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EVIDENCE—ADMISSIBILITY OF DECEPTION ("LIE-DETECTOR") TESTS—[New York] On trial for robbery in the first degree, as a second offender, the defendant offered the expert testimony of Rev. W. G. Summers as to the results of a "lie-detector" test which had been performed on him. Overruling the objection of the district attorney the court received the evidence and permitted the jury to evaluate it: *People* v. *Kenny*, 3 N. Y. S. (2d) 348 (1938).

The principal case is the first reported decision, and at that only a trial court decision, allowing the admissibility of the results of machines or instruments popularly described as "lie-detectors." The only two former cases both reached the opposite result: *Frye* v. *United States*, 293 Fed. 1013 (D. C. 1923); *State* v. *Bohner*, 210 Wis. 651, 246 N. W. 314 (1933).

The *Frye* case decided in 1923 involved the use of the systolic blood pressure test of W. M. Marston and the court after an intelligent consideration of the problem said:

> "We think that the systolic blood pressure deception test has not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting evidence deduced from the discovery, development, and experiments thus far made."

Being the first case on the point it received many able and favorable criticisms in legal publications: (1924) 37 Harv. L. Rev. 1138; (1924) 33 Yale L. J. 771; (1924) 24 Col. L. Rev. 429.

Ten years later the Wisconsin court passing on the admissibility of a proffered test on the Keeler Polygraph still felt that deception tests had not yet passed beyond the experimental stage; see notes in (1933) 24 J. Crim. L. 440; (1933) 13 B. U. L. Rev. 321; (1933) 8 Wis. L. Rev. 283.

But by March, 1938, the Queens County Court of New York decides that the Rev. Summers' development of the pathometer is safely beyond the experimental stage. For the court, as in the two previous cases, adopts as a basis the legal principle set out in 2 Wigmore, Evidence (2d ed. 1923) §875: "if ever there is devised a psychological test of the evaluation of witnesses the law will run to meet it." And this court is confident the time has come.

A brief review of Father Summers' accomplishments and claims for his instrument as given in the preliminary examination readily reveals the basis for this view of the court. As head of the Department of Psychology at the Graduate School of Fordham University, Summers holds two Ph.D.'s: one in physics from Georgetown University, and one in psychology from Gregorian University at Rome. Besides this he has done research at Prague University in Czechoslovakia and at the University of Vienna. And he modestly claims practical infallibility for his deception tests in 6,000 laboratory tests and 49 tests of actual criminal suspects. Such a record is not to be taken lightly and to better evaluate the worth of it requires a brief summary of the work and achievements of other experimenters in the field.

Physical appearance, motions, and mannerisms of a witness are well recognized tests of his credibility both in the lay and in the judicial mind: *Howard* v. *Louisville Ry.*, 32 Ky. L. 309, 105 S. W. 932 (1907); *Boykin* v. *People*, 22 Colo. 496, 45 Pac. 419 (1896); but see *Purdy* v. *People*, 140 Ill. 46, 29 N. E. 700 (1892). But in recent years there has been a steady effort to develop more scientific tests. Some thirty years ago Professor Münsterberg advocated an "association word and reaction test" for use by the courts (Münsterberg, On the Witness Stand, 73). But the practicality of such a test was blasted by Professor Wigmore, (1909) 3 Ill. L. Rev. 399, and the development swung off to physical phenomenon.

In 1914 Benussi developed the respiratory test based on the relation between false answers and the inspiration-expiration ratio. This method was later refined and used by Burtt of Ohio State University; cf. (1923) 4 J. of Experimental Psych. 1. Meanwhile W. M. Marston working under Münsterberg at Harvard developed a test based on the changes of the blood pressure; (1917) 2 J. of Experimental Psych. 117; (1921) 11 J. Crim. L. 551. Later Dr. J. A. Larson conceived the idea of combining the respiratory and blood pressure tests to form the so-called Berkeley Lie-Detector Test and for the first time actual work was done in connection with the police. His results were most encouraging but he admitted at that time there was no test which was suitable for "the positive identification of deception"; (1922) 47 A. B. A. Rep. 619; (1921) 12 J. Crim. L. 390. For the best discussion of the theory and development of these various techniques see McCormick, *Deception Tests and the Law of Evidence,* (1927) 15 Cal. L. Rev. 484.

Since that time the main work has been done during the past eight years by Leonarde Keeler and his associates at the Scientific Crime Detection Laboratory of Northwestern University School of Law. Fourteen years ago Keeler developed his "Polygraph" which combines instruments for testing the respiratory changes, the changes in the blood pressure, and the rate of heart beat. Later he supplemented his technique and instrument with a psychogalvanograph similar to that used by Summers; Keeler, *A Method for Detecting Deception,* (1930) 1 Am. J. Pol. Sci. 38; Inbau, *The "Lie-Detector,"* (1935) 40 Sci. Mon. 81. Well over 14,000 tests have been made including criminal suspects, bank employees, and laboratory

material. The results have been remarkable but no claim of infallibility is made. These experimenters estimate an accuracy of 85% in laboratory cases, and confessions have been obtained in approximately 75% of actual cases where deception was shown; cf. Inbau, supra at 83.

During all this period psychology departments in many colleges and universities have been experimenting with the changes in electrical resistance of the skin as a test of deception. Requiring only a galvanometer and a Wheatstone bridge, it provides a simple yet extremely sensitive instrument for laboratory work. Yet most workers have not found it too reliable when used alone. When used in connection with the pneumograph and the sphygmomanometer, as with the Keeler Polygraph, it has proven to be of some assistance; but not of any considerable practical value in actual cases.

Now Father Summers in his self-styled psychograph or pathometer employs only an instrument for recording the psycho-galvanic reaction of the skin. From his testimony in the *Kenny* case we learn that he began his work in 1931. While working on human emotional reactions he was led off into the field of detection of deception, and he has occupied himself with that since 1932. After testing 6,000 "guinea pigs" in his laboratory he was convinced that his apparatus and technique were "effectively 100% efficient." And in a critical test of 271 persons divided into three groups he claims to have been able to detect 98% of the guilty, better than 98% of the accomplices, and 100% of the innocent. As he states it, such results are due to the refinement of his instrument and the peculiar rhythm and repetition used in the asking of significant questions. Thoroughly convinced of the effectiveness of his test Summers was ready for the outside world. So he performed tests of 49 actual suspects; offered his testimony in at least two trials; and aided the sale of Conoco Oil in a full page advertisement giving a picture and chart of the "Lie-Detector" (May 21, 1938), Saturday Evening Post.

Yet when asked by the defense counsel in the *Kenny* case as to the results of the 49 actual cases the following delightfully vague dialogue occurred:

Q. Now Father, in connection with those 49 cases with respect to which you were asked to apply this machine or apparatus on, would you tell us what the result of that was?

A. The results have been, in all the cases which are closed to date, uniformly confirmatory of our results.

Q. In other words the courts subsequently affirmed or the public officials subsequently confirmed the results that you received from your use of this apparatus?

A. Or—yes, that is substantially correct.

In view of the general development of lie detection and of the specific work of Summers, was the court justified in deciding that the pathometer had gone beyond the experimental stages into the realm of general scientific acceptance? We do not believe so for two reasons.

First, no other experimenter in the field has been able to claim

100% efficiency. The Staff of the Scientific Crime Detection Laboratory using a psycho-galvanometric test, *in connection with two other recognized tests,* make no such claim of infallibility. So, unless we are to write Summer's claim off as pure exaggeration, we must credit his technique and interpretation of results with almost unbelievable efficacy. Secondly, it is apparent that Summers has not yet conducted enough tests under actual conditions to justify his confidence in the device. Other experimenters have found the galvanometric test more reliable in laboratory work than in actual practice. Yet Summers assumes just the opposite, although he has tried it on only 49 actual cases. Further, on these 49 cases it is not at all clear from the testimony how the results were checked or what was the mathematical percentage of accuracy.

But the court, anxious to lead the way and desirous of showing its breadth of vision and liberality, accepts Summers findings as undebatable. They point out that objections to scientific evidence are not novel; that the admissibility of fingerprints, handwriting analysis, rifle markings, and psychiatric evidence came only after constant rebuffs. This is all very true but it is no reason for a too hasty acceptance of the "lie-detector"; cf. Inbau, *Scientific Evidence in Criminal Cases,* (1934) 24 J. Crim. L. 825, 1140. The arguments of the *Frye* case and the *Bohner* case still seem peculiarly applicable to the pathometer.

Even today, fifteen years after the first case, there is no substantial agreement either as to instrument or as to technique. Summers claims his is the reliable one. Marston in his recent book, "The Lie-Detector Test" (1938), scoffs at Summers and claims his invention of the systolic blood pressure test is the reliable test; see Inbau, Book Review (pp. 305-308, this Journal), and (June, 1938) 33 Ill. L. Rev., which characterizes this book as very unscientific. And the Scientific Crime Detection Laboratory Staff believe their work has been the most trustworthy, while at the same time acknowledging severe limitations upon the accuracy of the technique. In such a state of scientific disagreement the objection of the Wisconsin court in the *Bohner* case is cogent: "the admission of the lie-detector may easily result in the trial of the lie-detector rather than the issues of the case."

But even more compelling is the possibility of "complications and abuses" foreseen by the court in the *Bohner* case and argued to the court in the *Kenny* case. At the present time there are a host of incompetent and unscrupulous persons awaiting the admission of the lie detection test to offer their own "lie-detectors" tests to the highest bidder; cf. Keeler, *Debunking the Lie-Detector,* (1934) 25 J. Crim. L. 153, 159; Inbau, *Detection of Deception Technique Admitted as Evidence,* (1935) 26 J. Crim. L. 262, 270; Inbau, *The Admissibility of Scientific Evidence,* (October, 1935) Law and Contemporary Problems (Duke University). Inasmuch as the tests depend largely on a diagnosis of the results registered by the instruments the matter can at best be largely one of opinion. Consequently there is no tangible criteria by which judge or jury may adequately evaluate the testimony. So this field, far more than fingerprints, or ballistics, is prone to the

quackery of self-seeking individuals.

The decision in the *Kenny* case having been for the defendant, it is very doubtful if there will be an appeal to the higher court. But shortly after it was decided a defendant in a murder trial in the New York City Court in Kings County offered the testimony of Summers once again. This court refused to follow the *Kenny* case and rejected the evidence: *People* v. *Forte,* U. S. L. Wk., July 5, 1938, p. 12. In line with what we have said that seems to be the sounder view.

Perhaps the best solution is a compromise position: allow the evidence to be admitted only if the prosecuting attorney and the defense counsel mutually agree on a particular test and also agree to accept the results as evidence. This procedure was followed in a Wisconsin case, *State* v. *Loniello and Grignano,* in the Circuit Court of Columbia County; see for a discussion of this case Inbau, *Detection of Deception Technique Admitted as Evidence,* (1935) 26 J. Crim. L. 262. Such a procedure avoids the two main objections to the wholesale admission of such evidence at the present time. First, there will be no necessity for long examinations of the expert witnesses and their techniques. Secondly, we can be assured that both sides will make an honest effort to engage a competent and reliable operator for the test. And thus may we simply and effectively keep the quacks and their "lie-detectors" from the courtrooms.

HORACE W. JORDAN.

FORMER JEOPARDY—DIVERSE OFFENSES SUBSISTING IN ONE ACT.—[Illinois] While accused was driving his automobile down the wrong side of the street at a high rate of speed, he simultaneously struck and killed two pedestrians (*A* & *B*). Upon being indicted for the manslaughter of *A*, the accused was set at liberty under the Illinois statute providing for discharge for want of prosecution within four months of commitment. Smith-Hurd Ill. Crim. Code ch. 38 §748. Subsequently the accused was indicted and convicted of the manslaughter of *B*. This conviction was affirmed over defendant's plea on appeal of double jeopardy. *People* v. *Allen,* 14 N. E. (2d) 397 (1938) (two justices dissenting). The court stated that there was no constitutional bar to conviction here as the constitutional provision against double jeopardy looks to the identity of the offense and not to the act, citing *State* v. *Billotto,* 104 Oh. St. 13, 135 N. E. 285 (1922). Looking, then, to the identity of the offense, the court determines that two offenses may spring from a single act and both may be prosecuted separately without placing the offender in double jeopardy.

On this point the courts are in hopeless conflict. One line of cases holds the act to be one offense regardless of the number or degree of the consequences of that act. *State v. Wheelock,* 216 Iowa 1428, 250 N. W. 617 (1933) (three persons killed in auto accident through negligence of accused; acquittal of defendant on charge of manslaughter of one victim a bar to further prosecution for manslaughter of others); *Smith* v. *State,* 159 Tenn. 674, 21 S. W. (2d) 400 (1929) (where a previous conviction for manslaughter bars conviction for assault); *People* v. *Barr,* 259 N. Y. 104, 181 N. E. 64 (1932) (Court

held death of ten people in one fire constituted but one offense). Also *State* v. *Damon,* 2 Tyler 387 (Vt., 1803); *Sadberry* v. *State,* 39 Tex. Cr. Rep. 466, 46 S. W. 639 (1898); 16 C. J. 283. The opposite line of authority says the act may result in more than one offense, as in the principal case. *State* v. *Fredlund,* 200 Minn. 44, 273 N. W. 353 (1937) (auto collision resulted in death of two people; acquittal on trial for death of one not a bar to further prosecution for death of the other); *Fay v. State,* 71 P. (2d) 768 (Okla., 1937) (several children struck by auto at the same time); *State* v. *Taylor,* 185 Wash. 198, 52 P. (2d) 1252 (1936) (five persons killed in auto collision, each killing a separate offense), also *Vaughn* v. *Commonwealth,* 2 Va. Cas. 273 (1821); *People* v. *Vaughn,* 215 Ill. App. 452 (1919).

The utter confusion existing in this field is well illustrated by comparing those cases mentioned above, when several deaths occur from a single act and yet only one offense can be charged, with the cases where two degrees of a crime are involved, as homicide and assault. In the latter type of case some jurisdictions will punish both degrees of the crime. *State* v. *Standifer,* 5 Porter 523 (Ala., 1837); *Winn* v. *State,* 92 Wis. 571, 52 N. W. 775 (1892). This sometimes results in the anomaly of a defendant who kills twice with the same bullet being better protected from punishment than another defendant who kills one and wounds the other of his victims.

Several tests have been advanced by the various courts which are supposed to aid in the determination of the question whether there is one offense or more. Some merely state that when there has been but a single act, there must necessarily be but a single offense. See *Gunter* v. *State,* 111 Ala. 23, 20 So. 632 (1895); *Spannell* v. *State,* 83 Tex. Cr. Rep. 118, 203 S. W. 357 (1918). This seems to be more a flat declaration of policy than a test. A related criterion has been labelled the "same transaction" test which holds that a series of acts closely connected, as the repetitious shooting of a gun, may constitute one act in law and thus one offense. *State* v. *Houchins,* 102 W. Va. 169, 134 S. E. 740 (1926). By this test the perpetrators of the St. Valentine's Day massacre (where seven men were murdered by a gangster's machine gun) would have constituted but one offense. A third standard is the subjective one called the intent test. Under this view the court looks into the mind of the accused to determine whether he has a single or multiple intent. If only one intent is found then there is a single offense, regardless of the number or severity of the results of the defendant's act. *Hurst* v. *State,* 24 Ala. App. 47, 129 So. 714 (1930); *Burnam* v. *State,* 58 S. E. 683 (Ga., 1907). To find a separate intent for every offense is pure conjecture at best. Who can accurately read the inner thoughts and feelings of another's mind? In cases of criminal negligence, as the instant case, the intent test obviously fails, for intent is not involved. However, some jurisdictions which sponsor this standard say that the negligent killing of two or more by the same act could not be more than one offense, because there was no intent. See *State* v. *Wheelock, supra,* and cases there cited.

Another and perhaps the most logical test used by the courts is called the "same evidence" test,

an objective test which looks to the identity of the offense rather than that of the act or the intent. Wharton on Criminal Law (12th ed. 1932) §396; *Vaughn* v. *Commonwealth, supra; State* v. *Billotto, supra; State* v. *Fredlund, supra; People* v. *Majors,* 65 Cal. 138 3 Pac. 597 (1884); *State* v. *Corbett,* 117 S. C. 356, 109 S. E. 133 (1921). Thus, where there has been two or more killings, there are as many offenses as there are deaths, no matter if there is only one intent or but a single act. The courts have circumvented the procedural double jeopardy difficulty by placing emphasis upon the name of the person injured. *State* v. *Clavey,* 355 Ill. 358, 189 N. E. 364 (1934) (where the name of deceased was held to be an essential fact in the indictment); Wharton, op. cit. §646. But see *State* v. *Wheelock, supra.* Thus where the facts are the same under two indictments, the court will allow conviction under both indictments if the second indictment differs from the first only as to the name of the injured person.

The basic reason for all these rules penetrates to a question of policy that can be decided only after one determines whether the killing of one individual as such is an offense against the state. If one is to be responsible for the consequences of his reckless acts, as in manslaughter, then that one should be responsible for as many killings as spring from his criminally negligent act. It is difficult to understand why two killings should be punishable as one if they happened to have come about through a single act. In tort law a tort feasor is liable for all consequences of negligence which he could reasonably foresee. Why not apply this doctrine to the criminally negligent also? Then a reckless driver, as in the instant case, should foresee that his recklessness might result in the death of one, two, or more people. He has a separate foreseeability for each person, so that each injury constitutes a separate offense and is punishable as such. The criticism of this argument, that repetition of trial will hinder court efficiency and subject accused to consecutive trials, is answered by a possibility of joinder of similar offenses in one indictment. The principal case in effect recognizes the analogy to tort principles and lays stress on the consequences rather than the act or intent. This rationale of the problem seems the most sensible as it exacts a just penalty from the criminal for his crimes against society.

O. WENDELL LANNING.

EVIDENCE—ADMISSIBILITY OF EVIDENCE OF A CONSPIRACY NOT CHARGED IN THE INDICTMENT.—[New York] Can an accused be convicted under an indictment charging him with having done certain specific acts, when the proof adduced at the trial shows merely that he conspired with others to do these acts, and that his co-conspirators actually did them? This was the question before the Court of Appeals of New York in the recent case of *People* v. *Luciano,* 14 N. E. 2d, 433. The court answered the question affirmatively.

Luciano and others were members of a gang of criminals which sought to gain control of prostitution and other commercialized vice in New York City. The prostitutes were induced to work through the combination by force and violence. In return for various sums paid by

them, the women received room and board and "protection," consisting of bail and legal defense if they were arrested. Luciano and his confederates were indicted for three types of crime: placing a female in a house of prostitution, receiving money for having so placed her, and receiving money from the earnings of the woman so placed, without giving consideration therefor. There was no evidence submitted to prove that Luciano himself did any of these acts. However, the jury found that he had conspired with others to do them, and that these others had performed them. On the basis of the conspiracy he was convicted. This is entirely in accord with New York authority. Penal Law of New York §2; *People* v. *McKane,* 143 N. Y. 455, 8 N. E. 950 (1894); *People* v. *Bliven,* 112 N. Y. 79, 19 N. E. 638 (1889); *People* v. *Cassidy,* 213 N. Y. 388, 107 N. E. 713 (1915); *People* v. *Wicks,* 42 N. Y. S. 630, affirmed without opinion, 154 N. Y. 766; 49 N. E. 1102 (1896); *People* v. *Micelli,* 142 N. Y. S. 102, affirmed without opinion, 216 N. Y. 727, 111 N. E. 1094 (1913), and cases there cited. In view of these precedents, the dissent of Judge Rippey, based in part on the ground that the defendant was convicted of a crime with which he was not charged, is surprising.

People v. *McKane,* 143 N. Y. 455, 38 N. E. 950 (1894), is the leading New York case on this point. The defendant in that case induced members of the board of registry to violate the Election Law. He was charged with violating that law and was convicted, although the statute was so worded that only members of the board were legally capable of violating it. He had conspired to break it and that was considered enough upon which to convict him. In the earlier case of *People* v. *Bliven,* 112 N. Y. 79, 19 N. E. 638 (1889), the defendant was convicted of performing acts which he himself could not actually have performed at that time, as he was absent when the crime was committed. The court said: "It [the crime] was proved by showing that the act although committed by a third person, and in the absence of defendant, was so committed by his aid and procurement, and in that way in law and in morals and in good sense he committed the act himself." Judge Chase summed up the New York view in *People* v. *Cassidy,* 213 N. Y. 388, 107 N. E. 713 (1915), when he stated: "When sufficient evidence of a common design and purpose amounting to a conspiracy has been given to make the question one for the jury, any evidence of the acts and declarations of the conspirators in furtherance of the common purpose is competent. In a case like this it is not necessary in order to make such proof competent that the conspiracy should be charged in the indictment." This seems to be the general rule as well. Wharton's Criminal Evidence (11th ed. 1935) §701. *Hammond* v. *State,* 173 Ark. 674, 298 S. W. 714 (1927); *Cossack* v. *U. S.,* (C. C. A. 9th, 1936), 82 F. (2d) 214, cert. denied, 298 U. S. 654; 298 U. S. 678, rehearing denied, 298 U. S. 691 (1936); *Coplin* v. *U. S.,* (C. C. A. 9th, 1937), 88 F. (2d) 652, 660; *Belden et al.* v. *U. S.,* (C. C. A. 9th, 1915), 223 Fed. 726; *Vilson* v. *U. S.* (C. C. A. 9th, 1932), 61 F. (2d) 901; *Kraus* v. *U. S.,* (C. C. A. 8th, 1937), 87 F. (2d) 656; *Lee Dip* v. *U. S.,* (C. C. A. 9th, 1937), 92 F. (2d) 802, cert. de-

nied, 58 S. C. R. 526, 82 L. Ed. 510 (1938).

One New York case goes further. It is *People* v. *Putnam,* 85 N. Y. S. 1056, affirmed without opinion, 179 N. Y. 518, 71 N. E. 1135 (1904). The defendant in that case was indicted for grand larceny. He was found to be one of a group of conspirators prosecuting the felonious enterprise. He was not only convicted on the basis of the conspiracy, but the court allowed evidence to be introduced against him of the acts of his co-conspirators in a similar undertaking, but one in which he was not concerned. The case of *Lee Dip* v. *U. S.* (C. C. A. 9th, 1937) 92 F. (2d) 802, cert. denied, 58 S. C. R. 526, 82 L. Ed. 510 (1938), might be considered an even further extension of the principle, although when the facts are considered there are qualifying circumstances which make the decision justifiable. The defendant in that case was suspected of concealing opium. While the officers were searching his premises, one Chin Fook came in through the back door carrying opium. The defendant was charged with concealing grains of the narcotic found on the premises, but the evidence concerning Chin Fook was admitted and held to have been properly admitted upon appeal. It was not proven that Chin Fook was concerned in the concealing of the opium for which the defendant was indicted, nor that Lee Dip and Chin Fook were conspirators in the opium business. However, it was brought out at the trial that they were partners in the maintenance of a nearby gambling house. Chin Fook had a key to the defendant's premises, and there were other circumstances tending to show a close relationship between the two. In the principal case, the evidence of the conspiracy admitted was of the one in which the defendant was a conspirator. In the *Putnam* case, *supra,* the evidence admitted concerned the acts of the defendant's co-conspirators in a similar undertaking, but one in which the defendant was not concerned. In the *Lee Dip* case the court allowed evidence concerning a possible conspirator to be introduced who was not involved in the transaction for which the defendant was on trial. This is an extension of the general view, and it is doubtful if it is a wise one. The evidence does not really concern the charge for which the defendant is on trial, and might conceivably prejudice his interests. The jury should not be influenced by the crimes of his associates in weighing his guilt or innocence.

On the whole, the doctrine as expressed by the principal case seems to be a sound one. It is certainly valuable, for if we did not have it, criminals like Luciano would be free today. There is no reason to believe that it would be unfair to the accused. If a person has procured the commission of a criminal act, or induced another to commit it, he should be punished as severely as the one actually performing it. The mere fact that conspiracy is indictable as a separate offense should not operate to preclude its admissibility as evidence in other criminal prosecutions.

JAMES KAY.