Evidence

By Hardy Gregory, Jr.*

Every Georgia attorney and trial court judge ought to set aside the time to read every Georgia appellate court opinion on the subject of evidence (or, for that matter, any other selected subject) rendered during a given period of a year. The feel that one acquires for the attitude of the appellate courts of Georgia is interesting. Most though, will not have the time for such projects, so that to read someone else's selections and comments may be of some benefit. It will not, however, give the "feel" that one acquires through an individual reading of the cases.

I. Polygraph Tests

Georgia now has a rule of law admitting polygraph test results into evidence.[1] However, it is a very narrow rule with stringent limitations. First, such evidence is admissible only where there is an express stipulation of the parties that it is admissible.[2] Of course, no such agreement is ever very likely to be reached unless entered into before the test is administered. Second, if the only evidence of guilt in a criminal case is polygraph evidence, a conviction will not stand because such evidence is only circumstantial evidence of guilt, and circumstantial evidence must exclude every other reasonable hypothesis save that of the guilt of the defendant.[3] In announcing the rule of admissibility of polygraph test results, the Supreme Court of Georgia also announced that this evidence standing alone does not exclude every other reasonable hypothesis because such tests are insufficiently reliable.[4] Third, the parties are entitled to an instruction to the jury that the examiner's opinion may only be used to indicate whether the person examined believed he was telling the truth at the time of the examination, and that the jury is not bound by the examiner's opinion, but may disregard it entirely or decide what other weight it should be given in the case.[5] In short, the rule in Georgia is: (a) the results of polygraph tests are admissible if, and only if, agreed to by the parties, (b) the evidence is

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1. State v. Chambers, 240 Ga. 76, 239 S.E. 2d 324 (1977).
2. *Id.*, 239 S.E. 2d at 325.
3. Ga. Code Ann. §38-109 (1974).
4. 240 Ga. at 80, 239 S.E. 2d at 327.
5. *Id.*

circumstantial only, and (c) the trial court must, upon request, instruct the jury as to the use of such evidence.[6]

II. Character Evidence—Prior Criminal Conduct

The common law growth of the rules of evidence is seldom marked by such a sudden alteration as was accomplished by the opinion in *Chambers*. More frequently, the growth is seen to follow gradual trends from one point to another as would be expected from the nature of the entire growth process. The cases pointed out here show a mere trend and for their significance in this article, rely upon the extent to which they further the trend. The trend in question relates to a subpart of the rule of evidence governing the admissibility of evidence of the defendant's character in a criminal trial. That subpart deals with proof of the criminal conduct of the defendant other than the criminal conduct with which he is charged. The trend in Georgia is toward a more liberal allowance of the use of such evidence in criminal prosecutions. A great many of the decisions in criminal cases now being rendered by Georgia's appellate courts deal with this trend. The policy of the law is to preclude the prosecution's offering evidence of the defendant's prior criminal conduct merely to show that the defendant is a bad fellow and, therefore, probably committed the crime now under investigation, which is, without a doubt, a sure-fire way to get a conviction where the evidence is otherwise thin or weak. There may be, however, other issues as to which such evidence is relevant and therefore admissible. McCormick has listed a number of such issues.[7] For the purpose of seeing the trend in question, one begins with the doctrine of *Bacon v. State*:[8]

6. Lest one surmise that the rule now announced is the end rather than the beginning of a common law development, *see* Chambers v. State, 146 Ga. App. 126, 245 S.E. 2d 467 (1978), which is the decision in the court of appeals after the reversal on certiorari, where the remaining issues were decided. There had been an agreement between the parties including a requirement that defense counsel be allowed to review each question regarding the alleged crime. There were certain control questions (questions used to test the examinee's reactions under known circumstances) asked by the examiner but not reviewed by defense counsel. Of course, the argument was made that these questions were not in regard to the alleged crime. Even so, the court reversed and stated that agreements between counsel regarding the administration of polygraph tests "must be scrupulously adhered to by both sides." 146 Ga. App. at 129, 245 S.E. 2d at 469.

7. C. McCormick, Evidence, §190, at 448 (2d ed. 1972). McCormick goes on to suggest that a better approach than the case by case establishment of such a list would be a balancing test between prejudice of the other-crimes evidence on the one hand and a need, convincingness, and strength of the other-crimes evidence on the other hand. In fact, a common theme running throughout the second edition of McCormick is a recommendation for less rigid rules of evidence and for more discretion in trial judges, a recommendation which, if followed, would make conscientious judging more difficult and careless judging an even simpler task. The quality of justice would more closely follow the quality of trial judges. For another list, *see* Thomas v. State, 239 Ga. 734, 737, 238 S.E. 2d 888, 891 (1977).

8. Bacon v. State, 209 Ga. 261, 71 S.E. 2d 615 (1952).

> On a prosecution for a particular crime, evidence which in any manner shows or tends to show that the accused has committed another crime wholly distinct, independent, and separate from that for which he is on trial, even though it be a crime of the same sort, is irrelevant and inadmissible, unless there be shown some logical connection between the two from which it can be said that proof of the one tends to establish the other.[9]

The *Bacon* case first resulted in a decision in the court of appeals[10] in which the court erroneously concluded that in the defendant's burglary trial, proof of six wholly independent burglaries committed by the defendant over a period of four years up to and including the date of the burglary alleged in the indictment, was admissible on the issue of intent. The court of appeals acknowledged that such evidence standing alone would be insufficient to uphold a conviction because it went only to the issue of intent and other evidence would be necessary to prove the other elements of the crime of burglary. Nevertheless, the court of appeals held that the past crimes were some evidence of intent in the case at hand.[11] The Supreme Court of Georgia pointed out in its decision that to allow such an exception to the rule against admitting evidence of other crimes would amount to abolishing the rule itself, for every crime involves intent or criminal negligence and, therefore, other crimes could always be shown except in cases of criminal negligence.

There must be a logical connection between the two crimes so that proof of one tends to prove the other. That the crimes are of the same sort is simply not enough. As it is, the rule in Georgia has evolved so that on the issue of identity, for instance, there are two requirements: first, there must be proof that the defendant is the perpetrator of the independent crime. Second, there must be a logical connection or similarity between the two.[12] With this background one can see the trend shown in *Hamilton v. State*.[13] In *Hamilton*, the defendant was charged with armed robbery. The witnesses could not identify the defendant but there was other circumstantial evidence tending to identify the defendant as the perpetrator. To further show identity and a common scheme, the state offered evidence of three independent crimes committed during the same month as the crime in question. In all of the crimes, including the one in question, the victims were ordered to lie on the floor, where they were then bound, hand and foot. In each incident the perpetrator sought to take bank credit cards from the victims. The problem existing with regard to application of the rule was that identity of the defendant in two of the three other crimes was not positively established. In one of the two where identity was not positively established, there was, at least, strong circumstantial evidence of the de-

9. *Id.*
10. Bacon v. State, 85 Ga. App. 630, 70 S.E. 2d 54 (1952).
11. *Id.* at 638, 70 S.E. 2d at 60.
12. French v. State, 237 Ga. 620, 621, 229 S.E. 2d 410, 411 (1976).
13. 239 Ga. 72, 235 S.E. 2d 515 (1977).

fendant's guilt, but in the other, there was no identification of the defendant and the only circumstances connecting him to the crime were that his co-defendant in the other crimes was identified and there were similarities in the way the crimes were committed. The court then concluded that any error resulting from the testimony of a victim in one of the other crimes was harmless error because the additional evidence against the defendant was overwhelming.[14] The dissenting opinion of Justice Ingram did not agree that the evidence of guilt was overwhelming nor that the error was harmless.[15] The dissent implied that this was tantamount to announcing that the defendants may be "tried on their record" even where there is no connection with the crime on trial. What would a trial judge have done with this evidence if Georgia recognized the balancing test as suggested in McCormick[16] and elsewhere?

A classic example of the use of proof of another crime for evidence of identity was *Stephens v. State,*[17] which caused the court no difficulty at all. A tall, thin, black male committed two armed robberies of convenience stores within twenty minutes of each other, driving the same type automobile, wearing the same type clothing, using the same type silver pistol, and giving both victims the same type instructions not to activate any hidden camera. In the second robbery, the defendant's picture was taken. The defendant was identified by eyewitnesses in both robberies. These facts clearly fulfill the two elements required for admissibility. *Clemson v. State*[18] raised a noteworthy point concerning element number two. This element may be established either by showing a similarity between the two crimes or by showing a connection between the two. "Similarity" and "connection" have entirely different meanings. The "similarity" of two crimes is well established in the *Stephens* case. The facts of *Clemson* show a "connection." The defendants were on trial for an armed robbery in which they drove up beside two hitchhikers and ordered them at gunpoint to throw their valuables into the car. The evidence of the other crime offered on the issue of identity was that the defendants had robbed a service station earlier that same evening. The *connecting* facts were that the two crimes occurred on the same evening within hours of each other, they were geographically near each other, the same type automobile was used in each, and the individuals involved were five black males, three of whom were younger in appearance than the other two. These facts were enough to connect the two crimes even though they were not similar in occurrence.

A third example worthy of mention is *Blake v. State,*[19] in which the defendant was charged with the shocking death of a two-year-old girl. He

14. *Id.* at 76, 77, 235 S.E. 2d at 518.
15. *Id.* at 77, 78, 235 S.E. 2d at 518, 519.
16. *See* note 7, *supra.*
17. 239 Ga. 446, 238 S.E. 2d 29 (1977).
18. 239 Ga. 357, 236 S.E. 2d 663 (1977).
19. 239 Ga. 292, 236 S.E. 2d 637 (1977).

had taken the child to the Eugene Talmadge Memorial Bridge, and in a fit of anger directed at the child's mother, he threw the child off the bridge where she fell to her death over one hundred feet below in the cold waters of the Savannah River. During the guilt-innocence phase of the trial, the state was permitted to show that the defendant had on a prior occasion gone to his former wife seeking reconciliation. Upon her refusal, he grabbed her two-year-old son and threatened to stab the child with a knife unless his former wife would come back to him. (Additional facts which the trial court properly admitted during the sentencing phase showed that the defendant subsequently stabbed his former wife after she rescued the boy.) The evidence in *Blake* was not used to establish identity, for that issue was not present. Instead, the independent criminal conduct was admitted on the issue of "state of mind, plan and motive of the defendant."

The problems generated by the state's use of this type of evidence in order to show motive, bent of mind, and course of conduct are illustrated by *Hodge v. State.*[20] During the defendant's rape trial, the victim's sister was permitted to testify that the defendant had once told her, "that if he had the opportunity he wanted to make love to me" and that shortly after the rape occurred, but before it was reported, the defendant pinched the sister "on her rear."[21] Other evidence was offered which showed that the defendant had, a month or so before the rape, given an "obscene" book to a married woman. The supreme court held that this evidence of prior conduct was erroneously admitted, but found that the admission was "harmless error" because it was not highly probable that this evidence had contributed to the conviction.[22] This resulted in two dissenting opinions and one concurring opinion.[23]

Many appellate decisions deal with the threshold question of whether certain minimum evidence has been sufficient to place the defendant's character in issue. In other words, suppose there is a casual reference that the defendant was seen at the jail, or reference to another case, or reference to a police officer's statement that he knows the defendant. Do these references amount to placing the defendant's character into issue? For example, in *McClendon v. State,*[24] a GBI agent testified that he knew the defendant and further that the house where stolen goods were found had been "connected with the defendant." This did not amount to injecting the defendant's character into issue. The testimony of an officer in *Powell v. State,*[25] that the defendant had told the officer that he "had gone to Tifton to see a married lady" also did not place the defendant's character into issue. However, the statement of a GBI agent in *Boyd v. State*[26] that the

20. 239 Ga. 612, 238 S.E. 2d 404 (1977).
21. *Id.* at 613, 238 S.E. 2d at 405.
22. *Id.*
23. Justice Bowles concurred, while Justices Jordan and Hill dissented.
24. 142 Ga. App. 575, 236 S.E. 2d 541 (1977).
25. 142 Ga. App. 641, 236 S.E. 2d 779 (1977).
26. 146 Ga. App. 359, ___ S.E. 2d ___ (1978).

defendant was a "known narcotic dealer" not only placed the defendant's character into issue, but nothing less than a mistrial was adequate to correct the error.[27] An admonition by the trial judge cautioning the jury to "disabuse their minds" of the statement was inadequate.[28]

III. RELEVANCY

The magnitude of difficulty in judicial decision-making varies directly with the amount of discretion a rule of evidence vests in the trial judge and inversely with the concreteness of the rules of evidence. The trial judge looks and hopes for a rule which will draw clear distinctions between what is and what is not admissible. It is painful to find that in some instances, the law leaves it solely to the discretion of the judge to somehow do what is right in admitting or ruling out evidence. After all, it is these rulings and the evidence admitted thereunder which will seal someone's fate or fortune. Who wouldn't prefer to have such grave decisions in "the law" rather than have to pronounce a personal preference, albeit a legal personal preference?

Relevancy is one of those rules which help burden trial judges. It probably could not be any other way. "Questions of the relevancy of evidence are for the court and no precise and universal test [of admissibility] has been established."[29] Even so, every trial judge would be well advised to select one of the many definitions of relevancy given here, there and yonder in the law, write it down and have it ready to pronounce in court, for surely, there has never been a jury trial in Georgia where no relevancy objection was made. One case during the survey period went back to 1856 to find such a definition.[30] In *Cox v. K-Mart Enterprises of Georgia, Inc.*,[31] the plaintiff was injured in a K-Mart department store by a falling vacuum cleaner. The defendant sought to show that if the vacuum cleaner had simply fallen without being pulled by the plaintiff herself, it would have fallen harmlessly between the plaintiff and the shelving. A witness was allowed to testify as to experiments which had been carried out to demonstrate the truthfulness of the defense in this regard. The plaintiff's objection was that there was an insufficient showing of similarity of circumstances between the facts proved and the facts of the experiment. This objection was treated as a relevancy objection and the court of appeals offered this definition:

> Because questions of relevance of evidence are for the court . . . , when facts are such that the jury, if permitted to hear them, may or may not make an inference pertinent to the issues, according to the view which

27. *Id.* at 361, ___ S.E. 2d at ___.
28. *Id.* at 360, 361, ___ S.E. 2d at ___.
29. Johnson v. Jackson, 140 Ga. App. 252, 230 S.E. 2d 756 (1976).
30. Walker v. Roberts, 20 Ga. 15 (1856).
31. 143 Ga. App. 30, 237 S.E. 2d 432 (1977).

> they may take of them, in connection with other facts in evidence, they are such that the jury ought to be permitted to hear them.[32]

What more is this than a rule allowing the trial judge to exercise discretion? How would there ever be harmful error under such a rule? If there ever was harmful error, would it not really be one person substituting his judgment as to discretion for the judgment of another?

Relevancy being of the nature it is, there is perhaps no way to be more concrete. Furthermore, a party who objects that proffered evidence is irrelevant has done no more than to say that it is inadmissible, and has made no objection that requires a ruling by the court.[33] Therefore, while a trial judge could simply rest on this rule of law and overrule the objection, more evenhanded justice might require that counsel be required to more fully state the reason for the objection, why the evidence is not only irrelevant but is prejudicial to his client's cause, or why some other rule of evidence is breached. An excellent illustration of the difficulty imposed upon those enforcing the relevancy rule occurred in *Steiner v. Melvin.*[34] *Steiner* was a wrongful death action brought by the parents of an operator of a motorcycle who was killed in a collision with the defendant's vehicle. The collision occurred near a narrow, one lane, 500 foot bridge over which the traffic was controlled by means of a traffic light located at each end of the bridge. Testimony showed that before reaching the bridge, the deceased had stopped in obedience to the traffic light, but that he had passed through this light before it turned to green. He then crossed over the bridge and went some two hundred feet beyond it to the point of the collision. This presented the frequently raised question of how far removed from the point of impact does one's conduct remain relevant.[35] The simple test of hypothetically moving the traffic light in this case more and more distant from the point of impact will demonstrate the difficulty of applying the rule of relevancy. The decision in *Steiner* was that the evidence was relevant, as it was "closely connected by time and distance to the accident. . . ."[36]

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32. *Id.* at 33, 237 S.E. 2d at 434 (citation omitted).

33. Hogan v. Hogan, 196 Ga. 822, 28 S.E. 2d 74 (1943).

34. 143 Ga. App. 97, 237 S.E. 2d 635 (1977).

35. Consider the speed prior to impact cases. In Lovejoy v. Tidwell, 212 Ga. 750, 95 S.E. 2d 784 (1956), two witnesses were traveling in the same direction as the plaintiff when the plaintiff passed them at a speed of approximately 85 miles per hour. Ten to fifteen minutes later, while traveling at a speed of 50 to 55 miles per hour, the witnesses reached the scene of a collision involving the plaintiff. This testimony of the plaintiff's prior speed was offered as circumstantial evidence of plaintiff's speed at the point of impact. The trial court thought it was relevant, the court of appeals thought it was irrelevant, and the Georgia Supreme Court thought it was relevant. The outcome was more dependent upon the notions of the court with the last shot at the case than upon any analytical pursuit of the meaning of relevancy. But, from the record, one feels that the jury verdict may well have turned on this very evidence.

36. 143 Ga. App. at 98, 237 S.E. 2d at 636. Judge McMurray disagreed with the majority on this point. He argued that the running of the red light was irrelevant "inasmuch as no proximate causal connection with the collision occurring more than 750 feet away was shown by the evidence." 143 Ga. App. at 102, 237 S.E. 2d at 639 (McMurray, J., dissenting).

In most drug cases, the state has a mug shot of the defendant taken when his hair was still an appropriate street length to identify him as being on the drug scene. At the trial, the defense counsel has usually "cleaned the defendant up" so that he could pass for a seminary student. Is the mug shot material (as opposed to relevant) where identity is not in issue? *Marshall v. State*[37] demonstrates that an objection of "immaterial" is not really an objection at all. The court ruled that no harm was shown by the introduction of the mug shot even if it was immaterial.[38] To avoid having this evidence presented, the defendant needs to demonstrate how this immaterial evidence wrongfully identifies him with a culture of which he is not a part, to his own serious prejudice. To counter this argument, the state needs to show issues, other than identity, which the mug shot will help prove.

IV. HEARSAY

A. *Business Records Statute*

The Business Records Statute[39] has been around long enough for some of the questions of its application to have been resolved. However, each year, there usually arises a point or two for clarification. This year one more point was put to rest. Suppose that business *A* has a document in its possession containing a business entry made by business *B* while the document was in the custody of business *B* and that later the document was transferred to business *A*. May a witness familiar only with the business records of business *A* lay the foundation for admissibility of this record including the entry made at business *B*? The answer is yes. The problem goes back for its beginning to an earlier Georgia Supreme Court decision in which a large number of Veterans Administration records were offered.[40] The basic flaw in most of these records was that they contained opinions of all sorts from many sources. Beyond that, in dealing with part of the records, the opinion notes that these records were records of the Defense Department and not of the Veterans Administration and could not be a "memorandum or record of an act, occurrence, or event of the Veterans Administration, as they obviously were records or memoranda of the Defense Department"[41] even though they were found among the records kept by the Veterans Administration.

Lewis v. United California Bank[42] involved a suit brought on behalf of a bank arising out of factoring services rendered by the bank. The defendant sought to have the trial court exclude business records offered by the bank

37. 143 Ga. App. 249, 237 S.E. 2d 709 (1977).
38. *Id.* at 253, 237 S.E. 2d at 712.
39. GA. CODE ANN. §38-711 (1974).
40. Martin v. Baldwin, 215 Ga. 293, 110 S.E. 2d 344 (1959).
41. *Id.* at 302, 110 S.E. 2d at 351.
42. 143 Ga. App. 126, 237 S.E. 2d 645 (1977).

on the ground that the records contained entries made by various manufacturers before the records were forwarded to the bank. The defendant relied on *Martin v. Baldwin,* and pointed out that no witness from the manufacturers appeared to establish that the entries were contemporaneously made in the regular course of the manufacturers' business. The court of appeals pointed out that the manufacturers' records were sent to the bank and were retained by it in the ordinary and regular course of the bank's business, an observation which hardly seems to meet the point raised. For authority, the court of appeals relied upon that portion of the Business Records Statute requiring that its provisions be liberally interpreted and applied. The case then went to the Georgia Supreme Court on certiorari.[43] The majority opinion by the supreme court was a simple affirmance, but of interest is a concurring opinion written by Justice Bowles, who just happens to have been counsel of record for one of the parties in *Martin v. Baldwin.* He pointed out that the Defense Department records offered in *Martin* were not accompanied by proof that they were records made in the regular course of the business of either the Defense Department or of the Veterans Administration.[44] In other words, *Martin* cannot be read to stand for the proposition that entries made in one business may not be admitted as part of the records of another business. It has been better put by Justice Bowles as follows:

> Where routine, factual documents are made by one business, transmitted or delivered to a second business, and there entered or kept by the second business in the regular course of the business of the receiving business, they can become business records of the receiving business. Where the proper statutory foundation is laid they may be admitted in evidence as business records of the receiving business even though they were not initially prepared, made or produced by it. The test is not who made the original document constituting the event, act, transaction, or occurrence, but whether or not the document after it was made became a part of the business records of the person or firm having custody of the same.[45]

A different division of the court of appeals reached the same result in *Serve v. First National Bank of Atlanta,*[46] although in a slightly different manner in an opinion decided two months prior to the court of appeals decision in *Lewis.* The defendant had made payment on a note owed by her to bank *A* by endorsing and tendering to bank *A* a check given to her by a third party and drawn on bank *B.* The check was returned to bank *A* from bank *B* stamped "account closed." Bank *A* filed suit, and at the trial, a witness who was an employee of bank *A* testified for the purpose of laying a foundation for admitting the check as a business record of bank *A.* The objection, of course, was that no foundation was laid as to the making of

43. Lewis v. United Cal. Bank, 240 Ga. 823, 242 S.E. 2d 581 (1978).
44. *Id.* at 824, 242 S.E. 2d at 582 (Bowles, J., concurring).
45. *Id.* at 824, 825, 242 S.E. 2d at 582.
46. 143 Ga. App. 239, 237 S.E. 2d 719 (1977).

the "account closed" entry by bank *B.* This opinion having been written before *Lewis,* the court of appeals relied on that part of the Uniform Commercial Code providing that a stamp or writing of a drawee bank showing refusal of payment is admissible in evidence.[47] Under *Lewis,* the stamp or writing would be admissible under the Business Records Statute without regard to the Uniform Commercial Code. Even if one might say that the result in *Lewis* amounts to a stretching of the literal terms of the Business Record Statute, the result is nevertheless good. So long as only routine business entries not containing opinions, and being trustworthy because of their routine nature are allowed under the *Lewis* doctrine, much court time and inconvenience of witnesses will be saved with very little, if any, harm being done to the search for the truth.

B. Medical History

With little fanfare, the 1977 General Assembly enacted a statute creating an exception to the hearsay rule.[48] Under that section, statements made for the purpose of receiving medical treatment or diagnosis are admissible. To read the statute causes one to speculate that those interested in personal injury litigation guided the act through the General Assembly. The future might very well prove that this hearsay exception will have a greater impact, however, upon criminal law than civil litigation. While it is but a note in passing, it is interesting that the first opinion cited under the new code section was *Banks v. State,*[49] a prosecution for child molestation. In *Banks,* a nurse was allowed to testify as to what the child told her had happened. The child had seen the nurse at the hospital emergency room shortly after the event. The opinion does not quote the testimony but does state that the testimony was "pertinent to the diagnosis and treatment."[50]

Suppose a victim identifies the defendant to the doctor as being the one who shot the victim. Is this pertinent to treatment? Would it matter, as to the treatment, who pulled the trigger? Will the identity of an assailant generally be pertinent to the diagnosis or treatment? Suppose the issue is intent. The defendant claims accident and the state claims intentional knifing. Would the witness' statement to the doctor as to how he was approached by the defendant (in reality an effort to establish intent) be pertinent to diagnosis and treatment? Once the bar begins to fully utilize this statute in criminal cases, the appellate courts will have some difficult interpretations to make.

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47. GA. CODE ANN. §109A-3-510(b) (1973).

48. GA. CODE ANN. §38-315 (Supp. 1978). §38-315 provides: "Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment shall be admissible in evidence."

49. 144 Ga. App. 471, 241 S.E. 2d 587 (1978).

50. *Id.* at 472, 241 S.E. 2d at 589.

C. *Res Gestae*

Res gestae causes problems. There is little general agreement as to its meaning and even less as to its application. This point is demonstrated by three cases, all of which involve statements by children who were allegedly abused in one way or another by an adult. In *Clark v. State*,[51] the defendant was charged with the aggravated sodomy of a six-year-old boy. Some 30 to 40 minutes after the incident, and after the child had been unsuccessfully questioned by others, the child told his father what had taken place. The trial court found that the child's statement to his father was part of the res gestae. In a five to four decision, the court of appeals reversed. The court applied the following test in deciding against res gestae: ". . .were the declarations a part of the occurrence to which they relate, or were they a mere narrative concerning something which had fully taken place and had therefore become a thing of the past?"[52] The majority found that the child was merely reciting a narrative of past events. However, two dissenting opinions were written. One dissenting opinion used the following test to reach the opposite result from the majority: ". . .where the complaint constitutes a part of the res gestae not only is the fact that a complaint was made, 'but the complaint made, is admissible; and the details of the complaint may be given' in evidence as well."[53] This may beg the question, so for good measure a different test was also given: "the ultimate test of res gestae is spontaniety and logical relation to the main event . . . , contemporaneous with the main fact but not necessarily precisely concurrent in point of time."[54] The other dissenting opinion relied upon the proposition that res gestae rules should be more liberally applied in the case of children since they are less likely to fabricate statements than adults,[55] a rule that any parent might seriously question.

The second case is like unto the first, with an opposite result. In *Johnson v. State*,[56] a six-year-old girl was allegedly molested by the defendant. Statements made by the child, first to her mother and then to a police officer, both within fifteen to twenty minutes of the incident, were admitted. Citing only the time factor, the majority agreed that the statements were part of the res gestae.[57] Judge Smith, who wrote the concurring opinion, objected to the mere consideration of lapse of time as a determining factor and went on to find the statement to the mother within the res gestae and the statement to the police officer without the res gestae. Nevertheless, he found the error to be harmless.[58]

51. 142 Ga. App. 851, 237 S.E. 2d 459 (1977).
52. *Id.* at 852, 237 S.E. 2d at 460.
53. *Id.* at 855, 237 S.E. 2d at 462 (McMurray, J., dissenting).
54. *Id.* (citation omitted).
55. *Id.* at 856, 237 S.E. 2d at 462 (Banke, J., dissenting).
56. 142 Ga. App. 560, 236 S.E. 2d 552 (1977).
57. *Id.* at 561, 236 S.E. 2d at 553.
58. *Id.* at 562, 236 S.E. 2d at 553.

The final case in this area was *Williams v. State*,[59] involving cruelty to a four-year-old and a seven-year-old. An eight-year-old, found not competent to testify at the trial, had told her mother about the defendant's acts of cruelty toward the other children, which had been committed in the presence of the eight-year-old. This statement to the mother was made almost two days after the event. Without dissenting or concurring opinions, this statement was held to be without the res gestae.[60] Again the harmless error rule prevented a reversal. The question now is whether these cases point to a weakness in the res gestae exception to the hearsay rule or whether they point to a weakness in the hearsay rule itself as it applies to the statements of very young children, particularly in child abuse cases. Suppose that each of the children who were injured in the above cases had been taken to an emergency room and had there given the same statements to a nurse who was about to treat them. Would the state have been able to get them admitted under the medical history exception of Ga. Code Ann. §38-315?[61]

D. Conspiracy Statements

Georgia has for many years recognized the rule that declarations made by one of several conspirators may be admitted in the trial and used against a co-conspirator.[62] This rule was further defined and broadened during the survey period by *Knight v. State*.[63] In *Knight*, a threat made by one of three conspirators was allowed in evidence in the separate trial of a co-conspirator. The conspiracy was proven to exist at the time of the crime of armed robbery, but this statement was made some three months previously at a time when the record was silent as to the existence of a conspiracy. The rule adopted in *Knight* was that if the evidence relates to motive or intent and is a declaration made by a co-conspirator prior to the time the defendant on trial joined the conspiracy, it is admissible against the defendant on trial who did later join the conspiracy.[64] A caveat to this announcement of the rule is the statement in the opinion that perhaps from the evidence the jury could have found the conspiracy to have been in existence and the defendant a part thereof at the time of the declaration.[65]

V. Best Evidence Rule

The best evidence rule can usually be counted on to create some interesting questions. It is sought to be applied by many litigants to situations

59. 144 Ga. App. 130, 240 S.E. 2d 890 (1977).
60. *Id.* at 132, 240 S.E. 2d at 891, 892.
61. *See* note 48, *supra* and accompanying text.
62. Ga. Code Ann. §38-306 (1974).
63. 239 Ga. 594, 238 S.E. 2d 390 (1977).
64. *Id.* at 599, 238 S.E. 2d at 394.
65. *Id.* at 599, 600, 238 S.E. 2d at 394.

where it simply is not appropriate. The rule is stated as follows: "the best evidence which exists of the fact sought to be proved shall be produced, unless its absence shall be satisfactorily accounted for."[66] Too literal a reading of this code section causes most of the trouble. Litigants who find some evidence offered by an opponent harmful to their cause often view this rule as one precluding *any* evidence where "better" evidence may somewhere exist.

To the surprise of some litigants, and to the dismay of some, that is not the rule. However, it is the interpretation the defendant in *Adams v. State*[67] would have liked. He contended that the best evidence rule would require the production of a motor vehicle license plate and would preclude proof of the number on the plate by oral testimony. The tag was a metal plate with numbers. "[T]he best evidence rule applies only to the contents of a writing. The rule does not require that chattels be introduced in evidence."[68] If, for example, a party is seeking to prove the existence of an independent fact such as certain expenses incurred, and not the content of records containing the expenses, then oral testimony of the amount of the expenses is admissible.[69] Furthermore, a best evidence objection is not well taken where a police officer testifies orally as to the contents of a confession made by the defendant, and the objection is based on the fact that a tape recording had been made of the defendant's confession. The best evidence rule applies only to writings, and does not extend to tape recordings.[70]

VI. Opinion Evidence

Those interested in the determination of the full value of the life of a human being will need to read *Woods v. Andersen*.[71] An economic expert was allowed to give an opinion of the value of the economic loss concerning the life of a six and a half year old child. His opinion incorporated an estimate of future inflationary trends and, to be exact, the trends for the next sixty years. The case caused a very divided court in which one dissenter saw the evidence as "pure conjecture."[72] The majority, however, held in favor of the admission of this expert testimony. But where does opinion testimony become too speculative? Where should a court draw the line?

66. Ga. Code Ann. §38-203 (1974).
67. 142 Ga. App. 252, 235 S.E. 2d 667 (1977).
68. *Id.* at 254, 235 S.E. 2d at 669.
69. Klem v. Southeast Ceramics, Inc., 142 Ga. App. 610, 236 S.E. 2d 694 (1977).
70. Pryor v. State, 238 Ga. 698, 707, 234 S.E. 2d 918, 926, 927 (1977).
71. 145 Ga. App. 492, 243 S.E. 2d 748 (1978).
72. *Id.* at 499, 243 S.E. 2d at 753 (Smith, J., dissenting).