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Evidence--Expert Opinion of Speed Based on Damaged Condition of Vehicle

Louis Sweetland Southworth II
West Virginia University College of Law

would permit a student to vote if he complied with the constitutional requirements and evidenced an intent not to return home. Another factor supporting this position is the absence of a constitutional provision directly relating to student voting. As stated by a former Attorney General, once a prospective voter complies with the constitution, it would take a strong showing to deny that person his right to vote.[20] However, only the West Virginia Supreme Court can determine when a voter has complied with the constitution.

Jacob Michael Robinson

Evidence—Expert Opinion of Speed Based on Damaged Condition of Vehicle

P's intestate was involved in a three car collision at an intersection. A police officer with four years experience on the police force investigated the accident shortly after it occurred. The officer was asked if he had formed an opinion, based on the physical damage to the automobiles and the tire marks in the intersection, whether the automobile driven by *P's* intestate was moving or standing still at the time of the collision. *D's* objection to the question was sustained and *P* was non-suited. *Held,* affirmed. Where a witness investigates but does not see a wreck, he may describe to the jury signs, marks and conditions found at the scene, including damage to the vehicle involved. These observations, however, cannot provide a basis for an opinion by the witness concerning the vehicle's speed because the jury is as well qualified as the witness to determine what inferences the facts will permit or require. *Farrow v. Baugham,* 266 N.C. 739, 147 S.E.2d 167 (1966).

It is within the discretion of the trial court to ascertain whether a witness has the degree of skill, knowledge or experience not common to laymen in a particular field that will qualify him as an expert.[1] However, before the expert may render an opinion, it must be shown that the subject matter is so distinctly related to some science, profession, business or occupation as to be beyond

[20] 1923-1924 W. VA. ATT'Y GEN. BIENNIAL REP. 647.
[1] Byrd v. Virginian Ry., 123 W. Va. 47, 13 S.E.2d 273 (1941).

the knowledge of the average laymen.[2] Therefore, an estimation of speed from observed data will be allowed only if it is found to be a proper subject matter for expert opinion. Concerning this question, the courts are in disagreement.[3]

The apparent majority, which holds that a determination of speed based on damage[4] to the vehicle is not a proper subject matter for expert opinion, generally do so for one of two reasons: either that the opinion lacks scientific or technical certainty, or the jury is as well qualified as the witness to determine what inferences can be drawn from the facts. For example, in *Union Bus Lines v. Moulder*,[5] the Texas court held that expert opinion testimony based entirely on the damaged condition of the vehicles and their positions after impact was incompetent. This witness had been qualified as an expert by the trial court because of his observation of numerous automobile wrecks as a police officer and his attendance at a school at which instruction was given in estimating speed from skid marks and apparent force of impact. However, his opinion of speed based on damage was not competent. It was held not to relate to a matter concerning which the expert had knowledge superior to ordinary jurors as no attempt was made to show that he had used any technical or scientific methods in arriving at his estimate. Similarly, in the Connecticut case of *Stephanofsky v. Hill*,[6] the plaintiff did not object to the qualifications of the state policeman as an expert but to the admission of his opinion of the speed at which a vehicle was traveling before it collided with posts at a culvert. The opinion in part was based on the position of the car after impact, *i.e.*, the course taken and the distance covered. These factors were held to involve "too many unknown elements to admit of any

[2] McCormick, Evidence § 13 (1954).

[3] Grasty v. Tanner, 206 Va. 723, 146 S.E.2d 252 (1966); see Annot., 93 A.L.R.2d 287 (1964).

[4] This comment attempts to focus only on the admissibility of opinion evidence as to speed based on the condition of a motor vehicle after the accident. However, the opinion evidence in many cases is based at least in part on other conditions observed at the accident scene, namely, marks on the road and position of the vehicles involved. In these cases, it is often difficult to discern whether the opinion was rejected in principle, Grasty v. Tanner, *supra* note 3, or merely that it was improper because the facts on which it was based were insufficient, Stephanofsky v. Hill, 136 Conn. 379, 71 A.2d 560 (1950). In any event, a court that rejects the opinion when it is based on damage and other facts would certainly reject it if based on damage alone.

[5] 180 S.W.2d 509 (Tex. Civ. App. 1944).

[6] 136 Conn. 379, 71 A.2d 560 (1950).

degree of certainty"[7] since the position of the vehicle may have been the result of something else, such as an increase of pressure by the driver's foot on the accelerator caused by the impact. Thus, the only facts from which speed could be determined were "the damage to the posts and the front end of the plaintiff's car [which] of itself afforded no sufficient basis for determining the number of miles per hour it was traveling at the time of impact."[8]

Other cases, including the principal case, which have held that opinion of speed is not a proper subject matter have reasoned that the jury can draw a conclusion from the facts as well as the witness. To permit the opinion would "invade the province of the jury."[9] A recent Virginia case is in accord with these decisions. In *Grasty v. Tanner*,[10] the court rejected an opinion as to speed by an expert engineer based on a scientific examination of the damaged vehicle. The Virginia court noted the conflict of authority on the admission of such an opinion based on damage to the car, but followed what it considered to be the greater weight of authority.

Notwithstanding the majority view, substantial authority exists favoring the admissibility of an expert opinion of speed which is based in part on the damaged condition of the vehicle. In *Foreman v. Heinz*,[11] two witnesses, a sheriff and a policeman, qualified as experts due to their experience and special training. They estimated the speed of an automobile based on the location and damage to the two vehicles involved, skid marks and other physical facts. The Kansas court upheld the admission of their testimony, stating that the weight to be given such evidence was a matter for the jury to determine. A similar result was reached in a recent California case[12] which held that a traffic officer, whose duties included the investigation of automobile accidents, could qualify as an expert entitled to give an opinion respecting the speed of an automobile based on the physical facts at the

[7] *Id.* at 383, 71 A.2d at 562.
[8] *Id.* at 383-84, 71 A.2d at 562.
[9] When a court makes this assertion, it is obviously expressing a fear that the jury will attach weight to an opinion merely because the witness is respected or influential and not make an independent decision on an issue that the jurors are capable of deciding themselves. McCormick, *op. cit. supra* note 2, § 12, at 26; see Stephanofsky v. Hill, *supra* note 6; Grasty v. Tanner, 206 Va. 723, 146 S.E.2d 252 (1966).
[10] 206 Va. 723, 146 S.E.2d 252 (1966).
[11] 185 Kan. 715, 347 P.2d 451 (1959).
[12] Davis v. Ward, 219 Cal. App. 2d 144, 32 Cal. Rptr. 796 (1963).

accident scene, *i.e.*, the damaged condition of the vehicles and skid marks.

Opinion evidence has been admitted even in cases in which the investigating officer found no skid marks at the accident scene to aid his investigation. This situation is most common when the vehicle leaves the road and collides with a fixed object. As a result, the investigating officer is limited to the damage to the vehicle and other property damage in formulating his opinion. This was the case in *Cross v. Estate of Patch*,[13] where the vehicle left the road and struck two posts and a bridge. The Supreme Court of Vermont concluded that a properly qualified expert could give an opinion of the speed at which the automobile was traveling at the time of impact based on these facts. Furthermore, opinions based entirely on damage to the vehicle by witnesses other than investigating officers have been upheld. That the special expertise of the witness is based solely on practical experience in appraising and viewing damaged cars rather than on engineering knowledge has been held to affect only the weight of testimony, not its admissibility.[14]

The position of the West Virginia Supreme Court on this subject is not clear. In *Reall v. Deiriggi*,[15] an attempt was made to qualify two state patrolmen as experts in order that they could give their estimates of speed based on the damage to the automobile, tire marks and property damage.[16] The refusal of the trial court to permit their opinions was upheld by the West Virginia Supreme Court. The court stated that the conclusions of a witness should never be received into evidence if all the facts can be ascertained and made intelligible to the jury or if they are such that a person of ordinary intelligence is capable of understanding and comprehending them. In this case, since the jury was fully informed of the conditions and had viewed the accident scene, they could determine the rate of speed as well as the witnesses. Thus, the court apparently holds that an estimation of speed based on the damaged condition of the vehicle is not a proper subject matter for an expert opinion. However, in the more recent case of *Butcher v.*

[13] 123 Vt. 11, 178 A.2d 393 (1961).

[14] Harrington v. Travers, 288 Mass. 156, 192 N.E. 495 (1934) (garage mechanic); Freeman v. Scahill, 92 N.H. 471, 32 A.2d 817 (1943) (witness with eighteen years experience in appraising and viewing damaged cars).

[15] 127 W. Va. 662, 34 S.E.2d 253 (1945).

[16] Record, pp. 191-93.

Stull,[17] the West Virginia court indicated that an opinion of speed based on the damaged condition of a vehicle is a proper subject matter for expert opinion. The court affirmed the trial court's refusal to permit a conclusion by a witness whether an automobile was traveling at a high rate of speed when it struck a rock ledge. The court stated that "the opinion of a witness, who had merely observed an automobile after it had come to rest against an obstruction, as to its speed at the moment of impact, was properly excluded *where there was no attempt to qualify such witness as an expert.*"[18]

Thus, the interesting question arises whether the West Virginia Supreme Court would allow an expert such as a "traffic accident analyst"[19] to give his opinion of speed based on the damage to the car and its position against an object after impact. Its most recent decision indicates that it might be willing to recognize that this area is a proper subject matter for expert testimony. Such a view, however, would be contrary to that of Virginia and the majority of jurisdictions.

Louis Sweetland Southworth, II

Property—Effect of Alteration of Recordable Instruments

X signed a deed granting property to *D.* Although not signed in *S's* presence, *S,* notary public and secretary for *D's* attorney, acknowledged the signature after inquiry of *X* and other witnesses. Upon the return of the three page executed deed to *D's* attorney, the words "and appurtenances thereunto belonging" were added to the deed, the first page being retyped and inserted in place of the original first page, the other two pages, containing the signature and acknowledgment, remaining intact. This draft was returned to *X,* who orally reacknowledged her signature, although no new notarial certificate was added. The notary left the deed in possession of *X.* Later, *D's* attorney received the deed from *D,* and had the deed properly recorded. *Ps,* heirs-at-law of *X,* sought to have this deed declared void because of lack of execution or delivery.

[17] 140 W. Va. 31, 82 S.E.2d 278 (1954).
[18] *Supra* note 17, syl. 4. (Emphasis added.)
[19] Lester v. Rose, 147 W. Va. 575, 595, 130 S.E.2d 80, 94 (1963).