

FIND Request: 49 N.Y.2d 636

Court of Appeals of New York.
Liliane FELDSBERG et al., as Administrators of the
Estate of Eric M. Feldsberg, Deceased, Appellants,

v.

James P. NITSCHKE, Respondent.

April 1, 1980.

In action for wrongful death and pain and suffering commenced after plaintiffs' decedent, a hitchhiker, was killed in motor vehicle accident, the Supreme Court, Trial Term, New York County, William Mertens, J., rendered judgment upon verdict in favor of defendant, and plaintiffs appealed. The Supreme Court, Appellate Division, 66 A.D.2d 757, 412 N.Y.S.2d 2, affirmed, and plaintiffs appealed. The Court of Appeals, Cooke, C. J., held that: (1) rule governing use of depositions does not establish absolute and unqualified right to use deposition at any time during course of trial, and (2) it was not error for trial court, after defendant had been called as plaintiffs' witness and had been excused after redirect examination subject to recall for purpose of testifying in connection with certain photographs of accident scene, to refuse to allow plaintiffs' counsel to use defendant's deposition for one question claimed to be inconsistent, as plaintiffs had full opportunity to present their case, and trial court, in effort to control case before it, could limit reexamination, through either defendant or his deposition, into matters covered extensively in earlier examination.

Affirmed.

Meyer, J., dissented and filed opinion in which Wachtler and Fuchsberg, JJ., concurred.

West Headnotes

[1] Courts 106 ↪ 237(1.1)

106 Courts

106VI Courts of Appellate Jurisdiction

106VI(B) Courts of Particular States

106k237 New York
106k237(1) Appellate Jurisdiction of
Court of Appeals in General

106k237(1.1) k. In general. Most Cited Cases
(Formerly 106k237(1))

In action for wrongful death and pain and suffering in which primary issue on appeal was whether rule, which permits use of adverse party's deposition for any purpose, overrides in all instances trial court's discretionary power to control litigation before it, dissenting opinion in Appellate Division viewing rule as prohibiting trial court's limitation on use of deposition was dissent on question of law, and thus appeal as of right was properly before Court of Appeals. CPLR 3117(a), par. 2, 5601(a).

[2] Pretrial Procedure 307A ↪ 204

307A Pretrial Procedure

307AII Depositions and Discovery

307AII(C) Discovery Depositions

307AII(C)5 Use and Effect

307Ak201 Use

307Ak204 k. Purpose. Most Cited

Cases

Rule, which provides that deposition of party may be used for any purpose by any adversely interested party, and which permits use of deposition as evidence in chief without making party deponent witness of party introducing deposition or binding offerer to deponent's version of events, does not establish absolute and unqualified right to use deposition at any time during course of trial, since order of introducing evidence and time when it may be introduced are matters generally resting within sound discretion of trial court, and rule confers upon deposition no special qualities rendering its use immune to ordinary rules of trial practice. CPLR 3117(a), par. 2.

[3] Appeal and Error 30 ↪ 946

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k944 Power to Review

30k946 k. Abuse of discretion. Most

Cited Cases

Trial 388 ⤴ **18.5**

388 Trial

388III Course and Conduct of Trial in General

388k18.3 Role and Obligations of Judge

388k18.5 k. Discretion. Most Cited Cases

(Formerly 388k18)

Trial court is not without power to ensure orderly and fair administration of justice merely because particular item of evidence is technically admissible, and although there exist general rules for conduct of trials, deviation from these rules may be necessary to fit circumstances of particular case, and, indeed, power to permit deviation is integral part of trial judge's function, and court often has before it complex litigation and is duty bound to assure fairness and avoid unnecessarily protracted or confusing presentation of evidence, and this power to control case necessarily is of discretionary nature, and its exercise is not reviewable save for clear abuse of discretion.

[4] **Trial 388** ⤴ **59(2)**

388 Trial

388IV Reception of Evidence

388IV(B) Order of Proof, Rebuttal, and Re-opening Case

388k59 Order of Admission in General

388k59(2) k. Discretion of court. Most

Cited Cases

Order of introducing evidence and time when it may be introduced are matters generally resting in sound discretion of trial court.

[5] **Trial 388** ⤴ **66**

388 Trial

388IV Reception of Evidence

388IV(B) Order of Proof, Rebuttal, and Re-opening Case

388k65 Reopening Case for Further Evidence

ence

388k66 k. In general. Most Cited Cases

Trial court has power to permit introduction of evidence after close of offerer's case or prohibit same.

[6] **Witnesses 410** ⤴ **330(1)**

410 Witnesses

410IV Credibility and Impeachment

410IV(A) In General

410k330 Cross-Examination to Discredit Witness or Disparage Testimony in General

410k330(1) k. In general. Most Cited

Cases

Method and duration of cross-examination to determine witness' credibility or accuracy is within trial court's control.

[7] **Witnesses 410** ⤴ **277(1)**

410 Witnesses

410III Examination

410III(B) Cross-Examination

410k277 Cross-Examination of Accused in Criminal Prosecutions

410k277(1) k. In general. Most Cited

Cases

Witnesses 410 ⤴ **282.5**

410 Witnesses

410III Examination

410III(B) Cross-Examination

410k279 Questions on Cross-Examination

410k282.5 k. Repetition of questions and questions calling for repetition of answers. Most

Cited Cases
(Formerly 410k2821/2, 410k282)

While court may not deprive party of right to inquire into matters directly relevant to principal issues of case against him, it may, in proper exercise of discretion, restrict inquiry into collateral matters or prohibit unnecessarily repetitive examination.

[8] **Witnesses 410** ⤴ **286(2)**

410 Witnesses

410III Examination

410III(C) Re-Examination

410k285 Redirect Examination

410k286 Scope and Extent
410k286(2) k. Discretion of court.

Most Cited Cases

Recall of witness for redirect examination is subject to discretion of court.

[9] Witnesses 410 ↪ **262**

410 Witnesses

410III Examination

410III(A) Taking Testimony in General

410k261 Recalling Witnesses

410k262 k. In general. Most Cited Cases

Generally, sound trial practice demands that every witness be questioned in first instance on all relevant matters of which he has knowledge and be excused at completion of this testimony, as recall at later point in trial not only may inject untoward administrative burdens into litigation by reopening whole range of prior testimony, but may also unfairly disadvantage adversary in his ability to meet proof or unnecessarily divert jury's attention away from material issues of case, but, in certain situations, trial court may find it necessary to depart from this general rule and may do so in its discretion.

[10] Witnesses 410 ↪ **379(1)**

410 Witnesses

410IV Credibility and Impeachment

410IV(D) Inconsistent Statements by Witness

410k379 Inconsistency of Statements as Ground of Impeachment in General

410k379(1) k. In general. Most Cited Cases

Rule, which permits introduction of prior inconsistent statement sworn or subscribed by witness for purposes of impeachment, does not limit trial court's general powers to control litigation before it. CPLR 4514.

[11] Witnesses 410 ↪ **379(10)**

410 Witnesses

410IV Credibility and Impeachment

410IV(D) Inconsistent Statements by Witness

410k379 Inconsistency of Statements as Ground of Impeachment in General

410k379(8) Former Testimony of Witness

410k379(10) k. Depositions. Most Cited Cases

In action for wrongful death and pain and suffering, it was not error for trial court, after defendant had been called as plaintiffs' witness and had been excused after redirect examination subject to recall for purpose of testifying in connection with certain photographs of scene of motor vehicle accident, to refuse to allow plaintiffs' counsel to use defendant's deposition for one question claimed to be inconsistent, as plaintiffs had full opportunity to present their case, and trial court, in effort to control case before it, could limit reexamination, through either defendant or his deposition, into matters covered extensively in earlier examination. CPLR 3117(a), par. 2.

[12] Appeal and Error 30 ↪ **1043(6)**

30 Appeal and Error

30XVI Review

30XVI(J) Harmless Error

30XVI(J)6 Interlocutory and Preliminary Proceedings

30k1043 Interlocutory Proceedings

30k1043(6) k. Discovery and depositions. Most Cited Cases

In action for wrongful death and pain and suffering commenced after plaintiffs' decedent, a hitchhiker, was killed in motor vehicle accident, even if it were deemed erroneous, trial court's refusal, after defendant had been called as plaintiffs' witness and had been excused after redirect examination subject to recall for purpose of testifying in connection with certain photographs of accident scene, to allow plaintiffs' counsel to use defendant's deposition for one question claimed to be inconsistent, would not warrant reversal, in light of plaintiffs' considerable attack on defendant's credibility, and fact that there was ample evidence to support finding that decedent hitchhiker was contributorily negligent. CPLR 3117(a), par. 2.

[13] Evidence 157 ↪ **555.8(1)**

157 Evidence

157XII Opinion Evidence

157XII(D) Examination of Experts

157k555 Basis of Opinion

157k555.8 Automobile Cases

157k555.8(1) k. In general. Most

Cited Cases

(Formerly 157k555)

In action for wrongful death and pain and suffering commenced after plaintiffs' decedent, a hitchhiker, was killed in motor vehicle accident, in which action defendant testified that there were no skid marks from his vehicle, trial court properly excluded testimony of expert as to cause of skid marks, since investigator was not shown to have been familiar with circumstances of particular accident and in absence of proper foundation, any testimony concerning lack of skid marks would have been speculative.

[14] Evidence 157 ↪ 358

157 Evidence

157X Documentary Evidence

157X(C) Private Writings and Publications

157k358 k. Maps, plats, and diagrams.

Most Cited Cases

In action for wrongful death and pain and suffering commenced after plaintiffs' decedent, a hitchhiker, was killed in motor vehicle accident, trial court properly excluded transparent overlay which purported to represent distances at accident scene, since measurements were made by pacing distances and did not present accurate figures for jury's consideration.

*638 ***753 **1295 Melvin Hirshowitz and Hyman Bravin, New York City, for appellants.

*639 Michael Majewski and Joseph D. Ahearn, New York City, for respondent.

***640 OPINION OF THE COURT**
COOKE, Chief Judge.

[1] After a trial in an action for wrongful death and conscious pain and suffering, the jury returned a verdict in favor of defendant. Seeking a new trial, plaintiffs challenge certain evidentiary rulings by the trial court. The primary question is whether CPLR

3117 (subd. (a), par. 2), which permits the use of an adverse party's deposition for any purpose, overrides in all instances a trial court's discretionary power to control the litigation before it. It does not have such an effect and, therefore, the order of the Appellate Division is affirmed, 66 A.D.2d 757, 412 N.Y.S.2d 2.[FN1]

FN1. In reaching the merits of the instant appeal, it is first noted that defendant incorrectly argues that the dissent at the Appellate Division was not on a question of law and thus precludes an appeal as of right (see CPLR 5601, subd. (a)). The dissent did not consider the trial court's ruling merely an improper exercise of discretion. Rather, the dissent, in essence, viewed CPLR 3117 as prohibiting the trial court's limitation on the use of the deposition. The dissent, therefore, was on the law and the appeal is properly before the court.

*641 Decedent, Eric M. Feldsberg, died in 1972, shortly after being struck by a mobile camper operated by defendant on the ramp of Exit 18 on the Connecticut Turnpike. Defendant testified that as he approached the exit ramp, he observed Eric leaning against the guardrail on the right shoulder of the ramp. Eric left his position at the guardrail and approached the pavement. Considering him a hitchhiker, defendant steered the camper to the left and continued to decelerate. Eric then stepped onto the pavement, dodged back and forth, and darted to the island on the left side of the exit. Defendant, apparently confused by Eric's actions, turned the camper further to the left and stepped hard on the brake. These maneuvers were insufficient to avoid impact and Eric was thrown under the vehicle. Testimony from members of defendant's family who were traveling with him lent support to defendant's version of the accident.

Mrs. Petrea Anderson Harris, operating a vehicle immediately behind defendant, was a witness to the accident. Through her pretrial deposition, Mrs. Harris testified that defendant entered the deceleration lane close to the exit ramp. She observed Eric run onto the pavement, break stride, and then continue at a fast pace. She did not see Eric dodge or dart back and forth, ***754 but did observe defendant decelerate on the exit ramp, veer to the left and saw his brake

lights prior to impact.

Both defendant's negligence and Eric's contributory negligence were the underlying issues at trial. Plaintiffs' theory was that Eric, left off on the right shoulder of the exit ramp by another vehicle, observed the camper make a sharp turn onto the ramp and, in an attempt to avoid the oncoming camper, ran across the road to the island on the left of the ramp.

****1296** Defendant had been called as plaintiffs' witness and had been excused after redirect examination. Plaintiffs, however, requested that defendant be available to give testimony in connection with certain photographs of the accident scene. The court at that point made clear that the recall was not to be for the purpose of repeating conflicts concerning the distances involved or to repeat areas of testimony already covered. ***642** Counsel did not object and represented that he did not intend to conduct such an examination, indicating that the only purpose for recalling defendant was for his testimony concerning the photographs. However, when defendant was recalled, counsel for plaintiffs began the examination by asking defendant about his observations of decedent's conduct. The court sustained a defense objection, reminding counsel of the previous ruling that the recall was to be for the limited purpose of marking the photographs. Counsel acknowledged his understanding of the initial ruling but asserted that he had three matters which came up during the intervening period. After the court refused to permit the additional inquiry, counsel further requested a ruling concerning the use of defendant's deposition for one question claimed to be inconsistent, asserting that the deposition could be read without defendant being present on the stand. Plaintiffs' counsel then asked if he could use the deposition with defendant on the stand. In light of the reservation concerning the examination of defendant and considering the use of the deposition to be a further examination of defendant, the court ruled that counsel could not make further use of the deposition.

[2] Plaintiffs urge that the refusal to allow further use of the deposition imposed an unwarranted restriction on the presentation of their case and was contrary to the express terms of CPLR 3117 (subd. (a), par. 2). That rule provides, "the deposition of a party * * * may be used for any purpose by any adversely interested party". This provision, adapted from for-

mer subdivision (d) of rule 26, now subdivision (a) of rule 32 of the Federal Rules of Civil Procedure (see First Preliminary Report of the Advisory Committee on Practice and Procedure, N.Y.Legis.Doc., 1957, No. 6(b), p. 146), was intended "to authorize use of a party's deposition unlimitedly against the deponent" (Sixth Report of the Advisory Committee on Practice and Procedure, N.Y.Legis.Doc., 1962, No. 8, p. 318). The section permits use of the deposition as evidence in chief without making the party-deponent the witness of the party introducing the deposition or binding the offerer to the deponent's version of events (see CPLR 3117, subd. (d); Spampinato v. A. B. C. Cons. Corp., 35 N.Y.2d 283, 360 N.Y.S.2d 878, 319 N.E.2d 196). Plaintiffs would have this court read CPLR 3117 (subd. (a), par. 2), not as merely establishing the admissibility of the contents of a deposition as evidence of the facts asserted without a showing that the deponent is unavailable (see Siegel, Practice Commentaries, ***643** McKinney's Cons.Laws of N.Y., Book 7B, CPLR 3117:3, p. 491), but also as establishing an absolute and unqualified right to use the deposition at any time during the course of trial. We decline to adopt plaintiffs' interpretation, however, for to do so would be to do violence to certain well-settled principles of trial practice.

[3] A trial court is not without power to ensure the orderly and fair administration of justice merely because a particular item of evidence is technically admissible. Although *****755** there exist general rules for the conduct of trials, deviation from these rules may be necessary to fit the circumstances of a particular case. Indeed, the power to permit deviation is an integral part of the Trial Judge's function. The court often has before it complex litigation and is duty bound to assure fairness and avoid unnecessarily protracted or confusing presentation of evidence. This power to control the case necessarily is of a discretionary nature, and its exercise is not reviewable save for a clear abuse of discretion (see Richardson, Evidence (10th ed. Prince), s 459, pp. 449-450).

****1297** [4][5][6][7] Thus, the order of introducing evidence and the time when it may be introduced are matters generally resting in the sound discretion of the trial court (Philadelphia & Trenton R. R. Co. v. Stimpson, 14 Pet. (39 U.S.) 448, 463, 10 L.Ed. 535; 6 Wigmore, Evidence (3d ed.), s 1867, p. 498). This "cardinal doctrine" (6 Wigmore, s 1867, p. 498) recognizes the court's power to permit the introduc-

tion of evidence after the close of the offerer's case (People v. Koerner, 154 N.Y. 355, 48 N.E. 730; Wright v. Reusens, 133 N.Y. 298, 307, 31 N.E. 215) or prohibit the same (Agate v. Morrison, 84 N.Y. 672). Similarly within the trial court's control is the method and duration of cross-examination to determine a witness' credibility or accuracy (see Langley v. Wadsworth, 99 N.Y. 61, 63, 1 N.E. 106). In addition, while the court may not deprive a party of the right to inquire into matters "directly relevant to the principal issues of the case against him" (People v. Ramistella, 306 N.Y. 379, 384, 118 N.E.2d 566), it may, in the proper exercise of discretion, restrict inquiry into collateral matters (see People v. Braun, 158 N.Y. 558, 567-569, 53 N.E. 529) or prohibit unnecessarily repetitive examination (Matter of Friedel v. Board of Regents, 296 N.Y. 347, 351, 73 N.E.2d 545).

[8][9] Nor can it be doubted that recall of a witness for redirect examination is subject to the discretion of the court (see 6 Wigmore, Evidence (3d ed.), s 1898, pp. 570-572). Generally, sound trial practice demands that every witness be questioned *644 in the first instance on all relevant matters of which he has knowledge and be excused at the completion of this testimony. In this manner, the litigation is contained within reasonable limits, the adversary is aware of the evidence he will have to meet and the jury is not unnecessarily confused. Recall at a later point in the trial not only may inject untoward administrative burdens into the litigation by reopening the whole range of prior testimony, but may also unfairly disadvantage the adversary in his ability to meet the proof or unnecessarily divert the jury's attention away from the material issues of the case. In certain situations, however, the trial court may find it necessary to depart from this general rule and may do so in its discretion (see *id.*, pp. 570, 572, quoting People v. Mather, 4 Wend., 229, 249).

[10] Given the considerable body of law recognizing the trial court's discretionary power to control the case before it, we cannot accept plaintiffs' contention that CPLR 3117 (subd. (a), par. 2) establishes an absolute right on the part of the offerer to use a deposition at any time during the presentation of the case, subject only to the exclusion of repetitious matter. [FN2] A deposition contains no more than testimonial evidence of the party-deponent and is merely the vehicle by which this evidence comes before the trier

of fact. CPLR 3117 confers upon the deposition no special qualities rendering its use immune to ordinary rules of trial practice. Thus, the discretionary power to control the use of live witnesses applies with equal force to control the use of a deposition. Of course, in exercising its discretion, the trial court may not act arbitrarily***756 or deprive a litigant of a full opportunity to present his case. But such an abuse of discretion does not infect the ruling here.

[FN2] Plaintiffs also place reliance on CPLR 4514, which permits introduction of a prior inconsistent statement sworn or subscribed by the witness for purposes of impeachment. This section, however, no more limits the trial court's general powers of control than does CPLR 3117.

[11] Notwithstanding plaintiffs' protests to the contrary, it is readily apparent that the proffered use of the deposition was merely to continue the examination of defendant, to highlight one more apparent inconsistency. Faced with an adverse ruling concerning the scope of examination on recall, plaintiffs' counsel asserted the right to read the deposition without defendant on the stand. In the circumstances of this case, the trial court could properly reject this attempt to circumvent its ruling. [FN3]

[FN3] As part of the ruling, the trial court stated that plaintiffs had elected to call defendant and use the deposition in the course of that examination and could not thereafter offer into evidence the deposition alone. If the court considered CPLR 3117 to mandate such an election, this portion of the rationale was erroneous. The record, however, reveals that the court's ruling was predicated primarily on an exercise of discretion after a consideration of the circumstances of the particular case.

*645 **1298 Plaintiffs had ample opportunity to present any inconsistencies between defendant's trial testimony and his deposition. Indeed, after calling defendant to the stand, counsel for plaintiffs conducted an exhaustive examination into defendant's perceptions and reactions and confronted him with inconsistencies in his deposition. Defendant testified fully concerning the distance between the vehicle and decedent when decedent started to move across the

exit ramp. Plaintiffs' counsel had the opportunity then to use the allegedly inconsistent statement in the deposition. Either through inadvertence or as part of a conscious strategy, he failed to do so.

After affording plaintiffs a full opportunity to elicit testimony concerning the distances involved, the trial court, in an effort to control the case before it, could limit re-examination, through either defendant or his deposition, into matters covered extensively in earlier examination. Whether viewed as a continued examination of defendant on recall or simply as reuse of the deposition, the trial court could properly reject plaintiffs' attempt to do indirectly what it had ruled could not be done directly.[FN4]

FN4. The argument that the inconsistent statement may also be considered an admission does not render the trial court's ruling erroneous. Plaintiffs exploited defendant as a witness through both live testimony and the deposition. Plaintiffs simply were not deprived of a meaningful opportunity to present material evidence to the trier of fact.

Of course, this is not to say that the exclusion of a deposition is proper merely because the party-deponent has already testified or is present and available (see Spampinato v. A. B. C. Cons. Corp., 35 N.Y.2d 283, 360 N.Y.S.2d 878, 319 N.E.2d 196, supra; Perkins v. New York Racing Assn., 51 A.D.2d 585, 378 N.Y.S.2d 757; Rodford v. Sample, 30 A.D.2d 588, 290 N.Y.S.2d 30; Merchants Motor Frgt. v. Downing, 227 F.2d 247 (8th Cir.)). Rather, we simply find it inappropriate to establish a per se rule which would strip the court of all power to prevent unnecessary repetition or unfair surprise simply because a deposition is offered, (see Coughlin v. Capitol Cement Co., 571 F.2d 290, 308, n. 31, (5th Cir.); Fey v. Walston & Co., 493 F.2d 1036, 1046 (7th Cir.)). Like all other evidence, the use of the deposition is subject to the trial court's control.

[12] Indeed, exclusion of the deposition worked no prejudice to *646 plaintiffs. Although characterizing the deposition testimony as directly contradicting defendant's trial testimony, a closer examination reveals that the conflict is more apparent than real. At the deposition, defendant testified that decedent was approximately 20 feet away when he went directly in front of the vehicle. Defendant testified at trial that

when decedent took one or two steps onto the concrete he was 25 to 50 yards away, when he moved further over the concrete slab he was about 20-25 yards away ***757 and finally, when he darted back and forth, he was between 5 to 15 yards away. Thus, the portion of the deposition sought to be introduced apparently conflicted with testimony relating to a different point in time; any remaining discrepancy is of minor significance. Additionally, although there was sufficient evidence to show that defendant was negligent, there was ample evidence to support a finding that decedent was contributorily negligent. In light of the evidence and plaintiffs' considerable attack on defendant's credibility, the exclusion of the offered portion of the deposition, even if it were deemed erroneous, would not warrant reversal.

[13][14] Turning then to plaintiffs' additional assignments of error, we find no basis for reversal. Addressing defendant's testimony that there were no skid marks from his vehicle, plaintiffs sought to introduce testimony of an expert as to the cause of skid marks. Assuming without deciding **1299 that this was a proper area for expert testimony, this testimony was properly excluded. The investigator was not shown to have been familiar with the circumstances of the particular accident and, thus, in the absence of a proper foundation, any testimony concerning the lack of skid marks would have been speculative. Similarly proper was the exclusion of a transparent overlay which purported to represent the distances at the accident scene. As the measurements were made by pacing the distances, the trial court could properly exclude the overlay as not presenting accurate figures for the jury's consideration.

Accordingly, the order of the Appellate Division should be affirmed.

MEYER, Judge (dissenting).

Crucial to the determination of this appeal is the fact that the three questions and answers plaintiffs sought to read from defendant's deposition constituted an admission on his part bearing materially upon the issue of decedent's contributory negligence. I agree that neither *647 CPLR 3117 nor CPLR 4514 gives a party the absolute right to decide the point in the trial at which he will read to a jury an inconsistent statement of his opponent made during a deposition taken under oath. Both sections deal with admissibility and while either would make the three questions

and answers in issue admissible, neither deals with the time at which such evidence is to be introduced nor indicates that the right to introduce it may not be waived. That does not leave the matter in the wholly unfettered discretion of the Trial Judge, however. Admissible evidence is not to be excluded on the basis of generalizations concerning what the effect of its admission could be, but rather only when the specific circumstances of the particular case warrant doing so. Under the circumstances of this case exclusion of the three questions and answers was an abuse of discretion, prejudicial to plaintiffs, and requires reversal and the granting of a new trial.

As then Judge Fuld put it in another context in Ando v. Woodberry, 8 N.Y.2d 165, 167, 203 N.Y.S.2d 74, 75, 76, 168 N.E.2d 520, 521, "(I)t is well to recall the principle, basic to our law of evidence, that 'All facts having rational probative value are admissible' unless there is sound reason to exclude them, unless, that is 'some specific rule forbids' (1 Wigmore, Evidence (3d ed., 1940), p. 293). It is this general principle which gives rationality, coherence and justification to our system of evidence and we may neglect it only at the risk of turning that system into a trackless morass of arbitrary and artificial rules." [FN1] A corollary of that principle is that though the Trial Judge has the power through his control of the conduct of the trial to exclude admissible evidence for reasons of fairness, it is not a power to be exercised by way of pavlovian reaction, but only when there is good reason,***758 in terms of unfairness to the opposing side in so doing. The role of a Trial Judge is a great deal more than that of a traffic cop (see People v. Moulton, 43 N.Y.2d 944, 945, 403 N.Y.S.2d 892, 374 N.E.2d 1243), but of necessity it is the trial lawyer who determines in the first instance the order in which proof will be presented. He may offer evidence at a particular time to accommodate the convenience of witnesses, because he feels the facts can be most simply presented in a particular order or because he considers a particular point in the trial the time when specific items of evidence will have the greatest effect on the jury. As concerns clearly relevant *648 and material evidence, his choice, whether strategic or inadvertent, should not be the basis for excluding such evidence from consideration by the jury unless it would in fact be unfair to the other side not to exclude it. Though unfairness was argued by defendant's attorney, the record clearly demonstrates that there was none.

[FN1. Accord: People v. Wise, 46 N.Y.2d 321, 327, 413 N.Y.S.2d 334, 337, 385 N.E.2d 1262, 1265: "In case of doubt, therefore, the balance should be struck in favor of admissibility" (cf. People v. Ramistella, 306 N.Y. 379, 384, 118 N.E.2d 566, cited by the majority).

The majority acknowledges that there was sufficient evidence to take the negligence**1300 issue to the jury (p. --, p. 757 of 427 N.Y.S.2d, p. -- of -- N.E.2d), but its statement of general rules and characterization of plaintiffs' attorney's conduct obscures the issue upon which the Trial Judge ruled and its relationship to the contributory negligence issue. It will be helpful, therefore, to sharpen focus as to the issue under discussion.

The specific questions and answers which plaintiffs' counsel sought to read in order to show inconsistency in Dr. Nitschke's testimony were:

"Question: How far away was he when he [FN2] went directly in front of you?

[FN2. "He" refers to plaintiffs' decedent.

"Answer: I don't recall.

"Question: Could you say it was as far as twenty feet?

"Answer: It may have been.

"Question: Might it have been farther than twenty feet?

"Answer: I doubt it. I really don't recall exactly."

It is undisputed that this portion of the deposition had not previously been put before the jury, that plaintiffs' attorney sought simply to read the questions and answers to the jury without the defendant on the stand, and that defendant had never been examined concerning a statement by him that decedent was no more than 20 feet from defendant when decedent was directly in front of the camper. Irrelevant, therefore, is discussion of the recall of a witness (p. 643, 644, p. 755 of 427 N.Y.S.2d, p. 1297 of 404

N.E.2d), the reopening of a whole range of testimony (p. 644, p. 755 of 427 N.Y.S.2d, p. 1297 of 404 N.E.2d), diversion of the jury's attention from the main issues of the cases (p. 644, p. 755 of 427 N.Y.S.2d, p. 1297 of 404 N.E.2d), limiting re-examination of a witness (p. 645, p. 756 of 427 N.Y.S.2d, p. 1297 of 404 N.E.2d), and unnecessary repetition (p. 645, p. 756 of 427 N.Y.S.2d, p. 1297 of 404 N.E.2d). Likewise inappropriate is the suggestion that plaintiffs sought to "continue the examination of defendant" by the proffered use of the deposition (p. 644, p. 756 of 427 N.Y.S.2d, p. 1298 of 404 N.E.2d), for the majority recognizes (p. 644, p. 755 of 427 N.Y.S.2d, p. 1297 of 404 N.E.2d, n. 2) that CPLR 4514 makes any prior inconsistent statements under oath admissible and agrees (p. 644, p. 756 of 427 N.Y.S.2d, p. 1297 of 404 N.E.2d, n. 3) CPLR 3117 permits use of the deposition alone as *649 such a statement. The inappropriateness of the suggestion becomes apparent if we suppose that the out-of-court statement of defendant had been made in an MV-104 report, for that paper would be admissible [FN3] on the certification of the Commissioner of Motor Vehicles alone at any point in the trial without reference to ***759 whether defendant were on the stand at the time or his deposition had been used to contradict him, or even if he had never taken the stand and his deposition had never been read, simply because the statement constituted an admission.[FN4]

FN3. Even to contradict statements of defendant in a deposition of defendant read by plaintiff as part of his case in chief (Yeargans v. Yeargans, 24 A.D.2d 280, 265 N.Y.S.2d 562).

FN4. "It is well-settled law that in a civil action the admissions by a party of any fact material to the issue are always competent evidence against him, wherever, whenever and to whomsoever made" (Nappi v. Falcon Truck Renting Corp., 286 App.Div. 123, 126, 141 N.Y.S.2d 424, 427, affd. 1 N.Y.2d 750, 152 N.Y.S.2d 297, 135 N.E.2d 51 (citing Reed v. McCord, 160 N.Y. 330, 341, 54 N.E. 737); see, also, Fisch, New York Evidence (2d ed.), s 791).

It is, moreover, a misreading of the record to suggest that plaintiffs' counsel was attempting to "circumvent" the adverse ruling concerning scope of

examination on recall (p. 644, 756 of 427 N.Y.S.2d, p. 1297 of 404 N.E.2d). Counsel did first ask if he could use the deposition while defendant was on the stand but, the Trial Judge having ruled he could not, then asked for a ruling whether he could read from it an inconsistency. The Trial Judge apparently did not believe his prior rulings were being circumvented for he first ruled that he would permit use of the deposition "for that limited purpose", but then, in light of plaintiffs' ***1301 attorney's limited reservation with respect to further examination of defendant, reversed himself and sustained the objection. Plaintiffs' attorney then pointed out his right to read the deposition without defendant on the stand and the court reserved decision until after the luncheon recess. After recess, on the basis of additional research, plaintiffs' attorney quoting from Wigmore argued that an admission of an opponent can be used against him without calling him and that a deposition is no less an admission than any other statement of the opponent.[FN5] The Trial Judge then ruled that having called defendant and used his deposition in the course of that examination plaintiffs' counsel had made an election and could not thereafter utilize the deposition for any purpose (a ruling which the majority agrees (p. --, p. 756 of 427 N.Y.S.2d, p. -- of -- N.E.2d, n. 3) was erroneous). He never focused on whether there would be any unfairness to defendant*650 in permitting it to be used, perhaps because any question of possible unfairness had been removed from the case when plaintiffs' counsel, pointing out to the court that he only sought to read from the deposition, not to recall defendant, said "The only reason I mention Dr. Nitschke is in the spirit of fair play, so that he may be here if there are any answers counsel wants him to make." Had counsel not so forewarned his opponent, there would nevertheless be substantial question whether reading the questions and answers could be held unfair (cf. Gonzalez v. Medina, 69 A.D.2d 14, 21-22, 417 N.Y.S.2d 953, 958 ("The right of the party to read the deposition transcript of an adverse party is not dependent upon the voluntary decision made by the adverse party to absent himself from the trial")). Since he did, the absence of unfairness is clear.

FN5. He quoted from the Fourth Edition. The present version is to be found at volume 5 of Wigmore on Evidence (Chadbourne rev., s 1416, p. 243).

Thus, the Trial Judge's ruling was based on his

erroneous view of the law as to plaintiffs' election, rather than on his discretionary assessment of unfairness or confusion that might arise if defendant's otherwise relevant and admissible admission was put before the jury, but if the ruling be considered nevertheless to have been discretionary, it must nonetheless be reversed as an abuse of discretion in light of the total absence from the record of any indication of unfairness or possible jury confusion.

Nor can I agree with the majority that the error was harmless. To be borne in mind is the fact that this is an action for both wrongful death and conscious pain, in which the burden of proof as to contributory negligence is on the defendant. The contention of plaintiffs was that Dr. Nitschke did not make his turn into the exit ***760 lane until he was nearly past the deceleration lane (an added lane at the extreme right-hand side of the turnpike, several hundred yards in length), which would have put defendant's vehicle much closer to decedent at the time of defendant's turn than did defendant's version. Defendant's contention was that he had entered the deceleration lane near its beginning, that decedent had started across the exit lane when defendant was close to him and had reversed course several times in front of the camper before being struck. Had defendant entered the deceleration lane when he said, decedent would have had longer warning of defendant's intended use of the exit lane, and, therefore, greater time to evaluate his own movements, and the probability of a jury finding of contributory negligence *651 would likewise be enhanced. The fact that Dr. Nitschke had testified at his examination before trial [FN6] that decedent was but 20 feet away when he went directly in front of defendant, but testified at trial [FN7] to distances of up to 50 yards when decedent stepped onto the concrete, 25 yards when he was three quarters of the way across the concrete of the exit lane, and 5 to 15 yards when decedent began to go back and forth as defendant claimed was bound to be of greater than minor significance in the **1302 jury's deliberations. It bore materially on whether the jury believed defendant's claim of an early turn into the deceleration lane. It also lent some credence to defendant's darting back and forth contention, which was much more possible to have occurred over a 75-foot or a 45-foot distance than at a 20-foot distance. Mrs. Harris, the driver of the car behind the Nitschke camper as it entered the exit lane, placed its entry quite close to the exit lane, and testified as to decedent's movements (not all of which could she see)

that he hesitated and then ran quite fast when he disappeared from her view in front of the camper. Her testimony on those points would tend to negate defendant's contention that decedent darted back and forth. Moreover, both her markings on a photograph and defendant's wife's trial testimony placed decedent off the exit lane and on its left-hand shoulder at the time he was struck. In light of the foregoing, it is impossible to conclude that the jury's verdict may not have been different than it was had the Trial Judge not erroneously excluded the questions and answers he did.

FN6. Taken a year and a half after the accident.

FN7. Some four and a half years after the accident.

In view of my conclusion concerning the deposition point, I deem it unnecessary to discuss the expert testimony rulings.

For the foregoing reasons, I vote to reverse the order of the Appellate Division and grant a new trial.

JASEN, GABRIELLI and JONES, JJ., concur with COOKE, C. J.

MEYER, J., dissents and votes to reverse in a separate opinion in which WACHTLER and FUCHSBERG, JJ., concur.

Order affirmed, with costs.

N.Y., 1980.

Feldsberg v. Nitschke

49 N.Y.2d 636, 404 N.E.2d 1293, 427 N.Y.S.2d 751

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