Evidence -- Opinion Rule -- Estimate of Speed from Mark on Road

Cyrus F. Lee

the newspaper or newspapers specified therein have been determined from the application and examination required by law to be that or those most likely to give notice to the person to be served. Provided; that if it be shown that such statement did not appear in said order, or that the information given in the application and examination required by the immediately preceding section was so false and misleading as to cause the newspaper or newspapers specified not to be that or those most likely to give notice to the person to be served, or that from the information given in such application and examination the newspaper or newspapers specified could not reasonably have been determined to be those most likely to give such notice, then the service of summons is to be void and of no effect.[20]

J. DICKSON PHILLIPS, JR.

Evidence—Opinion Rule—Estimate of Speed from Mark on Road

In *Tyndall v. Hines Co.*[1] plaintiff was struck by defendant's truck while walking on the shoulder of the road. A highway patrolman testified as to the presence of marks on the grass and shoulder. He testified that they were not brake marks, but were marks made when the truck made a sudden turn, thus shifting the weight to one side or the other. The trial court allowed him to give his opinion as to the speed of the vehicle, based upon such physical data. On appeal, questioning the admissibility of the evidence and alleging its admission was prejudicial to the defendant, the Supreme Court *Held:* That the witness not having seen the truck in motion would not be permitted to give an opinion as to its speed. "The opinion must be of facts observed. The witness must speak of facts within his knowledge. He cannot under the guise of an opinion give his deductive conclusion from what he saw and knew."[2] Finding the evidence prejudicial, the court awarded the defendant a new trial.

Instances where the court will allow the witness to express himself in terms of inferences drawn from facts observed may be divided in two classes, which are subject to separate and distinct rules of admissibility: (1) Where the witness is specially qualified and by virtue of such may aid the jury. (2) Where the witness is unable otherwise to present the facts to the jury.[3] The former which is most commonly characterized as expert opinion is received because the witness' skill in

[20] The provisions for length and cost of publication could be inserted after the portion set out above.

[1] 226 N. C. 620, 39 S. E. (2d) 828 (1940).

[2] *Id.* at 623, 39 S. E. (2d) at 830.

[3] It is recognized that these classifications are but broad general divisions of admissible opinion, and that there are some admissible opinions that cannot be easily placed in one or the other class but exist in the twilight zone of both.

drawing the proper inference from the observed or assumed facts is greater than the jury's; while the latter is a rule of necessity or convenience adopted to provide for the situation where the facts cannot be so told by the witness as to make the jury as able as he to draw the proper inference.[4]

Though the opinion is one that is inadmissible from a witness not specially qualified, if it be proper from one who is, an objection that the witness is not specially qualified must be taken at the trial;[5] and when this is not done it is too late upon appeal to object that the witness did not qualify as an expert.[6] Whether a particular witness is an expert or not is a preliminary question of fact to be determined by the court below.[7] That once determined, as it necessarily is determined, if the testimony is admitted, the appellate court ordinarily accepts the lower court's determination.[8] It follows that where an opinion is admitted without objection as to the special qualifications of the witness the appellate court should test the competency of the evidence according to the rules applicable to both classes of opinion mentioned above.

Was the opinion in the principal case competent because the witness was unable otherwise to present the facts to the jury? The observation by the court that: "He (the witness) gave a plain, clear, and distinct description of the signs, marks, and conditions he found at the scene of the collision so that ordinary jurymen could readily understand and appreciate just what he saw," would indicate the statement as to the speed of the truck, based upon these observations, was not admissible as this class of opinion. The opinion here was not a substitute method of presenting the facts observed, but was an inference or conclusion drawn from them.

Was the evidence competent as expert opinion? The failure to state the question calling for the opinion in hypothetical form would not be objectionable, where the expert is speaking from personal observations.[9] Since the requirement that the witness be shown to be better

[4] WIGMORE, EVIDENCE (3rd ed. 1940) §§557, 1917; STANSBURY, NORTH CAROLINA EVIDENCE (1946 ed.) §132.

[5] Summerlin v. Railroad, 133 N. C. 550, 45 S. E. 898 (1903); Britt v. North Carolina R. R., 148 N. C. 37, 61 S. E. 601 (1908); *but see* Bivings v. Gosnell, 141 N. C. 341, 53 S. E. 861 (1906).

[6] State v. Corriher, 196 N. C. 397, 145 S. E. 773 (1928); Ramsey v. Standard Oil Co., 186 N. C. 739, 120 S. E. 331 (1923); Vann v. Atlantic Coast Line R. R., 182 N. C. 567, 109 S. E. 556 (1921).

[7] LaVecchia v. Land Bank, 218 N. C. 35, 9 S. E. (2d) 489 (1940); State v. Cafer, 205 N. C. 653, 172 S. E. 176 (1934); State v. Combs, 200 N. C. 671, 158 S. E. 252 (1931); State v. Cole, 94 N. C. 958 (1886). *But cf.* Pridgen v. Gibson, 194 N. C. 289, 139 S. E. 443 (1927) (a finding by the trial court as a matter of law that a witness was not an expert was reviewed and reversed).

[8] State v. Gray, 180 N. C. 697, 104 S. E. 647 (1920); Jones v. Norfolk Southern R. R., 176 N. C. 260, 97 S. E. 48 (1916); Lumber Co. v. Atlantic Coast Line R. R., 151 N. C. 217, 65 S. E. 920 (1909).

[9] Dulin v. Henderson-Gilmer Co., 192 N. C. 638, 135 S. E. 614, 49 A. L. R. 663 (1926); WIGMORE, EVIDENCE (3rd ed. 1940) §675; Anno 82 A. L. R. 1338 (1931).

qualified than the jury to draw such an inference had been waived in the principal case, the answer to the above question should depend on whether any inference stronger than a remote speculative guess could be drawn from the observed facts.[10] Notwithstanding his qualifications, even the expert must base his opinion upon data adequate to authorize an opinion.[11] The principle is well established that when an expert gives an opinion based upon supposed facts the facts assumed must be legally sufficient to support the opinion.[12] The principle should be equally applicable when the opinion is based on the personal observations of the witness.[13] Most courts recognize that an expert can base an opinion as to the speed of a vehicle upon the length of brake skid marks, if given the weight of the vehicle, condition of the tires and other physical conditions.[14] Similarly experts given the weight, speed, conditions of the road, and other pertinent physical conditions have been allowed to state an opinion as to the distance within which a vehicle could have been stopped.[15] Generally the courts have refused to allow

[10] Everart v. Fischer, 75 Ore. 321, 147 Pac. 189 (1915); Reall v. Deirizzi, 127 W. Va. 662, 34 S. E. (2d) 253 (1945); WIGMORE, EVIDENCE (3rd ed. 1940) §959; compare McCarthy v. Souther, 83 N. H. 29, 137 Atl. 445 (1927) (fact that impact broke handle on door basis for opinion of speed).

[11] Shams v. Saportas, 152 Fla. 48, 10 So. (2d) 715 (1942) (proper to exclude opinion based upon two patrolmen's observations after the collision).

[12] Hobbs v. Union Pacific R. R., 62 Idaho 58, 108 P. (2d) 841 (1940) (error to admit an opinion of an expert as to the speed of a train based alone on the distance it had traveled after the collision); Bazeman v. State, 177 Md. 151, 9 A. (2d) 60 (1940) (error to admit opinion as to possible stopping of car, without stating condition of tires, surface of road, etc.); Bryant v. Stone, 178 N. C. 291, 100 S. E. 578 (1919) (proper to exclude opinion as to cause of boat overturning based upon appearances next morning); Thomas v. Inland Motor Freight Co., 190 Wash. 428, 68 P. (2d) 603 (1937) (error to admit opinion that truck with adequate braking power could have slowed sufficiently to have rounded curve, when the speed of the truck was not shown); Boyd v. Virginian Ry., 123 W. Va. 47, 13 S. E. (2d) 273 (1941) (error to admit opinion as to possible stopping distance of train without including speed as a part of the basic data).

[13] Union Bus Lines v. Maulder, 180 S. W. (2d) 509 (Tex. Civ. App. 1944) (error to admit opinion of speed based alone on damaged condition of vehicles); Hobbs v. Union Pacific R. R., cited *supra* note 12; Bryant v. Stone, cited *supra* note 12; Shams v. Saportas, cited *supra* note 11.

[14] Jackson v. Vaughn, 204 Ala. 543, 66 So. 469 (1920); McKenney v. Wintersteen, 122 Neb. 679, 241 N. W. 112 (1932) (expert had specially qualified himself by experiments under the same physical conditions). *Contra:* Young v. Swartz, 34 N. E. (2d) 795 (Ohio Ct. of App. 1941); Heidner v. Germschied, 41 S. D. 439, 171 N. W. 208 (1919) (witness was allowed to state opinion after he was shown to know the kind of car, condition of roadbed, and length of skid mark); Rankin v. Hughes, 161 S. W. (2d) 883 (Tex. Civ. App. 1942); Luethe v. Schmidt-Gaertner Co., 170 Wis. 590, 176 N. W. 63 (1920). In *Savadow v. Keystone Transportation Co.*, 241 App. Div. 161, 271 N. Y. Supp. 293 (1934) the court held it reversible error to exclude expert opinion that skid marks of length shown could not have been made except by car exceeding the legal speed limit. Compare Cheek v. Brokerage Co., 209 N. C. 569, 183 S. E. 729 (1936) where an opinion as to which side of the center line an accident occurred based upon data observed after the collision was excluded because it invaded the province of the jury.

[15] This is but an application of the same principle with variables and unknowns changed. Berkowitz v. American River Gravel Co., 191 Cal. 195, 215 Pac. 675 (1923); Birdsong v. Meyers, 141 Kan. 140, 40 P. (2d) 430 (1935); State v. Gray, 180 N. C. 697, 104 S. E. 647 (1920).

a witness to give an opinion as to the speed of a vehicle based alone on its sound in motion,[16] or the sound of a collision.[17] However, the Missouri court has held it proper to allow an expert to give an opinion as to the speed of an automobile based upon such data.[18]

No general determination can be made as to the minimum sufficiency of data necessary to support an opinion. This question must be passed upon first by the trial court in the light of the circumstances of each case and is reviewable as a question of law. No case has been found which upholds the admissibility of an opinion based upon data so scant as that in the principal case.

Sometime in the future there may be developed a scientific technique which can provide a method for the estimation of speed based upon data even as meager as that used in the principal case. When this is done it will be time enough to re-examine the rule of evidence which now excludes such estimations.

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Federal Jurisdiction—Removal of Suits Instituted in State Courts Under the Fair Labor Standards Act

Section 16(b) of the Fair Labor Standards Act, hereinafter abbreviated as F. L. S. A., provides that employee suits for the recovery of unpaid minimum wages or overtime compensation "may be maintained in any court of competent jurisdiction."[1] Section 24(8) of the Judicial Code provides that regardless of diversity of citizenship or the sum in controversy the district courts of the United States shall have jurisdiction over "all suits . . . arising under any law regulating commerce."[2] Section 28 of the Judicial Code provides that "Any suit of a civil nature . . . arising under the Constitution or laws of the United States . . . of which the district courts of the United States are given original jurisdiction . . . may be removed by the defendant . . . to the district courts."[3]

In *Swettman et al. v. Remington Rand*[4] plaintiff employee brought action to recover alleged overtime compensation, liquidated damages, reasonable attorneys' fees and costs under the F. L. S. A. Action was removed from the state court in which it was commenced. Plaintiff moves to remand on ground that Congress intended to amend the Re-

[16] Law v. Gallegher, 9 Harr. (Del.) 189, 197 Atl. 479 (1938); Challinor v. Axton, 246 Ky. 76, 54 S. W. (2d) 600 (1932); Park v. Gandio, 286 Mich. 133, 281 N. W. 565 (1935); Lambach v. Colley, 283 Pa. 366, 129 Atl. 88 (1925).

[17] Knoche v. Pease Seed and Grain Co., 134 Neb. 130, 277 N. W. 798 (1938); Mierendorf v. Soalfeld, 138 Neb. 876, 295 N. W. 901 (1941).

[18] Murphy v. Cole. 338 Mo. 13, 88 S. W. (2d) 1023 (1935).

[1] 52 STAT. 1069 (1938), 29 U. S. C. A. §216(b).

[2] 36 STAT. 1092 (1913), 28 U. S. C. A. §41(8).

[3] 36 STAT. 1094 (1914), 28 U. S. C. A. §71.

[4] 65 F. Supp. 940 (S. D. Ill. 1946).