Volume 12 | Issue 2 Article 6

1967

The Smith Rule and a Party's Burden of Coming Forward When Relying on Circumstantial Evidence

Paul A. Kiefer

THE *SMITH* RULE AND A PARTY'S BURDEN OF COMING FORWARD WHEN RELYING ON CIRCUMSTANTIAL EVIDENCE

I. INTRODUCTION

In 1959 the Supreme Court of Pennsylvania, in *Smith v. Bell Tel. Co.*,[1] put to rest the conflict in the various rules applied by the different courts within the Commonwealth and, indeed, the Supreme Court itself, with regard to a plaintiff's introduction of evidence sufficient to withstand a motion for compulsory nonsuit[2] when attempting to establish his case by circumstantial evidence. Prior to the *Smith* decision, there were basically two rules applied by the courts. Under one rule, in order for plaintiff's case to withstand a motion for compulsory nonsuit it was required that the jury be able to draw only one reasonable inference from the circumstantial evidence presented. The other rule required only that the inference drawn from a number of possible inferences outweigh the remaining possible inferences that could have been drawn from the evidence presented. In *Smith* the Supreme Court adopted this latter rule.

The general scheme of this comment will be to discuss the *Smith* decision and its development in subsequent cases. It should be noted initially that while the courts repeatedly use the term "burden of proof" in the *Smith* line of cases, they are actually referring to a plaintiff's burden of coming forward with evidence[3] sufficient to withstand a motion for compulsory nonsuit and get his case to the jury.[4]

II. CIRCUMSTANTIAL EVIDENCE

> The Pennsylvania Supreme Court has defined evidence as:
> *Any species of proof, or probative material, legally presented at the trial of an issue,* by the act of the parties and through the medium of witnesses, records, documents, concrete objects, etc., for the purpose of inducing belief in the minds of the court or jury as to their contention.[5]

Circumstantial evidence has been defined to include "all evidence of an indirect nature, whether the inference afforded by it be drawn from experience, or by reasoning from the circumstances of a particular case,

1. 397 Pa. 134, 153 A.2d 477 (1959).
2. PA. STAT. ANN. tit. 12, § 645 (1953).
3. "There is a difference between burden of proof and the burden of going forward with evidence." McFadden v. Fogelsanger, 62 Dauph. 192, 193 (1951). See also MacDonald v. Pennsylvania R.R. Co., 348 Pa. 558, 36 A.2d 492 (1944); Zenner v. Goetz, 324 Pa. 432, 188 Atl. 124 (1936).
4. This becomes apparent upon an examination of how the *Smith* case arose on appeal. After the plaintiff had presented his case, the defendant moved for a compulsory nonsuit, which was granted. The case never went to the jury, therefore the court could not be referring to burden of proof.
5. Commonwealth *ex rel.* Hendrickson v. Myers, 393 Pa. 224, 228, 144 A.2d 367, 370 (1958) (quoting BLACK, LAW DICTIONARY (4th ed. 1951)).

or by reason aided by experience."[6] The term "all evidence" when read against the Supreme Court's definition of evidence indicates that both real and testimonial evidence may be circumstantial. By "indirect nature" the courts have in mind testimonial evidence other than eye-witness testimony concerning the conclusion sought to be established.[7] In other words, the conclusion sought to be established was not observed by the witness; instead only some or all of the surrounding circumstances tending to support the conclusion were observed.[8] Real evidence is circumstantial in nature when it is offered as proof in establishing something more than the mere existence of the real evidence itself, such as when it is used as a basis for reasoning to a particular conclusion.

The reasoning process involved in proving a case is probably better understood if the various elements of the case attempted to be proved are framed in terms of syllogisms with the major premises comprised or founded upon matters of general knowledge and experience,[9] and the minor premises consisting of direct evidence, circumstantial evidence and propositions formulated from direct or circumstantial evidence or both. The conclusions of the syllogisms would be the conclusions necessary to the disposition of the case. It should be kept clearly in mind that most circumstantial evidentiary facts must first be established by direct evidence in the form of eye-witness testimony or by the introduction of real evidence.[10] However, there is a possibility that a proposition or conclusion offered to circumstantially establish an ultimate conclusion in a case was initially a conclusion which itself was established either in whole or in part by circumstantial evidence.[11] In effect, there are series or plateaus of syllogisms reaching to the ultimate conclusion of a case.

III. *Smith v. Bell Tel. Co.*

In 1948 defendant Counties Contracting & Construction Company constructed an underground conduit to carry telephone lines pursuant to a contract with defendant Bell Telephone Company. The conduit was laid beneath the sidewalk of a home which the plaintiff purchased two years later. Smith discovered seepage in the basement of his home

6. 1 HENRY, PENNSYLVANIA EVIDENCE § 8, at 14 (4th ed. 1953).

7. In Ebersole v. Beistline, 368 Pa. 12, 17, 82 A.2d 11, 13 (1951), the court stated that: "Proof of negligence may be furnished by the circumstances themselves and it is not essential to have *eye-witness* testimony, but where the circumstantial evidence is offered because *direct proof* is not available. . . ." (Emphasis added.) It is clear that the court is equating direct evidence to eye-witness testimony. See 1 WIGMORE, EVIDENCE § 25, at 390–401 (3d ed. 1940).

8. 1 WIGMORE, EVIDENCE § 25, at 398 (3d ed. 1940).

9. An inference is: "A process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, or a state of facts, already proved or admitted." Simon v. Fine, 167 Pa. Super. 386, 391, 74 A.2d 674, 676 (1950) (quoting BLACK, LAW DICTIONARY (4th ed. 1951)). *Accord,* Watkins v. Prudential Ins. Co., 315 Pa. 497, 173 Atl. 644 (1934); Stevenson v. Stewart, 11 Pa. 307 (1849).

10. 1 WIGMORE, EVIDENCE § 25, at 400 (3d ed. 1940).

11. The risk that is run here is an objection to an inference upon an inference. Cantwell v. Bristol Township, 412 Pa. 469, 194 A.2d 922 (1963).

shortly after taking occupancy. In attempting to find the cause of the seepage, he tunneled under the sidewalk and found "that the telephone conduit had crushed the sewer lateral and was blocking it."[12] In an action to recover for the damages to his property, the plaintiff introduced testimony to the effect that piers (supports) are normally placed under the conduits when they cross above other pipes to keep the conduit from settling and crushing the pipes beneath. Smith testified that, in tunneling under the sidewalk, he found no materials to indicate that supports had been placed under the conduit. However, no direct evidence was introdued to show that piers had not been constructed.[13] Defendant's motion for compulsory nonsuit was granted and the plaintiff appealed.

In support of the nonsuit the lower court applied the rule that, "where plaintiff's case is based on circumstantial evidence and inferences to be drawn therefrom, such evidence must be so conclusive as to exclude any other reasonable inference inconsistent therewith. . . ."[14] The court concluded that while the plaintiff had established the occurrence of an accident, "the best that could be said for plaintiff's case was that 'the collapse of the conduit may have been the consequence of defendant's negligence.' "[15] Since the collapse of the conduit could have been due to factors other than defendant's negligence, plaintiff had failed to meet his burden of coming forward with sufficient evidence to withstand a motion for compulsory nonsuit. The Supreme Court disagreed with the trial court's conclusion, stating that the proper test to be applied is:

> [W]hen a party who has the burden of proof relies upon circumstantial evidence and inferences reasonably deducible therefrom, such evidence, in order to prevail, must be adequate to establish the conclusion sought and must so preponderate in favor of that conclusion as to outweigh in the mind of the fact-finder any other evidence and reasonable inferences therefrom which are inconsistent therewith.[16]

The basic distinction between the lower court's test and the test adopted by the Supreme Court is that under the former, evidence introduced must lead conclusively to only one inference and result in only one conclusion, while under the latter test, the evidence must preponderate in favor of the inference sought so as to outweigh any other reasonable inference that is inconsistent with it. As the court aptly points out, if the lower court's formula were the rule, "what would be the province of the jury? In no case where there was more than one reasonable inference would the jury be permitted to decide."[17] This language clearly indicates that,

12. Smith v. Bell Tel. Co., 397 Pa. 134, 136, 153 A.2d 477, 479 (1959).
13. No such evidence appears in the court's opinion. It would seem that if there were any such evidence, the defendant would have introduced it, and the court would surely have mentioned it.
14. Smith v. Bell Tel. Co., 397 Pa. 134, 136, 153 A.2d 477, 479 (1959).
15. *Id.* at 139, 153 A.2d at 480.
16. *Ibid.* In so doing, the court overruled many prior cases. See 397 Pa. at 137, 153 A.2d at 477.
17. Smith v. Bell Tel. Co., 397 Pa. 134, 137, 153 A.2d 477, 479 (1959).

while the court uses the phrase "burden of proof," it is in fact referring to plaintiff's burden of coming forward.

The initial determination as to whether the plaintiff has met his burden of coming forward is made by the judge when he decides whether to sustain or overrule the defendant's motion for a compulsory nonsuit.[18] In reaching this decision he must determine whether a reasonable jury could find that the inference plaintiff seeks to establish is more probable than the other inferences which might be drawn from the evidence presented. The "only reasonable inference" rule appeared to be an attempt on the part of the courts to keep a case from reaching a jury where a choice had to be made between several plausible inferences. As such, the rule reflected a certain distrust of a jury's ability to choose wisely, a distrust which was remedied at the expense of plaintiff's case. The *Smith* rule has struck a middle ground. The court still retains the right to decide whether a case is to get to a jury, but the plaintiff does not have to exclude all but one reasonable inference. The resultant rule indicates a greater, although not complete, trust of a jury's ability and, at the same time, indicates a more liberal approach toward the plaintiff's burden of coming forward with the evidence.

In analyzing the problem posed in *Smith,* the court stated that it was "not . . . faced with a case relying on circumstantial evidence to show both the happening of the accident and the defendant's negligence. It is clear that the injury was caused by the conduit crushing the sewer lateral."[19] It follows from the court's use of the word "both" that either defendant's negligence or the cause of the damage to plaintiff's property was established[20] circumstantially.[21] Since the court concluded that defendant's *negligence* was established circumstantially, it must have been of the opinion that the *cause* was established by direct evidence. This conclusion is incorrect. Since the plaintiff did not actually see the conduit crush the sewer, that fact could only be established indirectly by testimony as to the circumstances as viewed by him in digging around the sewer and conduit. Such evidence would be indirect since one could not reason directly from it to the conclusion that the conduit crushed the sewer without going through a syllogistic reasoning process. The minor premise would be that the conduit was on the sewer and the sewer was crushed. The major premise, derived from knowledge and experience, would be that when an object is found lying on another object which is crushed, and the object was not crushed before being placed beneath the ground, the former object was probably the cause of the latter being crushed.

18. Mr. Justice Bell in his concurring opinion in the *Smith* case states that "whether the evidence, if believed, is legally sufficient to satisfy this test is in the first instance for the Court's determination. . . ." *Id.* at 144, 153 A.2d at 482.

19. Smith v. Bell Tel. Co., 397 Pa. 134, 139, 153 A.2d 477, 480 (1959).

20. The word "established" as employed in this situation means that the plaintiff came forward with enough evidence to withstand a motion for compulsory nonsuit.

21. This is so because there are two types of testimonial evidence, direct and indirect.

The conclusion would be that the conduit crushed the sewer. The court appears to overlook this process of reasoning in arriving at the same conclusion.

Turning to the other elements of plaintiff's case, it is apparent that the plaintiff established defendant's negligence by circumstantial evidence. Plaintiff could only testify with regard to the circumstances existing at the time he dug around the conduit, and there is no indication in the opinion that he called any workman to testify with regard to whether they installed or saw installed any supports under the conduit. Therefore, it seems fair to conclude that plaintiff introduced no direct evidence as to defendant's negligence, but established it solely by circumstantial evidence. It should be noted that the plaintiff did not establish that there were no supports under the conduit *at the time* of the accident by direct evidence.

Before proceeding to an analysis of the cases decided subsequent to *Smith,* the court's statement that circumstantial evidence was not employed to show both the happening of the accident and defendant's negligence[22] is worth noting again in a different light. It has already been pointed out that the jury had to rely on circumstantial evidence to prove the cause of injury. The point to be raised here is whether the court is limiting the rule established in *Smith* to those situations where the cause of injury is established by direct evidence only. The language of the opinion suggests that such a limitation was intended.

IV. SUBSEQUENT CASES

A discussion of *Johnston v. Dick*[23] is helpful for an understanding of what is not sufficient to meet the requirements of the *Smith* rule. Plaintiff Johnston, an employee of the State Highway Department, was severely injured on October 3, 1956, between 4:30 P.M. and 5:00 P.M., when a kerosene lantern he was lighting to mark the presence of road construction exploded. It was later established that the lantern did not contain kerosene but a mixture of kerosene and gasoline. The mixture came from the Highway Department's maintenance barn. There were four pumps at the barn: one for diesel oil, one for kerosene and two for gasoline. The attendant at the garage testified that he filled plaintiff's filling can from the second, or kerosene tank. The mixture in that tank proved to be explosive. The Highway Department records showed a delivery of kerosene on October 2 between 2 and 6 A.M. from Sherer Oil Company, additional defendant, by Carmen Dick, the defendant, and a delivery of gasoline by the Atlantic Refining Company on October 3 between 8 and 10 P.M. Dick denied delivering anything but kerosene. The testimony at trial indicated that no one was on duty at the maintenance barn from 4 P.M. October 2 to 4 P.M. October 3. The jury returned a verdict for the plaintiff but the trial court granted the defendant's motion for a judgment

22. See note 19 *supra.*
23. 401 Pa. 637, 165 A.2d 634 (1960).

non obstante verdicto. On appeal the plaintiff contended that the *Smith* rule should have been applied to overrule the defendant's motion. The Supreme Court rejected this argument, asserting that, "The trouble with this reference is that plaintiff is not offering circumstantial evidence in the instant case but only circumstantial supposition. . . ."[24] To reason from the fact that there was an explosive mixture and conclude that Dick delivered that mixture is to beg the question, since such reasoning must be based initially on the premise that any explosive mixture delivered was delivered by Dick. That is precisely what the plaintiff was attempting to prove. It could not be assumed, and there was no justification for it based on knowledge and experience. The court stated: "The best that plaintiff has done is to suppose that defendant may have done all manner of negligent things, without any evidence, direct or circumstantial, that he actually did any of them."[25] In other words, for the jury to conclude that Dick delivered the mixture would be simply a guess on their part.[26]

One of the first cases decided subsequent to *Smith, Lear v. Shirk's Motor Express Co.*,[27] involved an action to recover for personal injuries suffered in a collision. The case is important for several reasons. First, the rule enunciated in *Smith* was applied to defendant's burden of coming forward with evidence when attempting to establish plaintiff's contributory negligence.[28] This extension was logical and expected since the elements of contributory negligence are essentially the same as those required for a plaintiff to get his case to the jury. A second point to be noted is the application of the *Smith* rule to a personal injury action.[29] In *Shearer v. Insurance Co. of North America*,[30] the *Smith* rule was applied to an action in assumpsit as a standard for determining whether plaintiff had met his *burden of proof*.[31] Defendant insurer refused to pay plaintiffs' claim for damages allegedly caused by an explosion, arguing that the damage suffered was not caused by an explosion but by subsidence, a peril not covered by the policy. The plaintiffs contended that the cracks in the walls and the settling of the home were caused by "retreat operations"[32] in mines located

24. *Id.* at 643, 165 A.2d at 637.

25. *Id.* at 644, 165 A.2d at 637. Other cases in which plaintiff has been denied recovery under the *Smith* rule are: Puskarich v. Trustees of Zembo Temple, 412 Pa. 313, 194 A.2d 208 (1963); Davies v. McDowell Nat'l Bank, 22 Pa. D.&C.2d 692, *aff'd*, 407 Pa. 209, 180 A.2d 21 (1962).

26. The court has consistently held that the jury may not be permitted to guess or speculate. See Schofield v. King, 388 Pa. 132, 130 A.2d 93 (1957) (overruled on other grounds).

27. 397 Pa. 144, 152 A.2d 883 (1959).

28. *Id.* at 151, 152 A.2d at 887.

29. Johnston v. Dick, *supra*, also involved a personal injury action. However, *Shirk* seems to be the first personal injury action to which the *Smith* rule was applied.

30. 397 Pa. 566, 156 A.2d 182 (1959).

31. In *Shearer* defendant appealed from the denial of two motions: a motion for judgment non obstante verdicto and a motion for a *new trial*. The court considered and passed on both motions. In considering the latter motion the court used the *Smith* rule to determine whether plaintiff had met his *burden of proof*.

32. Apparently, when mining for coal one method of supporting the ceiling of the mine is to leave pillars of coal behind you as you proceed forward. When the mine is worked through, the miners remove the pillars as they leave the mine by blasting. *Id.* at 569, 156 A.2d at 184.

directly beneath their home. Expert testimony relating to the elements of cause and causal connection, and testimony to the effect that windows rattled and that loud "explosion–like sounds" were heard[33] was introduced by the plaintiffs in attempting to show that their property damage had resulted from an explosion.

The interesting aspect of *Shearer* lies in the court's use of the *Smith* rule as a standard for measuring *burden of proof*. *Shearer* involved a situation in which the case *had gone* to the jury, and the court was asked to evaluate its decision in terms of the preponderance of the evidence. The language of the *Smith* rule is amenable to such application. In fact, *Shearer* clearly reveals that such language is applicable to two aspects of the plaintiff's case. The language concerning more than one inference has reference to the burden of coming forward with evidence, while the language concerning the preponderance of one inference over another deals with the plaintiff's burden of proof.

The *Smith* rule is usually applied where the plaintiff has established all of the elements of his case by direct evidence, with the exception of defendant's negligence. In the case of *Finny v. G. C. Murphy Co.*,[34] plaintiff slipped on a large quantity of oil and fell on defendant's floor. She contended that the oil was the excess remaining after defendant had oiled its floors, but no direct evidence was introduced to show that the oil she slipped on was of the same type that defendant used on its floors, nor that defendant had placed it there. The only evidence offered on this point was testimony to the effect that the floors looked newly oiled. The plaintiff did establish by direct testimony, however, that the large quantity of oil she saw beneath her feet as she fell had caused her to fall. The court reversed a nonsuit stating that under the *Smith* test defendant's negligence was a question for the jury.

An interesting case, factually, is that of *Bocchicchio v. Curtis Publishing Co.*,[35] dealing with a libel action brought by Felix Bocchicchio, "Jersey Joe" Walcott's manager. The action grew out of an article published by Curtis concerning the Marciano-Walcott fight which stated that Bocchicchio had allegedly rubbed capscium vaseline on Walcott's body and gloves, intending that it should get into Marciano's eyes and impair his vision during the fight. The court, after reviewing the evidence presented with regard to the truth of the statement, made reference to the *Smith* rule and asserted its applicability to the area of libel.[36]

---

33. *Id.* at 572, 156 A.2d at 184.

34. 406 Pa. 555, 178 A.2d 719 (1962). *Accord,* Lewis v. United States Rubber Co., 414 Pa. 626, 202 A.2d 20 (1964); Flagiello v. Crilly, 409 Pa. 389, 187 A.2d 289 (1963); Riesberg v. Pittsburgh & Lake Erie R.R., 407 Pa. 434 (1962); Hartigan v. Clark, 401 Pa. 594, 165 A.2d 647 (1960); Geiger v. Schneyer, 398 Pa. 69, 157 A.2d 56 (1959); Sechrist v. Consolidated Market House of Lebanon, 203 Pa. Super. 271, 199 A.2d 538 (1964); Graham v. Sieger, 196 Pa. Super. 622, 176 A.2d 457 (1961); Donovan v. Philadelphia Parking Authority, 24 Pa. D.&C.2d 686 (Munic. Ct., Phila. Co.), *aff'd per curiam,* 196 Pa. Super. 90, 173 A.2d 667 (1961); Actman v. Zubrow, 191 Pa. Super. 516, 159 A.2d 30 (1960).

35. 203 F. Supp. 403 (E.D. Pa. 1962).

36. *Id.* at 410.

V. SOME SPECIAL CIRCUMSTANCES[37]

In *Lear v. Shirk's Motor Express Co.,* discussed previously, the court averted to a special situation in which the "only reasonable inference" rule,[38] rejected in *Smith,* still has vitality. This situation arises where the trial judge finds that a party is contributorially negligent as a matter of law on the basis of that party's own testimony. If the evidence presented at trial leads to only one conclusion, the jury could not help but reach that conclusion. They may, in the usual situation, reject a conclusion on the basis of the party's credibility, but there can be no issue of credibility with regard to a party's statement against himself,[39] and the conclusion must stand.

In *Cuthbert v. City of Philadelphia,*[40] plaintiff brought an action for injuries suffered when she tripped while crossing a street. Mrs. Cuthbert could not testify that she actually saw what caused her to trip at the time of her fall, but she did testify that she returned to the scene and found a depression in the street which she alleged was the cause of her tripping. The Supreme Court reversed a judgment for the plaintiff, holding that she had failed to prove causal connection as a *matter of law.* The court pointed out that, even if one of the defendants had been negligent in allowing the depression to remain unattended,[41] it was just as reasonable to infer that plaintiff had tripped over the trolley tracks located in the area where she fell. If that were the case, she could not recover from the defendants.[42] A possible distinction between the *Smith* and *Cuthbert* cases appears to lie in the fact that in *Cuthbert* there was direct evidence as to *two* instrumentalities that could have possibly caused the injury, the depression and the trolley rail, while in *Smith,* there was direct evidence as to only *one* possible instrumentality that could have caused the injury, the conduit. Holding this distinction in abeyance for a moment, a case one step further removed from *Smith* than *Cuthbert,* in terms of this distinction, is the case of *Cantwell v. Bristol Township.*[43] In *Cantwell* plaintiff was seriously injured when he dove into a reservoir. There was circumstantial evidence that he had hit his head on something, but there was no direct evidence introduced as to the identity of that something. The Supreme Court quoted the lower court, asserting that, "without any direct evidence of an obstacle, the jury could not be permitted to infer the existence of such an obstacle, and upon such inference base the further inference that, that was what plaintiff struck. . . ."[44]

37. While investigating these possible situations it might be worth while to keep in mind the distinction alluded to in the *Smith* case to the effect that, "we are not here faced with a case relying on circumstantial evidence to show both the happening of the accident and defendant's negligence." See note 19 *supra.*
38. See note 28 *supra.*
39. *Ibid.*
40. 417 Pa. 610, 209 A.2d 261 (1965).
41. *Id.* at 613, 209 A.2d at 263.
42. *Id.* at 616, 209 A.2d at 264.
43. 412 Pa. 469, 194 A.2d 922 (1963).
44. *Id.* at 470.

There are, therefore, three possibilities with regard to the instrumentality causing an injury: first, the situation where there is no direct evidence as to the instrumentality causing the injury *(Cantwell);* second, the situation where there is direct evidence as to two or more instrumentalities that could have caused the injury *(Cuthbert);* and third, the situation where there is only direct evidence as to one instrumentality which could have possibly caused the injury *(Smith).* In the first and possibly the second instance, the court will rule as a *matter of law* that the plaintiff has not met his burden of coming forward with the evidence under the *Smith* rule. This *may* have been what the court was driving at in *Smith* when it said that "we are not here faced with a case relying on circumstantial evidence to show both the happening of the accident and the defendant's negligence."[45] The court could be equating the happening of the accident with its cause, or more particularly, with the instrumentality that possibly caused the injury. If this is so, *Smith* may be limited in application to those situations where there is direct evidence on the record of at least one instrumentality that could have caused the injury. The language from *Cantwell* quoted above lends some support to this contention. If there is direct evidence as to more than one instrumentality, and one or more of them could have caused the injury, additional evidence must be presented so that the jury can reach a decision as to which instrumentality was actually involved.[46]

It will be remembered that in *Smith* the court did not consider the plaintiff's failure to establish the circumstances existing *at the time* of the accident by direct evidence. It would seem that the liberalization of the test for determining whether plaintiff has met his burden of coming forward with the evidence, when viewed in light of the fact that the court did not consider this requirement in *Smith,* would result in a relaxation of this requirement. However, such has not been the case,[47] for the courts will at different times inject a "condition at the time of injury" requirement into the *Smith* test, and it is impossible to predict exactly when it will be raised.[48]

VI. CONCLUSION

In *Smith v. Bell Tel. Co.,* the court rejected the "only reasonable inference" test in favor of a more liberal test for determining whether a plaintiff has met his burden of coming forward with evidence sufficient to withstand a motion for a compulsory nonsuit when he relies on circum-

45. Smith v. Bell Tel. Co., 397 Pa. 134, 153 A.2d 477, 480 (1959).

46. If this were not so the jury would only be guessing as to which instrumentality was the cause of the injury. See note 26 *supra.*

47. In the case of Steiner v. Pittsburgh Ry., the court states that, *"there was no proof that these facts* existed at the time of the death or *caused or had any connection with decedent's death."* 415 Pa. 549, 551, 204 A.2d 254, 255 (1964).

48. It seems that this requirement and its application is largely within the discretion of the trial judge. Brandon v. Peoples Natural Gas Co., 417 Pa. 128, 207 A.2d 843 (1965).

stantial evidence to establish his case. That case involved an action to recover for property damage resulting from defendant's negligence. The *Smith* test has since been applied in landlord-tenant situations,[49] personal injury cases, actions in assumpsit, actions in libel, and to defendant's burden of coming forward with evidence in establishing contributory negligence. The test may, however, be subject to certain exceptions. The courts seem to imply that there are situations where a plaintiff cannot meet his burden by relying on circumstantial evidence alone. For example, direct proof may be required as to the instrumentality that caused injury. A less predictable situation is presented where the court requires the circumstances existing at the time of the injury to be established by direct evidence. The *Smith* decision has not excluded the application of the "only reasonable inference" test altogether. That test still has validity in those instances where a party indicates his contributory negligence by his own statements; but it is apparent from the discussion above that the *Smith* test will be increasingly applied to cases in different areas of civil liability, and that juries will play a greater role in deciding these cases.

Paul A. Kiefer

49. Gaynor v. Nagob, 204 Pa. Super. 265, 203 A.2d 358 (1964); Sechrist v. Consolidated Market House of Lebanon, 203 Pa. Super. 271, 199 A.2d 538 (1964); Graham v. Sieger, 196 Pa. Super. 622, 176 A.2d 457 (1961); Actman v. Zubrow, 191 Pa. Super. 516, 159 A.2d 30 (1960).