

VII. Evidence

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A. Hearsay

1. *Patterson Revisited*.—As in previous years,¹ the rule enunciated in *Patterson v. State*² continued during this survey period to be a focus of attention in the appellate courts. The *Patterson* rule permits the admission, as substantive evidence, of extrajudicial statements of witness-declarants who are present and available for cross-examination.³

The Indiana Supreme Court, in *Watkins v. State*,⁴ recently fashioned a limitation upon the *Patterson* rule but is apparently loathe to apply it. In *Watkins*, the court dealt with the issue of a witness-declarant who either denies making a prior statement or denies any memory of doing so. Two codefendants⁵ challenged the admissibility as substantive evidence of prior statements by a witness-declarant who vacillated at trial regarding her memory of the statements. The court agreed with their contentions and limited the *Patterson* rule by holding “that when the witness (out-of-court declarant) denies having made the statement in question or denies having any memory of having done so, the statement is inadmissible as substantive evidence, because it obviously cannot be then cross-examined.”⁶ However, whether the witness-declarant has denied making the statement, professed no memory of it, or admitted it is to be determined by the trial court from “all of [the witness-declarant’s] testimony and not merely from isolated bits and pieces.”⁷ Applying that

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¹See generally Tanford, *Evidence, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 197, 198-202 (1984); Karlson, *Evidence, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 191, 191-94 (1983); Karlson, *Evidence, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 227, 227-30 (1982).

²263 Ind. 55, 324 N.E.2d 482 (1975).

³*Id.* at 58, 324 N.E.2d at 484-85.

⁴446 N.E.2d 949 (Ind. 1983).

⁵Watkins, Warner, and Smith were codefendants in the trial court. Their appeals, filed separately, were consolidated for the court’s convenience. *Id.* at 952.

⁶*Id.* at 960.

⁷*Id.* In this regard, the standard to be applied on appellate review is tantamount to that applied whenever the appellate courts are called upon to review any challenge to the sufficiency of evidence; that is, the court will neither reweigh the evidence nor judge the credibility of the witness. *E.g.*, *Robinson v. State*, 266 Ind. 604, 365 N.E.2d 1218 (1977).

standard, the court found the statements to be admissible as substantive evidence because the witness-declarant's equivocal testimony could properly have been regarded by the trial court as a memory lapse or lack of knowledge regarding the actual events in question rather than a denial of or a failure to recall her out-of-court declarations.⁸

In *Crafton v. State*,⁹ the court recognized the *Patterson* rule as "modified"¹⁰ by *Watkins* but nevertheless determined that an extrajudicial statement was admissible. While the purpose for introducing the prior statement by the witness-declarant was unclear, the court found no reversible error even if admitted as substantive evidence because it was within the trial court's purview, due to its "superior position"¹¹ of being able to observe the witness-declarant, to resolve any conflicts regarding his memory of the statement in question.¹² The prior statements of two other witness-declarants may have been inadmissible under *Watkins*, but those "statements were nonetheless entitled to the same probative effect afforded to otherwise competent evidence since counsel failed to object."¹³

It thus appears that a witness-declarant must either make an unequivocal denial of the prior statement or profess absolutely no memory of it before the limitation imposed by *Watkins* will have any practical effect. The prior statement will nevertheless be admissible for impeachment purposes,¹⁴ though with an admonishment or limiting instruction that it should be considered only as such. Such an admonishment or instruction is of "questionable value"¹⁵ because it requires that jurors compartmentalize their minds whenever evidence is admissible for one purpose but not another.¹⁶ Counsel is therefore confronted with the ageless and difficult to verify but still troublesome proposition that jurors may make inappropriate use of the prior statement.

The Indiana Supreme Court, in *Brewster v. State*,¹⁷ declined to extend *Patterson* to the situation in which a witness refuses to testify.¹⁸ In *Brewster*, the defendant's brother (the witness-declarant) was an eyewitness to the shooting with which Brewster was charged. The witness-

⁸446 N.E.2d at 960-01.

⁹450 N.E.2d 1042 (Ind. Ct. App. 1983).

¹⁰*Id.* at 1054.

¹¹*Id.* at 1052.

¹²*Id.*

¹³*Id.* at 1055 (citation omitted).

¹⁴*Samuels v. State*, 267 Ind. 676, 372 N.E.2d 1186 (1978).

¹⁵*Id.* at 679, N.E.2d at 1187.

¹⁶See C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 59 at 135-36, § 251 at 603-04 (2d ed. 1972).

¹⁷450 N.E.2d 507 (Ind. 1983).

¹⁸See also *LaBine v. State*, 447 N.E.2d 592 (Ind. 1983) (Although witness-declarant's loss of memory and assertion of fifth amendment privilege made him unavailable for cross-examination, there was no error in the admission of his prior statement where the jury was instructed to consider it only for purposes of impeachment.).

declarant gave a statement to the police shortly after the incident. When called at trial, he merely identified his brother and then refused, even under court order, to testify further.¹⁹ The contents of the prior statement were related to the jury by the detective who took the statement, and the witness-declarant was then recalled by the trial court for purposes of cross-examination upon the contents of the statement. While never specifically asked about the statement, he indicated, in response to defense counsel's questioning, that he would continue to refuse to testify. While the admission of the contents of the statement was found to be harmless error in view of its corroboration by other properly admitted evidence, the court stated:

We question the extension of the *Patterson* rule, however, to an incident such as the one in the instant case where the witness giving the statement, neither admitting nor denying that he did give it, refuses to testify and makes it apparent to all that he will not testify under any circumstances. The witness cannot be considered available for cross-examination under such circumstances and this was shown when the defendant did, in fact, call him for cross-examination.²⁰

The court in *Brewster* distinguished another recent decision, *Rapier v. State*,²¹ in which the witness-declarant's prior statement was held admissible under *Patterson*. In *Rapier*, the witness-declarant, who was neither a codefendant nor an accomplice, asserted an invalid fifth amendment privilege. The witness-declarant admitted making the prior statement but repudiated its trustfulness and stated that he had been coerced when making the statement. The *Brewster* court distinguished *Rapier* on that basis.²²

Although it has been suggested that the posture of the witness-declarant in *Rapier* "made cross-examination practically impossible,"²³ contrasted to the situation in *Brewster*, the witness-declarant was arguably available for cross-examination concerning his prior statement as he did not completely refuse to give direct testimony regarding it. It should also be noted that under circumstances similar to those in *Rapier*, the United States Supreme Court has stated that cross-examination may well be "futile."²⁴

¹⁹450 N.E.2d at 508. The witness-declarant did not assert a fifth amendment privilege.

²⁰*Id.* at 510.

²¹435 N.E.2d 31 (Ind. 1982).

²²450 N.E.2d at 509-10.

²³Tanford, *supra* note 1, at 200.

²⁴*Nelson v. O'Neil*, 402 U.S. 622, 629 (1971). The Court stated, "For once [the witness-declarant] had testified that the [prior] statement was false, it could hardly have profited the respondent for his counsel through cross-examination to try to shake that testimony." *Id.*

Close reading of *Brewster* and *Rapier* discloses an additional, although somewhat inconspicuous, factor of which notice should be taken: the attempt, or lack thereof, by counsel to cross-examine the witness-declarant. The court, in *Brewster*, noted that counsel attempted to cross-examine the witness-declarant,²⁵ but counsel in *Rapier* did not,²⁶ although that witness-declarant may have been amenable to cross-examination.²⁷ It may therefore be inferred that counsel should attempt to cross-examine a witness-declarant before a *Patterson* challenge will be favorably received upon appellate review.

2. *Child Hearsay in Crimes Against Children*.²⁸—A recently enacted statute creates, under specific circumstances, an exception to the hearsay rule for the extrajudicial statements of certain child-declarants who allegedly have been the victims of child molesting, battery, kidnapping, or confinement.²⁹ The statute provides for the admission into evidence

²⁵450 N.E.2d at 508, 510.

²⁶435 N.E.2d at 33.

²⁷*Id.* at 35. The court stated, "The attitude and testimony of the witness indicated that he may have responded to cross-examination by the defendant if an attempt had been made." *Id.*

²⁸The following is not intended to be an exhaustive analysis of a topic that will undoubtedly be the subject of substantive litigation and comment in the future.

²⁹Act of Mar. 1, 1984, Pub. L. No. 180-1984, 1984 Ind. Acts 1488 (codified at IND. CODE § 35-37-4-6 (Supp. 1984)).

The statute provides:

- (a) This section applies to criminal actions for the following:
 - (1) Child molesting (IC 35-42-4-3).
 - (2) Battery upon a child (IC 35-42-2-1(2)(B)).
 - (3) Kidnapping (IC 35-42-3-2).
 - (4) Confinement (IC 35-42-3-3).
- (b) A statement that:
 - (1) is made by a child who was under ten (10) years of age at the time of the statement;
 - (2) concerns an act that is a material element of an offense listed in subsection (a) that was allegedly committed against the child; and
 - (3) is not otherwise admissible in evidence under statute or court rule; is admissible in evidence in a criminal action for an offense listed in subsection (a) if the requirements of subsection (c) are met.
- (c) A statement described in subsection (b) is admissible in evidence in a criminal action listed in subsection (a) if, after notice to the defendant of a hearing and of his right to be present:
 - (1) the court finds, in a hearing:
 - (A) conducted outside the presence of the jury
 - (B) attended by the child;
 that the time, content, and circumstances of the statement provide sufficient indications of reliability; and
 - (2) the child:
 - (A) testifies at the trial; or
 - (B) is found by the court to be unavailable as a witness because:
 - (i) a psychiatrist has certified that the child's participation in

of a prior statement, not otherwise admissible under court rule or statute, by a child under the age of ten at the time of the statement. The statement must concern an act that is a material element of the offense charged; it may be admitted, after a hearing conducted outside the presence of the jury, if the trial court finds that the "time, content, and circumstances" of the statement indicate it is sufficiently reliable.³⁰ If the child is unavailable to testify,³¹ the statute requires corroboration of the act. The prosecuting attorney must give notice to the defendant of the intent to introduce the statement within a time frame sufficient to permit preparation of a response.³²

Indiana, in enacting this law, has apparently followed the lead of Washington which recently enacted a similar provision.³³ There are, however, distinctions between the laws: the Washington statute is limited

- the trial would be a traumatic experience for the child;
- (ii) a physician has certified that the child cannot participate in the trial for medical reasons; or
- (iii) the court has determined that the child is incapable of understanding the nature and obligation of an oath.

(d) If a child is unavailable to testify at the trial for a reason listed in subsection (c)(2)(B), a statement may be admitted in evidence under this section only if there is corroborative evidence of the act that was allegedly committed against the child.

(e) A statement may not be admitted in evidence under this section unless the prosecuting attorney informs the defendant and the defendant's attorney of:

- (1) his intention to introduce the statement in evidence; and
- (2) the content of the statement;

within a time that will give the defendant a fair opportunity to prepare a response to the statement before the trial.

³⁰IND. CODE § 35-37-4-6(c)(1) (Supp. 1984).

³¹By this provision, the statute addresses the situation where the *Patterson* rule is not applicable; that is, where the child is not to be available as a witness at trial.

³²IND. CODE § 35-37-4-6 (Supp. 1984).

³³WASH. REV. CODE ANN. § 9A.44.120 (Supp. 1984-85) provides:

A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, not otherwise admissible by statute or court rule, is admissible in evidence in criminal proceedings in the courts of the state of Washington if:

(1) The court finds, in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and

(2) The child either:

(a) Testifies at the proceedings; or

(b) Is unavailable as a witness: *Provided*, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.

in its application to charges involving sexual abuse, and it fails to even attempt to define when a child is "unavailable."³⁴

The foundations of necessity and reliability serve as the rationale for any exception to the hearsay rule.³⁵ The obvious concern is whether or not the new statute adequately addresses these foundational principles while sufficiently protecting the defendant's rights under the confrontation clause.³⁶

Indiana Code section 35-37-4-6 is clearly designed to address the problems generally believed to be inherent in the prosecution of certain offenses against children; that is, the possible necessity for the prior statement arises from the unique circumstances often considered attendant to such crimes. Children are generally believed, correctly or not, to be poor witnesses due to their inferior memories; their fear of the defendant, the courtroom setting, and the attorneys; and their suggestibility. In sex abuse cases, additional necessity may be created by the lack of other witnesses and the lack of corroborative physical evidence.³⁷

Proponents of such an approach assert that trustworthiness of the prior statement is guaranteed because the trial court is required to examine not only the content of the prior statement but the circumstances surrounding it. Thus it is asserted that the trial court's consideration of such factors as the child's age and mental capacities; social and scholastic achievements; relationships, including any to the defendant; threats; spontaneity; language employed; and corroborative evidence ensures the reliability of a prior statement.³⁸ Finally, it has been argued that such a statute protects the defendant because it allegedly surpasses constitutional requirements and safeguards.³⁹

It would appear, however, that Indiana Code section 35-37-4-6 has infirmities. It is not limited to charges involving sexual abuse, and it is doubtful that necessity for such prior statements is of paramount interest in the other enumerated crimes. While sex abuse rarely occurs in the presence of other persons, the same is not necessarily true for the other crimes of battery, kidnapping, and confinement. Thus, it is far more likely that there may be other witnesses and corroborative evidence in a case involving any of those crimes. That corroboration is required when the child is to be unavailable at trial is an apparent attempt to ensure a higher degree of trustworthiness to the prior statement. The

³⁴*Id.*

³⁵See 5 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1420 (1st ed. Supp. 1974).

³⁶U.S. CONST. amend. VI.

³⁷Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 COLUM. L. REV. 1745, 1749-51 (1983).

³⁸*Id.* at 1758, 1761-62.

³⁹*Id.* at 1766. In *Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980), the Court held that hearsay, to be admissible, must be marked by sufficient "indicia of reliability."

statute, however, calls for “corroborative evidence of the act,”⁴⁰ not corroboration of the child’s prior statement. Unless the defendant is a relative or other person well-known to the child, the requirement of corroboration does not lend any reliability to the prior statement as it concerns identity.⁴¹

The statute is vague in several respects, especially as it relates to the child’s unavailability due to medical reasons, either physical or emotional. One unanswered question is whether the physician who certifies that the child cannot participate in the trial is to be one chosen by the child’s parents or one chosen by the trial court. Also left unanswered is whether, in either situation, the defendant will be permitted to have his own expert examine the child.

The vagueness is not limited to that section of the statute dealing with unavailability due to medical reasons. It is noteworthy that while the statute calls for both a hearing at which the child is present and an opportunity for the defense to prepare a response to the prior statement, it is not clear that either requirement will afford the defendant any meaningful opportunity for cross-examination.

Finally, the statute may permit the admission into evidence of the prior statement of an otherwise incompetent witness as it provides that a child may be found to be unavailable to testify at trial if the child is “incapable of understanding the nature and obligation of an oath.”⁴² While the actual oath may not be critical,⁴³ it is arguable that the child, under this new law, would not be required to demonstrate any obligation to be truthful. The law would thus permit the use of a prior statement, that due to extrinsic factors appears to be trustworthy,⁴⁴ in lieu of the presence of a child who is too unreliable to be permitted to testify at trial.⁴⁵ This clearly conflicts with the premise that any exception to the hearsay rule must be predicated, at least in part, upon a foundation of trustworthiness or reliability. If the child is a poor witness because he

⁴⁰IND. CODE § 35-37-4-6(d) (Supp. 1984).

⁴¹Note, *Confronting Child Victims of Sex Abuse: The Unconstitutionality of the Sexual Abuse Hearsay Exception*, 7 U. PUGET SOUND L. REV. 387, 402 (1983).

⁴²IND. CODE § 35-37-4-6 (c)(2)(B)(iii) (Supp. 1984). Compare IND. CODE § 34-1-14-5 (1982) which provides that children under the age of ten are incompetent as witnesses “unless it appears that they understand the nature and obligation of an oath.” Under this provision, any determination concerning the competency of a child under the age of ten has been left to the discretion of the trial court. It is still necessary, however, that the trial court determine that the child is able to understand the difference between the truth and a lie and feel a compulsion to tell the truth. *E.g.*, *Bowers v. State*, 435 N.E.2d 309, 310 (Ind. Ct. App. 1982).

⁴³J. WIGMORE, *supra* note 35, § 10 (oath is merely concomitant to cross-examination and not a fundamental justification for hearsay rule).

⁴⁴See *supra* text accompanying note 38.

⁴⁵Note, *supra* note 41, at 392.

or she feels no compulsion to be truthful, there will be no incentive to produce the child at trial.⁴⁶

3. *Business Records.*—*a. Police accident reports.*—The business records exception, one of Indiana's well-recognized and more important exceptions⁴⁷ to the hearsay rule, remained unmodified despite an attempt this survey period to have a police accident report containing statements by witnesses admitted into evidence in *State v. Edgman*.⁴⁸ The Indiana Court of Appeals reaffirmed the rule requiring both the maker of the business record and the informant to be under a business duty to report before a business record is admissible under that exception.⁴⁹

Although an accident report prepared by a law enforcement officer qualifies as a business record,⁵⁰ the report is unique because it commonly contains statements taken from witnesses during the officer's investigation regarding the incident which the officer did not witness. Unlike employees in the true business scenario from whom statements are taken and incorporated in the report made by a supervisor or records keeper,⁵¹ the witness of an accident is not under a business duty to observe and report the facts of the accident. Thus, admitting into evidence a report containing these statements of questionable veracity would contravene the premise of the exception.⁵²

⁴⁶*Id.* at 401.

⁴⁷See *Herman v. State*, 247 Ind. 7, 210 N.E.2d 249 (1965), *cert. denied*, 384 U.S. 918 (1966); *Polus v. Conner*, 92 Ind. App. 465, 176 N.E. 234 (1931); *J. P. Smith Shoe Co. v. Curme-Feltman Shoe Co.*, 54 Ind. App. 401, 118 N.E. 360 (1918); *Marks v. Box*, 54 Ind. App. 487, 103 N.E. 27 (1913); *Indianapolis Outfitting Co. v. Cheyne Electric Co.*, 52 Ind. App. 153, 100 N.E. 468 (1913).

⁴⁸447 N.E.2d 1091 (Ind. Ct. App. 1983), *transfer denied*, July 7, 1983.

⁴⁹*Id.* at 1103. Indiana embraces the business records exception by common law. For documents to qualify under the common law rule, the following requirements must be met:

- 1) The records offered must have been the original entries;
- 2) They must have been made in the regular course of business at or near the time of the event recorded;
- 3) The facts must have been within the first hand knowledge of someone whose business duty it was to observe and report the facts;
- 4) The witness who had knowledge of the facts must be unavailable.

Wells v. State, 254 Ind. 608, 615, 261 N.E.2d 865, 870 (1970). Indiana has modified these common law dictates slightly and no longer requires the witness who had knowledge of the facts to be unavailable. See *Burger Man, Inc. v. Jordan Paper Products*, 170 Ind. App. 295, 352 N.E.2d 821 (1976).

⁵⁰The term "business" is broadly construed. See *Herman v. State*, 247 Ind. 7, 210 N.E.2d 249 (1965) (a document from gambling operations which was record of payoffs to bribed police officers was admissible as business record).

⁵¹*State v. Estate of Stephens*, 426 N.E.2d 116 (Ind. Ct. App. 1981) (personal knowledge of transaction by record-keeper not necessary under business records exception to hearsay rule where record keeper made entry in routine course of business based on information reported by other employees acting in regular course of business who did have personal knowledge of transaction).

⁵²The exception to the hearsay rule for business records is based upon the fact that

In *Edgman*, the State offered an accident report prepared by an officer who did not witness the accident and thus had no first hand knowledge of the exact place where the car collided. Based upon the officer's investigation, however, information concerning the nature and location of the accident was filed in the officer's report.⁵³ Due to the officer's death in 1971, another officer who conducted a followup investigation at the hospital, but who also did not witness the accident, acted as the sponsor for the report during his direct examination.⁵⁴ The trial court refused admission of the report under the business records exception to the hearsay rule and the Indiana Court of Appeals affirmed the ruling.

In its entirety, the report contained significant information which was not based on the personal observations of the preparer of the report. Moreover, the information in the report was apparently supplied by persons who were not under a business duty to observe and report the facts of the accident. Recognizing the exception's requirements were designed to ensure the veracity of statements contained within the records, the court of appeals held that the requirements were not satisfied by the police report, and thus the report was not within the business records exception.⁵⁵

the circumstances of preparation assure the accuracy and the reliability of the entries. See C. McCORMICK, *supra* note 16, § 306. The heart of the rule is the requirement that the observation, reporting, and recording of the facts all be made by someone in the regular course of business. *Wells v. State*, 254 Ind. 608, 616, 261 N.E.2d 865, 870 (1970).

⁵³447 N.E.2d at 1103. The report did not indicate whether the officer's conclusions as to the nature of the accident were based upon witnesses listed in the report or other unidentified sources. *Id.* at 1103 n.10.

⁵⁴*Id.* at 1102. Although the officer did not identify himself as the custodian of the record—a requirement of admission under the business records exception, see *Darnell v. State*, 435 N.E.2d 250 (Ind. 1982)—*Edgman's* counsel stipulated the report was a true and accurate copy of the report as found in the Gary Police Department files. 447 N.E.2d at 1103 n.9.

⁵⁵447 N.E.2d at 1104. Although the report in its *entirety* may have been inadmissible, certainly portions of it which did not rely on information gleaned from others would not have been hearsay and were therefore admissible. See *Wells v. State*, 254 Ind. 608, 261 N.E.2d 865 (1970) where the court held portions of a police memorandum showing time, date, log number, case number, and the fact a telephone conversation occurred (but not the substance of the conversation) were admissible although the report in its entirety contained hearsay. In *Edgman*, the State asked, in the alternative, for the court to permit the report's sponsor to read certain portions. Those portions related to the posted speed at the accident site, lane markings, and the location of the accident. 447 N.E.2d at 1102. The court of appeals concluded that the trial court did not err in refusing the request. The officer was properly prevented from testifying through the record as to the location of the accident for the same reason the entire record was inadmissible: the recording officer did not have personal knowledge and the narrative account of the accident was either hearsay or the opinion and conclusions of the officer and therefore inadmissible. *Id.* at 1105. In addition, although the officer could have read those portions dealing with the posted speed and lane markings as they were not subject to the taint of hearsay, no

b. Hospital Records.—*Fendley v. Ford*⁵⁶ offers an extensive footnote⁵⁷ which reviews the law concerning the admissibility of hospital records. Although hospital records are admissible in Indiana under the business records exception,⁵⁸ the Indiana Court of Appeals noted that not every item within the record is automatically admissible.

Two factors generally affect the admissibility of entries in hospital records: 1) whether or not the entry is medically germane to the treatment, and 2) whether the entry is one of fact or opinion.⁵⁹ Judge Shields noted two areas in which the application of these factors remains unsettled. First, Indiana has not yet addressed whether the medical entry, as opposed to a mere bookkeeping entry, is required to be germane to the treatment, medical history, or diagnosis of the patient.⁶⁰ The second question, whether the entry of blood alcohol tests or similar diagnostic tests is a fact or an opinion, is an issue which has received differing treatment in other jurisdictions.⁶¹

The court in *Fendley* was not required to develop a holding concerning either area of the law because of the resolution of the case based on the lack of chain of custody.⁶² Nonetheless, the footnote is instructive in its overview of hospital records under the business records exception.

B. Physical Evidence

1. Use of Dolls in Sex Abuse Cases.—In *Newton v. State*,⁶³ the court upheld the use, both before and during trial, of an anatomically correct doll by a seven-year-old victim of child molestation and incest. The court concluded, however, that any pretrial preparation which included the use of the doll was a “factor properly considered in determining her credibility.”⁶⁴

reversible error was committed when the trial court excluded the testimony because the evidence would have merely corroborated other evidence. *Id.*

⁵⁶458 N.E.2d 1167 (Ind. Ct. App. 1984).

⁵⁷*Id.* at 1170 n.3.

⁵⁸*Id.* at 1171 n.3 (citing *State v. Estate of Stephens*, 426 N.E.2d 116 (Ind. Ct. App. 1981); IND. CODE §§ 34-3-15.5-1 to -4 (1982)).

⁵⁹458 N.E.2d at 1171 n.3.

⁶⁰*Id.*

⁶¹*Id.* Jurisdictions differ in whether the test results are admissible as “fact” or whether an additional foundation is required before the results are admissible. *Compare Commonwealth v. Seville*, 266 Pa. Super. 587, 405 A.2d 1262 (1979) (results of diagnostic tests are admissible as “fact”) with *Wadena v. Bush*, 305 Minn. 134, 232 N.W.2d 753 (1975) (a showing of some additional foundation required before test results will be admitted).

⁶²See *infra* text accompanying note 89.

⁶³456 N.E.2d 736 (Ind. Ct. App. 1983).

⁶⁴*Id.* at 742.

On appeal Newton argued that the child's use of the doll at trial was unnecessary and that her pretrial practice with the doll denied him his due process rights to cross-examine and confront her. The court quickly disposed of the former contention, but found the latter to be "creative" because Newton analogized the child's pretrial preparation with the doll to hypnotically enhanced testimony.⁶⁵ That analogy, while found to be inapposite, was treated at some length.

The court correctly distinguished hypnotically influenced testimony from testimony theoretically aided by pretrial preparation.⁶⁶ Most significantly, the court recognized the differing rationales underlying hypnosis and pretrial preparation.⁶⁷ Hypnosis is used to refresh memory or increase recollection, and it thus produces testimony based upon a revived memory. Pretrial preparation, including practice with a doll, is used to aid a witness in articulating his or her own recollection and is not intended to change the witness' memory. Additionally, pretrial preparation raises no questions involving scientific accuracy while such questions do surround hypnotically induced testimony.⁶⁸ Finally, the court recognized that while there may be some suggestivity inherent in pretrial preparation, it is not at all like the "hypersuggestibility"⁶⁹ that may result when a witness is hypnotized.⁷⁰

2. *Photographs Taken by Automatic Cameras.*—The "silent witness theory" which permits the use of photographs as substantive, rather than merely demonstrative, evidence was first adopted in Indiana in *Bergner v. State*.⁷¹ Under this theory it is not necessary that a witness identify a photograph as an accurate representation of what he or she observed.⁷² Until recently, all decisions under the silent witness theory concerned Polaroid photographs.⁷³ In those decisions, a sufficient foundation was demonstrated where there was expert testimony that the photographs had not been altered and an approximate date that the photographs had been taken was established.⁷⁴

⁶⁵*Id.* at 741.

⁶⁶Pretrial meetings with witnesses are recognized as an integral part of the preparation of a case for trial. C. McCORMICK, *supra* note 16, § 2, at 2.

⁶⁷456 N.E.2d at 742.

⁶⁸See generally Levitt, *The Use of Hypnosis to "Freshen" the Memory of Witnesses or Victims*, 17 TRIAL 56 (Apr. 1981).

⁶⁹*Id.* at 56.

⁷⁰456 N.E.2d at 742.

⁷¹397 N.E.2d 1012 (Ind. Ct. App. 1979), *transfer denied*, July 1, 1980.

⁷²*Id.* at 1015.

⁷³*Buck v. State*, 453 N.E.2d 993 (Ind. 1983); *Torres v. State*, 442 N.E.2d 1021 (Ind. 1982); *Bergner v. State*, 397 N.E.2d 1012 (Ind. Ct. App. 1979) *Buck* and *Torres* were charged as codefendants.

⁷⁴In *Bergner* the approximate date of the photographs was established by the child-victim's appearance in the photographs and the dates of manufacture of the film. 397

During this survey period, the Supreme Court of Indiana, in *Groves v. State*,⁷⁵ dealt for the first time with the admission, under the "silent witness theory," of photographs taken by automatic cameras. The court reaffirmed the *Bergner* principle that the determination whether or not an adequate foundation for the admission of photographs under the "silent witness theory" has been established is committed to the discretion of the trial court and will be reviewed only for abuse of that discretion.⁷⁶ The *Groves* court, however, recognized the nonmandatory guidelines for photographs taken by automatic cameras as set out in *Bergner*:

"In cases involving photographs taken by automatic cameras, such as Regiscopes or those found in banks, there should be evidence as to how and when the camera was loaded, how frequently the camera was activated, when the photographs were taken, and the processing and chain of custody of the film after its removal from the camera."⁷⁷

Because there was no evidence introduced concerning the processing of the film, the court held the photographs were improperly admitted. *Groves*' conviction was reversed because the photographs, coupled with an improper identification made from them, counterbalanced any properly admitted evidence.⁷⁸

3. *Chain of Custody*.—Two recent cases stressed the need to establish a proper chain of custody for body specimens taken from a person for testing in a laboratory. In *Baker v. State*,⁷⁹ and *Fendley v. Ford*,⁸⁰ body specimens were sent to a laboratory for testing, and the test results were then entered in a medical record. At the trial in each cause, the medical records were offered as exhibits and would have been properly admissible⁸¹ had a proper chain of custody been established for the specimens.

N.E.2d at 1018. In *Torres* the mother of the child-victim was familiar with the defendants' apartment and was able to recall the approximate date on which the child was alone with the defendants. *Torres v. State*, 442 N.E.2d 1021, 1023, 1025 (Ind. 1982). The same approximation was held to be sufficient in *Buck*. *Buck v. State*, 453 N.E.2d 993, 995-96 (Ind. 1983).

⁷⁵456 N.E.2d 720 (Ind. 1983).

⁷⁶This is the same standard that is applied to the admission of photographs as demonstrative evidence. *E.g.*, *Hope v. State*, 438 N.E.2d 273 (Ind. 1982).

⁷⁷456 N.E.2d at 721 (emphasis deleted) (quoting *Bergner v. State*, 397 N.E.2d 1012, 1017 (Ind. Ct. App. 1979)).

⁷⁸456 N.E.2d at 723.

⁷⁹449 N.E.2d 1085 (Ind. 1983).

⁸⁰458 N.E.2d 1167 (Ind. Ct. App. 1984).

⁸¹Hospital or medical records are admissible in Indiana under the business records exception although a separate foundation for the admission of an expert opinion within the record may be required. *See supra* text accompanying note 58.

In *Fendley*, the insufficient chain of custody foreclosed the need for the court to resolve whether the report could have been admitted. 458 N.E.2d at 1170. In *Baker*, the report was admitted at the trial court despite the flawed chain of custody. The Indiana Supreme Court ruled the admission was error, but harmless. 449 N.E.2d at 1088.

The purpose of requiring an adequate chain of custody is to render improbable the chance the original item has either been exchanged with another, tampered with, or contaminated.⁸² Thus, the chain of custody necessary for any item of evidence depends upon the item. If the item is one which is unique or readily identifiable, clearly the chain of custody need not be elaborately established.⁸³ However, if the item is susceptible to alteration, tampering, or substitution, then the chain of custody foundation is more stringent.⁸⁴ Because body specimens are fungible and highly susceptible to contamination, a stringent chain of custody is necessary, though every remote possibility of tampering need not be ruled out.⁸⁵

*Arnold v. State*⁸⁶ offers what the Indiana Supreme Court recognizes as the minimal chain of custody evidence necessary to conclude the specimen taken from the person was the specimen subsequently analyzed. In *Arnold*, the State offered a "rape kit" assembled by a physician in the emergency room of the hospital. The physician testified that the kit offered by the State was the same kit assembled as a result of his examination of the victim. A serologist testified that she subjected the contents of the kit offered in evidence to testing. This "identicalness" of the specimen from the time of its taking to its delivery to a laboratory was held sufficient for a chain of custody foundation.⁸⁷

Unfortunately, in neither *Fendley* nor *Baker* was this evidence ever elicited. In *Fendley*, the physician testified that she ordered a blood test and was present when the sample was drawn. Additionally, an administrative technologist testified that the laboratory performed blood alcohol tests and recorded the results in the patient's hospital records, but did not testify as to the arrival of this particular blood sample in the laboratory and its testing. The court held that the failure to offer any evidence as to the means by which the blood was sent to and received

⁸²See *Arnold v. State*, 436 N.E.2d 288 (Ind. 1982). *Arnold* also addressed when the chain of custody rule begins to run: "The rule operates, however, only for the period after the evidence comes into the possession of law enforcement personnel." *Id.* at 291 (citations omitted). See also *Thorton v. State*, 268 Ind. 456, 376 N.E.2d 492 (1978). To correct any misunderstanding, the court in *Baker* noted that the statement was not intended to apply to chain of custody cases involving medical exhibits. 449 N.E.2d at 1088. Thus, the chain of custody must be established for body specimens tested and reported in an exhibit, whether or not the specimens are in police custody.

⁸³*Pollard v. State*, 270 Ind. 599, 388 N.E.2d 496 (1979) (State did not need to establish a complete chain of custody where officer scratched his initials on butt of gun and was later able to raise its partially obliterated serial number by use of an acid solution); *Jones v. State*, 457 N.E.2d 231 (Ind. Ct. App. 1983) (chain of custody sufficient where two ends of copper tubing taken from the same pipe were placed in evidence bag although the bag lacked being sealed by an inch).

⁸⁴*Jones v. State*, 260 Ind. 463, 296 N.E.2d 407 (1973).

⁸⁵*Bivins v. State*, 433 N.E.2d 387 (Ind. 1982).

⁸⁶436 N.E.2d 288 (Ind. 1982).

⁸⁷*Id.* at 291.

by the laboratory⁸⁸ prevented the trial court from reasonably concluding the sample was the same sample as the one taken by the physician.⁸⁹

The foundation offered for the hospital record and examination results of a rape victim was even more deficient in *Baker*. The hospital records were offered and admitted for the purpose of establishing sperm was found in the body specimen taken from the victim. Apparently no evidence was ever presented by the doctor or someone of authority present at the taking of the specimens, and no attempt was made to establish a chain of custody of the specimen.⁹⁰ The Indiana Court of Appeals found the admission of the records to be clear error in view of the total absence of proof of the specimen's chain of custody.⁹¹

Baker and *Fendley* merely reaffirm and stress the need for evidence of chain of custody before a sufficient foundation can be laid for the admission of a record containing test results on a body specimen. At a minimum, that evidence must establish that a physician or person of authority was present when the specimen was taken,⁹² that the specimen was then delivered to the laboratory, and that the laboratory performed tests on the same specimen.

C. Refreshing Recollection of Witness

In *Gaunt v. State*,⁹³ the Indiana Supreme Court granted a more liberal license to counsel who wish to refresh a witness' memory with a memorandum made while the facts were fresh in the recollection of the witness. Contrary to the rule previously observed in Indiana, the court adopted the view that if a memorandum is used merely to revive a memory, and the witness testifies from independent recollection, it is not essential that the memorandum be made at or near the time of the events recorded if the trial court is satisfied that the memorandum is not unreliable by reason of remoteness.⁹⁴ Under the prior rule, a witness could refer to a memorandum if it was either made at the time of the event or while the event was fresh in the witness' memory.⁹⁵ The rule remains unchanged to the extent that if a witness consults the memo-

⁸⁸For an example of a proper foundation which ensures identicalness of the specimens, see *Orr v. Econo-Car of Indianapolis*, 150 Ind. App. 411, 276 N.E.2d 524 (1971).

⁸⁹458 N.E.2d at 1170.

⁹⁰449 N.E.2d at 1087.

⁹¹*Id.* at 1088.

⁹²The identity of the person who actually takes the sample appears to be of little consequence. In *Fendley*, the doctor could not recall whether she or one of the nurses drew the sample. The court did not find this fatal to the chain of custody issue because the doctor was nonetheless able to ensure the blood specimen was Ford's. 458 N.E.2d at 1170 n.2.

⁹³457 N.E.2d 211 (Ind. 1983).

⁹⁴*Id.* at 216.

⁹⁵*Sage v. State*, 127 Ind. 15, 26 N.E. 667 (1891); *Prather v. Pritchard*, 26 Ind. 65 (1866); *Wabash & Erie Canal v. Bledsoe*, 5 Ind. 133 (1854); *Cleveland, C., C., & St. L.*

randum and he or she has an independent recollection of the facts contained therein, the witness may testify to those facts as being within his or her personal knowledge.⁹⁶

In *Gaunt*, the written memorandum offered to refresh the witness' memory was a deposition of the witness taken more than one year after the date of the crime, and almost a year before the testimony presented at trial.⁹⁷ At trial the witness stated that he remembered giving the deposition and that his memory of the events was better on the day of the deposition than on the day of trial. The witness further identified the deposition as a true copy of the testimony he had given. The Indiana Supreme Court held that the trial court had discretion to determine whether the remoteness in time between the events and the taking of the deposition rendered the deposition unreliable as an accurate record of the events.⁹⁸ The trial court did not abuse its discretion in permitting the witness to refresh his memory with the deposition.⁹⁹

Gaunt signals Indiana's complete adoption of the "classical" view of refreshing recollection which imposes no restriction upon the use of memoranda to refresh.¹⁰⁰ Thus, counsel may use any memorandum as

Ry. v. Woodburry Glass Co., 80 Ind. App. 298, 120 N.E. 426 (1918); Ellis v. Baird, 31 Ind. App. 295, 67 N.E. 960 (1903).

⁹⁶Clark v. State, 4 Ind. 156 (1853). The witness' ability to recall those facts which the witness had previously known, but which had at the moment escaped recollection, significantly determines whether the document is admissible for refreshing recollection or for substantive evidence under the past recollection recorded exception to the hearsay rule. Because the doctrines are easily confused, a brief review of their differences may be helpful.

In *United States v. Riccardi*, 174 F.2d 883 (3d Cir.), *cert. denied*, 337 U.S. 941 (1949), the doctrines were distinguished:

The primary difference between the two classifications [present recollection revived and past recollection recorded] is the ability of the witness to testify from present knowledge: where the witness' memory is revived, and he presently recollects the facts and swears to them, he is obviously in a different position from the witness who cannot directly state the facts from present memory and who must ask the court to accept a writing for the truth of its contents because he is willing to swear, for one reason or another, that its contents are true.

. . . .

The difference between present recollection revived and past recollection recorded has a demonstrable effect upon the method of proof. In the instance of past recollection recorded, the witness, by hypothesis, has no present recollection of the matter contained in the writing. Whether the record is directly admitted into evidence, or indirectly by the permissive parroting of the witness, it is nevertheless a substitute for his memory and is offered for the truth of its contents.

Id. at 886, 887 (footnote omitted).

⁹⁷457 N.E.2d at 216.

⁹⁸*Id.*

⁹⁹*Id.*

¹⁰⁰See 3 J. WIGMORE, *supra* note 35, at § 7581 (McNaughton rev. 1961); see also C. MCCORMICK, *supra* note 16, at § 9.

a stimulus to present memory, without restriction as to authorship,¹⁰¹ guarantee of correctness,¹⁰² or time of making.¹⁰³ Although *Gaunt* grants counsel greater freedom in the use of memoranda to refresh a witness' memory, opposing counsel's opportunity to challenge the evidence admitted as a result of the refreshing has not been sacrificed or diluted. Even in the circumstance where the memorandum is made at a time remote from the incident, such as the night before the witness testifies,¹⁰⁴ the opposing counsel has the opportunity to subject the witness, while under oath, to cross-examination, and the witness' capacities for memory and perception may be attacked and tested. The witness' determination to tell the truth may be investigated and revealed, and any protestations of lack of memory will merely undermine the probative worth of the witness' testimony.

D. *Opinion and Expert Testimony*

A series of decisions from the Indiana courts treated the admission of opinion evidence or expert testimony regarding the speed of a motor vehicle. Although the decisions are consistent with the previous rules controlling the admission of such evidence, the decisions are instructive in the application of those rules to a variety of situations in which the issue arose. When read together, and the courts' statements distilled, it is clear the trial court has considerable latitude in the admission or rejection of marginally relevant opinion evidence. Further, a witness who qualifies as an expert may give an opinion of speed to aid the trier of fact, and the witness' knowledge of special factors, formulas, or calculations in forming the opinion will go to the weight of the testimony rather than its admissibility.

A divided Indiana Supreme Court ruled in *Martin v. Roberts*¹⁰⁵ that the rules of evidence do not require a witness to demonstrate a knowledge or use of specific scientific principles, formulas, or calculations in order to be qualified to state an opinion.¹⁰⁶ *Martin* involved a passenger's (Roberts') claim against the driver of a dune buggy for injuries sustained

¹⁰¹*Ellis v. Baird*, 31 Ind. App. 295, 67 N.E. 960 (1903) (a witness could refer to a bill for provisions furnished to decedent's estate in order to refresh his memory, although the bill was not made by the witness or at his direction).

¹⁰²Clearly, if the memorandum relied upon at trial was written by one other than the witness, *see id.*, the witness can make no legitimate guarantee of correctness.

¹⁰³*Gaunt* vests the only restriction as to the time of making the memorandum in the discretion of the trial judge. The memorandum need not be made while the facts are fresh in the recollection of the witness, or contemporaneous, or reasonably so, with the event.

¹⁰⁴*E.g.*, *Smith v. Bergmann*, 377 S.W.2d 519 (Mo. Ct. App. 1964).

¹⁰⁵464 N.E.2d 896 (Ind. 1984). The court's opinion was written by Justice Pivarnik, with whom Chief Justice Givan and Justice Hunter concurred. Justice DeBruler dissented with an opinion in which Justice Prentice concurred.

¹⁰⁶*Id.* at 899.

as a result of the driver's wanton and willful conduct.¹⁰⁷ The accident occurred while driving down a country road. The driver lost control of the dune buggy which crossed the road diagonally and the rear wheel of the dune buggy snagged on a telephone guy wire. The dune buggy stopped suddenly, catapulting the passengers from the vehicle.

In attempting to establish the driver's misconduct, Roberts called a state trooper who investigated the accident. The officer testified, over objection, that in his opinion the speed of the dune buggy was sixty-five miles per hour at the time of the accident.¹⁰⁸ In Indiana, it is proper for an expert witness to give an opinion in order to aid the trier of fact.¹⁰⁹ However, the fact that a witness is a police officer does not automatically qualify the officer to testify as an expert on the speed of motor vehicles.¹¹⁰ The party offering the officer as an expert witness has the burden of qualifying the officer as an expert.¹¹¹ The officer in *Martin* testified he was trained in accident investigation, and he had investigated from 200 to 300 accidents at the time of the investigation of the instant accident.¹¹² As part of his training, the officer was instructed how to determine the cause of an accident and how to estimate speed at the time of the accident from such data as skid marks and damage to the vehicle.¹¹³

The Indiana Court of Appeals and the parties agreed the officer qualified as an expert witness in the subject of estimating speeds.¹¹⁴ However, the court found this expertise and skill to be peculiarly inappropriate to this accident which did not involve a collision impact; rather, the damage to the vehicle apparently resulted from the exertion of tensile forces as opposed to compressive forces.¹¹⁵ More troubling to

¹⁰⁷At the time, the Indiana Automobile Guest Statute precluded recovery against the owner or operator of a motor vehicle unless the injuries were caused by the wanton or willful misconduct of the owner or operator. IND. CODE § 9-3-3-1 (1982) (*amended by Act of Mar. 1, 1984, Pub. L. No. 68-1984, § 2, 1984 Ind. Acts 925, 925-26 (codified at IND. CODE § 9-3-3-1 (Supp. 1984)).*

¹⁰⁸464 N.E.2d at 900.

¹⁰⁹*Blackmon v. State*, 455 N.E.2d 586 (Ind. 1983); *Washington v. State*, 271 Ind. 97, 390 N.E.2d 983 (1979); *Williams v. State*, 265 Ind. 190, 352 N.E.2d 733 (1976); *Terre Haute First Nat'l Bank v. Stewart*, 455 N.E.2d 362 (Ind. Ct. App. 1983).

¹¹⁰*McCraney v. Kuechenberg*, 144 Ind. App. 629, 634, 248 N.E.2d 171, 173 (1969).

¹¹¹"To qualify a witness as an expert, two requirements must be met:

'1) the subject of the inference . . . [is] so distinctly related to some science, profession, business or occupation as to be beyond the ken of laymen. . . .

.[Second, there must be a showing] the witness . . . [has] sufficient skill, knowledge or experience in that field as to make it appear that his opinion or inference will probably aid the trier in his search for the truth.' "

Martin v. Roberts, 452 N.E.2d 182, 184 (Ind. Ct. App. 1983) (quoting *Davis v. Schneider*, 182 Ind. App. 275, 283, 395 N.E.2d 283, 290 (1979)).

¹¹²464 N.E.2d at 899.

¹¹³*Id.*

¹¹⁴*Id.*

¹¹⁵452 N.E.2d at 186.

the court was the absence of any testimony by the officer concerning the facts, formulas, or factors the officer used in forming his opinion.

The data upon which the officer relied in forming his opinion consisted of his estimated distance of the debris and passengers from the chassis and the amount and nature of damage to the fiberglass body and chassis, including the forward displacement of the rear seat and the steering wheel.¹¹⁶ In addition, the officer offered photographs taken by him and his associates of the vehicle at the scene.¹¹⁷ The officer failed, however, to testify which, if any, of these factors were integral in a formula or principle for estimating speed, and further failed to disclose the formula or principle used in arriving at his opinion.¹¹⁸ In the absence of this evidence, the court concluded it was error to admit the officer's opinion.

The Indiana Supreme Court reversed and vacated the opinion of the court of appeals, specifically ruling that whether or not an expert has knowledge of, or actually uses, a formula which may aid in forming an opinion constitute factors which go to the weight of the opinion, not its admissibility.¹¹⁹ The majority reasoned that opposing counsel has the opportunity on cross-examination to question the expert on the specific knowledge or use of formulas and principles. Additionally, the counsel may bring forward other expert witnesses on the subject. Therefore, it is not required as part of the foundation for offering an expert's opinion to specify the formula, facts, or factors used to arrive at an opinion.¹²⁰

The justices dissenting in *Martin* echoed the cry sounded by the court of appeals: under the facts of this accident, the witness was not truly qualified to offer an opinion unless he also offered evidence of heightened training, skill, or experience with these unusual circumstances.¹²¹ The dissenting justices recognized, as did the court of appeals, that the officer's special expertise and knowledge is a threshold issue. Under the dissent's analysis, the trial court should have exercised greater care in ascertaining whether the offered witness was in a position to throw light on the question of speed of the vehicle.¹²²

¹¹⁶*Id.* at 185.

¹¹⁷464 N.E.2d at 900.

¹¹⁸452 N.E.2d at 186. The court of appeals hypothesized the formula might consider such factors as the weight and load of the vehicle, the weight of the occupants' bodies, and the manner and means by which the steering wheel and rear seats were attached. *Id.* at 187.

¹¹⁹464 N.E.2d at 899.

¹²⁰*Id.* at 901.

¹²¹*Id.* at 906. The dissent observed that the taut guy wire, the dissimilar front and rear tires, and the manner in which the fiberglass body had detached were special factors requiring special expertise. *Id.*

¹²²*Id.* (citing *New York Life Ins. Co. v. Kuhlenschmidt*, 218 Ind. 404, 33 N.E.2d 340 (1941)).

Estimates of the speed of a motor vehicle are not matters which are the exclusive province of experts.¹²³ Indiana has long recognized that lay opinions of speed are generally admissible in evidence.¹²⁴ Contrasted to the stringent requirements for admitting an expert opinion as to speed of a vehicle, a lay opinion by one who actually observes the vehicle in motion may be admitted with distinct ease.¹²⁵ Two lay opinions as to speed of a vehicle were admitted in *Carson v. State*¹²⁶ and, curiously, were held sufficient to sustain a conviction for a speeding charge. The facts of this curiosity piece are certain to enshrine LeRoy Carson as one of the true desperadoes in history and deserve full mention.

On October 30, 1982, LeRoy Carson and his wife drove through the town of Fowler. Fowler Police Chief James Patton and Fowler Street Superintendent Tom Tinsman, sitting in Tinsman's street department pickup truck, observed the Carsons as they passed through the town. Chief Patton determined that Carson was exceeding the thirty-five miles per hour posted speed limit in Fowler,¹²⁷ so he and Tinsman gave chase. Although Patton turned on the truck's amber and red lights and flashed his headlights, Carson failed to see them or stop. Consequently, a police roadblock was set up, and the Carsons were stopped at gunpoint about ten miles from Fowler. Carson was cited for speeding. In a trial by court, he was convicted and fined three dollars and costs.

Carson appealed, contending that the lay opinions of Patton and Tinsman constituted the only evidence of his speed and were not sufficiently reliable to ground a judgment. Although the court acknowledged that lay opinions are always somewhat suspect,¹²⁸ the court declined to find the unassisted opinions untrustworthy or insufficient to sustain the conviction.

Obviously, as the layperson's opinion becomes more "technical" and more precise, it becomes increasingly suspect. A witness may testify a distance was "long" or "short"; however, if the witness attempts to testify that the distance was fifty meters and not fifty-five meters, the accuracy should be questioned and the basis for the witness' opinion investigated. The lay opinion in *Carson* established the vehicle's speed

¹²³See generally 8 AM. JUR. 2D *Automobiles and Highway Traffic* § 1701 (1980).

¹²⁴See, e.g., *Perry v. State*, 255 Ind. 623, 266 N.E.2d 4 (1971); *American Motor Car Co. v. Robbins*, 181 Ind. 417, 103 N.E. 641 (1913); *Louisville, N.A. & C. Ry. v. Hendricks*, 128 Ind. 462, 28 N.E. 58 (1891); *Garr v. Blissmer*, 132 Ind. App. 635, 177 N.E.2d 913 (1961).

¹²⁵Opinions of lay witnesses are often admissible upon nontechnical subjects such as estimates of speed, distance, height, and size, for the reason that in such cases it is difficult or impossible for the witness to explain his or her mental processes to the jury. *Perry v. State*, 255 Ind. 623, 629, 266 N.E.2d 4, 8 (1971).

¹²⁶459 N.E.2d 734 (Ind. Ct. App. 1983).

¹²⁷Patton and Tinsman later testified it was their opinion Carson was traveling at 45 miles per hour.

¹²⁸*Id.* at 735.

at forty-five miles per hour in a thirty-five miles per hour zone. Allowing for a margin of error, Police Chief Patton and Tinsman necessarily had to be able to estimate with a fair degree of precision to place Carson above the thirty-five miles per hour limit. Whether such preciseness could be achieved without the assistance of radar or speedometer matching is questionable.¹²⁹

Carson is illustrative of the great deference appellate courts will grant to the trial court in the admission of marginally credible evidence. Further, much discretion is vested in the court or trier of fact who may consider such subjective elements as the sartorial appearance of the witness in considering the weight assigned to evidence once admitted.

Ostensibly, the court of appeals was reluctant to disturb the weight assigned to the witnesses' lay opinions when the burden of proof in speeding infraction cases is merely a preponderance of the evidence.¹³⁰ Under a standard of preponderance the trial court needed to give only slightly more credence to the lay opinions than to Carson's denial of guilt.

In *Gates v. Rosenogle*,¹³¹ the court of appeals again deferred to the discretion of the trial court in the admission of a lay opinion of speed. However, the opinion was based not upon visual observation of the vehicle, but upon the sound of the vehicle. *Gates* was a suit for personal injuries sustained in a collision between a motorcycle on which the plaintiff was a passenger and a van driven by the defendant. In defense, the defendant sought to give his opinion as to the speed of the motorcycle before impact. His opinion was based solely upon the sound of the motorcycle's engine as it approached the van.

Courts have generally disagreed whether an opinion of speed from a layperson who did not actually see the vehicle as it traveled, but only heard it, is admissible.¹³² Most courts recognize visual perception is not the exclusive sensory means of gaining personal knowledge. However, courts are reluctant to admit opinions based on knowledge attained solely by auditory perception, especially where the opinions purport to be precise.¹³³ *Kuhn v. Stephenson*,¹³⁴ an early Indiana case on which de-

¹²⁹Police Chief Patton and Tinsman attempted to check Carson's speed on the speedometer of the pickup truck, but by that time Carson had left the city limits and was traveling 55 miles per hour which was the posted speed. 435 N.E.2d at 735.

¹³⁰IND. CODE § 34-4-32-1(d) (1982).

¹³¹452 N.E.2d 467 (Ind. Ct. App. 1983).

¹³²See 8 AM. JUR. 2D, *supra* note 123, § 1073 (1980); see also Annot., 33 A.L.R.3D 1405 (1970).

¹³³See *Green v. Richardson*, 69 Mich. App. 133, 244 N.W.2d 385 (1976) (where witness had no special experience or qualification regarding estimating speed, the witness' opinion that the car was traveling 70 miles per hour based on the sound of engine and sound of tires on gravel was properly excluded). *But see Rone v. Miller*, 257 Ark. 791, 520 S.W.2d 268 (1975) (where court held admissible a nonexpert's opinion that from sound car was being "driven real fast" or was "overspeeding").

¹³⁴87 Ind. App. 157, 161 N.E. 384 (1928).

fendant relied, permitted an opinion of speed from a witness who had heard, but had not seen, the vehicle. The court noted, however, that the witness was uniquely qualified because he was a mechanic with twelve years experience and was familiar with the model of the vehicle involved.¹³⁵ Under those facts, the appellate court concluded it was not error to admit the opinion.¹³⁶ In *Gates*, the defendant argued he had owned and ridden motorcycles and previously observed motorcycles racing on the street where the accident occurred. He admitted, however, that he was not familiar with the model of motorcycle involved in the accident. In light of the witness' lack of special qualifications, the court of appeals held the trial court did not abuse its discretion in excluding the opinion.¹³⁷

When *Gates* and *Kuhn* are considered together it is clear that the touchstones for the opinion's admission are the credentials and special expertise of the layperson. A trial court may admit a layperson's opinion of speed based solely on auditory perception if the layperson holds unique experimental qualifications. Where the layperson possesses no special talents or familiarity with the vehicle, however, the trial court may properly exclude the opinion.

¹³⁵*Id.* at 160, 161 N.E. at 384.

¹³⁶*Id.* at 160, 161 N.E. at 385.

¹³⁷452 N.E.2d at 471.

