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One Year Review of Evidence

Vance R. Dittman Jr.

ONE YEAR REVIEW OF EVIDENCE

By VANCE R. DITTMAN, JR.
Professor of Law, University of Denver College of Law

The purpose of this review is to point out those decisions and statutes relating to the law of evidence which have become effective during the calendar year of 1958 and which have enunciated or adopted new principles, not heretofore clearly established in Colorado and thus are important to the profession. No attempt has been made to cite cases which apply principles already established and which would be merely repetitive. The review covers decisions rendered prior to the latest possible date before this review goes to press.

The year has seen the adoption of no statutes relating to this field. In the opinion of the author, there are but three cases decided by the supreme court which should be included as being within the scope of this review as stated above.

In the case of *Davis v. People*[1] the defendant had been convicted of burglary and the question presented was whether the trial court had committed reversible error in admitting into evidence two stocking masks, a hammer and a flashlight, identified as belonging to the defendant. The testimony showed that when the defendant was arrested a mask fell from his person and that when he was taken to his car the police found there another mask, the hammer and the flashlight. It should be noted that the defendant denied the commission of the offense and that there was nothing in the record to show that the burglar had worn a mask or that he had been equipped with a hammer or a flashlight. Hence this evidence could not directly identify the defendant as the culprit. Pointing out that there were no applicable Colorado decisions, the supreme court determined that no error had been committed. It relied upon decisions from other jurisdictions which permit the admission of such evidence under one of two theories: (1) that possession of burglary tools shortly after the commission of the offense tends to establish the charge, or (2) that such devices are admissible as part of the history of the arrest, and that the evidence here was tied directly to the defendant's apprehension. The first theory rests upon a principle similar to that applied in admitting evidence of other offenses to show a scheme or plan, motive, identity or other fact from which an inference of guilt of the offense charged may be drawn. The relevancy or materiality of the evidence is not so clear under the second theory, since in the instant case it was not shown how the history of the arrest had anything to do with the defendant's guilt except as such facts connected with the arrest might also constitute circumstantial evidence under the first theory. The court might have made it clearer why such evidence could be deemed to be helpful.

O'Brien v. Wallace[2] involved the admissibility of expert opinion testimony upon the issue of sanity. The record showed clearly that the expert's opinion was based solely upon other evidence admitted *at the trial* and that such evidence was conflicting. The supreme court held that the testimony of the expert was not admissible under these circumstances

[1] 321 P.2d 1103 (Colo. 1958).
[2] 324 P.2d 1028 (Colo. 1958).

and pointed out that in order for testimony of this nature to be admissible the expert must have heard the evidence admitted at the trial, there must be no material conflict in the evidence, the witness must assume it to be true, the evidence must have been properly admitted under the hearsay rule and have been material and the witness' opinion must not be predicated, in whole or in part, upon the opinions of others. This decision clarifies the rule applicable to a procedure which is, at best, an unsatisfactory one. It should indicate to trial attorneys that opinion testimony based upon actual knowledge of the facts by the witness, or upon hypothetical questions, is much to be preferred.

The third case, *Weiss v. Axler*,[3] involved error assigned to the instruction given on the law of res ipsa loquitur and in the exclusion of testimony concerning custom and usage in connection with the defendant's acts, where such customs and usage were contrary to and inconsistent with specific directions furnished by the manufacturer for the use of a permanent wave solution, the injuries having resulted from such use.

Taking first the problem arising out of the trial court's exclusion of testimony regarding custom and usage, the supreme court clearly stated the rule to be applied in situations of this sort. It said that custom and usage may not be resorted to as a test of due care where not in compliance with the directions of the manufacturer of a product whose use may be dangerous if the directions given are not followed, and that a failure to follow such instructions constitutes negligence. It is clear, of course, that the court did not decide that such evidence cannot be admitted where the use of a product contrary to express directions is not shown to be dangerous. The case is not authority, one way or the other, for that problem.

The decision of the court on the instruction relating to the doctrine of res ipsa loquitur is, it is submitted, not clear, but troublesome and unsatisfactory. It is believed that there is considerable room for doubt as to exactly what this aspect of the case stands for, and for that reason the author of this review sets forth below what he believes the court held.

It appears to the writer that the court decided the following propositions relating to res ipsa loquitur:

> (1) The circumstances establishing a basis for the application of the doctrine of res ipsa loquitur give rise to a *presumption* of negligence.
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> (2) The determination that the facts establish such presumption involves the exercise of a judicial function and that the court then resolves that the occurrence, unexplained, indicates negligence and establishes a prima facie case against the defendant.
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> (3) This is a true presumption *of law* and rules out any inference of negligence. The presumption is conclusive as a matter of law unless the evidence given by the defendant to explain the circumstances destroys the presumption.
>
> (4) This presumption is a *compulsive* presumption of negligence which continues to exist until the *defendant* has satisfied the fact finder (the jury), by a preponderance of evi-

[3] 328 P.2d 88 (Colo. 1958), noted in 35 DICTA 307 (1958).

dence, that he was not negligent and if he thus satisfies the fact finder he has destroyed the presumption. The sole question in a res ipsa case is whether or not the defendant has overcome the prima facie case of negligence against him by establishing by evidence satisfactory to the jury that he was not negligent.

(5) It is the province of the jury to consider the *explanation* factually, and from the standpoint of the credibility of witnesses, and if they are not believed the presumption remains.

(6) That a presumption of negligence arose in the instant case from the plaintiff's evidence, making a prima facie case, establishing res ipsa, and requiring the defendants to *prove* exculpation from their presumed negligence.

If this analysis of the case is correct it would seem that a number of conclusions might properly be drawn from it.

It has now been established in Colorado that res ipsa gives rise to a *presumption* of negligence. This clarifies the ambiguous decisions heretofore found in the Colorado reports which treated res ipsa both as though it were a presumption and as though it gave rise to an inference only. The permissive inference theory has now been discarded.

That the strength of this presumption is so great that it actually shifts the burden of proof of the issue of negligence in such a way that it becomes the duty of the defendant to show by a preponderance of the evidence that he is not negligent also seems to be clear from the wording of the decision. This appears to disregard the fundamental distinction between the burden of proof in the sense of the risk of non-persuasion, and the burden of going forward with the evidence, which rests upon a defendant when the plaintiff has made out a prima facie case. If that is the true import of the decision it constitutes a rather startling position, in view of the general rule that the burden of proof is fixed by the pleadings in the case and does not shift thereafter.

The jury is left to determine whether or not the evidence offered by the defendant is sufficient to show his freedom from negligence and if they determine that it is sufficient the presumption of negligence disappears from the case and the verdict should be favorable to the defendant.

In considering the evidence offered by the defendant to show his freedom from negligence, the credibility of the defendant's witnesses is one of the facts to be weighed by the jury, and their lack of credibility, in the opinion of the jury, will result in the presumption's remaining in the case, since then the defendant will not have proved freedom from the negligence which has been presumed to exist.

Since the court had before it no motion of the plaintiff for a directed verdict, the question of the propriety of directing a verdict in favor of a legal presumption was not resolved. This question would have been squarely presented had such a motion been made and ruled upon by the trial court. In those cases where the basic fact upon which the presumption rests is not conceded by the parties in their pleadings or by stipulation, or where it is not properly the subject of judicial notice, it can be established only by evidence. In such cases it is difficult to determine whether the court can decide such facts on the evidence submitted without improperly encroaching on the function of the jury as the fact

finder. The rule appears to be that if the evidence is such that no reasonable trier of fact could fail to find the existence of the basic fact, the judge may direct a verdict in favor of the plaintiff. If the evidence is not so conclusive, the existence of the basic fact must be established by the jury or other fact finder.[4]

It is hoped that this question can be resolved by the court in a proper case, in order that this troublesome problem may be settled for the benefit of Colorado practitioners. As to the points which were raised and which should have been decided, it is unfortunate that *Weiss*, by a decision which is lacking in clarity, left the law in a state of uncertainty.

[4] See e.g. Jefferson Standard Life Insurance Co. v. Clemmer, 79 F.2d 724 (4th Cir. 1935), where the court clearly and incisively discussed many of the points raised in *Weiss*.