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THE "PHYSICAL FACTS RULE": TO SEEM IS TO BE?†

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"Description . . . is not
the thing described . . . .
It is an artificial thing that exists,
In its own seeming, plainly visible . . . ."

—from "Description Without Place"
by Wallace Stevens[1]

It is not surprising that Wallace Stevens, a lawyer who was also a gifted poet-philosopher, would put his finger upon the human weakness that makes a concept like the "physical facts rule" difficult for the human mind to control. Rarely is the thing which we refer to as a "physical fact" itself actually in court. It is there by description only: description by oral testimony, description by diagram, description by photograph, etc. Yet such are the workings of the human mind that description becomes reality. Perhaps unconsciously we will it so, because we would rather have *some* "reality" to cling to than admit to ourselves that we will never really know what the reality was—than admit to ourselves that we are adjudging *on the basis of probabilities merely* the rights and fortunes of our fellow human beings. The description given us by our witness carries us along and, in our minds, itself becomes the thing described. Even knowing as we do that avowedly fictitious descriptions carry us along in the same way every time we read a novel or see a play, we nonetheless fail—often quite willingly—to test or question the quality of the description upon which we build judgments affecting the rights of people.

Let us begin with a self-evident proposition. A party who has adduced evidence tending to show the existence of a certain fact cannot then prevent the submission or consideration of evidence tending to show the nonexistence of that fact with the argument that the evidence of nonexistence is incredible because it contradicts the existence of the very fact at issue. Stated in this way, would anyone disagree?

But the "physical facts rule" works powerful magic. We need only

†It was Professors Field and Kaplan who caused me to stop and think about the "physical facts rule." *See* Field and Kaplan, Materials for a Basic Course in Civil Procedure 492 (2d temp. ed. 1968). My thanks also to Professor Malcolm Sharp, whose lifelong calling it has been to stir minds.

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1. Stevens, The Collected Poems of Wallace Stevens 339-46 (1968). Stevens was a full-time lawyer and business executive who also found the time to become a poets' poet.

replace the word "fact" wherever it appears in our initial proposition with the abracadabra "physical facts" and we somehow transport the proposition from the realm of the self-evident. Adroit counsel do, in practice, adduce evidence tending to show the existence of certain "physical facts" and then successfully prevent the submission or consideration of evidence tending to show the nonexistence of those "physical facts" with the argument that the evidence of nonexistence is incredible because it contradicts "the physical facts," that is, the very facts at issue.

A recent New Mexico case, *Bolen v. Rio Rancho Estates,*[2] will serve as an example. Plaintiff put on testimony tending to show that defendant's fence blocked plaintiff's decedent's view of the truck which was approaching the fatal intersection at right angles. Defendant put on evidence tending to show that his fence did not block the view. Defendant subsequently argued that he was entitled to a directed verdict because the plaintiff's evidence was incredible—contradicting as it did the "physical fact" that defendant's fence did not block the view. The New Mexico Court of Appeals agreed. This iteself would seem incredible if we were not aware by previous experience that, on occasion, the "physical facts rule" works wonders.[3]

To break the charm which the "physical facts rule" occasionally works, even on well-disciplined minds, I propose first to say some negative things about it and then to suggest a formula restatement of it which hopefully will transform it from talisman to effective procedural tool.

First to the negative things: The "physical facts rule" is not a rule at all, but merely an entanglement of two distinguishable and equally unremarkable applications of the law of judicial notice. Evidence intended to contradict judicially known attributes of physical entities should not be admitted or considered. Likewise, evidence intended to contradict judicially known scientific principles, laws of nature, or matters of common knowledge should not be admitted or considered.[4] To lump these applications together and call them a rule vests them with unwarranted stature and discourages analysis.

2. 81 N.M. 307, 466 P.2d 873 (Ct. App. 1970).

3. In fairness to the Court, it must be said that its stated ground for decision looks bad more obviously on this oversimplified statement of the case than it will later when we add the details. I hope to persuade you, however, that, with every possible complicating detail considered, the stated ground for decision is just as bad, even if less obviously.

4. Even these simplified statements are valid only in those jurisdictions where judicial notice of a proposition forecloses counsel from disputing by formal evidence the truth of the fact noticed. *See* McCormick, Law of Evidence 710-11 (1954). In those jurisdictions in which judicial notice does not foreclose further dispute, the co-existence of a "physical facts rule" very arguably makes no sense at all. I have found no authority putting New Mexico explicitly in either category, but New Mexico's recognition of the "physical facts rule" puts

Judicial opinions abound with indiscriminate references to "physical facts," "physical laws," "scientific principles," and "laws of nature."[5] Furthermore, these marks of finality have attracted to themselves adjectives that ring with commensurate finality. Why *should* a jury be allowed to decide against the "undisputed"[6] physical facts? What counsel would dare dispute "indisputable"[7] physical facts? It's vice enough, of course, that the incantation of formulas often forecloses effective consideration of the specific issue at hand, but the vice is compounded when—as is too often the case—"undisputed" and "indisputable" are used as if they also were interchangeable. In any useful formulation of the "physical facts rule," they are not.

Then to the restatement: Courts and commentators have shown a vaguely focused awareness that the "rule" is a hybrid with a tendency to get out of hand, but their attempts to limit and define have not set it apart in any useful detail. If we are unwilling to remove the "physical facts rule" from the working terminology of trial and appellate practice, or if we are unwilling to look upon it as two rules—a "physical facts rule" and a "scientific principles rule," we should at least reconsider and restate it in terms which recognize its composite nature, make explicit the several discrete steps necessary to its proper application, and minimize its capacity to mesmerize. These requirements are met, I believe, by the following restatement:[8]

> The operation of the physical facts rule justifies the entry of a summary judgment or the direction of a verdict against the pro-

her by logical implication with those jurisdictions in which judicial notice has conclusive effect.

5. For cases illustrating this statement and the statements of the next paragraph, *see* principally West Digest: Trial 139(1); Evidence 588. For an additional smattering of relevant cases *see* West Digest: Evidence 4, 5(2), 7, 589, 595; Appeal & Error 991, 1003; Railroads 348 (2,8), 350(17); Street Railroads 99(12).

6. Or "uncontradicted" or "uncontested."

7. Or "uncontradictable" or "incontestable."

8. The "rule" is stated here in terms that make it directly applicable to the determination of motions for summary judgment, directed verdict, and judgment notwithstanding the verdict. With some modification, the rule is also applicable to the determination of demurrers, 12(b)(6) motions to dismiss, and motions for judgment on the pleadings. *See, e.g.,* Morgan, *Judicial Notice,* 57 Harv. L. Rev. 269, 273 and n.7 (1944) citing Commissioners v. Prudden & Co., 180 N.C. 496, 105 S.E. 7 (1920). Applying the Class 2 part of the rule to pleadings, however, raises some questions that I would like to think about some more. For that reason, I postpone to another time any statement of the rule as it applies to pleadings or any statement of the rule in universal terms.

It is possible that this statement of the "rule" is reducible to terms which would render the distinction made therein illusory at another level of discourse. But to reduce the statement to that level would make it useless as a tool for legal analysis, even though to do so might make it more esthetic mathematically or philosophically.

ponent of a cause or defense only where the sole evidence, not otherwise discounted, upon an essential element of the proponent's cause or defense is:

[Class 1] evidence that an entity known directly to the senses and of established identity in the case has an attribute which it is judicially known not to have;

[Class 2A] evidence of a condition, fact, or event which, by the application of a certain judicially known principle of science or law of nature or a combination of such principles, could not have been the antecedent of a consequent condition, fact, or event established in the case; or

[Class 2B] evidence of a consequent condition, fact, or event different from that required by the application of a certain judicially known principle of science or law of nature, or a combination of such principles, to antecedent or surrounding circumstances established in the case.

An entity known directly to the senses under Class 1 is established in the case if its existence and identity

1) have been judicially noticed;
2) have been judicially or evidentially admitted;
3) are undisputed in the evidence; or
4) are so certain by the evidence that the court could justifiably direct a verdict on the issue, standing alone, of its existence and identity.

A condition, fact, event, or circumstance under Class 2 is established in the case if

1) it has been judicially noticed; or
2) it has been judicially or evidentially admitted.

CLASS 1 (THE "PHYSICAL FACTS" RULE)

The formulation of Class 1 contemplates the manipulation of three elements: (1) a proposition of fact that must be judicially noticeable; (2) a proposition of fact that must be at least so certain by the evidence that the court could justifiably direct a finding on it *standing alone;* and, (3) the evidentiary assertion the credibility of which is to be tested. The process by which these three statements are resolved to an answer about credibility is most usefully likened to the *conditional argument* of logic. The court can be said to draw a conclusion from the factual premises of a *conditional argument* and then to compare that conclusion to the testimony to be evaluated. The proposition in the major premise must be judicially noticeable. To be so noticed, it must be *indisputable.* The proposition in the minor premise need not be indisputable. Typically, it will state an adjudicative fact which is known to the court only by the concession

of the parties or by the testimony of witnesses. The coincidence of this adjudicative fact in the transaction or occurrence out of which the lawsuit arose will have been fortuitous and in no way dictated by the nature of the universe.[9] Before the court may use this proposition as its minor premise, it must determine that the proposition is "established in the case." The most popular way to justify this determination in the cases has been to say that the proposition is *undisputed.*

In summary, the court must (1) identify the major premise and determine that it is judicially noticeable (that is, indisputable), (2) identify the minor premise and determine that it is established in the case (which determination will usually and allowably be evidenced by a statement that the proposition is *undisputed*), (3) deduce the correct conclusion from the premises, and (4) compare that conclusion to the evidence to be evaluated.

Now we need a Class 1 case to test the formula.

I have found no New Mexico case that falls in Class 1, but a good example of that class of cases is *Cameron v. Goree,*[10] an automobile negligence action in which plaintiff had judgment on a jury verdict. The Supreme Court of Oregon reversed and ordered that a nonsuit be entered for the defendant. The testimony upon which plaintiff relied to prove defendant's negligence tended by necessary inference to show that just prior to the accident defendant's car, a 1941 Chevrolet, was travelling at somewhere between 204 and 318 miles per hour.[11] The court said: "We think that people of average intelligence know that automobiles such as the one which the appellant drove cannot travel 200 miles per hour."[12] It then invoked and discussed the "incontrovertible physical facts rule," concluding that "every deduction which can be drawn from the data given by Mr. LaValley attributes to the appellant's car a speed which is palpably impossible. . . ."[13]

Thus, we can state *Cameron v. Goree* in terms of the rule as follows: The sole evidence (not eliminated on other grounds) upon an essential element of plaintiff's case (defendant's negligence) was testimony (which necessarily implied) that an entity known directly to the senses (defendant's 1941 Chevrolet) had a capability (speeds of 204 to 318 miles per hour) which it was judicially known not to

9. Still it is possible for the proposition in the minor premise to be judicially noticeable. Therefore, I have let "judicial notice" remain as one of four ways in which the proposition may be "established in the case."

10. 182 Ore. 581, 189 P.2d 596 (1948).

11. *Id.*, 189 P.2d at 603-04.

12. *Id.*, 189 P.2d at 603.

13. *Id.*, 189 P.2d at 604.

have.[14] We can also state it as a conditional argument: If defendant's car was a 1941 Chevrolet, then defendant's car could not go 200 miles per hour. Defendant's car was a 1941 Chevrolet. Therefore, defendant's car could not go 200 miles per hour.

The proposition that a 1941 Chevrolet cannot go 200 miles an hour may not inhere in the nature of the universe, but based upon what people of average intelligence and information know about the characteristics and capabilities of 1941 Chevrolets, and in the absence of proof that this is not the kind of 1941 Chevrolet that people of average intelligence and information know about, we can justifiably view it as *indisputable,* and hence, judicially noticeable.

Is the minor premise that defendant's vehicle was a 1941 Chevrolet disputable? Yes, it is, notwithstanding the "fact" that a 1941 Chevrolet is unmistakably "physical" in appearance. It may well be that testimony that the car was not a 1941 Chevrolet would be met with disdain by persons who had been at the scene. But the jury was not at the scene. We are concerned only with what the jury might allowably "know." There's nothing in the nature of the universe yet known to man which requires that one of the vehicles participating in the occurrence otherwise being described to the jury be a 1941 Chevrolet. We must look at the "physical fact" from the *jury's* point of view, not from that of the witness. Any confusion with the rule is caused by shifting one's point of view from the jury box to the scene of the event.

Was the minor premise established, i.e., *undisputed?* We cannot really tell from the report. The court treated it as if it were,[15] and we can only say that it is the kind of fact that we would expect the parties to the usual case to concede. If it truly was undisputed, then *Cameron v. Goree* illustrates the correct application of the physical facts rule to a Class 1 case.

CLASS 2 (THE "SCIENTIFIC PRINCIPLES" RULE)

A condition, fact, event, or circumstance under Class 2 qualifies as "established in the case" only if it has been judicially noticed or judicially or evidentially admitted. I admit that any concession to the indiscriminate language of the cases would require us to include the other two means of qualification as well (that is: "undisputed in the evidence" and "so certain by the evidence that the court could justifiably direct a verdict upon it [the condition, etc.] standing

14. "Courts take judicial notice of facts which form part of the common knowledge of people who possess average intelligence." *Id.,* 189 P.2d at 603.

15. *Id.,* 189 P.2d at 603.

alone"). But if we include them here, we are left with only the illusion of a rule for Class 2 cases.

Consider the amazing thought process we must endorse if we are to accept the "undisputed-in-the-evidence" qualification: "We must disregard this evidence of fact A because it contradicts uncontradicted (undisputed) evidence of non-A." If the evidence of A contradicts the evidence of non-A, then the evidence of non-A is not undisputed. If the evidence of A does not contradict the evidence of non-A, then the "scientific principles" branch of the "physical facts rule" does not apply at all.

The conclusion must be that courts which talk of "undisputed" physical facts when discussing cases which fall within the "scientific principles" branch of the "physical facts rule" commit an embarrasingly fundamental transgression against straight thinking, unless they mean to say that a party must contradict evidence of physical circumstances directly and expressly (that is: circumstantial contradiction will not suffice) or have such circumstances taken as established against him. If that is what they mean, the proposition should be explicitly stated and explicitly justified.

Psychologically, we are all vulnerable, I suppose, to unarticulated and unexamined feelings about matters of proof. There is the feeling that testimony about "physical facts," even if not verified, is at least verifiable. We take the scientist's word when he tells us that a certain experiment produces a certain result, because it is unlikely (we believe) he would lie about something that can so easily be checked against him by repeating the experiment. Similarly, we accept testimony about the identity of a vehicle or the existence of damage or skidmarks because we believe it unlikely that a witness would misstate his perception when the object of that perception was or still is accessible to others. Furthermore, we believe, if the opponent could honestly dispute directly proponent's testimony about something so accessible, so verifiable, as "physical facts," he certainly would do so. As Professor McCormick has said in another context, "This notion . . . is an expression of feeling rather than logic but it is an emotion so universal that it may stand for a reason."[16]

True, it may so stand, and has probably so stood. But it should not. There are several explanations for an opponent's failure to contradict directly the existence of alleged "physical facts." For example, it is probably true much more often than not that the "physical facts" surrounding an automobile accident do not remain accessible and verifiable for longer than a few hours after the acci-

16. McCormick, Law of Evidence 503 (1954), discussing the "notion that it does not lie in the opponent's mouth to question the trustworthiness of his own declarations."

dent. In *Elzig v. Gudwangen,*[17] as an instance, the dual wheel tracks allegedly made by defendant's truck on the soft shoulder of the highway, if ever they were there, were doubtless obliterated long before plaintiff's counsel ever came into the case. To defendant's contention that these memories of tire tracks were "physical facts which had been conclusively established."[18] the Eighth Circuit Court correctly replied:

> We think that the evidence in this case as to the wheel track of the Elzig truck on the west shoulder of the highway was not in a broad sense, uncontradicted evidence, and was not the kind of evidence which could be accepted blindly and without regard to the credibility of the witnesses who gave it and the weight which should be accorded to it. The wheel track had ceased to exist shortly after the happening of the accident. Its existence at the time of the collision was not a fact easily disproved. . . .[19]
>
> * * *
>
> [T]he evidence as to the wheel track of the Elzig truck on the west shoulder of the road, while not expressly contradicted by any evidence to the contrary upon that point, is inferentially disputed by the testimony of the two young women in the Daniel car. . . .[20]

Thus, at the very most, direct contradiction of testimony tending to show the existence of certain "physical facts" could only be required when direct contradiction is still possible. And even that limited application of a direct-contradiction-required rule would serve too often as a trap for slow moving or slow thinking counsel. The rule should be that circumstantial contradiction is sufficient contradiction.[21]

Consider also the reasoning required of us if we are to accept the "so-certain-by-the-evidence" qualification for Class 2 cases. That is: Why must we disregard this evidence of fact A? Because it contradicts not–A, which is "so certain by the evidence." How can we say not-A is "so certain by the evidence" in the face of this evidence of A? Because this evidence of A is not substantial evidence. Why is this evidence of A not substantial evidence? At this point, we have (as the

17. 91 F.2d 434 (8th Cir. 1937).
18. *Id.* at 439.
19. *Id.* at 443.
20. *Id.* at 444.
21. Wisehart v. Mountain States Tel. & Tel. Co., 80 N.M. 251, 453 P.2d 771 (Ct. App. 1969), *cert. denied,* 80 N.M. 234, 453 P.2d 597 (1969). With what flexibility and with what exceptions the rule should be applied must be left to another time.

story goes) one of two choices. We may say, "Because it contradicts not-A, which is 'so certain by the evidence'," but that would lock us back into our circular argument in perpetual futility. Or we may look outside our rule for help. If we do that, of course, we have used some other (probably unarticulated) set of premises to bail us out—not those which underlie the "physical facts rule."

The rule for Class 2 cases also contemplates the manipulation of three statements. The process required might perhaps also be stated superficially in the form of a syllogism or a conditional argument, but to do so would conceal more than it would reveal. The equation is (or is most like) the process required for cases of Class 2.

The simplest form of statement for Class 2 is an equation with a two-term statement on the left and a one-term statement on the right (our "consequent condition, fact, or event"). One of the two terms on the left is a constant; this, of course, is the proposition which must be judicially noticeable. The other term on the left (our "antecedent or surrounding circumstances") and the single term on the right are variables; that is, there is nothing in the nature of the universe which informs the trier of their identity; before the trier is told by witnesses what "facts" fill these blanks, the trier might reasonably accept any one or combination of many alternatives. For Class 2A cases, the variable term on the right is given. For Class 2B cases, the variable term on the left is given.

To apply the rule correctly, the court must (1) determine that the given term is "established in the case", (2) determine that the constant term is *indisputable,* that is, judicially noticeable, (3) solve the equation for the third term, and (4) compare the result to the evidence to be evaluated. If the given term is not established in the case, or if the constant term is not judicially noticeable, the evidence to be evaluated should be sent to the trier of fact.

Again we need some cases to test our formulation.

A Class 2A example of the "physical facts rule" is *Ortega v. Koury,*[22] wherein the defendant was sued for the wrongful death of plaintiff's 3½-year-old son. Defendant's northbound car concededly struck the boy with its right headlight somewhere in the east or northbound lane of the street. The trial court sitting without a jury found for the defendant, but the New Mexico Supreme Court reversed and remanded to the trial court "with a direction that it set aside the judgment, assess the plaintiff's damages, and enter judgment in his favor for the amount thereof"[23] on the ground that

22. 55 N.M. 142, 227 P.2d 941 (1951).
23. *Id.* at 147, 227 P.2d at 944.

"[t]he findings made by the court on the issue of negligence are not supported by substantial evidence."[24]

Defendant had testified "that he did not see the child that was killed nor any other child on the street at or prior to the fatal accident"[25] and that the impact had occurred *three to five feet* from the east line of the street.[26] This testimony would have supported the theory (apparently not expressly adopted by the defendant) that the boy had run quickly into the street from the east side. The supreme court rejected this testimony (and, implicitly, the theory it supported) as "so inherently improbable as to be unworthy of belief."[27] The court said:

> Physical facts and conditions may point so unerringly to the truth as to leave no room for a contrary conclusion based on reason or common sense, and under such circumstances the physical facts are not affected by sworn testimony which in mere words conflicts with them. When the surrounding facts and circumstances make the story of a witness incredible, or when the testimony is inherently improbable, such evidence is not substantial.[28]

The court was not clear about the "physical facts" upon which it relied, nor about the specific testimony which it deemed contradicted by those "physical facts," but the only evidence that tends to contradict defendant's testimony with any logical plausibility is that there was glass and blood on the pavement *ten feet* from the east line of the street, or one-half foot from the center line.[29]

Let's apply our restated rule to the decision. First, we can state the decision in terms of the rule as follows: The sole evidence upon an essential element of Koury's defense (unavoidable accident) had as a necessary link testimony of a fact (impact occurred three to five feet from the east sideline of the street) which, by the application of a combination of judicially known principles of physics (stated in lay terms according to their effect: where a car collides at low speed with a very small boy, impact debris will come to rest at the point of impact or on a short extension through the point of impact of the line of travel of the car), could not have been the antecedent of an established consequent condition (there was glass and blood on the pavement ten feet from the east sideline of the street).

24. *Id.* at 146, 227 P.2d at 944.
25. *Id.* at 144, 227 P.2d at 942.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* at 143-144, 227 P.2d at 942.

The graphic statement of this equation might look something like this:

"X"		Constant Term		Given Term
unknown point of impact	X^{30}	Where a car collides at low speed with a very small boy, impact debris will come to rest at the point of impact or on a short extension through the point of impact of the line of travel of the car	=	glass and blood on the pavement ten feet from the east sideline of the street

Let's assume for the moment that our given term is "established" and our constant term is "indisputable"; then, solve the equation for the third term, the unknown point of impact. The answer will be "impact ten feet from the east sideline of the street." By comparing this result to the testimony to be evaluated ("impact three to five feet from the east sideline of the street"), we would conclude that the testimony to be evaluated could not be true.

Before the Supreme Court of New Mexico accepted that conclusion as correct, however, it should have asked itself consciously (1) whether the given term of the equation was established and (2) whether the constant term was *indisputable.* If the answer to either question was no, the court should not have directed judgment notwithstanding the verdict.

Was the given term established?

It was not judicially noticed, nor could it have been. If we say it was established because the investigating policeman so testified,[31] we have employed a rule of decision that has nothing to do with the physical facts rule. That is: the trier of fact is bound by the testimony of an investigating policeman. We know that the Supreme Court of New Mexico did not intend to adopt that rule. Heavily

30. As used here, the multiplication sign means only that the terms are to be employed together by way of the process required by the principle or principles invoked; not that the terms are literally to be multiplied together. Sometimes, however, the process required would be simple multiplication. For example, in a case where such testimony would be relevant, defendant testifies that he measured the circumference of Circle X and it was 3.14 yards around; plaintiff testifies that he stepped off the diameter of Circle X and it was 2 yards across. By applying a simple mathematical principle requiring only one-step multiplication, we can determine as a "physical fact" that one of the parties is mistaken. Unfortunately, the principle tells us nothing about *which* party is mistaken. Even more unfortunately, some courts have thought that it does.

31. Ortega v. Koury, 55 N.M. 142, 144, 227 P.2d 941, 942 (1951).

though the testimony of an investigating policeman may usually weigh in the balance, the credibility of an investigating policeman is not, by virtue of his official status or respected position, put beyond question. Nor can we say his testimony must be accepted because it was not contradicted. It was contradicted circumstantially by defendant's testimony that the point of impact was from three to five feet from the east sideline of the street.[32] (Most of this paragraph, of course, has served as further explicit demonstration that saying a given term under Class 2 is "established in the case" because it is "undisputed in the evidence" or "so certain by the evidence" is saying nothing at all about the "physical facts rule.")

Under the restated rule, one permissible means of qualfication as "established in the case" remains. Was the given term judicially or evidentially admitted? The court said nothing about a judicial admission. In one part of his testimony, however, the defendant apparently accepted as true the policeman's testimony that the glass and blood were found ten feet from the curb. He attempted to reconcile this evidence with his (the defendant's) testimony that impact occurred three to five feet from the curb by applying his own set of scientific principles to the facts.[33] Arguably then, the defendant brought himself within the rules which allow a party's self-disserving testimony to be held conclusive against him, that is, to be treated as an evidential admission.[34] His testimony as a whole showed unequivocally (the argument goes) that he did not take issue with the proposition that glass and blood were found ten feet from the curb, but only with the plaintiff's contention that a certain inference had to be drawn from that fact. If we accept this argument (and it is tenable), then the court did determine correctly (or could have, had it considered the problem explicitly at all) that the given term of our equation was "established in the case," because evidentially admitted.

If we accept this argument, we are led directly to the second question the court had to resolve. Was the constant term of our equation indisputable, i.e., judicially noticeable?

The combination of principles of physics which the court unconsciously (but necessarily) applied as its constant term was a questionable subject for judicial notice. There is at least some support in

32. *Id.*

33. "Well, you take here now, when you hit a person, maybe the momentum of the car dragged him to there, or maybe the shatter of the glass could fly 10 feet, or when you hit a body or anything you hit, it isn't going to fall right where you hit it, it could have really gone farther back." *Id.*

34. *See* McCormick, Law of Evidence 513-16 & n. 14 (1954).

experience for the physical principle which the defendant urged for the court's notice.[35] Courts generally have been reluctant to allow formula reconstruction of events in accident cases involving moving vehicles, because of the many unidentified, immeasurable, and uncontrollable variable forces which may come into play.[36] There are several relevant variables not accounted for in our equation, because they were not established by the parties: At the instant of impact, was the line of travel of defendant's car parallel to the east line of the street or was it swerving? Was the little boy moving and, if so, how fast and what was his line of travel? There are probably others; without the help of a physicist, that's about all we can say. Perhaps the court should not—without the help of a physicist—have fashioned its own laws of physics for the occasion.

If *Ortega v. Koury* is wrong, it is the only erroneously decided Class 2A case I have found in New Mexico.[37]

We can now return to *Bolen v. Rio Rancho Estates*[38] to illustrate the misapplication of the physical facts rule to a Class 2B case. Plaintiff's fourteen-year-old daughter (Elaine) was killed when the motorbike she was riding collided at right angles at an intersection with a truck driven by one Martin. Elaine was proceeding east on 19th Street; Martin was proceeding south on Grand Street. To see each other as they approached the intersection, Martin and Elaine had to look over (or through) a solid wooden fence four feet high which ran around the corner lot owner's front yard. Plaintiff sued Martin, of course, but also sued the corner lot owner (Defendant Drum), the lumber man who built the fence (Defendant Shoffner), and the area developer (Defendant Rio Rancho Estates), on the theory that the fence obstructed visibility and endangered traffic and that erection and maintenance of such a fence at the intersection was

35. "[W]hen you hit a body . . ., it isn't going to fall right where you hit it . . . ." Ortega v. Koury 55 N.M. at 144, 227 P.2d at 942.

36. State *ex rel.* Los Lunas Hosp. & Trng. Sch. v. Montgomery, 78 N.M. 266, 430 P.2d 763 (1967); International Svc. Ins. Co. v. Ortiz, 75 N.M. 404, 405 P.2d 408 (1965); Massey v. Beacon Supply Co., 70 N.M. 149, 371 P.2d 798 (1962); Crocker v. Johnston, 43 N.M. 469, 95 P.2d 214 (1939). *And see* Cameron v. Goree, 182 Ore. 581, 189 P.2d 596, 606 (1948):

> The damage wrought in some collisions appears to be freak and capricious . . . . In all instances, however, the law of physics operates indiscriminately and what appears to be novel damage in a particular case would be readily understandable if all the circumstances were brought to light.

37. Correctly decided Class 2A cases are those New Mexico cases cited *supra* note 37, plus Johnson v. Mercantile Ins. Co., 47 N.M. 47, 133 P.2d 708 (1943) and Larsen v. Bliss, 43 N.M. 265, 95 P.2d 214 (1939). Elzig v. Daniel, discussed *supra* notes 19-22, is also a correctly decided Class 2A case.

38. 81 N.M. 307, 466 P.2d 873 (Ct. App. 1970).

negligence which was a concurring proximate cause of the accident.

The trial court directed verdicts in favor of Defendants Shoffner and Rio Rancho Estates. The jury returned verdicts in favor of Defendants Drum and Martin. The New Mexico Court of Appeals reversed and remanded as to Defendant Martin, but affirmed the trial court as to the other three defendants. Directed verdicts in favor of Defendants Shoffner[39] and Rio Rancho Estates[40] were proper (said the court), and a verdict should have been directed for Defendant Drum,[41] because plaintiff had produced "neither evidence nor inference that Elaine's view of Martin's pickup was obscured by the fence."[42]

Plaintiff did produce a witness who testified that he had to stand up three or four inches on his motorbike (the very motorbike Elaine had borrowed and ridden into the accident) to see over the fence and that Elaine was quite a bit shorter than he was.[43] But the court dismissed his testimony as incredible under the "physical facts rule"[44] saying:

> The motorcycle owner's testimony as to his own obscured vision is inherently improbable because the undisputed physical facts show his vision was not obscured. . . . The physical facts are that anyone with an eye level four feet or higher above 19th Street could see the cab of the pickup over the fence.[45]

This ruling was erroneous, and holding it up to our restated rule will show us why. First, we can verbalize it in terms of the rule as follows: The sole evidence upon an essential element of plaintiff's case against Defendants Drum, Shoffner, and Rio Rancho Estates was testimony of a consequent condition (Elaine's view of Martin's truck was obstructed by Drum's fence) different from that required by the application of a certain judicially known principle of physics (simply stated: light travels from object to eye or to camera lens in a straight line) to purportedly established circumstances (a straight line drawn from a point identical to Elaine's eye level at any relevant location on 19th Street, to a point anywhere on the upper two feet of Defendant Martin's truck at any relevant location on Grande Street would not intersect Defendant Drum's fence at any point).

Once again, a more graphic form of equation might look like this:

39. *Id.* at 308, 466 P.2d at 874.
40. *Id.* at 312, 466 P.2d at 878.
41. *Id.* at 308, 466 P.2d at 874.
42. *Id.* at 309, 466 P.2d at 875.
43. *Id.*
44. *Id.* at 308-09, 466 P.2d at 874-75.
45. *Id.* at 309, 466 P.2d at 875.

Given Term		Constant Term		"X"
A straight line drawn from a point identical to Elaine's eye level at any relevant location on 19th Street to a point anywhere on the upper two feet of Martin's truck at any relevant location on Grande Street would not intersect Drum's fence at any point	X^{46}	Light travels from object to eye or to camera lens in a straight line	=	Was Elaine's view of Martin's truck obstructed by Drum's fence?

Assuming again for the moment that our given term is "established" and our constant term is "indisputable," our solution for the third term of the equation will be "Elaine's view of Martin's truck was *not* obstructed[47] by Drum's fence." By comparing this solution to the testimony to be evaluated ("Elaine's view of Martin's truck *was* obstructed by Drum's fence"), we would again conclude that the testimony to be evaluated could not be true.

But, once again, the court should not have drawn this conclusion without first consciously determining (1) that the given term of the equation was established and (2) that the constant term was *indisputable.*[48] In this case, the term which must qualify as judicially noticeable does so. It states a verifiable principle of physics which is also common knowledge. By what token, on the other hand, did the court consider its given term to be "established"?

The court said:

> Photographs show that at a height four feet above the eastbound

46. *Supra* note 31.

47. This case necessarily stands for the proposition that partial obstruction is no obstruction, a proposition with which eye doctors, psychiatrists, camouflage experts, and traffic safety experts would, I expect, take brisk exception. I suggest preliminarily that the definition of visual obstruction implicit in the Court's decision should not be (or become) the law.

48. Though the Court misapplied the rule, it stated the substance of the rule correctly:

> The cases denying application of the rule have usually done so either because the physical facts were not established, . . . or because the established physical facts were such that conflicting oral testimony was not inherently improbable. . . . Bolen v. Rio Rancho Estates, 81 N.M. 307, 309, 466 P.2d 873, 875 (Ct. App. 1970).

The "inherently improbable" formula has often been stated in the cases. By speaking in terms of "inherent improbability," a court shows its vaguely articulated recognition that there is a scientific or commonly known principle at work which operates with such certainty that the court is willing to notice it judicially.

> lane of travel on 19th Street almost all of the cab of Martin's pickup is visible above the fence. . . . Surveyed elevations of the two streets and of the fence at its highest point show that at a height four feet above 19th Street, the pickup, which was over six feet in height, would always be visible over the fence. . . . It is undisputed that the seat of a motorcycle 'just like' the one in the accident is 31½ inches above the ground. A 5 foot 2 inch female, seated erect on the motorcycle, has an eye level 4 feet 7 inches above the ground. These physical facts render inherently improbable the inference from the motorcycle owner's testimony that Elaine's vision over the fence was obscured because of her size. . . .[49]

The court neglected to say that all of the "facts" which it recited, and which it employed to nullify *plaintiff's* evidence, came to the court's knowledge by way of *defendants'* witnesses[50] or by way of *defendants'* counsel.[51] What the court really meant when it held, by implication, that these facts were "established" was that it believed the testimony of *defendants'* witnesses and that it accepted *defendants'* photographs and diagrams as authentic and accurate representations of certain physical circumstances which could no longer be verified by independent investigation.

In other words, the court thought and acted as it would have been permissible for a jury to do in reaching a verdict on the evidence, and not as a court must do in deciding on a motion for directed verdict. For it was *not* "established" to the certainty required for directing a verdict that Elaine Bolen could see Martin's truck over Drum's fence just because the defendants produced a surveyor who testified (albeit in the impressive language of trigonometry) that she could. Whether or not this surveyor was mistaken or this survey was slanted should have been for the jury to decide in light of *all* the evidence. It was *not* "established" to the certainty required for directing a verdict that Elaine Bolen could see Martin's truck over Drum's fence just because the defendants produced a photograph which testified that she could. Seeing may be believing, but seeing a picture requires us to believe only that someone has indeed taken a picture of *something.* Whoever first said, "one picture is worth a thousand words" said nothing about any guarantee that the thousand words be truthful. Every law library has a six-pound, 723-page book that illustrates with photographs the many ingenious ways in which photographs can be made to lie.[52] Whether or not this photograph had been made to lie

49. *Id.*

50. Record, vol. 2, at 299-337, Bolen v. Rio Rancho Estates, 81 N.M. 307, 466 P.2d 873 (Ct. App. 1970).

51. *Id.* at 226; Answer Brief for Defendant Drum at 7.

52. Photographic Misrepresentation (M. Houts ed. 1964). In this case, little sleight-of-

was for the jury to decide in light of all the evidence.[53] The picture was definitely *not* the "physical fact" upon which the issue of visibility turned.

What the court must have meant when it said that certain of these facts were "undisputed" is that the plaintiff did not *directly* assail the defendants' testimony on these points by counter testimony; for certainly these "undisputed" facts were of logical necessity *circumstantially* disputed by plaintiff's witness.[54] And, of course, it is clear that circumstantial contradiction can suffice to put an opponent's testimony in dispute.[55]

In sum, the surrounding circumstances upon which the court raised its "undisputed physical facts" were clearly not "established": they were not judicially noticeable; they were not judicially admitted; they were circumstantially disputed by the testimony of plaintiff's witness. Therefore, the court's conclusion was invalid under the "physical facts rule" because one of the terms of the equation by which the "physical facts rule" should have been applied was invalid.[56]

CONCLUSION

Perhaps it is wrong to hold courts accountable for their judgments on the substantiality of evidence. Perhaps what is needed in this era of crowded calendars is a whole set of rules solid in sound but vague in application which a judge can wield to terminate cases that seem obvious to him. If so, then it is wrong to tinker with the "physical facts rule." For the "physical facts rule," applied unanalytically, is the weapon par excellence for cutting off a party's right to trial by jury. Once the magic words are invoked, it often happens that no one

camera would have been required. The photographer might simply have taken the photographs at a height from the ground misleadingly greater than the four feet to which he testified; or from a location on the ground different from the location on the street to which he testified; or both. Whether he did or not should have been for the jury to decide.

53. Or if it was for the court, it was for reasons which have nothing to do with the "physical facts rule."

54. *Supra* note 44 and accompanying text.

55. Wisehart v. Mountain States Tel. & Tel. Co., 80 N.M. 251, 453 P.2d 771 (Ct. App. 1969), *cert. denied,* 80 N.M. 234, 453 P.2d 597 (1969). *Supra* note 22 and accompanying text.

56. Correctly decided Class 2B cases in New Mexico are Alexander v. Cowart, 58 N.M. 395, 271 P.2d 1005 (1954), and Wisehart v. Mountain States Tel. & Tel. Co., 80 N.M. 251, 453 P.2d 771 (Ct. App. 1969), *cert. denied,* 80 N.M. 234, 453 P.2d 597 (1969).

A very recent case, Sanchez v. Public Service Co.,___ N.M.___, 487 P.2d 180 (Ct. App. 1971), which the Court erroneously purported to decide under the "physical facts rule," does not fall within the rule at all, because–as the factual issue was presented–there was no legitimate question of judicial notice to be decided. As a straight-forward problem regarding the burden of going forward with evidence, the case is interesting. Its true significance should not be obscured by shrugging it off as a "physical facts" case.

(including the party who invoked the words) is further able to perceive that there is not a "physical fact" to be seen in the courtroom. In the mind's eye, description has taken on substance and stands there as the thing described. But to seem is *not* to be, nor to have been. Although the photograph in court and the diagram drawn so impressively by an expert witness *seem* to *be* the object in question, neither is the *thing* purportedly described. It is still the duty of the fact-finder to reconstruct the events as best it can from these "seemings."

The fact-finder should not be relieved so casually of the important and difficult responsibility that the uncritical invocation of the "physical facts rule" allows. The proposals set forth should ensure that this will not happen.