subject to exclusion because it hinders making a rational decision on the main issue.

Repetitious or cumulative evidence is another such area. Once evidence reaches the point where it is repetitious or merely cumulative, it should be excluded for the very practical reason of the limitation of time in the conduct of human affairs. It could be argued that purely repetitious or cumulative evidence does not meet the probative force test because it does not have sufficient additional probative force alone, since other evidence on the same fact or issue already has been introduced. This is not a true application of the probative force test and would do violence to its meaning. The cumulative or repetitious evidence might have as much probative force as the first evidence introduced on the same subject.

7. *Ibid.* See also Thomson & Jensen, *Evidence,* 30 Mo. L. Rev. 1 (1965).

The real reason for exclusion is a practical consideration in the administration of justice, and it should be so recognized.

Thus the areas of exclusion of evidence are defined by rules of law, constitutional or statutory, and by generally recognized specific policies. These rules and policies of exclusion are not primarily concerned with the probative force of evidence. They are not complex. They are subject to practical application. Recognition is given to such exclusionary rules and policies by the last clause of the probative force test as now stated.

III. Theoretical Discussions of Formalized Historical Rules Give No Practical Guide to Admissibility

The modern dialogue concerning logical relevancy, legal relevancy, and conditional relevancy does not solve the question of admissibility. Evidence is sometimes said to be logically relevant if it tends to prove or disprove a proposition properly provable in the case. This is circuitous argument: if a proposition is properly provable in the case, then it is logically relevant.

Legal relevancy is said to be that evidence which is logically relevant and which is admissible, that is, not inadmissible. There is a singular lack of a practical guideline in such discussion. Nor is it helpful to state that legal relevancy is more limited than logical relevancy, and that even evidence which may be legally relevant is sometimes only conditionally relevant.

The mere statement of the different definitions and categories of relevancy illustrates the difficulty in avoiding confusion when emphasizing relevancy as a test for admissibility. The likelihood of confusion increases because of disagreement among authorities as to whether logical relevancy or legal relevancy should control admissibility. Such scholarly discussion, while interesting, is of little assistance to the trial judge and lawyer. The often complex and confusing arguments concerning relevancy of whatever category are avoided by the simple probative force test of admissibility.

IV. Formalized Historical Rules are Applications of The Probative Force Test in Specific Situations

Formalized historical rules of admissibility were developed only as an indication of the reliability of evidence in specific situations. They

are merely an application of the probative force test in such situations. Unless this principle is recognized, confusion results. It is for this reason that appellate decisions often appear to be in conflict with the application of evidentiary rules. Such conflict disappears when the probative force test is applied.

The hearsay rule and its exceptions, for example, are nothing more than applications of the probative force test. Hearsay was originally excluded because it was considered unreliable. It did not have sufficient probative force to be admissible. But certain situations give a guaranty of reliability so that hearsay has sufficient probative force. Thus developed the hearsay rule exceptions of res gestae, admissions against interest, declarations against interest, dying declarations and similar categories. The business record rule does nothing but state that recorded items which might be hearsay are kept under circumstances that sufficiently guarantee their probative force; therefore they are admissible.

A similar review of each formalized historical rule of evidence reveals that it is founded upon and is an application of the probative force test. The difficulty is that what started out to be a means of expressing the probative force test became an end in and of itself. The crutch of the formalized historical rules of admissibility became so established that little inquiry was made as to the basic reason for their existence. It must be recognized that the formalized historical rules of admissibility are mere expressions of the probative force test and are subject to the fundamental application of that test. Otherwise, more rules and exceptions to rules will proliferate. Confusion will continue to control. It is time that discussion as to what constitutes prospectant evidence, concomitant evidence and retrospectant evidence be relegated to history where it belongs.[8]

V. The Probative Force Test Does Work

The best argument for the use of the simple probative force test is that it works. It establishes a rational basis for the admissibility of evidence upon which a rational determination of the facts and issues can be made by those charged with that responsibility. The basic purpose of evidence is not lost. The practicality of the probative force test can be illustrated by an analysis of the recent decisions of the appellate courts of any state or federal jurisdiction. Whether expressed or not, the pro-

8. *Supra* note 2, § 43.

bative force test is being applied as the controlling factor governing admissibility of evidence. The appellate courts are referring to "probative force" with greater frequency. Some recent decisions of the Missouri appellate courts are examples of this trend.

A. *Evidence Lacking Probative Force Excluded*

In *Matta v. Welcher*[9] the court held that defendant's offer of proof that plaintiff's automobile traveled 350 to 375 miles in a short period of time prior to the accident was properly refused. Defendant's counsel recognized there was little hope of securing admission of this evidence on the theory that it showed excessive speed of plaintiff's automobile at the very time of the two-car collision. Therefore, defendant's counsel argued that this evidence showed that plaintiff was contributorily negligent because he either acquiesced in or failed to protest against the consistent, negligent and imprudent operation of the automobile before the collision.

The court held that the exclusion of such evidence was proper for four reasons. First, evidence of the conduct of different drivers at distant points during the trip was logically irrelevant. Second, the admission of such evidence would have been prejudicial to plaintiff because contributory negligence cannot be proved by showing similar prior acts of negligence. Third, the probative value of the evidence was slight. Fourth, such evidence would involve consideration of many collateral matters.

It was unnecessary for the court to do anything more than apply the probative force test. The opinion makes it clear that this was the basic test relied upon:

> "Even disregarding the vagueness and generality of defendants' offer of proof, and assuming that it might have been logically relevant upon the pleaded issue of imputed contributory negligence, had it been more fully developed, still the fact that evidence is logically relevant in some degree does not imperatively require its admission where, as here, the probative value of the evidence is slight and its admission involves consideration of many collateral matters which are remote in time and conjectural in their nature."[10]

Logical relevancy was not the controlling principle and need not have been mentioned. The court discussed two general exclusionary areas,

9. 387 S.W.2d 265 (Spr. Mo. App. 1965).
10. *Id.* at 269.

undue prejudice and the injection of collateral matters. Any evidence adverse to a party may be said to be prejudicial to some extent. The question is whether the evidence is unfairly prejudicial. The evidence in *Matta* would not qualify for exclusion on this basis. Nor would the offered evidence qualify for exclusion because of the policy against injection of collateral matters if the evidence had actual probative force. The real reason this was excluded was because what happened on the long trip preceding the collision was so remote in time and place that it did not have sufficient force logically tending to prove the issue of plaintiff's contributory negligence at the time and place of the accident. This lack of probative force prevented this evidence from qualifying as admissible.

Courts do not always clearly refer to the probative force test in excluding evidence. Sometimes the reasons cited by the court for exclusion are not justified upon close analysis. Under these circumstances it becomes obvious that the probative force test was used, whether referred to or not.

In *Parlow v. Dan Hamm Drayage Co.*[11] the collapse of an "A" frame and jib was involved. Plaintiff submitted his theory of recovery under the *res ipsa loquitur* doctrine. Defendant introduced evidence through an expert witness as to the specific manner in which the "A" frame collapsed. This evidence tended to refute plaintiff's claim that the collapse was caused by defendant's negligence. When defendant by the same expert witness attempted to introduce opinions as to the exact cause of the collapse and how the "A" frame could have been used safely, plaintiff's objections were sustained. In holding this evidence properly excluded, the court first referred to the principle that the question of qualification of an expert witness rests in the sound discretion of the trial court. The difficulty with this assigned reason is that in the second preceding paragraph of the opinion the court noted that the witness' qualifications as an expert were not questioned. The court then stated that defendant already had the benefit of the expert's testimony as to the manner of the collapse as well as the benefit of an effective demonstration as to the cause of the collapse. The court next pointed out that further expressions by the witness as to whether or not the method employed in using the "A" frame was proper would have been of little practical assistance to the jury, and concluded that the jury was as capable as the expert witness in deciding that issue from the evidence already presented.

11. 391 S.W.2d 315 (Mo. 1965).

The basis of exclusion could not have been the failure of the witness to qualify as an expert, nor the fact that his opinions might have been so cumulative as to be excluded on the basis of policy against prolonging trials beyond practical limits. The rational conclusion is that the court was following the probative force test in holding that the mere opinion of the expert as to what actually happened had no probative force for two reasons: (1) the facts were already in evidence, and (2) the expert witness did not have knowledge superior to that of the jury. Since the expert did not possess superior knowledge as to how the accident happened, he was no more qualified to decide that issue than the twelve jurors. The expert's opinions, as such, in the excluded areas had insufficient probative force.

B. *Expert Witnesses and the Probative Force Test*

Characterization of types of evidence tends to conceal the basic requirement for admissibility. It is often stated by courts that certain evidence should be excluded on multiple grounds. In reality there are only two grounds why evidence is not admissible: it either fails to qualify under the primary language of the probative force test or its admission is prohibited by the exclusionary portion of the test under a rule of law or established policy not concerned with probative force.

The probative force test is the only basis upon which rulings with respect to testimony of expert witnesses can be made compatible. In *Shelby County R-IV School Dist. v. Herman*,[12] a condemnation proceeding, different grounds were assigned for excluding testimony from three persons as to the value of the land being acquired. A landowner's opinion evidence of value of the property involved normally is admissible in a condemnation proceeding because of his superior knowledge of his own property. Yet, in this case the landowner's testimony as to the value of his land was excluded because it was based primarily upon the net profit from a farming operation for a selected period. The court pointed out that an opinion based upon a highly variable factor was without probative value.

Two other witnesses testified on behalf of the landowner and were qualified as real estate brokers dealing in farm properties. Their testimony as to the commercial value of a portion of the farm land being

12. 392 S.W.2d 609 (Mo. 1965).

acquired was excluded. The court gave as a reason that these witnesses, while expert with respect to farm properties, were not qualified as experts with respect to commercial properties. In this portion of the opinion the court did not refer to the probative force test or use the words, "probative value." Yet the test was the same. The two witnesses, expert in the value of farm properties, did not have any superior knowledge with respect to the value of commercial properties so as to give their opinions on that subject any probative force. The court might well have said that the testimony of the witnesses in the form of their opinions on this subject simply had no probative value.

In *North Kansas City Memorial Hosp. v. Wiley*,[13] a hospital administrator testified as an expert witness for the purpose of allocating charges for hospitalization and medication. This was held reversible error because the hospital administrator, while an expert in his chosen field, was not a medical expert qualified in the matters on which he testified. Again, this is simply another application of the probative force test. The hospital administrator had no superior knowledge which gave his opinion any more probative force than the opinion of any other layman. It is entirely correct to say that he was not an expert witness in medical matters, but the true ground for exclusion of evidence is more clearly expressed in the terms of the probative force test.

In *Bertram v. Wunning*,[14] a medical doctor testified he could not say with reasonable medical certainty that the accident in question was the competent producing cause of plaintiff's hernia. Subsequently, the doctor testified there was a ninety per cent chance that it was caused by the accident and a ten per cent chance that it was not. Clearly, the doctor was an expert witness qualified in his field and competent to express an opinion on the matter of causation. Yet, the court held that it was error to admit the testimony of the doctor on causation because it allowed the jury to award damages based upon speculation and conjecture. The court remarked that a trial is not a game of chance. Expressing the possibility of causation in percentages is nothing more than speculation. The doctor's testimony did not meet the probative force test, but the court did not express it that way.

Bertram can be compared with *Kinealy v. Southwestern Bell Tele-*

13. 385 S.W.2d 218 (K.C. Mo. App. 1964).
14. 385 S.W.2d 803 (St. L. Mo. App. 1965).

phone Co.,[15] where the expert was a geologist who testified in detail concerning the possible causes of landslides. The geologist expressed the opinion that it was extremely likely that defendant's activities in excavating a ditch caused the landslide which damaged plaintiff's property. Then it was established 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. In fact, the probative force test was applied and again it was held that the expert's testimony did not establish causation.

Kinealy and *Bertram* must be distinguished from *Hay v. Ham*,[16] where the testimony of a physician was ruled admissible to prove the physical condition of plaintiff immediately before trial. There the causal connection was established by other facts and circumstances in the case. Testimony of plaintiff and other laymen was used and considered of sufficient probative force to be admissible on the issue of causation. The opinions of the expert were limited only to the existence of a condition. With respect to that limited issue the expert had the facts to apply his superior knowledge; his estimony had probative force on that limited issue. This concept is supported by the dicta in *Bertram* pointing out that there was lack of independent evidence of probative force to connect the condition which the expert found with the accident.[17] Reconciling or explaining evidentiary rulings concerning expert witnesses by use of formalized historical rules is a real challenge. It is much simpler to understand or predict evidentiary rulings in the expert witness field if the probative force test is used.

C. *Business Records and the Probative Force Test*

In various jurisdictions, either by statute or case decisions, qualifications have been established for the admissibility of business records. Unfortunately, these artificial qualifications often overlook the basic purposes of evidence and consequently the probative force test. Even if business records fail to qualify under a business records statute, they still should be admitted into evidence if they meet the probative force test.

In *Mutual Fin. Co. v. Auto Supermarkets, Inc.*,[18] a former employee

15. 368 S.W.2d 400 (Mo. 1963).
16. 364 S.W.2d 118 (K.C. Mo. App. 1962).
17. *Supra* note 14.
18. 383 S.W.2d 296 (St. L. Mo. App. 1964).

Missouri Law Review, Vol. 31, Iss. 1 [1966], Art. 9

of plaintiff identified a ledger card which was introduced as a business record. The court held that such admission was proper because the former employee testified that he had been an officer of the company, had supervised the records system, had been involved personally in the business transaction in question when it occurred and that the record was maintained in the usual course of business. The court expressed the additional opinion that the facts to which he testified were sufficient to justify the admission of the exhibit. However, it would appear that while the former employee of plaintiff testified to many of the requirements of the Uniform Business Records as Evidence Law,[19] it is certainly not clear that he testified to all of such requirements. The record was not in his custody or control at the time of trial. He had not personally seen the mortgage and its execution to which the ledger card referred. Regardless of whether there may have been some deficiencies in qualifying the ledger card exhibit as a business record under all the strict requirements, it was recognized, again without using the words, that it qualified under the probative force test. That was sufficient.

D. *Application of the Probative Force Test Does Not Depend Upon a Particular Characterization of Evidence*

The probative force test is not concerned with weighing one type of evidence against another or weighing evidence within the same type; that is the function of the trier of fact. The probative force test is concerned only with admissibility in the first instance.

In *Schneider v. Prentzler*[20] plaintiff relied solely upon physical facts. Defendant relied upon the testimony of an eye-witness. Both types of evidence qualified under the probative force test. The court stated that it would not disqualify either type of evidence or give more weight to one type than another in reviewing a jury's verdict. Circumstantial evidence such as that based upon physical facts can be as effective and, in some cases, more effective than direct eye-witness evidence in aiding the trier of fact. Both types have exactly the same standing as far as admissibility is concerned when both have met the probative force test.

In *Chandler v. Gorda*[21] the case involved two sets of photographs of a wooden bridge. The first set was taken shortly after the accident, the

19. § 490.680, RSMo 1959.
20. 391 S.W.2d 307 (Mo. 1965).
21. 384 S.W.2d 523 (Mo. 1964).

second, approximately eight months later. There were some changes in the bridge shown by the last set of photographs. These were explained and were not relied upon when the last set of photographs were offered in evidence. Plaintiff's witnesses testified that in the later photographs the bridge was hardly recognizable as the bridge in question. Defendant's witness testified that, except for the changes as described, the last photographs were a fair representation of the bridge. The court held that both sets of photographs had probative force. The effect of discrepancies was for the jury. Here the court did not weigh evidence of the same type; it determined only what portions of the offered evidence of the same type met the probative force test.

E. *Evidence May Be Admissable Under the Probative Force Test Which Would Not Be Admissible if a Formalized Rule Were Applied*

Another danger in using a formalized rule of admissibility is that such rules are too narrow and, if strictly applied, would exclude evidence having probative force. In *White v. Burkeybile*[22] plaintiff was allowed to read from defendant's deposition narrative statements of how an automobile collision occurred as admissions against interest. Much of this narrative statement contained in the deposition and read into evidence did not meet the classical definition of admissions against interest. Yet the portion of defendant's deposition which was read did have some probative value bearing upon plaintiff's version of the accident which was adverse to defendant.

Although the court referred to this evidence as admissions against interest, certainly there is some question as to whether it would conform to the classical definition. No difficulty is encountered with this decision, however, if the probative force test is applied. Then it clearly becomes apparent that the previous deposition testimony of defendant was admissible because it logically tended to prove plaintiff's version of the accident. It is only common sense that plaintiff is not required to accept a possible second version which defendant might well give from the witness stand.

Once defendant made these statements in his deposition, plaintiff could introduce them into evidence under the probative force test. This should be true whether or not this evidence fell within the historical

22. 386 S.W.2d 418 (Mo. 1965).

formalized definition of a direct admission against interest. This illustrates the flexibility of the probative force test. It allows the trier of fact to consider all material which logically tends to prove or disprove the main issue.

VI. Conclusion

The probative force test as now stated meets the demands of the complexity of modern nociety. It supplies a rational basis for determining admissibility of evidence. It eliminates misleading concepts. The present trend is to recognize the probative force test and to give less emphasis to the formalized historical rules.

The probative force test expresses in simple language a single and exclusive measure for admissibility of evidence so that the trial judge and lawyer have a practical guide. This does not mean that the point has been reached where the formalized historical rules of evidence can be ignored. So long as appellate courts continue to refer to such rules the working lawyer must be well acquainted with them. The time will come when the probative force test will be universally recognized as the main guideline for admissibility of evidence. The law of evidence may yet struggle out of the age of the abacus and join the rest of society's rules in the electronic digital computer age. There is growing hope—the probative force test.