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**A Wistful Farewell to Pink Bugg & Queen Caroline* has been reprinted with the gracious permission of the Maryland Bar Journal (see Md. Bar J. vol. XXVIII, no. 5). The author has supplemented his original article with a section on presumptions and jury instructions that appear for the first time herein.

A WISTFUL FAREWELL TO PINK BUGG & QUEEN CAROLINE*

Hon. Joseph F. Murphy, Jr.

Trial lawyers and trial judges have been applying the Maryland Rules of Evidence since Friday, July 1, 1994. One of those rules modified the Rule in Queen Caroline's Case. I applaud that modification. Another abolished the Rule in Pink Bugg's Case. "The Rule in Pink Bugg's Case?" you ask. Yes, dear reader, there was such a rule.

On October 19, 1964, Pink Bugg was one of the Cecil County taxicab drivers lined up at the Whistle Stop bus station in Perryville, awaiting the arrival of sailors returning to the Naval Training Station at Bainbridge. Although he was well back in the line when the first bus arrived, Bugg (in the words of another driver) "shot up, cut everybody off, loaded up a full load and went off to Bainbridge." He then raced back to the Whistle Stop and was now "first in line for the next bus." As the Court of Appeals noted, because his actions were "contrary to the prevailing custom," it was "no surprise that [several other drivers] took a rather dim view of Bugg's conduct."

Just how dim a view they took was the subject of a civil action for assault that Bugg filed against three of the drivers. Representing himself in a jury trial, Bugg sought to establish the difference between what he looked like before the incident and what he looked like after the dust had settled. He called a neighbor to testify about the dramatic change in his physical condition. This strategy did not succeed. The following transpired during the neighbor's direct examination:

Q. (BY THE COURT) You say [that you saw] nothing unusual about his face or his head or anything?

A. He looked that night just about like

he is looking right now. He always had been a bad man, ever since I have been knowing him. Bad man. Fights with me every time he gets in conversation with me. Bad man. Of course, he is my neighbor. We are neighbors.

The evidentiary issue was generated by the following cross-examination of Bugg's neighbor:

Q. (BY APPELLEES' COUNSEL) What is Mr. Bugg's reputation for good order, sobriety, peacefulness, and general reputation in the neighborhood where he lives? Is it good or bad?

MR. BUGG: I object to that.

A. It is bad. Bad as anybody I have met since I have been in the world, and I will soon be 70 years old, December 27th.

THE COURT: I overrule the objection.

A. He is the baddest man I ever met.

The trial judge entered a judgment against Bugg at the conclusion of his case-in-chief. The Court of Appeals affirmed that ruling as to defendant Brown (who had been home in bed on the evening in question), but reversed as to the other defendant-appellees. *Bugg v. Brown*, 251 Md. 99, 246 A.2d 235 (1968). This case, however, was as important as it was amusing, because it established that there are civil cases in which a party's

character for a relevant character trait is admissible circumstantial evidence of how he or she acted on the occasion at issue. As a general rule, the character of a party is not admissible in a civil case unless: (1) the nature of the proceedings, e.g., a defamation action, puts a party's reputation in issue; or (2) the party's character for veracity comes under attack during his or her testimony. *Bugg*, 251 Md. at 106, 246 A.2d at 239. Under the Rule in Pink Bugg's Case, however, in civil actions for assault and battery--when the trier of fact must determine who was the initial aggressor--each party has the right to prove that the adverse party has a bad character for "turbulence." *Id.*

That rule has been trumped by Rule 5-404(a)(1). Character testimony is no longer admissible as circumstantial evidence of how a party to a civil case probably acted on a particular occasion. Criminal defendants have a right to establish their good character for a trait that is pertinent to the crime. Md. Rule 5-404(a)(1)(A). Persons who are sued for assault, or for conduct that involves fraud, should have this right as well.

That the Rule in Pink Bugg's Case has been abolished, however, is no reason to complain about the overall excellence of our new rules. These rules are working very well because many lawyers and judges worked very hard to accomplish the purpose set out in Rule 5-102. It would take all the space I have been allocated to identify each contributor. Two persons, however, deserve special commendation: Hon. Alan M. Wilner, Chair of the Rules Committee, and Professor Lynn McLain of the University of Baltimore School of Law.

Now, back to the major changes.

IMPEACHMENT

Under the Rule in Queen Caroline's Case, the lawyer who sought to impeach a non-party witness with a prior inconsistent written statement was prohibited from asking any questions about that statement until the witness--while on the stand--was given an opportunity to read it. This rule was based on the questionable assumption that witnesses will abide by the oath to testify truthfully. All too often, of course, it impaired counsel's ability to expose a deceitful witness.

Rule 5-613(a) strikes an ideal balance. The witness must ultimately be given an opportunity to examine the statement, but not before answering questions about it. The significance of the change to Queen

Caroline's Rule has been diminished somewhat by the adoption of Rule 5-802.1. Under this rule, derived from *Nance v. State*, 331 Md. 549, 629 A.2d 633 (1993), when a witness is on the stand, his or her prior inconsistent written (or recorded) statement (or statement made under oath) is admissible as substantive evidence. Counsel now have less difficulty dealing with the shifty turncoat witness who has given a prior inconsistent written statement.

Rule 5-616, which has no federal counterpart, is a very useful guide for trial lawyers and trial judges. It distinguishes "intrinsic" impeachment (in which the witness is asked about the impeaching fact) from "extrinsic" impeachment (in which proof of the impeaching fact comes from a source other than the witness sought to be impeached). It identifies those modes of impeachment that: (1) can only be pursued by questioning the witness, e.g., "prior bad acts;" (2) must be initially pursued by questioning the witness, e.g., "prior inconsistent statements;" and (3) may be pursued without questioning the witness, e.g., "bias." Under Rule 5-616(b)(4), for example, extrinsic evidence offered to impeach a witness's "impaired ability" (to observe, recall, describe, etc.) is not admissible unless counsel questioned the witness on that point--or unless the judge is persuaded that "the interests of justice" would be best served by admitting the evidence despite the absence of the required foundation. This Rule also gives the judge discretion to admit: (1) impeachment evidence that is "collateral" (i.e., the evidence is relevant to no issue other than the issue of whether the witness gave an untruthful answer to a particular question); and (2) "collateral" rehabilitation evidence as well.

Rule 5-608 requires that the trial judge sustain a timely objection to "specific instances" impeachment unless, outside the hearing of the jury, counsel seeking to introduce such evidence establishes a "reasonable factual basis" to believe that the incident(s) occurred.

CHARACTER

When character is an essential element of the claim or the defense, a character witness can testify during direct examination about specific instances that form the basis of his or her personal opinion. On the other hand, when character testimony is being offered as circumstantial evidence, Rule 5-405 restricts specific instance testimony to cross-examination. That restriction overrules the holding in *Hemingway v. State*, 76

Md. App. 127, 543 A.2d 879 (1988).

SUBSEQUENT REMEDIAL MEASURES

Rule 5-407 excludes evidence of remedial measures undertaken subsequent to the plaintiff's injury. As a practical matter, proof of such measures will now be admitted only if the defendant is foolish enough to open the door by defending the claim on the theory that "there was nothing else we could have done."

EXPERTS

Case law required that an expert state the basis of his or her opinion before the opinion could be expressed. Rule 5-705 abolishes that requirement "(u)nless the court requires otherwise."

Rule 5-706 provides for "court appointed experts."

HEARSAY

A person's non-assertive conduct is now treated as circumstantial evidence of his or her state of mind. While an "implied assertion" may well be excluded under some other rule, it will no longer be excluded under the rule against hearsay.

Unlike the federal rules (that place an artificial "non-hearsay" label on certain out-of-court declarations that are classic hearsay exceptions), our rules divide hearsay exceptions into three categories: (1) Rule 5-802.1 contains those exceptions that apply only when the witness who testifies at trial is the person who made the out-of-court declaration; (2) Rule 5-804 contains those exceptions that apply only when the out-of-court declarant is "unavailable" to testify; and (3) Rule 5-803 contains the exceptions that apply regardless of whether the out-of-court declarant is available to testify. The new rules combine the best of the federal rules and our prior case law.

When a writing qualifies as "past recollection recorded," it will now be read to the jury but it will not get into the jury room. A document now becomes "ancient" after twenty years. The "excited utterance" exception applies only to statements about the exciting event, rather than to any statement triggered by the exciting event. A statement of intent to do something in the future is admissible to prove only the conduct of the declarant, rather than the conduct of the declarant and

any other persons mentioned in the declaration. Learned treatises are no longer admissible for the limited purpose of impeachment. "Dying declarations" are now admissible in civil cases as well as in prosecutions for offenses other than murder. The "prompt complaint" of a rape now applies to all sexual assaults. Everyone should be happy with the user-friendly exceptions for various kinds of records.

The admissibility of "hearsay within hearsay" (e.g., a party's admission of negligence in the police report) is controlled by Rule 5-805, while the impeachment (and rehabilitation) of hearsay declarants is controlled by Rule 5-806.

AUTHENTICATION

A business record may now be authenticated through a certificate that complies with Rule 5-902, rather than through a "live" witness, provided that the lawyer who wishes to use this procedure complies with the notice requirement of Rule 5-902(a)(11). The absence of an entry in a public record can also be proven by such a certificate, but it appears that testimony will still be required to prove the absence of an entry in a business record. Under Rule 5-902(a)(12), the court can require that any authentication objection be made before the trial begins.

ODDS AND ENDS

We now have a rule of "immediate completeness" for all written, recorded, and transcribed statements. Rule 5-106 extends to all such items the rule of completeness provided for depositions by Rule 2-419(b).

Rule 5-201 resolved any disagreement on the issue of whether counsel could introduce evidence that controverted a fact about which the court took judicial notice. The introduction of such evidence is prohibited by that rule.

Rule 5-1004 provides for the introduction of "secondary" evidence when the absence of the original document has been excused. Case law required that counsel use the "best (i.e., most accurate, probative, reliable, satisfactory) secondary" evidence in such a situation. That requirement does not appear in the new rule.

Offers of compromise, payment of medical expenses, and statements made during plea negotia-

tions all enjoy more protection under the new rules. We now have "State's agent" and child's "support person" exceptions to the "sequestration" rule. Lawyers representing criminal defendants must be aware of the potential dangers lurking in Rules 5-410(b)(1), 5-410(c), and 5-611(b)(2).

JURY INSTRUCTIONS ABOUT PRESUMPTIONS

Rule 5-301(a) provides for the method by which the judge presiding over a civil trial decides whether the evidence offered to rebut a presumption: (1) is so conclusive that the presumption has been rebutted as a matter of law; (2) is so weak that the presumed fact stands established as a matter of law; or (3) has generated a genuine issue of controverted fact that must be resolved by the trier of fact. According to the Committee Note, this rule was intended to codify the approach to presumptions taken by the Court of Appeals in *Grier v. Rosenberg*, 213 Md. 248, 131 A.2d 737 (1957). Does this rule require a change in jury instructions? In the humble opinion of your author, the answer is "no," unless the Rule actually trumps the holding in *Grier*. Let us examine the facts of that case.

On January 5, 1953, at about 1:30 P.M., Maurice Flather was driving a Baltimore Transit Company "trackless trolley" on the "21 line" in Baltimore City. The bus was proceeding in a northerly direction on Caroline Street, and stopped to pick up passengers at the southeast corner of Caroline and Monument Streets. Miss Mable Grier was the last passenger to board at that stop, and she was about to pay her fare when the traffic light changed to green for northbound traffic.

As the bus began to enter the intersection, a blue car that had been positioned to its left made (in Flather's words) "a sharp right hand turn in front of [the bus and] went east on Monument Street." Flather slammed on the breaks. As a result of the unusual stop, Miss Grier was thrown against the windshield of the bus and her head struck the rear view mirror. She ultimately sued (1) the Baltimore Transit Company; (2) Mr. Flather; and (3) Harry Rosenberg, the alleged owner of the blue car.

A Baltimore City Court jury heard Mr. Flather testify that 72-751 was the license number of the blue car that caused the sudden stop, and heard the Chief Investigator of the Department of Motor Vehicles testify that this license number had been issued for an automobile owned by Mr. Rosenberg. The jurors also heard from

Mr. Rosenberg, and ultimately returned a verdict in favor of each defendant.

In a Memorandum Opinion explaining why he was denying Miss Grier's motion for a new trial, the trial judge provided the following summary of (1) Mr. Rosenberg's testimony; (2) the jury instructions on the issues generated by that testimony; and (3) the plaintiff's exception to those instructions:

Rosenberg testified in his own behalf. The incident occurred January 5, 1953, at Monument and Caroline Streets. His first knowledge of it was six months later when he received a letter from the Baltimore Transit Company dated July 13, 1953. The substance of his testimony is that he has no recollection of the incident, and there was no way for him, after receipt of said letter, to ascertain whether or not his automobile was at the intersection mentioned at the particular time the incident occurred. Rosenberg is a distributor of coin operated machines with offices at the time at 1101 Cathedral Street. He lived at 3825 Copley Road, which is in northwest Baltimore, near Cold Spring Lane and Dolfield Avenue. His duties are in the office and he does very little traveling around the city. He uses his car to drive to the office each day and keeps it on a parking lot across from the office. His wife has a car. He checked his records and found nothing that would cause him to be in that section on that particular day. His employees have their own cars which they use to make service calls. Occasionally an employee may use Rosenberg's car and he does not ask the reason for doing so. He conferred with all his employees and they could not remember about the particular day.

At the conclusion of the testimony, the jury was instructed, in substance, that in order to render a verdict against Rosenberg, it must find:

- (1) That an automobile crossed in front of the trolley.
- (2) That the automobile belonged to Rosenberg.
- (3) That Rosenberg or someone on Rosenberg's business was driving the automobile with his permission.
- (4) That the driver of the automobile was negligent.

The jury was further instructed that the burden of proof was on the plaintiff to establish to their satisfaction, from all the evidence in the case, each and all of the above propositions, and if she failed to do so, or if their minds were in a state of even balance as to any one of said propositions, their verdict should be in favor of Rosenberg.

Plaintiff excepted to the charge. The ground of the exception appears to be that if the jury found propositions (1) and (2) above, there was a presumption that the automobile was being driven at the time either by Rosenberg, or on his business by his agent or servant, and the burden of overcoming the presumption was on Rosenberg.

My late friend Amos Meyers, Esq., a fine person and a fine trial lawyer, was Miss Grier's counsel. The Record Extract contains the exception he interposed on Miss Grier's behalf, and the trial judge's response to that exception:

(Mr. Meyers) May I ask for a clarification of the three or four items wherein the court stated the obligation that the plaintiff must show of Mr. Rosenberg's negligence. I believe that in that connection, your Honor, you should tell the jury that the presumption is that the operator of the vehicle is the owner's agent and that then the burden is on the defendant Rosenberg to show the contrary, if they believe that was his car at the scene of the accident.

(The Court) No, I think in view of the denial of ownership of the automobile alleged to have been involved, even if there was a presumption, the jury has to determine the matter from all the evidence. A prima facie case of agency probably results from proof of ownership and the presumption would be effective until evidence is offered from which a contrary finding may be made. When such evidence is offered, then it is my understanding that the trier of the facts has to determine the question from all the evidence. The burden of proof never shifts.

In the Court of Appeals, Amos prevailed on his contention that Miss Grier was entitled to a new trial because the Court held that the requested instruction "should have been given." *Grier*, 213 Md. at 252, 131 A.2d at 739. The appellate court explained:

In a long line of decisions of this Court, it has been held that there is a rebuttable presumption that the driver of an automobile is the agent, servant and/or employee of the owner thereof. . . [a]nd this includes a rebuttable presumption that the agent, servant and/or employee was operating the automobile within the scope of his employment. (citations omitted)

This Court also has previously approved the granting of instructions of this nature, relating to negligence. Indeed, if the instruction be not granted, how is the jury to know of the presumption? No matter how clearly the ownership of a motor vehicle might be established, without any information of, or instruction concerning, the presumption, the jury might have great reluctance in finding the driver of such vehicle an agent or servant of the owner acting within the scope of his employment.

Grier, 213 Md. at 252-253, 131 A.2d at 739.

Subsequent cases have made clear that the kind of presumption at issue in *Grier* shifts both the burden of production and the burden of persuasion. See, e.g., *Phillips v. Cook*, 239 Md. 215 at 221-22, 210 A.2d 743 at 747-48 (1965). In *Phillips*, the evidence was sufficient to require that the jury decide the question of whether the driver of an automobile involved in an accident was about the owner's business on that occasion. The trial judge's instructions told the jurors, in essence, to answer that question "yes" unless they were persuaded to the contrary. This instruction was held to be entirely correct. *Phillips*, 239 Md. at 222, 210 A.2d at 748.

There are situations in which the jury must be instructed about an applicable presumption, e.g., the criminal defendant's presumption of innocence, or the presumption of correctness provided for by statute in Workers' Compensation and Health Claims proceedings. Rule 5-301 makes no change to such instructions. Under *Grier* and *Phillips*, when the presumption at issue is the kind of evidentiary presumption that shifts both the burden of production and the burden of persuasion (e.g., the presumption that the driver is the agent of the owner, or the presumption that the grantee profited from a confidential relationship with the grantor), the jurors are instructed to find that the presumed fact is true unless they are affirmatively persuaded that it is not true. If Rule 5-301 now prohibits the kind of "burden shifting" instruction that "should have been given" in *Grier v. Rosenberg*, this Rule has made a most unfortunate change in the area of jury instructions.

OTHER UNRESOLVED ISSUES

Will our "catchall" hearsay exceptions--Rules 5-803(b)(24) and 5-804(b)(5)--admit any declaration that is a "near miss" under one of the traditional hearsay exceptions? I predict that the answer is "no."

In products liability cases, will Rule 5-407 exclude remedial measures taken prior to the date of the plaintiff's injury, but subsequent to the date on which the allegedly defective product entered the stream of commerce? That issue really should be resolved on a case-by-case basis.

Does the *Frye-Reed* test still apply to the expert opinion, an essential component of which is the result of a scientific test? Under *Frye-Reed*, scientific test results--and opinions that could not be expressed without reliance on such results--cannot be admitted into evi-

dence (in the absence of a statute or a reported opinion of a Maryland appellate court holding that the results are admissible) unless the proponent establishes that the relevant scientific community is in general agreement that the scientific test at issue is capable of producing an accurate result. See, e.g., *Keen Corp. v. Hall*, 96 Md. App. 644 at 654-60, 626 A.2d 997 at 1002-05 (1993); *United States Gypsum Co. v. Mayor of Baltimore*, 336 Md. 145 at 181-83, 647 A.2d 405 at 423-24 (1994). It took the Supreme Court eighteen years to announce that the *Frye* test was abolished when the Federal Rules of Evidence went into effect. I am certain that it will not be that long a period of time before we learn whether the *Frye-Reed* test will be abandoned. I hope that this test will stay with us.

Does our strict "evidence aliunde" rule still apply when a "vicarious admission" is offered under Rule 5-803(a)(4) or (5), and the foundational proof of employment or concertive criminal conduct is in dispute? Under the federal rules: (1) the judge, not the jury, decides whether the foundation is adequate; and (2) in making that decision, the judge is not restricted to evidence independent of the out-of-court declaration at issue. There are good arguments for retaining the "evidence aliunde" rule, and good arguments for following the federal practice.

I close with a reference to Rule 5-402, which reminds us that "decisional law not inconsistent with these rules" remains with us. By improving on the decisional law, the Maryland Rules of Evidence have made a sterling contribution to our jurisprudence.

About the Author:

The Honorable Joseph F. Murphy, Jr. is currently a member of the Court of Special Appeals of Maryland. He has been teaching Evidence at the University of Baltimore School of Law since 1974 and is the author of the *Maryland Evidence Handbook* (Michie 2d ed. 1993).
