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# Evidence--Motor Vehicles--Judicial Notice of Radar (People v. Magri, 3 N.Y.2d 562 (1958))

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EVIDENCE—MOTOR VEHICLES—JUDICIAL NOTICE OF RADAR.—Defendant was convicted of speeding on the evidence of two police officers and a radar graph. Since no expert had testified as to the operating principles of radar, defendant objected to the introduction of the radar graph into evidence. The Court of Appeals *held* the testimony of the two police officers sufficient to convict, and also stated that judicial notice would be taken of the accuracy of radar. *People v. Magri*, 3 N.Y.2d 562, 147 N.E.2d 728 (1958).

Judicial notice is that substitute for evidence whereby the court, without proof, takes cognizance of law and facts.[1] Application of scientific principles or discoveries, however, are not judicially recognized as valid while still in the experimental stage.[2] The accuracy of their practical application must be generally recognized in their particular scientific field and be publicly accepted before they merit judicial notice.[3] The courts have exercised judicial notice in diverse scientific areas.[4] The legislature also, by statute, may make the introduction of scientifically proved facts prima facie evidence of guilt.[5]

Although courts have often discussed judicial notice of radar, they have refused to admit radar readings into evidence unless an expert witness first testified as to its operating principles and accuracy.[6] Thus, in the first reported case concerning radar, a Delaware

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[1] UNDERHILL, CRIMINAL EVIDENCE § 60 (5th ed. 1956).

[2] The courts have refused to exercise judicial notice in the fields of lie detectors, People v. Forte, 279 N.Y. 204, 18 N.E.2d 31 (1938); People v. Becker, 300 Mich. 562, 2 N.W.2d 503 (1942), and truth serum, Knight v. State, 97 So. 2d 115 (Fla. 1957), because there is no general scientific recognition that such instruments are a valid and feasible method of detection.

[3] See, *e.g.*, RICHARDSON, EVIDENCE § 40 (8th ed. 1955); UNIFORM RULES OF EVIDENCE, Rule 9.

[4] See, *e.g.*, People v. Soper, 243 N.Y. 320, 152 N.E. 433 (1926) (ballistics); People v. Roach, 215 N.Y. 592, 109 N.E. 618 (1915) (fingerprints); Cowley v. People, 83 N.Y. 464 (1881) (photographs); People v. Spears, 201 Misc. 666, 114 N.Y.S.2d 869 (New Rochelle City Ct. 1952) (drunkometer); Call v. City of Burley, 57 Idaho 58, 62 P.2d 101 (1936) (X-ray); State v. Slater, 242 Iowa 958, 48 N.W.2d 877 (1951) (urine test to prove intoxication); Jordan v. Mace, 144 Me. 351, 69 A.2d 670 (1949) (blood test to disprove paternity).

[5] See, *e.g.*, N.Y. VEHICLE & TRAFFIC LAW § 70(5)(c) (more than fifteen hundredths of one per centum of alcohol in the blood is prima facie evidence of intoxication); VA. CODE ANN. § 46-215.2 (Supp. 1956) (radar reading prima facie evidence of speeding).

[6] City of Rochester v. Torpey, 204 Misc. 1023, 128 N.Y.S.2d 864 (County Ct. 1953); People v. Nasella, 3 M.2d 418, 155 N.Y.S.2d 463 (N.Y.C. Magis. Ct. 1956); People v. Sachs, 1 M.2d 148, 147 N.Y.S.2d 801 (N.Y.C. Magis. Ct. 1955); State v. Moffitt, 48 Del. 210, 100 A.2d 778 (Super. Ct. 1953); Dietze v. State, 162 Neb. 80, 75 N.W.2d 95 (1956). In the *Dietze* case, the court proposed this problem: Was the testimony that the radar operated by throwing an electronic beam across the highway, which beam when broken, would indicate the speed of the object breaking the beam, sufficient foundation for the introduction of the radar evidence? The court concluded that this was not sufficient ground work, but since the defendant did not object at the trial, he was precluded from doing so on appeal.

court in 1953 [7] allowed its introduction after an expert testified and then charged the jury as follows:

> Based upon the testimony of the expert, . . . the evidence as to the accuracy of the Speed Meter was admissible . . . subject . . . to your determination as to its accuracy in measuring the speed of the defendant's vehicle. . . .[8]

The jury was further charged that radar alone as evidence of speeding ". . . would furnish sufficient evidence for the conviction of the defendant. . . ." [9] Two years later the highest court of New Jersey, in a similar dictum statement, dispensed with the necessity of expert testimony.[10]

New York has followed this trend. At first the courts refused to admit radar readings into evidence unaccompanied by expert testimony.[11] Later cases indicated that the accuracy of radar was sufficiently established to warrant use of judicial notice.[12] In the present case, the Court of Appeals has completed the trend toward judicial notice of radar.[13] However, the conviction was not sustained upon the radar evidence since a foundation for its admission was not sufficiently proved in the record.[14] It should be further noted that when judicial notice is taken of the accuracy of radar, radar devices in general cannot be attacked as being inaccurate. However, the particular device in question is still subject to attack by alleging that no sufficient foundation was established for its admission into evidence.

The Court of Appeals did not specify what foundation must first be laid. It would appear, however, that the foundation is of the same type needed to introduce evidence of a speedometer reading.[15] The

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[7] State v. Moffitt, 48 Del. 210, 100 A.2d 778 (Super. Ct. 1953).

[8] *Id.* at 779.

[9] *Id.* at 779-80.

[10] State v. Dantonio, 18 N.J. 570, 115 A.2d 35 (1955).

[11] City of Buffalo v. Beck, 205 Misc. 757, 130 N.Y.S.2d 354 (Sup. Ct. 1954); People v. Offermann, 204 Misc. 769, 125 N.Y.S.2d 179 (Sup. Ct. 1953). In the *Beck* case, four police officers testified from visual observations that defendant exceeded the speed limit, but the court reversed the conviction since it could not be determined if the conviction rested upon the testimony of the officers or the radar. This case is criticized in Baer, *Radar Goes to Court,* 33 N.C.L. Rev. 355, 377-78 (1955).

[12] People v. Nasella, 3 M.2d 418, 155 N.Y.S.2d 463 (N.Y.C. Magis. Ct. 1956) (dictum); People v. Sachs, 1 M.2d 148, 147 N.Y.S.2d 801 (N.Y.C. Magis. Ct. 1955) (dictum); People v. Sarver, 205 Misc. 523, 129 N.Y.S.2d 9 (New Rochelle City Ct. 1954) (dictum); People v. Katz, 205 Misc. 522, 129 N.Y.S.2d 8 (Yonkers City Ct. 1954) (dictum).

[13] People v. Magri, 3 N.Y.2d 562, 147 N.E.2d 728 (1958).

[14] *Id.* at 566, 147 N.E.2d at 731. See also City of Rochester v. Torpey, 204 Misc. 1023, 128 N.Y.S.2d 864 (County Ct. 1953); *cf.* People v. Heyser, 2 N.Y.2d 390, 141 N.E.2d 553 (1957).

[15] To prove the accuracy of a speedometer the witness must testify: that he saw the speedometer being tested; and describe the way it was tested (*e.g.,* the speedometer cable was detached and attached to a speedometer machine, with a master speedometer, which tests the accuracy of the speedometer). People v. Sachs, 1 M.2d 148, 155-56, 147 N.Y.S.2d 801, 808-09 (N.Y.C. Magis.

foundation should establish: that the radar officer was trained;[16] that the radar was tested by a trial run before it was used;[17] that the speedometer of the car in the trial run was tested;[18] and that the radar graph showed the results of the trial run.[19] After the radar preliminaries have been established, the People must then prove the defendant was the speeder. The proof of this must show: that the radar officer observed the speeding car and wrote on the radar graph a description of the car;[20] and that after apprehension, but before issuance of a summons, the apprehending officer verified that it was the proper person.[21]

A proposed addition to the Vehicle and Traffic Law [Section 56-c],[22] now pending state legislative action, would require an even broader foundation for the admission of radar readings into evidence. In addition to proof of the operator's qualifications and proper testing of the device, the proposed section would require the People to prove that signs indicating the speed limit and the use of radar were posted on the road where the violation occurred, and that a complete inspection was made ". . . six months prior to its use, of its [radar device's] mechanical parts and assembly by a mechanic trained in the construction and operation of such device." [23]

Judicial notice of radar should facilitate enforcement of speeding regulations and help reduce the number of road fatalities. However, the legislature has delayed full use of radar on state highways by

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Ct. 1955). Judicial notice of speedometers was taken in People v. Tyler, 109 N.Y.S.2d 756 (N.Y.C. Ct. Spec. Sess., App. Part 1952).

[16] To be a radar officer in New York City a police officer must complete a training class, given by the Engineering Bureau, that lasts over four months. After completing this class, two months of road training follows. People v. Sachs, *supra* note 15, at 149-50, 147 N.Y.S.2d at 803. Compare this with the training given in Washington. In reply to the question of the amount of training he received a police officer testified, ". . . a simple operation of testing and warming up the speed meter, locating the box in the trunk. That is the sum total of my training." State v. Ryan, 48 Wash. 2d 304, 293 P.2d 399, 403 (1956) (dissenting opinion).

[17] In order to show the radar was working properly a patrol car passes through the radar beam twice, once at the speed limit and once at ten to fifteen miles per hour greater than the limit. If the difference between the speedometer and the radar reading is more than two miles per hour, the radar is not working properly. Kopper, *The Scientific Reliability of Radar Speedometers,* 33 N.C.L. REV. 343, 353 (1955).

[18] People v. Sachs, 1 M.2d 148, 157, 147 N.Y.S.2d 801, 809 (N.Y.C. Magis. Ct. 1955).

[19] *Ibid.*

[20] On the graph should appear: the time and place of the speeding; the weather conditions; the color and make of the car; and a part of the license plate number. Kopper, *supra* note 17, at 353-54.

[21] People v. Sachs, note 18 *supra.*

[22] S. Int. No. 2612, A. Int. No. 3045.

[23] 139 N.Y.L.J. p. 4, col. 1 (March 5, 1958).

choosing, even in the light of the Governor's request for a change,[24] to retain the requirement that the apprehending police officer follow the speeder for a quarter mile in order to convict.[25]

EVIDENCE—RECORD OF POLICE SPEEDOMETER TEST HELD ADMISSIBLE UNDER CIVIL PRACTICE ACT SECTION 374-a.—Based on patrolman-relator's speedometer reading while following the defendant's automobile, defendant was charged with speeding.[1] The defense claimed a deprivation of the rights to confrontation [2] and cross-examination [3] due to the failure of the People to produce a witness who either tested or witnessed the testing of the radio patrol car's speedometer. The Court *held* that the Police Department's official records concerning the accuracy of the speedometer [4] were admissible into evidence under Section 374-a of the Civil Practice Act.[5] *People ex rel. Katz v. Jones* (N.Y.C. Magis. Ct., N. Queens Dist. Feb. 26, 1958) (opinion of Magis. Scopas).

Confrontation implies the right to the opportunity to cross-examine.[6] However, unlike cross-examination, this constitutional

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[24] Governor's Message, MCKINNEY'S SESSION LAWS OF NEW YORK, No. 1, A-73(3) (1958).

[25] See N.Y. VEHICLE & TRAFFIC LAW § 56(3), as interpreted by the instant case and the Governor's Message, note 24 *supra*.

[1] N.Y.C. TRAFFIC REGULATIONS § 60.

[2] N.Y. CONST. art. 1, § 6. ". . . [I]n any trial in any court whatever the party accused shall . . . be confronted with the witnesses against him." *Ibid.*

[3] "Cross-examination . . . is a matter of right in every trial of disputed issue of fact." Friedel v. Board of Regents, 296 N.Y. 347, 352, 73 N.E.2d 545, 547 (1947).

[4] The Rules and Regulations promulgated by the Police Commissioner (c. 24, § 25.1) read, "If the speedometer is found to be accurate the date and signature of the member of the force witnessing the test will be written immediately . . . on [a card] . . . [which] will be filed in the command to which the vehicle is assigned." People *ex rel.* Katz v. Jones, pp. 3-4 (N.Y.C. Magis. Ct., N. Queens Dist. Feb. 26, 1958) (opinion of Magis. Scopas). Furthermore, "by virtue of the Administrative Code of the City of New York, section 982-8.0, the court . . . is required to take judicial notice of all rules and regulations of New York City administrative . . . agencies." RICHARDSON, EVIDENCE § 25 (8th ed. 1955).

[5] "Any writing or record . . . made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of said act, transaction, occurrence or event, if the trial judge shall find that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event, or within a reasonable time thereafter." N.Y. CIV. PRAC. ACT § 374-a.

[6] See People v. Nisonoff, 293 N.Y. 597, 601, 59 N.E.2d 420, 422 (1944). See also 5 WIGMORE, EVIDENCE § 1365 (3d ed. 1940). Confrontation also con-