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Kentucky Law Survey: Evidence

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Evidence

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INTRODUCTION

During the Survey period, Kentucky courts addressed several significant issues in evidence law.[1] Most notably, the Kentucky Supreme Court redefined the use in a criminal case of prior criminal convictions to impeach a witness, including the accused. This Survey will highlight this decision and, to a lesser extent, discuss decisions addressing similar occurrences, spontaneous statements and the use of polygraph tests.[2]

I. EVIDENCE OF SIMILAR OCCURRENCES

Evidence of events whose circumstances are similar to those at issue often is offered for the probative value of showing conformity or repetition. Decisional law, over the years, has addressed the admissibility of such evidence according to its nature: habit, custom or similar occurrences.

Kentucky law prohibits the introduction of evidence of a person's habit to prove that he acted in conformity therewith

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[1] For the purposes of continuity and utility, the author has followed the format suggested in prior Surveys of Kentucky Evidence Law. *See, e.g.*, R. LAWSON, THE KENTUCKY EVIDENCE LAW HANDBOOK (2d ed. 1984); Underwood, *Kentucky Law Survey - Evidence*, 71 KY. L.J. 287 (1982-83).

[2] This Survey does not treat, but takes this opportunity to point out, the following significant cases: Davis v. Graviss, 672 S.W.2d 928 (Ky. 1984) (qualified opinion of an expert witness based on reasonable probability is admissible); Basham v. Commonwealth, 675 S.W.2d 376 (Ky. 1984) (evidence obtained in wiretap operation conducted by federal law officials is admissible in Kentucky courts, despite Kentucky statute making electronic eavesdropping illegal), *cert. denied*, 105 S. Ct. 1749 (1985); American Motors Corp. v. Addington, No. 82-CA-1624-MR, 31 KY. L. SUMM. 5, at 4 (Ky. Ct. App. July 13, 1984) (rollover propensity of other vehicles inadmissible where dissimilarities involved cause such evidence to be prejudicial); Rohleder v. French, 675 S.W.2d 8 (Ky. Ct. App. 1984) (review being limited to matters properly introduced into the trial record, documents not properly introduced pursuant to KY. REV. STAT. § 422.020(5) [hereinafter cited as KRS] cannot be reviewed on appeal); Dillard v. Ackerman, 668 S.W.2d 560 (Ky. Ct. App. 1984) (police officer cannot express opinion on reasonableness of automobile speed at time of accident); Commonwealth v. Morrison, 661 S.W.2d 471 (Ky. 1983) (litigant's prior misconduct properly excluded after balancing of probative value and prejudicial effect).

on a particular occasion.[3] Habit is one's regular response to a particular repeated situation.[4] While habit is related to character, the latter tends to be a more generalized description of one's disposition with respect to a general trait, such as honesty or peacefulness, rather than a description of one's regular response to a particular situation.[5] Judicial reluctance to admit evidence of habit may be due to its kinship with character, since both are offered to prove an act in conformity therewith.[6]

Custom is a trait which prevails in a business, trade, profession or calling.[7] In contrast to habit, evidence of custom is admissible in Kentucky to prove any material element of a claim or defense.[8] Similar occurrences are specific events involving a party to the litigation which need not amount to either habit or custom and which may even be one time occurrences.[9] The admissibility of evidence of occurrences similar to those being

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[3] R. LAWSON, *supra* note 1, at § 2.25(A)(1). *See also* Cincinnati, N.O. & T.P. Ry. v. Hare's Adm'x, 178 S.W.2d 835, 838 (Ky. 1944) (evidence that a driver always stopped and paid attention at a railroad crossing inadmissible to prove absence of negligence on particular occasion); Siler v. Renfro Supply Co., 26 S.W.2d 12, 13 (1930) (evidence that decedent was generally careful and prudent driver ruled inadmissible). This is contrary to the federal rules which permit the introduction of evidence of one's habit to prove conduct on a particular occasion in conformity with that habit. *See* FED. R. EVID. 406 [hereinafter cited as FRE]. FRE 406 states:

> Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

While courts frown on the use of character traits evidence to prove an act in conformity therewith on a particular occasion, they are more receptive to evidence of habit or business custom. *See generally* Green, *Relevancy and Its Limits*, 1969 ARIZ. ST. L.J. 533; Lewan, *The Rationale of Habit Evidence*, 16 SYRACUSE L. REV. 39 (1964).

[4] *See* R. LAWSON, *supra* note 1, at § 2.25.

[5] *Id.* at § 2.25(C).

[6] Kentucky is in the minority in failing to distinguish between habit and character. In most jurisdictions, habit evidence is admissible while character evidence is inadmissible to prove action in conformity therewith. Kentucky excludes both types of evidence. *See id.*

[7] *Id.* at § 2.25(C).

[8] *Id. See also* R.H. Kyle Furniture Co. v. Russell Dry Goods Co., 340 S.W.2d 220, 223 (Ky. 1960) (evidence that business custom of store was for manager to serve as purchasing agent was admissible on the issue of agency); Cincinnati, N.O. & T.P. Ry. v. Zeder, 328 S.W.2d 525, 527 (Ky. 1959) (if properly established, business custom that transporters of heavy machinery notify railroad prior to operating on the tracks admissible to prove negligence).

[9] *See* R. LAWSON, *supra* note 1, at § 2.25.

litigated is contingent on some special relationship between the prior occurrences and an element of the case.[10] Evidence of similar occurrences is admissible only where its relevancy goes beyond mere similarity.[11]

The purpose for offering the evidence is important in evaluating its admissibility.[12] Thus, evidence can be admitted to show the existence of a dangerous condition or notice thereof, or to show a representation or misrepresentation.[13] However, Kentucky courts have been reluctant to admit evidence of similar occurrences of carefulness or carelessness to prove negligence on a particular occasion[14] because such evidence is considered to have little probative worth in contrast to its potential for confusion.[15]

A court of appeals ruling[16] offered the Kentucky Supreme Court an opportunity to apply the similar occurrences doctrine in an unusual factual situation. *Montgomery Elevator Co. v. McCullough*,[17] a products liability action, involved an injury caused by an escalator located in a Shillito's department store.[18] Kevin McCullough, a ten-year old boy, was riding the escalator when his foot was caught and crushed between the escalator's tread and skirt.[19] The plaintiff settled with Shillito's and brought suit against Montgomery Elevator Company, the manufacturer of the escalator, for defective product design.[20]

The jury found Montgomery Elevator liable and apportioned

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[10] R. LAWSON, *supra* note 1, at § 2.25(B)(1). *See generally* 2 J. WIGMORE, EVIDENCE §§ 252, 457-58 (Chadbourne ed. 1979); 22 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5170 (1977); Morris, *Proof of Safety History in Negligence Cases*, 61 HARV. L. REV. 205 (1948); 63 AM. JUR.2D *Products Liability* §§ 236-37, 274 (1984); 29 AM. JUR.2D *Evidence* §§ 305-14 (1967); 65A C.J.S. *Negligence* § 234 (1964).

[11] Massie v. Salmon, 277 S.W.2d 49, 51 (Ky. 1955) (evidence that defendant had permitted other cattle to run at large in the past inadmissible to show similar conduct with a different animal).

[12] *See* E. CLEARY, MCCORMICK ON EVIDENCE § 200 (3d ed. 1984).

[13] *See* R. LAWSON, *supra* note 1, at § 2.25(B)(1).

[14] *See, e.g.*, Kentucky-W. Va. Gas Co. v. Slone, 238 S.W.2d 476, 480-81 (Ky. 1951); Louisville & N.R. Co. v. Taylor's Adm'r, 104 S.W. 776 (Ky. 1907).

[15] *See* R. LAWSON, *supra* note 1, at § 2.25.

[16] Montgomery Elevator Co. v. McCullough, 30 KLS 7, at 1 (Ky. Ct. App. Nov. 2, 1983).

[17] 676 S.W.2d 776 (Ky. 1984). *Montgomery* is also discussed in Adams, *Kentucky Law Survey - Torts*, 73 KY. L.J. 481 (1984-85).

[18] *Id.* at 778.

[19] *Id.*

[20] *Id.*

the $50,000 claim equally between Montgomery Elevator and Shillito's.[21] Montgomery Elevator appealed to the court of appeals claiming, in part, error regarding the admissibility of evidence of prior escalator accidents.[22] The court agreed with Montgomery Elevator and held that the trial court erred in admitting evidence of the prior accidents.[23] From this decision, McCullough appealed.

At trial, McCullough had introduced proof of other accidents involving identical or substantially similar escalators where a victim's foot was caught between the tread and skirt.[24] The Kentucky Supreme Court concluded that in a defective design products liability case, evidence of similar product failures under similar conditions is both relevant and admissible.[25] Evidence of similar injuries can be used to show either the dangerous nature of the product or the cause of the accident.[26] Both purposes are relevant since the evidence makes the presence of a defect either more or less probable.[27]

In upholding the admission of evidence of similar occurrences, the Court reaffirmed that the earlier accidents must be "substantially similar" to the accident at issue.[28] Substantial similarity, the Court concluded, is a matter of relevance to be determined by the trial court in its discretion.[29] Evidence of

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[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.* at 783. This Survey does not address two other issues presented on appeal: the notice of defect sent to Shillito's after delivery, *see id.* at 780-82; and the manufacturing at the same time and in the same plant by Montgomery Elevator of an escalator of safer design. *See id.* at 784 (Stephenson, J., dissenting). *See also* Adams, *supra* note 17, at 495-98.

[25] *Id.* Evidence of similar accidents has become a common element of proof in products liability cases. *See generally* 1 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 12.01 (1960); Annot., 42 A.L.R.3D 780 (1972) (other accidents used to prove dangerous nature of product).

[26] *See* 676 S.W.2d at 783.

[27] *See* Annot., *supra* note 25, at 795-96.

[28] *See* 676 S.W.2d at 783. See also FRE 401 which states: " 'Relevant Evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

[29] *Id.* Assuming arguendo that it was error to introduce evidence of prior accidents, the Court also noted that such error was harmless and that Montgomery Elevator had waived its right to object by its own placing of the injury list in front of the jury. *Id.* at 783-84.

similar escalator injuries was, for the Court, both relevant and admissible.[30]

II. PRIOR CRIMINAL ACTS OF THE ACCUSED: IMPEACHMENT BY USE OF CRIMINAL CONVICTIONS

In Kentucky, a witness in a criminal case, including an accused who chooses to testify, may be impeached by proof of any prior felony conviction.[31] This rule, announced in *Commonwealth v. Richardson*,[32] overrules the eighteen-year-old *Cotton v. Commonwealth*[33] standard.[34] *Cotton* had limited impeachment by proof of prior felony convictions to evidence of convictions for crimes involving dishonesty, stealing, or false statement.[35] *Richardson* essentially represents a return to the pre-*Cotton* standard of *Cowan v. Commonwealth*, under which any prior felony conviction is potentially available for impeachment.[36] Clarification of the impact of *Richardson* requires careful review of the decision, especially of its treatment of *Cotton*.

A. Cotton v. Commonwealth

In *Cotton v. Commonwealth* the defendant, Cotton, was convicted of armed robbery and attempted armed robbery.[37] Claiming that prejudicial error resulted from the prosecution's

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[30] *See id.* at 783.

[31] Commonwealth v. Richardson, 674 S.W.2d 515 (Ky. 1984). At common law a felony conviction or a conviction for a misdemeanor involving dishonesty rendered the person altogether incompetent as a witness. *See* J. WIGMORE *supra* note 10, at 520. The Federal Rules of Evidence represent a compromise, providing impeachment according to the nature of the crime and the length of imprisonment. FRE 609(a) provides:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

[32] 674 S.W.2d 515.

[33] 454 S.W.2d 698, 702 (Ky. 1970), overruled by Commonwealth v. Richardson, 674 S.W.2d 515.

[34] 674 S.W.2d at 517.

[35] 454 S.W.2d at 702, overruling Cowan v. Commonwealth, 407 S.W.2d 695, 698 (Ky. 1966).

[36] 674 S.W.2d at 517, citing Cowan, 407 S.W.2d 695.

[37] 454 S.W.2d at 699.

efforts to show the jury that he had several felony convictions, Cotton appealed his conviction.[38] On cross-examination, the prosecutor asked Cotton if he had ever been convicted.[39] After several unsuccessful objections, Cotton admitted a prior felony conviction.[40]

The Kentucky high court used Cotton's appeal as an opportunity to review the Kentucky rule on impeachment by use of prior felony convictions. The Court found the fundamental basis of the impeachment standard was that no admonition to a jury could rightly eliminate the prejudice visited on the defendant by the disclosure of past felonies unrelated to credibility.[41] The purposes of impeachment were found to be best served by a rule which limited the availability of prior conviction evidence to felonies involving dishonesty, stealing or false statement.[42] In essence, the Court was convinced that a prior conviction was only relevant when the circumstances underlying the conviction bore directly on the witness's credibility.[43]

Consequently, the Court modified its earlier rule, stated in *Cowan v. Commonwealth*,[44] which had allowed impeachment by all felony convictions.[45] The Court also established two preconditions to the admission of evidence of a prior felony conviction.

First, the trial court—in a proceeding colloquially known as a *Cotton* hearing—had to determine outside the presence of the jury whether the prior felony conviction involved dishonesty, stealing or false statement.[46] Second, even where the prior conviction was relevant to the witness's credibility, the trial court was to exercise "sound judicial discretion" in admitting evidence of the prior conviction—the value of the evidence as it related to credibility was to be weighed against its potential for prejudice to the defendant.[47]

Dean Lawson, in his treatise on Kentucky evidence law,[48]

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[38] *Id.* at 700.
[39] *Id.*
[40] *Id.* at 701.
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] 407 S.W.2d 695.
[45] 454 S.W.2d at 701.
[46] *Id.* at 702.
[47] *Id.* at 701.
[48] R. LAWSON, *supra* note 1, at § 4.20.

notes the two results of *Cotton* with respect to impeachment by prior criminal convictions. Procedural safeguards were established for the use of prior convictions against a criminal defendant who elected to testify,[49] and impeachment by evidence of prior felonies was limited to only those felonies involving falsehood, stealing or dishonesty.[50]

Subsequent decisions further delineated the *Cotton* standard. Not only did the Court expand the list of admissible felony convictions,[51] but it also allowed either party to identify the felony offense after impeachment was initiated.[52]

B. Richardson v. Commonwealth

Against this background *Richardson* was decided. Kenneth Richardson was convicted of criminal facilitation of both burglary and robbery.[53] On appeal, Richardson asserted that a *Cotton* error had occurred when a prior conviction of burglary was used to impeach him during trial.[54]

Concluding that *Cotton* prevented impeachment of the defendant by proof of a prior felony conviction identical to that for which the defendant was being tried, the Kentucky Court of

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[49] *Id.*

[50] *Id.*

[51] *Cotton* enumerated those crimes involving dishonesty and false statement to be "perjury, subornation of perjury, obtaining money or property under false pretenses, forgery, embezzlement, counterfeiting, fraudulent alterations, misappropriation of funds, false impersonation, passing checks without sufficient funds or on nonexistent banks, fraudulent destruction of papers or wills, fraudulent concealment, making false entries, and all felonies involving theft or stealing." 454 S.W.2d at 702. Subsequent decisions have added to the *Cotton* list: "income tax evasion," Bogie v. Commonwealth, 467 S.W.2d 767 (Ky. 1971); "armed robbery," Thomas v. Commonwealth, 487 S.W.2d 954 (Ky. 1972); and "burglary," Martin v. Commonwealth, 507 S.W.2d 485 (Ky. 1974).

[52] The decisions which followed *Cotton* further delineated the rule concerning the use of prior criminal acts to impeach. In Martin v. Commonwealth, 507 S.W.2d 485, the Court noted that *Cotton* permitted impeachment of a defendant or witness by evidence of multiple prior convictions, the identification of which was also admissible. Similarly, in Bell v. Commonwealth, 520 S.W.2d 316 (Ky. 1975), the Court gave the Commonwealth's attorney discretion—when asking the impeaching question—to identify the offense. Prosecutorial silence permitted the defendant to identify the offense. Finally, in Commonwealth v. Morris, 613 S.W.2d 616, 617 (Ky. 1981), the Court concluded that either the prosecution or the defense may choose to identify the offense. *See* text accompanying notes 53-77 *infra* for an explanation of how these situations are handled following Commonwealth v. Richardson, 674 S.W.2d 515.

[53] 674 S.W.2d at 516.

[54] *Id.*

Appeals reversed Richardson's conviction.[55] Evidently, the court of appeals determined that the potential for prejudice against the defendant, where the impeaching offense and the charged offense were identical, was greater than any impeachment value of the prior conviction.[56]

On review, the Kentucky Supreme Court was faced with the propriety of the appellate court's expansion of *Cotton*.[57] Writing for a divided Court, Justice Stephenson recognized that while *Cotton* had not spared a witness with a prior felony conviction the effect of presenting that fact to the jury, the decision had limited impeachment to "dishonest felonies."[58]

The Court found that the lower court's conclusion violated the "plain language" of *Cotton* in removing burglary from the list of "dishonest felonies."[59] Noting that the Kentucky Penal Code defines burglary as "knowingly [entering] or [remaining] unlawfully in a building" with the intent to commit a crime,[60] the Supreme Court determined that the "dishonest" nature of burglary required that it remain available for impeachment purposes.[61]

While introduction of the similar offense was potentially prejudicial, the Court concluded that *Cotton* permitted impeachment by a similar offense and that the trial court had not erred in admitting evidence of Richardson's prior burglary conviction.[62]

Citing *Cotton*, the Court affirmed Richardson's conviction and continued: "We are of the further opinion that in answer to the very real problem presented in this case, *Cotton* should

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[55] *Id.*

[56] *Id.* at 517.

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.*, citing KRS § 511.020. KRS § 511.020(1) states in part:

> A person is guilty of burglary in the first degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a building, and when in effecting entry or while in the building or in the immediate flight therefrom, he or another participant in the crime: [is armed or causes or threatens injury].

[61] 674 S.W.2d at 517.

[62] *Id.* "While we appreciate the force of Richardson's argument on the unfair prejudice of introducing a prior conviction of the same type as the principal offense on trial, we hold that *Cotton* and the subsequent cases cited herein approve this procedure and thus the trial court did not commit error in this respect." *Id.*

be and is hereby overruled."[63] Apparently, the "very real problem" was the prejudice to the defendant resulting from impeachment by identifying for the jury a prior conviction for a similar felony.[64] Thus, although unsympathetic to Richardson's individual plight, the Court did recognize that the *Cotton* rule could be unnecessarily prejudicial to a defendant. By overruling *Cotton* prospectively, the Court managed both to sustain Richardson's conviction and to insure greater fairness in the treatment of future defendants.[65]

However, the result in *Richardson* raises three concerns: the construction of the new impeachment rule, the scope of its application, and the necessity for adopting the new rule.

Under *Richardson*, impeachment of a witness, including the defendant, in a criminal case may be through proof of any prior felony conviction.[66]The *Richardson* rule does continue the requirement—as in *Cotton*—of a pre-impeachment evaluation of the relevancy of any prior convictions to the witness's credibility.[67] This *Richardson* hearing is to "determine whether the defendant will be unduly prejudiced by [the introduction of evidence of prior convictions]."[68] The court is to consider "nearness or remoteness of the prior convictions [and] such other factors as the court may deem pertinent."[69] In overruling *Cotton*, the Court again permits the use of all prior felony convictions, not just those of a "dishonest nature."[70] Although the trial court retains discretion to refuse to permit impeachment by prior felonies which do not reflect on credibility, the trial court no longer has a clear rule requiring it to do so. *Richardson* thus continues to require a *Cotton*-type hearing—although without the bright line guidance of *Cotton*—to evaluate the relevancy of prior convictions.

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[63] *Id.*

[64] *See id.*

[65] *See id.*

[66] *Id.* at 518.

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *See id.* at 517-18. Compare this rule with FRE 609(a), reproduced at note 31 *supra*. In contrast to the Kentucky rule, the Federal rule allows counsel for the government to question the witness as to the "name of the crime, the time and place of conviction, and the punishment." 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 609[05], at 609-86, quoting E. CLEARY, MCCORMICK ON EVIDENCE § 43, at 88 (1972).

Once the trial court determines that a prior felony conviction may be used for impeachment, the actual impeachment procedure is similar to that outlined in *Cowan*:

> [T]he rule will be construed essentially as in *Cowan*, . . . so that a witness may be asked if he has been previously convicted of a felony. If his answer is "Yes," that is the end of it and the court shall thereupon admonish the jury that the admission by the witness of a felony may be considered only as it affects his credibility as a witness if it does so. If the witness answers "No" to this question, he may then be impeached by the Commonwealth by the use of all prior convictions, and to the extent that *Cowan* limits such evidence to *one* prior conviction, it is overruled. After impeachment, the proper admonition shall be given by the court.
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> . . .
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> Identification of the prior offense or offenses, before the jury, by either the prosecution or the defense, is prohibited. . . .[71]

Thus, the defendant is given an opportunity to admit to a single unspecified felony conviction. Should he fail to do so, the prosecution is permitted to introduce evidence of *all* of the defendant's prior felony convictions.

The apparent motive for the Court's overruling *Cotton* is a preference for *Cowan*'s absolute bar to the identification of the prior felony offenses. Notably, neither prosecution nor defense may identify the offense. Documentary evidence serving as the basis for oral testimony as to the existence of a prior conviction is not to be submitted to the jury if it contains any information regarding "the nature of the offense on the prior conviction."[72]

The second area of concern entails understanding the prospective applicability of *Richardson*. Richardson's conviction remains in effect, having been affirmed on the basis of *Cotton*. For subsequent defendants, *Cotton* is inapposite, having been overruled by *Richardson*.[73] Yet there is some uncertainty as to which defendants fall under the "prospective" rule.

Although the decision offers no explicit clarification of the Court's intent, the implicit thrust of both *Richardson* and a companion case, *Diehl v. Commonwealth*,[74] is that *Richardson*

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[71] 674 S.W.2d at 517-18.

[72] *Id.* at 518.

[73] *Id.* at 517.

[74] 673 S.W.2d 711 (Ky. 1984). Both *Richardson* and *Diehl* were decided June 14, 1984.

applies only to threatened or actual impeachment procedures occurring after the *Richardson* opinion was rendered. In both cases, correct application of the *Cotton* standard was upheld in spite of the fact that *Cotton* did permit or would have permitted identification of the prior felony offense.[75]

The third concern is the necessity for overruling *Cotton*. The Court decided to overrule *Cotton* due to the "very real problem" *Richardson* presented.[76] Apparently, the problem was the presence of similar convictions and the resulting prejudice to the defendant.[77] The solution to this problem, however, did not require overruling *Cotton*.

The Court could have maintained the "dishonest felony" rule of *Cotton* by simply restricting impeachment to introduction of *one* felony conviction without identifying the felony itself. This would have avoided the similar conviction problem since the jury would only have been aware of the existence of a prior "dishonest felony" and not of its similarity to the crime at issue. Nor would there have been any undue prejudice to the defendant under this approach, since the specific nature of the crime would have remained undisclosed.

The Court could also have allowed for evaluation of the prejudicial effect of the similar conviction in the *Cotton* hearing, thus providing for its admission or exclusion based on the particular facts. The Court could also have reversed the appellate court's conclusion that burglary was not a "dishonest" crime without hazarding the "dishonest felony" rule. Admissibility of any conviction could be based on evaluation of the prejudicial effect on the defendant. This result would not have limited the basic rule of *Cotton* in limiting impeachment to "dishonest felonies."

III. SPONTANEOUS STATEMENTS: *Res Gestae*

Under Kentucky law, an out of court statement made in response to a startling occurrence or event is generally admissi-

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[75] *See* 674 S.W.2d at 517; 673 S.W.2d at 712. In *Diehl*, the Court emphasized that the permissibility of impeachment by proof of a prior conviction for a similar offense is contingent upon "trial court [determination] that the defendant will not be unduly prejudiced by the introduction of such evidence." 673 S.W.2d at 712.

[76] 674 S.W.2d at 517.

[77] *Id.*

ble.[78] In order to be admissible, the extrajudicial statement must have been spontaneously made in response to and concerning a startling event, and must be otherwise competent as evidence.[79]

These four elements establishing the admissibility of *res gestae* statements by witnesses were reaffirmed by the Kentucky Court of Appeals in *Goodman v. Eads*.[80] In *Goodman* the pedestrian plaintiff was crossing a city street at night when he was struck by the defendant driver.[81] Testimony of the litigants left unclear the circumstances which led up to the accident.[82] Yet, the defendant, Eads, testified that several bystanders ran up to the scene and stated: "[Goodman] ran in front of you."[83] The court concluded that the out of court declarations of these witnesses satisfied the *res gestae* rule that the declarations be: spontaneous, made in response to a startling event, made concerning the event, and otherwise competent evidence.[84]

IV. SCIENTIFIC EVIDENCE: POLYGRAPH TESTS

Conclusions derived from a scientific device or process are generally admissible if that device or process has received general scientific acceptance.[85] Findings based on radar and breathalyzer

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[78] R. LAWSON, *supra* note 1, at § 8.60. Under the federal rules, spontaneous statements, declarations, or excited utterances are governed by FRE 803. FRE 803(1) and (2) are the pertinent provisions:

> (1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter [is not excluded by the hearsay rule].
>
> (2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress or excitement caused by the event or condition [is likewise not excluded by the hearsay rule].

See generally 6 J. WIGMORE, *supra* note 10, at §§ 1745-64 (discussing requirements for and explanation of res gestae exception to hearsay rule); Slough, *Spontaneous Statements and State of Mind*, 46 IOWA L. REV. 224 (1961) (comparison of UNIF. R. EVID. 63(4), (12) hearsay exceptions formerly resolved almost exclusively in terms of res gestae).

[79] Preston v. Commonwealth, 406 S.W.2d 398, 400 (Ky. 1966), *cert. denied*, 386 U.S. 920 (1967).

[80] No. 83-CA-419-MR, slip op. at 4.

[81] *Id.* at 1-2.

[82] *Id.* at 2.

[83] *Id.* at 4. For other cases involving spontaneous declarations arising from automobile accidents, see Annot., 53 A.L.R.2D 1245 (1957).

[84] No. 83-CA-419-MR, slip op. at 4.

[85] R. LAWSON, *supra* note 1, at § 12.35(A). *Cf.* FRE 702 ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or

tests are admissible in Kentucky because the underlying technologies have received general scientific acceptance.[86] In fact, Kentucky courts generally take judicial notice of their admissibility, contingent primarily on proper operation and interpretation.[87]

Narcoanalysis and lie detector tests have not met with equal success.[88] Results from narcoanalysis, the administration of truth serum, have been repeatedly excluded from evidence.[89] Polygraph results have also been found inadmissible.[90] In fact, the Kentucky courts have held inadmissible any reference to a polygraph examination for either evidentiary or impeachment purposes.[91]

In *Douthitt v. Kentucky Unemployment Ins. Comm'n*,[92] the court of appeals had the opportunity to review polygraph admissibility rules in a civil action. The plaintiff, Douthitt, was dismissed by her employer for failure to undergo a polygraph examination pursuant to an employment agreement.[93] The court noted that the employer's polygraph rule, which required employees to undergo analysis at the request of the employer, was unreasonable since the test results are unreliable.[94] The court concluded that, even had Douthitt undergone the examination, the findings would not have been admissible, since polygraph results are inadmissible in both civil and criminal actions.[95] Inasmuch as polygraph results cannot show misconduct, one's refusal to submit to an examination cannot constitute misconduct.[96]

The use of polygraph tests in the employment setting has been the subject of considerable debate.[97] As evidenced by

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otherwise."). *See generally* Gianelli, *The Admissibility of Novel Scientific Evidence*: Frye v. United States, *a Half-Century Later*, 80 COLUM. L. REV. 1197 (1980).

[86] *See* Owens v. Commonwealth, 487 S.W.2d 897 (Ky. 1972) (breathalyzer); Honeycutt v. Commonwealth, 408 S.W.2d 421 (Ky. 1966) (radar).

[87] *See* 487 S.W.2d at 900.

[88] R. LAWSON, *supra* note 1, at § 12.35(A)(1). *See* 3 J. WIGMORE, *supra* note 10, at § 999.

[89] *See, e.g.*, Merritt v. Commonwealth, 386 S.W.2d 727, 729 (Ky. 1965).

[90] *See, e.g.*, Roberts v. Commonwealth, 657 S.W.2d 943, 944 (Ky. 1983).

[91] *See id.* at 944.

[92] 676 S.W.2d 472 (Ky. Ct. App. 1984).

[93] *Id.* at 473.

[94] *Id.* at 475.

[95] *Id.*

[96] *Id.*

[97] *See, e.g.*, Castagnera-Cain, *Defamation, Invasion of Privacy, and the Use of Lie Detectors in Employee Relations—an Overview*, 4 GLENDALE L. REV. 189 (1982);

Douthitt, the validity of private industry's use of polygraph tests on employees has entered the legal arena, requiring evaluation of the evidentiary effect of such tests. Concern over the reliability of these truth verification tests focuses on three factors: empirical verification of the process, the emotional state of the employee examined and the competence of the examiner.[98]

Often, as in *Douthitt*, the issue of the validity of polygraph tests arises in the context of employee dismissals. Arbitration proceedings under collective bargaining agreements have provided the most extensive decisional authority as to the evidentiary status of truth verification processes in the employment relationship. The majority of these decisions have either disallowed polygraph evidence or have accorded it little probative weight.[99] The Kentucky Court of Appeals decision is in accord with developing labor law.[100] In fact, one arbitrator has specifically stated that the truth verification process in the employment context invades the right of privacy and the right against self-incrimination.[101]

Arbitrators and the courts are not alone in limiting the utilization of polygraph tests in the employment relationship. Several states have enacted legislation either limiting or prohibiting the use of polygraph examinations.[102] These statutes, to varying degrees, proscribe employer conduct. The employer may be prohibited from requiring or demanding as a condition of employment submission to polygraph examination.[103] Voluntary submission upon the request of the employer may, however, be

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Silas, *Lie Box Battle*, 70 A.B.A. J. 34 (Feb. 1984); Note, *Lie Detectors in the Employment Context*, 35 LA. L. REV. 694 (1974-75).

[98] Gardner, *Wiretapping the Mind: A Call to Regulate Truth Verification in Employment*, 21 SAN DIEGO L. REV. 295, 300 (1984).

[99] *See, e.g.*, Temtex Prod. Inc. v. Stove, Furnace, & Allied Appliance Workers Local 53, 75 Lab. Arb. (BNA) 233 (1980) (Rimer, Arb.); Bowman Transp. Inc. v. International Union of Dist. 50, Local 13600, 59 Lab. Arb. (BNA) 283 (1972) (Murphy, Arb.); Lag Drug Co. v. International Bhd. of Teamsters Local 743, 39 Lab. Arb. (BNA) 1121 (1962) (Kelliher, Arb.).

[100] 676 S.W.2d at 472.

[101] *See* 39 Lab. Arb. (BNA) at 1123.

[102] *See, e.g.*, ALASKA STAT. § 23.10.037 (1972); CAL. LAB. CODE § 432.2 (Deering Supp. 1983); CONN. GEN. STAT. ANN. § 31-51(g) (West Supp. 1983-84); DEL. CODE ANN. tit. 19, § 704 (1979); HAWAII REV. STAT. §§ 378-21, -22 (1976).

[103] *E.g.*, CAL. LAB. CODE § 432.2; CONN. GEN. STAT. ANN. § 31-51(g); MASS. GEN. LAWS ANN. ch. 149, § 193 (West 1976).

allowed.[104] These state statutes are not limited to the issue of polygraph test validity alone but also establish, often through licensing, the quality of examiners and the accuracy and standardization of the administration and interpretation of tests.[105]

[104] *See, e.g.*, CAL. LAB. CODE § 432.2.

[105] *See* ALA. CODE tit. 34, §§ 34-25-1 to -36 (1977 & Supp. 1981); ARIZ. REV. STAT. ANN. §§ 32.2701-.2715 (1976 & Supp. 1981); FLA. STAT. ANN. §§ 493.561-.569 (West 1981); GA. CODE 84-5001 to -5016 (1975).