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EVIDENCE

CONCLUSIVENESS OF UNCONTRADICTED TESTIMONY—
INTERESTED WITNESSES

New Mexico. In *Morris v. Cartwright*,¹ an action against a truck owner arising out of a collision, defendants specially denied that the driver of the truck was operating the same while in the course of his employment. The driver testified that he was using the truck without authority or permission of the owners on a Sunday evening to visit his grandmother and while returning home, the accident occurred. The owner of the truck testified that he permitted the driver to keep the truck at his home to be used in emergency cases; that the truck was not to be used for his personal pleasure at any time; and that on the occasion in question, the truck had been used without authority or permission. It should be noted that at least one and perhaps both of these men were interested witnesses. Said the court: "This evidence is undisputed and must be accepted as true. It was, therefore, the duty of the court to declare as a matter of law that the Cartwrights [owners] were free from negligence and direct a verdict accordingly."² The plaintiff relied upon the fact that mere ownership by the defendant raised a presumption that the driver used the vehicle in the owner's service. But the court said that this presumption disappears when evidence on the other side was introduced and was uncontradicted. Plaintiff also relied upon inferences allowable from the facts that tools and pipes were found in the truck and that the driver was dressed in working clothes at the time of the collision. However, this evidence was said to raise a mere suspicion, and "such doubtful inferences are not sufficient to contradict positive testimony."³

For its ruling that "[t]his evidence is undisputed and must be

¹ 57 N. M. 328, 258 P. 2d 719 (1953).

² 258 P. 2d at 722.

³ *Id.* at 723.

accepted as true," the court felt it unnecessary to cite authority.

In *Waters v. Blockson*,⁴ decided a few months later, the question was whether or not a deed had been delivered so as to pass title from the decedent to the plaintiff. The plaintiff had had possession of the deed, which purported to pass title to him, at two different times during the life of the grantor. The court stated:

The evidence relied on by . . . [plaintiff] with respect to delivery of the deed . . . is the testimony of himself and wife, in addition to the presumption . . . arising from the possession of the deed on two occasions. He testified that the grantor immediately after having the deed prepared, handed it to him with directions to have it recorded. But the trial court was not required to accept as true the sworn testimony of the witness. [Citing California cases.] The general rule that uncontradicted testimony cannot be disregarded by the court, is subject to many qualifications and exceptions. As it is the duty of the trial court to determine what credit and weight shall be given to the testimony, an appellate court will not disturb a finding or conclusion denying credence, unless it appears that there are no facts or circumstances which at all impair the accuracy of the testimony. [Citing a California case.] That the trial court concluded the instant case is an exception to the rule, is clear.⁵

To rebut the contention that the testimony was uncontradicted, the court noted the following circumstances: there was conflict within the plaintiff's own testimony; a letter to the heirs of decedent from plaintiff treated the property as that of the heirs; decedent had paid the taxes, insurance and improvement costs on the land during the existence of the deed. The court did not mention the fact that the testimony was that of an interested witness.

It is surprising that neither of these opinions cited the earlier opinion of this same court in *Medler v. Henry*.⁶ In that case the court reviewed the authorities and, noting the split of authority elsewhere, found "no inconsistency in the decisions of this jurisdiction." The rule was said to be already established thus:

⁴ 57 N. M. 368, 258 P. 2d 1135 (1953).

⁵ 258 P. 2d at 1137.

⁶ 44 N. M. 275, 101 P. 2d 398 (1940).

... the testimony of a witness, *whether interested or disinterested*, cannot arbitrarily be disregarded by the trier of the facts; but it cannot be said that the trier of facts has acted arbitrarily in disregarding such testimony, although not directly contradicted, whenever any of the following matters appear from the record:

(a) That the witness is impeached by direct evidence of his lack of veracity or of his bad moral character, or by some other legal method of impeachment.

(b) That the testimony is equivocal or contains inherent improbabilities.

(c) That there are suspicious circumstances surrounding the transaction testified to.

(d) That legitimate inferences may be drawn from the facts and circumstances of the case that contradict or cast reasonable doubt upon the truth or accuracy of the oral testimony.⁷

Professor Wigmore says, ". . . the *mere assertion of any witness* does not of itself need to be believed, *even though he is unimpeached* in any manner; because to require such belief would be to give a quantitative and impersonal measure to testimony. . . ."⁸ The contrary holding he calls a "loose and futile but not uncommon heresy."⁹ Still, Mr. Wigmore cites many cases supporting this "heresy," and there can be no doubt that a substantial minority holds in accord with it. This is, in fact, one of the most confused fields in trial law, and even within a given jurisdiction there is apt to be little uniformity.¹⁰

⁷ 101 P. 2d at 403. Emphasis added.

⁸ 7 WIGMORE, EVIDENCE (3d ed. 1940) § 2034.

⁹ 7 *Id.*, § 2034 n.3.

¹⁰ "The credibility of witnesses is for the jury; but they must not be permitted to run away with the case.

"All agree that the jury must not believe impossibilities. Beyond this there is no rule generally applicable. As applied to uncontradicted testimony there are two broad rules: one, that the uncontradicted testimony of a witness is for the jury; the other, that the jury may not arbitrarily reject the uncontradicted testimony of a witness; and the courts apply one or the other as they mean to leave the matter to the jury, or to interfere. In the statement of those two rules the courts sometimes give preference to the power of the jury, and sometimes, on the other hand, require the jury to accept uncontradicted testimony unless there is some apparent reason against it. . . . Sometimes the two rules are given in combined or double form." Note, 8 A.L.R. 796, 797 (1920).

There is a further conflict as to whether or not a different rule should apply to interested and disinterested witnesses.¹¹ The majority hold that the testimony of an interested witness, though uncontradicted, is for the trier of fact. Among this group are jurisdictions which give binding effect to uncontradicted testimony when the witness is not interested.

However, the statement of rules in this area may be of small aid. "The rule has been stated as one of quite general application that the testimony of a party, or an interested witness, does not conclusively establish the fact testified to, although there is no evidence directly contradictory thereto, since the credibility of the testimony of such a witness presents a question of fact for the jury. This general rule, however, . . . is subject to so many exceptions as to deprive it of any actual force, except as the fact of interest is to be considered in weighing the testimony of the witness in connection with inconsistent evidence or probabilities, or his own admissions.

"Indeed, there is but little real support for the frequently stated rule that the interest of a witness renders his uncontradicted testimony a question for the jury. In the following cases, statements of the character referred to may be found, but the rule will not be found to have been applied except where the testimony of the interested witness, while not directly contradicted, was nevertheless inconsistent with other portions of his testimony, with other evidence, or with the natural probabilities, or the conduct or attitude of the witness was such as to cast suspicion upon his credibility. . . ."¹²

A careful reading of the *Medler* case suggests that the rule treating interested and disinterested witnesses alike was not the necessary and perhaps not even the proper result of its review

¹¹ *Ibid.*

¹² Note, 72 A.L.R. 27, 32 (1931).

of the authorities.¹³ Nevertheless, since the time of that case, the court has followed the rule in application as well as in statement.¹⁴ The two cases which occasion this writing, while citing no New Mexico cases on the point, are consistent with the rule in that neither mention the fact that the witnesses were interested. Nor was this a consideration *sub silentio*, as witness the *Morris* case in which the testimony was held conclusive.

INDISPENSABLE EVIDENCE—EXPERT OPINION

Oklahoma. In *United Ins. Co. v. McElwee*¹⁵ the court, with a brief recital of an established Oklahoma rule, settled a cause of action which would have probably occasioned more difficulty in the courts of other jurisdictions. Plaintiff had been rendered blind by optical atrophy and was attempting to establish as the cause some incident which would make the injury compensable under a policy issued by the defendant. The only medical witness was a doctor to whom plaintiff had gone for treatment. The doctor specified a number of possible causes of optical atrophy but explained that he did not know the cause of the plaintiff's condition. He did, however, negative as possible causes a blow on the head and getting cement in the eye—both of which had been relied upon by plaintiff in his search for a causal incident. Holding there was no evidence that the loss of sight resulted from an accidental bodily injury, the court said, "Recently¹⁶ . . . we affirmed our previous holdings on the point involved by declaring that it is the settled rule in this state that where injuries are of such character as to require skilled and professional persons to determine the cause and extent there-

¹³ As the *Medler* case shows, the history of the rule in New Mexico has grown out of the leading New York case, *Hull v. Littauer*, 162 N. Y. 569, 57 N. E. 102 (1900). For strong criticism of an interpretation of this case which is the same as the New Mexico interpretation at least since the *Medler* case, see Bobbe, *The Uncontradicted Testimony of An Interested Witness*, 20 Cornell L. Q. 33 (1934).

¹⁴ *Heron v. Gaylor*, 52 N. M. 23, 190 P. 2d 208 (1947); *Citizens Finance Co. v. Cole*, 47 N. M. 73, 134 P. 2d 550 (1943).

¹⁵ _____Okla., 258 P. 2d 609 (1953).

¹⁶ In *Spivey v. Attebury*, 205 Okla. 493, 238 P. 2d 814 (1951).

of, the question is one of science and must necessarily be determined by testimony of skilled professional persons."¹⁷

The rule is thus stated in a long series of cases growing out of *Willet v. Johnson*¹⁸ in 1904.¹⁹ It has proven more difficult to formulate a concise, workable test of when the injuries "are of such character as to require skilled and professional persons to determine the cause and extent thereof." First the test was said to be whether "the injury was objective rather than subjective."²⁰ Then a better statement was made: whether "[t]he symptoms of the injury were subjective and not objective."²¹ Finally, in *Inter Ocean Oil Co. v. Marshall*,²² counsel cited to the court two earlier opinions which were in apparent, but certainly not real, conflict, and the court found it necessary to make a more careful analysis of the application of the rule. Reasoning from the necessity of the rule, the court realistically indicated that a number of factors might enter in, and that probably no definition would suffice. Actually, to attempt such a definition would be to assume that there is a distinct line between the expert and the non-expert, which assumption cannot be sustained. The court said, "The elements of time, of the exclusion of the inference that any other cause intervened or caused it, and of clear physical evidence of the event or cause to which it is attributed when shown, and are so correlated that a man of general common sense and practical

¹⁷ 258 P. 2d at 610, 611.

¹⁸ 13 Okla. 563, 76 Pac. 174.

¹⁹ But see Comment, 5 Okla. L. Rev. 336, 341 (1952):

"Appointment of Experts. With the exception of sanity determinations in the county court the acquisition of expert witnesses is strictly a matter of partisan strategy among the litigants to any given case."

²⁰ Okla. Union Ry. v. Bertrand, 129 Okla. 263, 264 Pac. 621, 622 (1928).

²¹ *City of Pawhuska v. Crutchfield*, 155 Okla. 222, 8 P. 2d 685, 686 (1932). Another test was given in *Empire Oil and Refining Co. v. Fields*, 181 Okla. 231, 73 P. 2d 164, 165 (1937): "... where a person's physical condition is such that medical testimony is necessary to describe it and to ascribe the cause therefor, such medical testimony must be given to the jury before a trial court is justified in submitting the issue to the jury."

²² 166 Okla. 118, 26 P. 2d 399 (1933).

experience can draw but one conclusion, the necessity or reason supporting the opinion evidence rule are [*sic*] absent."²³

There can be no doubt that the rule is proper and beneficial. Even a generalization that expert testimony would be *required* wherever it would be *allowed* might be reasonably supportable,²⁴ but it is not logically necessary and would probably lead to confusion. However, there are *some* inferences which the jury is not qualified to make; some situations in which it should be their function to believe or disbelieve inferences made by others. Consider upon what basis the jury evaluates the diagnoses of medical and scientific experts. Here a very sensitive area is touched, one in which the law is open to the criticism that it has not kept up with and does not recognize the advances of science and the other professions. These criticisms in their extreme forms become proposals that certain decisions be delegated entirely to boards of experts. The law has responded in some fields.²⁵ No doubt other areas exist in which the inference of the jury, if left unfettered, may produce results which experts cannot accept. Just as it is difficult for the layman to understand how wrong may be his ideas as to legal rules, interpretations and consequences, so may it be

²³ 26 P. 2d at 403.

²⁴ Professor Wigmore writes: "There is no general policy or rule that *requires expert testimony* to form a part of the evidence on subjects open to expert testimony. . . . On any and every topic, only a qualified witness can be received; and where the topic requires special experience, only a person of that special experience will be received. If therefore a topic requiring such special experience happens to form a main issue in the case, the evidence on that issue *must* contain expert testimony, or it will not suffice.

"Now such an issue is rarely found. Generally, the topics on which only an expert witness can be received form usually but one element in the main issuable fact. Moreover, generally, the parties are eager enough to produce such expert testimony without any rule to require them." 7 WIGMORE, EVIDENCE (3d ed. 1940) § 2090.

Note that Professor Wigmore is here concerned with whether expert as distinguished from lay testimony will be required. The cases under discussion show that a prior problem is *whether any direct evidence at all* is to be required in certain situations, or whether the jury will be allowed to make certain inferences alone.

Mr. Wigmore then points out two well established exceptions in which expert testimony is universally required: (1) in actions against physicians or surgeons for malpractice and (2) in committal proceedings on the ground of insanity. The latter situation is usually dealt with by statute, and such statutes exist in Arkansas, Louisiana, New Mexico, Oklahoma and Texas.

²⁵ See last part of note 24 *supra*.

for lawyers to understand how ill-prepared they are to make inferences in certain fields. However, as long as the courts have the final say, it is improbable that much of the jury's function will be abandoned in any widespread reshuffling. Indeed, it is surprising that the Oklahoma rule was immediately stated in such general terms.

A recognition of the Oklahoma rule, its scope and application may be of more than academic interest to lawyers of other states whose courts are achieving the same results if they do not arrive at them by so direct a route.

As late as 1943, the Texas courts would have had difficulty in citing with complete approval the Oklahoma rule.²⁶ In *Lumberman's Mut. Casualty Co. v. Vaughn*²⁷ it was admitted that the decedent had died of poliomyelitis. However, the plaintiff sued the insurance company to establish accidental death, claiming that decedent's falling through a ceiling twelve feet to the floor had injured him so as to make him susceptible to the disease. Although the fall was established, there was no direct evidence of any serious injuries resulting therefrom; nor was there medical testimony stating affirmatively that such a fall or the injuries therefrom would probably have had some causal relation to the disease. The court said that any injuries resulting from the fall could be found by the jury only by inference, and since an inference upon an inference is not allowed, the verdict that these supposed injuries had caused the disease was not supported by the evidence. It would have been interesting to know what the court would have done if some obvious physical injuries resulted from the fall and the "inference upon inference" basis for decision had not been available.

Actually, it is not doubted that the hypothetical situation men-

²⁶ There was language in Texas cases which would support the Oklahoma rule, but this language had been applied only in cases dealing with malpractice, in which the requirement of expert testimony has been long established. *E.g.*, *Kaster v. Woodson*, 123 S. W. 2d 981 (Tex. Civ. App. 1938) *er. ref.*

²⁷ 174 S. W. 2d 1001 (Tex. Civ. App. 1943).

tioned would have resulted in the earlier establishment of the present Texas rule.²⁸ But it was not until 1947 that a Texas court, in *Scott v. Liberty Mut. Ins. Co.*,²⁹ said, "... there are certain scientific fields wherein the average juror or layman does not possess the knowledge or information from which to draw his own conclusion; and must be guided by the opinions of experts who have acquired scientific information on the subject." In that case the plaintiff testified that something had blown into his eye and burned. The doctor to whom he went for treatment found an irritation (conjunctivitis) and a nonmalignant fleshy growth which the doctor said had developed gradually over the years. Almost two years later, plaintiff went to another doctor who found a cancerous tumor in the eye. The doctors testified that the cause of cancer is not scientifically known; that one theory is that continuous or chronic irritation of a nonmalignant growth would cause it. Both were of the opinion that the accident and irritation of which plaintiff complained had nothing to do with the tumor. Against the contention that since the doctors did not know the cause, the jury could as well infer the cause, the court held plaintiff's evidence insufficient. The court had available to cite only *Lumberman's Mut. Casualty Co. v. Vaughn, supra*, and another line of cases which cannot be said to be direct support.³⁰

Nevertheless, the result is to be desired, and it seems now to be established in Texas.³¹ If the language of the Texas cases seems to be more restricted than the customary statement of the Oklahoma rule, it is felt that its application will prove no less broad and no less helpful.

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²⁸ The court said: "Granted, for the sake of argument, that Virgil suffered an injury to his spinal cord at the place where the infection struck, it would be the sheerest speculation to say that he would not have the disease without the injury. All of the doctors... said that they did not know of any case... in which a victim had suffered poliomyelitis following an injury of the kind described in the present case." *Id.* at 1005.

²⁹ 204 S. W. 2d 16, 18 (Tex. Civ. App. 1947) *er. ref. n.r.e.*

³⁰ *Coxson v. Atlanta Life Ins. Co.*, 142 Tex. 344, 179 S. W. 2d 943 (1944), and cases cited therein.

³¹ *Travelers Ins. Co. v. Blazier*, 228 S. W. 2d 217 (Tex. Civ. App. 1950) *er. disp.*; *Brown v. Shannon West Texas Memorial Hospital*, 222 S. W. 2d 248 (Tex. Civ. App. 1949) *er. ref. n.r.e.*