Washington Law Review

Volume 30
Number 2 *Washington Case Law-1954*

5-1-1955

Evidence

John P. Kovarik

will and for the determination of the validity of the provisions therein with respect to real estate. The trial court sustained a demurrer to the complaint, plaintiffs refused to plead further, judgment of dismissal was entered, and plaintiffs appealed. The court held, as a matter of first impression in this state, that when a complaint is filed for a declaratory judgment and the plaintiffs set forth facts showing the existence of an actual controversy relating to the matter covered by the declaratory judgment act (RCW 7.24.020), although not showing that the plaintiffs are entitled to a declaration of rights in accordance with their theory, a demurrer to the pleadings should be overruled. See also *Property* at page 178.

EVIDENCE

Hearsay—An Exception to the Rule. The importance in a civil action of the criminal record of a party or the deceased in a wrongful death action was further enhanced by the decision in *Fleming v. Seattle*.[1] Last year the court in *Minch v. Local Union No. 370, I.U.O.E.*[2] went beyond the general rule that the record of conviction could be used to impeach the witness.[3] There it held that the *fact* of conviction, when material without regard to the facts upon which the conviction was based, was admissible as to the amount of damages a plaintiff could recover for lost wages. In order to obtain employment, which was essentially limited to federal projects in that area, the plaintiff would have probably needed a security clearance from the F.B.I.

In the *Fleming* case, the defendant sought to show habitual drunkenness as affecting the earning power and life expectancy of the decedent in a wrongful death action. An offer of the record of a justice court showing eleven convictions for drunkenness, mainly on pleas of guilty, was not accepted by the trial court which sustained an objection that this was hearsay evidence. The defendant took exception. The jury rendered a verdict for $55,580 which the trial judge reduced, with the consent of the plaintiff, to $37,580. The decedent was 62 years old, had been advised by his physician to "take it easy" because of poor health, and had not been gainfully employed for several years. The decedent's wife had been supporting him and their three minor sons. While the majority opinion did not so state, Justice Olson in his dissent indicates that the judgment was considered excessive. This excessiveness would induce the court to find an error, as to the damage question, to be prejudicial.

Thus, a dilemma faced the court. It could follow what it conceded

[1] 145 Wash. Dec. 447, 275 P.2d 904 (1954).
[2] 44 Wn.2d 15, 265 P.2d 286 (1953); noted, 29 WASH. L. REV. 123 (1954).
[3] 1 WIGMORE, EVIDENCE 980 (3d ed. 1940).

to be the strict, general rule[4] against the admission of this hearsay evidence, or it could take a realistic look at the problem, admit that the evidence offered was clearly relevant, and discard the general rule where it seemed to produce an inequity. With a frank admission that the question had not been previously decided in this jurisdiction, and on the strength of meager precedent from other jurisdictions[5] coupled with recognition that modern writers urge an exception in this area,[6] the court chose the latter alternative and reversed the judgment on the damage issue. The justice court record, it was held, should have been admitted as persuasive, though not conclusive, evidence.

The rule against hearsay evidence is based on the proposition that to admit such evidence would deprive the opposition of the right to cross-examine the source.[7] The rationale of this decision seems to be that, practically speaking, since cross-examination probably could turn up no refutation of the inference this evidence begets, the opposition could lose no valuable right. That being true, there no longer is reason to exclude this probative material. The comment on the Rule in the Model Code of Evidence, cited in the opinion, illustrates the point:

> Where a person has an opportunity to defend himself and has entered a plea of *nolo contendere* or not guilty or has been found guilty beyond a reasonable doubt, the judgment entered on the plea or verdict certainly has sufficient value to be worth the consideration by a trier of fact, and necessarily includes a finding of facts essential to the judgment in the particular case.[8]

There seems to the writer little danger that the court will, considering the practical approach taken, deprive the trial judge of all discretion in such cases when in his opinion the admission of evidence of prior convictions would, though relevant, be unduly prejudicial.

---

[4] *See* 145 Wash. Dec. at 453, 275 P.2d at 910 where the court states: "The general rule appears to be that a judgment of conviction is not admissible in a civil case as evidence of the facts upon which it is based."

[5] The court cited Holmberg v. Murphy, 167 Minn. 232, 208 N.W. 808 (1926); Townsend v. Armstrong, 220 Iowa 396, 260 N.W. 17 (1935); and Craig v. Boston & Maine R.R., 92 N.H. 408, 32 A.2d 316 (1943). The Holmberg case, though a terse opinion, is directly in point. There, a record of former conviction for drunkenness was held admissible as to the damage issue in a wrongful death action. The Townsend case indicated that an allusion to such a record, before the jury, was not error inasmuch as the evidence should have been admitted and therefore the plaintiff could not complain. There is nothing in the Craig case that would indicate a criminal record was offered but merely stands for the proposition that testimony of prior convictions was material to the damage issue in a wrongful death action.

[6] The court cited 5 WIGMORE, EVIDENCE § 1671a (3d ed. 1940), and MODEL CODE OF EVIDENCE, Rule 521 (1946).

[7] 5 WIGMORE, EVIDENCE § 1367, 1368 (3d ed. 1940).

[8] MODEL CODE OF EVIDENCE, Rule 521 (1946).

Expert Testimony—Facts Which Must Be Included In Hypothetical Questions, and Facts Which May Form Basis of Answer. *Berndt v. Department of Labor & Industries,*[9] was a proceeding to obtain a pension under the Workman's Compensation Act on the theory that the death of the claimant's husband from coronary thrombosis was caused by worry resulting from fear that acute dermatitis, incurred in the course of the husband's employment, would be considered to be a venereal disease by the claimant, his wife. The only support of this theory was testimony given by a medical expert who had no knowledge of the decedent except what was included in a hypothetical question. This was deprived of its probative value by the court mainly on the ground that the question had omitted the fact that the claimant had been present at the initial diagnosis of the ailment as a dermatitis rather than as a social disease. The court expressly refused to rule on the questions: (1) That the dermatitis was the proximate cause of the coronary thrombosis, and (2) there was no evidence to support the allegation of apprehension of the decedent as the testimony of the claimant on this point was hearsay as to a purely subjective matter. The court stated the general rule:

> Although hypothetical questions propounded to medical experts need not always include all undisputed facts, any undisputed fact which is material and important in the formation of a fair, intelligent and sound opinion should be included.[10]

The court did not like the controversy. It referred to it as "not just another heart case" and indicated that no court had been asked to go "so far" as claimant urged. It is submitted, however, that in its act of conclusively suppressing the action by affirming the trial court's grant of judgment notwithstanding the verdict, it might have misapplied the rule. It is true that the fact of the claimant's knowing of the diagnosis is undisputed, but is it not ultimately the fact of the husband's apprehension which is in dispute? So long as the court is willing to allow the testimony of the claimant on this issue there is evidence to support the theory that the decedent was so worried; only the fact that he might not have reasonable cause to worry can be established by showing he was aware that she had heard the diagnosis. Must the claimant present to the expert this issue to decide along with the request for an interpretation of the general hypothesis given him?

---

[9] 44 Wn.2d 138, 265 P.2d 1037 (1954).

[10] *Id.* at 144, 265 P.2d at 1043.

There was no mention of the case of *State v. Underwood*[11] where it was stated:

> We think the rule is fairly well settled that, where the facts are in dispute, it is sufficient if a hypothetical question fairly states such facts as present the examiner's theory of the case.[12]

The court then went on to say that it was the duty of the jury to decide whether the facts as stated in the hypothetical question were true. This might therefore still be regarded as the general rule for disputed facts. The rule that material facts may not be omitted is directed at the tendency of counsel to fail to establish a complete "hypothesis" for the conclusion he wishes to obtain from the expert.[13] This "hypothesis" must, of course, be reasonably close to the case at hand in order for the jury to gain any advantage from the expert interpretation.[14] The meaning of the word "material" then might be material to the establishment of a logical and complete fact basis for the conclusion, and not material as in considering admissibility. Otherwise, as in the present case, the result of the ruling is to force the examiner to include conflicting evidence in his hypothetical questions and force the expert to comment upon that evidence. Alternative fact situations may be presented to the expert on cross-examination and his opinion on the opponent's theory obtained. This is the normal method for allowing the jury to decide the disputed issues of fact and yet enlist the aid of experts to interpret these facts for them when they are not qualified to do so.

The remaining fault the court found with the answer of the expert in this case was that he had assumed the additional grounds of financial worry and pre-existing coronary condition as a basis for his answer. This was drawn out on cross-examination. Though from the question which stated the decedent had been away from work for about seven

[11] 35 Wash. 558, 77 Pac. 863 (1904). This case was cited in 56 Wash. 47, 105 Pac. 149 (1909), and 112 Wash. 560, 192 Pac. 950 (1920), as explanatory of the rule on hypothetical questions. It has not been overruled.

[12] 35 Wash. at 561, 77 Pac. at 866.

[13] Bozman v. State, 177 Md. 151, 9 A.2d 60 (1939). The court stated in 9 A.2d at p. 62, regarding a question with reference to the distance a car could be stopped: "The question should have stated the condition of the tires on the car, the grade of the road, the condition of the concrete surface of the road, and any other factors which might have been material to the conclusion. It is well settled in this State that a hypothetical question must embrace every material element of the hypothesis founded upon the evidence, and a hypothetical question omitting any vital or essential fact testified to is properly disallowed." See also: Tugman v. Riverside & Dan River Cotton Mills, 144 Va. 473, 123 S.E. 179 (1926); Mathisen Alkali Works v. Redden, 177 Md. 560, 10 A.2d 699 (1940); and Starr v. Oriole Cafeterias, Inc., 182 Md. 214, 34 A.2d 335 (1943). The above three cases were the authority cited for the rule in the Berndt case.

[14] Griffith v. Thrall, 109 Ind. App. 141, 29 S.E.2d 345 (1940).

weeks, some financial worry might be inferred, and a diseased coronary artery might be a medical conclusion of the expert, the court is following the general rule that the whole basis for the conclusion must be found in the hypothetical question in such an instance.[15] This should illustrate the need for apprising the expert of the pitfalls of cross-examination, and the need for careful phrasing of the question.

Judicial Notice—Useful Life of Structure According to Internal Revenue Bulletin. *McFerran v. Heroux*[16] involved an action for damages for the breach of a covenant by a lessee of real property; the subject matter of the litigation was a grandstand, which was deemed—as between the parties—to be the personal property of lessee. The wooden grandstand burned to the ground and the defendants, the lessee and his assigns, were held in the trial court to have breached a covenant to rebuild. (The lessor had an option to purchase the grandstand for a stated small sum at the termination of the lease.) Because the plaintiff had offered no evidence as to the value of the grandstand at the time the option was to be exercised, the trial court awarded $1.00 damages to plaintiff. On appeal the supreme court cited for the first time the Model Code of Evidence, Rule 802,[17] as its general authority for taking judicial notice of an Internal Revenue Bulletin,[18] which set the life of a wooden grandstand at 15 years. On the basis of this the court changed the judgment to one for over $64,000, jointly and severally against all defendants.

While probably considering their decision in accordance with the equities of the case in that the trial disclosed the lessee-defendant had recovered about $60,000 from fire insurance, it is submitted that the court misunderstood and misapplied the rule they used. Assuming that the court is correct in using the Model Code, which does not purport to be a restatement of existing law, but a revision and statement of what the writers[19] think it should be, the court acted contrary to the Code when they arbitrarily applied Rule 802 without informing the

[15] 2 WIGMORE, EVIDENCE § 672 (3d ed. 1940).

[16] 44 Wn.2d. 631, 269 P.2d 815 (1954). See also *Property* at page 175.

[17] MODEL CODE OF EVIDENCE, Rule 802 (1942).

[18] U. S. Treasury Department, Bureau of Internal Revenue, Bulletin "F" (Rev. 1942), Income Tax Depreciation Obsolescence Estimated Average Useful Lives and Depreciation Rates, 2 CCH Fed. Tax Rep. § 1776.

[19] The introduction to the Code by Wm. Draper Lewis, Director of the American Law Institute, admits that some of the Code's provisions are controversial and states that because of the confused state of the law of evidence the attempt to write a restatement was abandoned and a revision undertaken. Though Professor Wigmore, as Chief Consultant, did not agree with the Code form, Mr. Lewis indicates that the substantive rules are substantially in accord with the Wigmore viewpoint.

parties of "the tenor of the matter to be judicially noticed and affording them reasonable opportunity to present [the court] information relevant to the propriety of taking such notice."[20] Until publication of the opinion, neither of the parties nor the court had mentioned judicial notice; the respondent was offered no opportunity to be heard.

It would also seem arguable that the Bulletin resorted to was not proper subject of judicial notice. The court quoted Rule 802: "The judge may of his own motion take judicial notice of . . . (b) specific facts so notorious as not to be the subject of reasonable dispute, and (c) specific facts and propositions of generalized knowledge which are capable of immediate and accurate demonstrations by resort to easily accessible sources of indisputable accuracy. . . ."[21] The Bulletin itself, however, after indicating in the first paragraph that the data therein is merely the "trend and tendency of official opinion," cautions in the second paragraph:

> Taxpayers and officers of the Bureau are cautioned against reaching conclusions in any case solely on information contained herein and should base their judgment on the application of all pertinent provisions of the law regulations, and other Treasury Decisions to all the facts in any particular case. They are set forth solely as a guide or starting point from which correct rates may be determined in the light of the experience of the property under consideration and all other pertinent evidence.[22]

Yet the court proceeded from a condition of no evidence on the depreciation rate to an established rate of 15 years, based on the Bulletin alone.

As specific authority for including the Bulletin the court said: "Within the scope of subparagraph (c) of the Model Code of Evidence, supra, this court has on numerous occasions taken judicial notice of standard mortality tables. . . ."[23] Professor Wigmore has deemed the taking of "judicial notice" of mortality tables a misnomer[24] and suggests that these are admissible when offered as evidence, though hearsay, under an exception he calls "Learned Treatises."[25] It is

[20] MODEL CODE OF EVIDENCE, Rule 804 (1942). See also, Rule 806(4) and comment thereon.

[21] The examples given in the comment on subparagraph (c) are: (1) Proper judicial notice that an ordinary auto could not negotiate a 95 degree turn at 45-50 miles per hour without mishap, and (2) a showing of divided opinion on judicially noticing that the period of gestation sometimes exceeds 300 days.

[22] *Supra* note 18.

[23] The cases cited for this were: Cox v. Polson Logging Co., 18 Wn.2d 49, 138 P.2d 169 (1943); Piland v. Yakima Motor Coach Co., 162 Wash. 456, 298 Pac. 419 (1931); Roalsen v. Oregon Stevedoring Co., 147 Wash. 672, 267 Pac. 433 (1929); and Heath v. Stephens, 144 Wash. 440, 258 Pac. 321 (1927).

[24] 9 WIGMORE, EVIDENCE § 2566(4) (3d ed. 1940).

[25] 6 WIGMORE, EVIDENCE §§ 1690-1700 (3d ed. 1940), and note especially § 1698.

significant that Professor Wigmore was the Chief Consultant in the drafting of the Code and the Code contains Section 529 entitled "Learned Treatises." Even our court has refused to treat the mortality tables as final determination of life expectancy, but only as some evidence to which may be added the state of health, occupation, etc., of the person whose expectancy is being determined.[26] It would seem then, that if the Bulletin were admissible at all, it would be limited in effect to some indication of the depreciation rate, and considering the caveat therein, not enough to finally determine that rate.

While there is a division of opinion on whether it is proper for an appellate court to take judicial notice of a fact overlooked by the trial judge[27] it is universally held that new evidence may not be introduced at that level. By introducing the Internal Revenue Bulletin of their own motion, it is submitted that the court not only took judicial notice, without apprising the parties, of an item not the proper subject thereof, but in effect introduced evidence into the appeal.

JOHN F. KOVARIK

LABOR LAW

Effect of Arbitration Agreements. The uncertainty created by the 1947 amendment to § 1 of the Washington Arbitration Act of 1943[1] was partially dispelled by the case of *Greyhound Corporation v. Amalgamated Association of Street, etc., Employees.*[2]

The action arose under a non-statutory arbitration provision contained in a collective bargaining agreement between Greyhound and the Union. The Union had objected to changes in the duties of certain of the bus drivers in the employ of Greyhound and demanded that the ensuing dispute be submitted to arbitration. Greyhound declined to arbitrate, sought a declaratory judgment to the effect that no arbitrable issue existed between the parties. The Union demurred to Greyhound's

[26] In Roalsen v. Oregon Stevedoring Co., note 8 *supra* at 675, 267 Pac. at 436, the court said, "It is true that the effect of such (mortality) tables is for the trier of facts, and true also that such triers, in determining life expectancy of any person, may take into consideration his vocation, occupation, and condition of health, both mentally and bodily, and may find that these considerations destroy the value of the tables as evidence; they are not inadmissible for that reason." It is notable that this is one of the cases the court relied upon as authority for the judicial notice taken in the Heroux Case.

[27] The Model Code of Evidence supports the proposition, see Rule 806; some authorities hold to the contrary. See Line v. Line, 119 Md. 403, 86 Atl. 1032 (1926). At any rate the assumption of a fact should not be treated as preventing opposing counsel from attacking the assumption. See 9 WIGMORE, EVIDENCE § 2567 (3d ed. 1940).

[1] Laws 1947 c. 209 § 1; RCW 7.04.010.

[2] 44 Wn.2d 808, 271 P.2d 689 (1954).