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Recent Case

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EVIDENCE—TURNCOAT WITNESS—CONFLICTING TESTIMONY

In the recent case of *Wolansky v. Lawson,* 389 Pa. 477, 133 A.2d 843 (1957), the Supreme Court of Pennsylvania held that a trial court's submission of a case to a jury on the basis of all of plaintiff's evidence which included repudiated testimony of two witnesses who recanted in open court, was fatal error and that the evidence did not support the verdict. The rule applied by the court is that where a witness has testified to two different versions or has made inconsistent and contradictory statements, and is confronted with that contradiction, his final statement is the only substantive evidence. After citing authority for the rule, the court said, "The rule is of course all the more applicable where the witness positively repudiates his earlier testimony." [1]

One reason previously given for this rule is that the court is not required to submit evidence which will merely enable the jury to guess at a fact in favor of a party who was bound to prove it.[2] It has repeatedly been decided that where the burden of proof is upon the plaintiff to establish certain facts before a recovery can be had, and his testimony or that of his witnesses, on the question, is so contradictory as to present to the jury no basis for a finding, except a mere conjecture, a non-suit is properly entered.[3]

Previous to *Wolansky v. Lawson,* however, the rule applied in the instant case has not been used in Pennsylvania to *overrule* the disposition of the case by the trial judge. It is interesting to note that in all the cases cited by the court as authority, the result of the decision on appeal was to *affirm* the trial court's disposition of the case.[4] This has some significance since another consideration of the Supreme Court in its prior application of the rule appears to have been to give some effect to the discretion exercised by the trial judge in deciding the question of whether to submit plaintiff's evidence to the jury. It is a recognized principle that the trial judge and the jury are best

[1] 389 Pa. at 480, 133 A.2d at 844.

[2] Ely v. Pittsburgh, C. C. & St. L. R. Co., 158 Pa. 233, 27 Atl. 970 (1893); 66 A.L.R. 1517.

[3] Goater v. Klotz, 279 Pa. 392, 124 Atl. 83 (1924); Zenzil v. Delaware, L. & W. R. Co., 257 Pa. 473, 101 Atl. 809 (1917); Black v. Philadelphia Rapid Transit Co., 239 Pa. 463, 86 Atl. 1066, (1913); Mulligan v. Lehigh Traction Co., 241 Pa. 139, 88 Atl. 318 (1913).

[4] Black v. Philadelphia Rapid Transit Co., *supra* note 3; Stewart v. Ray, 366 Pa. 134, 76 A.2d 628 (1950); Cox v. Wilkes-Barre Railway Corp., 340 Pa. 554, 17 A.2d 367 (1941); Mulligan v. Lehigh Traction Co., *supra* note 3.

qualified to determine the veracity and credibility of the testimony given, due to their presence at the trial which enables them to observe the general demeanor of the witness.[5]

The *Wolansky* case may be distinguished from the cases it cites in another important aspect. That is, in the *Wolansky* case there is a complete contradiction and reversal of previous statements given under oath. Here the witnesses were first called by plaintiff and were subjected to cross-examination, and later called by the defendant and again cross-examined. Upon being called by the defendant, the witnesses stated that they had testified falsely at their first appearance. The cases cited by the court as authority do not involve any such intentional prevarication but only deal with *mere* inconsistencies or contradictions which the witness attempted to explain away. It is suggested therefore that the rule as applied to the earlier Pennsylvania cases was an attempt by the court to preclude the jury from considering any inconsistent statements which were subsequently clarified.[6]

In view of the foregoing considerations it would appear that the *Wolansky* case represents an extension of the rule as previously applied in Pennsylvania. With this apparent extension in mind, it seems profitable to explore the effect of this extension and the possible future ramifications of the rule as extended.

The effect of the rule in the instant case is that whenever a witness changes his testimony as to a specific fact, the last testimony is the only substantive evidence and a jury will not be allowed to pass on the veracity and credibility of the witness in relation to his first story, in cases where plaintiff's cause of action rests on this first testimony.

It has been held that the weight and the value of the testimony of every witness is for the jury, even where such testimony is not denied or contradicted.[7] Also if the testimony of the parties is contradictory in all essentials, only a jury can decide the question of veracity and credibility.[8] The extension of the rule in the *Wolansky* case appears to negate any possible question of the veracity or credibility of the self-contradicting witness in his first testi-

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[5] It is not suggested that the rule should be inapplicable in all cases where its use would result in a reversal of the trial judge, however, this consideration does appear to have played some part in the prior application of the rule in Pennsylvania.

[6] In Stewart v. Ray, 366 Pa. 134, 138, while affirming the trial judge's submission of the case to the jury, the Supreme Court of Pennsylvania said, "A careful review of the testimony, particularly that of Magrino and Threnhauser, leads to the unalterable conclusion that the testimony of Magrino is consistent throughout and that the testimony of Threnhauser, while less clear, is equally positive and consistent as regard the happening of the accident."

[7] Rice v. Bauer, 359 Pa. 544, 59 A.2d 885 (1948).

[8] Miller v. Harris, 349 Pa. 55, 36 A.2d 309 (1944).

mony. The question cannot go to the jury even if the trial judge believes that this would be the best way to resolve the conflict in testimony. As was argued by Justice Musmanno in the dissenting opinion, it appears that the Supreme Court is deciding that a witness who admittedly testified falsely one time invariably tells the truth upon changing his testimony.[9] It is submitted that a better rule would be to allow the trial judge, in his discretion, to dispose of the conflicting testimony as he deems proper, with the appellate court providing a safeguard for manifest abuse.

The rule in the *Wolansky* case is at least somewhat analogous to the rule that prior inconsistent statements cannot be used as substantive evidence but only can be used for impeachment purposes. The reason for this rule, of course, is that such inconsistencies are hearsay.[10] Courts have repeatedly pointed out that prior inconsistent statements are not given under oath nor are they subject to cross-examination. Although this view is generally accepted by the courts, two of the most influential and learned men in the field of evidence have suggested that this rule be discarded.[11] Professor McCormick has said, "All in all, in view of these considerations, and after reading hundreds of illustrative cases, the writer believes that as a class prior inconsistent statements, when they are so verified that their actual making is not in doubt, are more reliable as evidence of the facts than the later testimony of the same witnesses." [12] The "considerations" the author refers to are the fact that in these cases there is an opportunity to cross-examine the witness thoroughly and also the prior inconsistent statements are perhaps superior in trustworthiness due to their recency and proximity to the fact situation.

This writer suggests that in cases, in which a witness reverses his prior testimony, the reasoning of Professor McCormick is at least partially applicable. That is, here the witness is subject to cross-examination, and the testimony is under oath and thus cannot violate the traditional concepts of the hearsay rule.

It is interesting to speculate concerning what possible ill-effects the rule of the *Wolansky* case may produce in the future.

One possible result may be to encourage litigants to attempt to influence witnesses. In a case where a large verdict is expected in favor of the plaintiff,

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[9] 389 Pa. at 484, 133 A.2d at 846.

[10] 3 WIGMORE, EVIDENCE § 1018 (3rd ed. 1940), and cases cited therein; 133 A.L.R. 1454 (1941); Lavodnick v. A. Rose and Son, 297 Pa. 86, 146 Atl. 455 (1929).

[11] 3 WIGMORE, EVIDENCE § 1018(b) (3rd ed. 1940) quoted with approval in Chicago, St. P., M. & O. Ry. v. Kulp, 102 F.2d 352, 358 (8th Cir. 1939) and McCormick, 25 TEXAS L. REV. 573 (1947).

[12] 25 TEXAS L. REV. at 578.

the defendant may be greatly tempted to "persuade" the witnesses to reverse their version of the facts after they have testified for plaintiff. The extension of this rule by the Supreme Court would insure defendant of a verdict or a non-suit if this could be accomplished.[13]

The rule of the *Wolansky* case would also result in serious difficulties for plaintiffs who were unable to avail themselves of honest and unwavering witnesses. Suppose, for example, that A was injured by the negligent operation of an automobile by B. The only witness that A could produce is W who saw the accident. W is a weak-willed and easily persuaded individual. B's attorney on cross-examination cannot induce W to change his version of the accident which favors A, but later calls W as B's witness. W now testifies that B was not at fault. A's chances for any recovery have vanished and his cause of action is defeated regardless of the judge and jury's belief of the witness' first testimony. There is an obvious injustice here. It seems logical that A should be allowed to have the contradictory testimony of W resolved by the jury if his case is dependent on it.

It is suggested that the instant ruling of the Supreme Court may produce an unnecessary uncertainty in the law of evidence in Pennsylvania and that perhaps the rule cited by the court should not be extended to fact situations similar to the *Wolansky* case. It will be interesting to note to what extent the case of *Wolansky v. Lawson* is adopted by the courts of Pennsylvania in the future.

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[13] In the *Wolansky* case, there was some evidence of an attempt to influence the change in testimony. To some extent, this fact could justify the trial judge's decision to submit the case to the jury.