Kentucky Law Journal

Volume 51 | Issue 1 Article 13

1962

Evidence--Res Gestae--Time Element in Rape

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which reasonable men at the time may have entertained a substantial doubt. In *Forsythe v. Rexroat*,[16] the court added to the confusion surrounding the application of the *doubtful* rule by stating it is not essential that the claim "be set up in particular terms sufficient to withstand a demurrer."[17]

With such inconsistent views of what constitutes a reasonable claim, certainly the *doubtful* rule is not easier to apply If these views were crystalized into one standard, the *doubtful* rule would be less difficult to apply Nevertheless, the reasonableness of the claim should not be questioned. A court should be satisfied that the claim which was withheld was reasonable because of the fact that the adverse party respected it enough to enter into the contract. The only question which should be presented to the court is whether the claim was in fact asserted in good faith. Under this rule, the reasonableness of the claim will necessarily become one of the factors in determining the good faith of the claimant.

The other reason urged in support of the *doubtful* rule is that it will prevent vexatious or fraudulent claims. However, there would be no practical difference if the *good faith only* rule were applied. These claims are, per se, not in good faith. By the use of this test the court in the principal case would have achieved the same result since the court indicated that the claim was treated seriously by all parties concerned, including their lawyers, and that the claim was of more than nuisance value.

Charles Samuel Whitehead

EVIDENCE—RES GESTAE—TIME ELEMENT IN RAPE.—The prosecutrix and her husband lived in a remote section of the state. Upon arriving home one day with his employer, the husband found his wife visibly nervous and excited. She told them she had been raped about an hour before their arrival. This was her first opportunity to tell anyone, and she told them immediately The trial court admitted the employer's testimony as substantive evidence and also permitted a police officer to read into the record a statement which the prosecutrix made to him about six hours after the event. Defendant appealed from the conviction for rape. *Held*: Reversed. While the employer's testimony is properly admissible as part of the res gestae,[1] the testi-

[16] 234 Ky. 173, 27 S.W.2d 695 (1929).
[17] *Id.* at 178, 27 S.W.2d at 698.

[1] Technically, this statement is dictum, but for all practical purposes it is holding.

mony of the officer clearly is not within the res gestae, and its admission constitutes reversible error. *Cook v. Commonwealth*, 351 S.W.2d 187 (Ky 1961).

Literally translated, *res gestae* means "things done." The ambiguities lurking behind this phrase have invited considerable criticism. To one writer, *res gestae* is "the lurking place of a motley crowd of conceptions in mutual conflict and reciprocating chaos."[2] To another, *res gestae* represents a substitute for reasoning—a term used to cloud the simple issue of whether an exception to the hearsay rule should be made.[3] Learned Hand has termed it "a phrase which has been accountable for so much confusion that it had best be denied any place whatever in legal terminology"[4] The antagonistic attitude of legal writers was classically expressed by Wigmore:

> The phrase res gestae has long been not only entirely useless, but even positively harmful. It is useless, because every rule of Evidence to which it has ever been applied exists as a part of some other well-established principle and can be explained in terms of that principle. It is harmful, because by its ambiguity it invites the confusion of one rule with another and thus creates uncertainty as to the limitations of both. It ought therefore wholly to be repudiated, as a vicious element in our legal phraseology.[5]

Res gestae is most frequently and probably most accurately applied to the "spontaneous exclamations" doctrine.[6] It is in this context that it is encountered in the principal case. The reason for admitting spontaneous utterances is as easy to comprehend as it is difficult to apply.

> The basis for the admission of declarations under the res gestae rule is the well-founded belief that statements made instinctively at the time of a specific transaction or event, without the opportunity for formulation of statements favorable to one s own cause, are likely to cast important light upon the matter in issue; as to such statements, the law creates a presumption of their truthfulness. The factual situation in each case will largely determine the extent to which the court will apply this rule. The marked trend of the decisions is to extend, rather than narrow, the scope of the doctrine. [7]

Following this trend, the principle case contains a notable extension for Kentucky While the court refused to admit the testimony of the

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[2] Stone, *Res Gesta Reagitata*, 55 L.Q. Rev. 66, 67 (1939).

[3] Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 Yale L.J. 229 (1922).

[4] United States v. Matet, 146 F.2d 197, 198 (2d Cir. 1944).

[5] 6 Wigmore, Evidence §1767 (3d ed. 1940). *But see* Annot., 163 A.L.R. 15, 20 (1946), where it is asserted: "In the vast area of situations in which the term res gestae is appropriate, it denotes a distinct principle of admissibility."

[6] For further applications of the phrase, see 6 Wigmore, *op cit, supra* note 5, §1768.

[7] 20 Am. Jur. *Evidence* §663 (1939).

officer to whom the prosecutrix made her statement six hours after the act, it indicated that the admission of the employer's testimony relating what the prosecutrix told him one hour after was not error. That an hour is not so long as to preclude spontaneity as a matter of law may appear absurd at first glance, but a further examination of the doctrine should be conducted before a conclusion is reached.

The test for spontaneity is whether there has been opportunity for fabrication following the termination of the emotional sway of the event.[8] Notwithstanding the practical difficulty in applying it, the spontaneity test is generally used in Kentucky.[9] Within this test, the Court of Appeals has considered the type of event involved, in addition to the time element, in determining whether an exclamation should be admitted as spontaneous. While the principal case allows statements made an hour after the event to be admitted as spontaneous in a rape situation, it has been held that statements made by a seriously wounded man within five minutes after the fight are not within the *res gestae*.[10] Regardless of the seeming inconsistency, the principal case follows the trend in allowing a more lenient rule in rape cases than is usually permitted in other situations. In sex crime cases a time lapse of up to an hour will not necessarily preclude admissibility if spontaneity can be found; beyond an hour it is virtually never found.[11]

The reason courts are more lenient in sex crime cases can be found in the following text:

> [T]he condition of the victim at the time of the particular utterance is a very important factor. The fact that she was dazed, excited, hysterical, bruised, or disheveled at the time of her utterances as to the alleged offense, has been noted in practically every case wherein such utterances were held admissible as part of the res gestae. On the other hand, the absence of such circumstances has been particularly stressed in the cases wherein such declarations were held not a part of the res gestae.[12]

Apparently there is a widespread belief that sex victims suffer emotional effects for an extended duration, and that their utterances can be trusted for some time after the act.

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[8] *Ibid. But see* Thayer, *Bedingfield's Case—Declarations as a Part of the Res Gesta*, 15 Am. L. Rev. 71 (1881), where the approach taken requires *contemporaneity* of the utterance and the act. A statement such as the one in the principal case, made an hour afterwards, certainly is not contemporaneous.

[9] Castle v. Allen, 274 Ky. 658, 120 S.W.2d 219 (1938); Brandenburg v. Commonwealth, 260 Ky. 70, 83 S.W.2d 862 (1935); Norton's Adm'r v. Winstead, 218 Ky. 488, 291 S.W. 723 (1927). *But see* Kentucky Util. Co. v. Consolidated Tel. Co., 252 S.W.2d 437 (Ky. 1952).

[10] Williams v. Commonwealth, 234 Ky. 729, 29 S.W.2d 11 (1930); *accord*, Philpot v. Commonwealth, 195 Ky. 555, 242 S.W. 839 (1922).

[11] Annot., 19 A.L.R.2d 579 (1951).

[12] 20 Am. Jur. *Evidence* §670.5 (Supp. 1962).

By disallowing the testimony of the officer, Kentucky follows the nearly universal rule based on the common sense belief that statements made as much as six hours after the act almost always lack spontaneity in the sense of arising from and being prompted by the act. By allowing the testimony of the employer, Kentucky follows the current trend of decisions in this limited type of *res gestae* situation. This is the first time the Kentucky court has been confronted with so close a situation.[13] It may be argued that Kentucky has extended the doctrine too far, but when a trial court is satisfied, as it was in the principal case, that the evidence of spontaneity is sufficient under the circumstances, ordinarily its exercise of discretion should not be disturbed.[14]

Terrence R. Fitzgerald

TORTS—PARENTAL LIABILITY FOR THE INTENTIONAL TORT OF MINOR CHILD—Plaintiff brought action for damages against parents of minor children who had allegedly committed assault and battery Defendants sons allegedly pursued plaintiff in an automobile, forced him to stop, dragged him from his automobile and injured him to the extent that he was hospitalized. Plaintiff alleged that the defendants knew their sons had dangerous tendencies of a malicious nature; that by lack of parental discipline they failed to prevent their sons from beating others; and that because of this negligence plaintiff was injured. One defendant imposed a demurrer, which was sustained. The plaintiff appealed. *Held*: Reversed and remanded. A cause of action is stated by alleging that defendants knew their sons had inflicted injuries on other boys, and that defendants were negligent in failing to exercise parental authority over their sons, thus making plaintiff's injuries possible. *Bieker v. Owens*, 350 S.W.2d 522 (Ark. 1961).

The common law rule is that a parent is not liable for the torts of his minor child.[1] Three exceptions are made to this rule: (1) when the parent employs the child and the child commits a tort in the course of employment, (2) when the parent participates in the

[13] *Res gestae* in sex crimes is a limited field. The closest Kentucky cases on this point are Hopper v. Commonwealth, 311 Ky. 655, 225 S.W.2d 100 (1949) (statements made several days after the event held inadmissible) and Cornwell v. Commonwealth, 291 S.W.2d 563 (Ky. 1956) (utterances made a few minutes after the act held admissible).

[14] In State v. Finley, 85 Ariz. 327, 338 P.2d 790, 794 (1959), the court said that "each case must depend upon its own facts and much must be left to the sound discretion of the trial court."

[1] Prosser, Torts §101 (2d ed. 1955).