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Medical Witness' Treatment by Courts

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PROFESSIONAL MEDICAL WITNESSES are often treated with suspicion by the courts. In the New York case of *Quinones v. St. Vincent's Hospital,*[1] the court said of one such doctor:

> He had no personal knowledge of any of the material facts and such opinions as appear in his testimony would not support a verdict on plaintiff's theory. . . . Therefore, the opinion of the doctor that the plaintiff sustained the alleged traumatic injury sometime between the time of the operation and the next day when she felt pain would not support a finding that the injury occurred during the period of unconsciousness. . . . Thus, the doctor's opinion does not, in any event, have the necessary factual background. His conclusions lack probative force in that they are "contingent, speculative or merely possible."

The courts, as well as the medical profession, should be contemptuous of individuals who make a living by going from one negligence case to another to testify about injuries or disabilities of which they have no personal knowledge. On the other hand, such actions are encouraged by physicians who are intimate with the case and who either do not want to be involved in any litigation, or go "overboard" in presenting the case for the side who has retained them.

A Texas intermediate appellate court ruled in a workmen's compensation case that the limitation of cross-examination of the employer's medical expert by the claimant as to whether he testified for a lot of insurance companies and whether he quite frequently examined patients for insurance companies, was improper, but not prejudicial.[2] On the other hand a Florida appellate court ruled in an automobile accident case that the trial court did not err in limiting the cross-examination of the injured person's chief medical witness for the purpose of establishing his bias or interest and the fact that he was under censure by the county medical society.[3] The court also said that the scope of the cross-examination of a witness to show bias or interest was a matter within the trial court's discretion.

Now let us examine some of the rules set down by the courts recently in regard to medical witnesses. We should first consider the locality or community rule as to expert witnesses in malpractice cases. This

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1 20 App. Div. 2d 529, 244 N.Y.S. 2d 690 (1965), *aff'd* 16 N.Y. 2d 572, 260 N.Y.S. 2d 842 (1965).

2 Martin v. Liberty Mutual Ins. Co., 388 S.W. 2d 27, 31 (Tex. Civ. App. 1965).

3 Alvarez v. Mauney, 175 So. 2d 57 (Fla. Dist. Ct. App. 1965).

rule was originally formulated when communications were usually slow or nonexistent, but it has lost much of its significance now because of the increasing number of medical schools, the free interchange of scientific information,[4] and the national uniformity of the certification requirements of all nineteen American specialty boards.[5]

Knowledge and experience has been established by the Supreme Court of New Jersey as the true standards, and it made no difference to that court that the medical expert was licensed in New York and not in New Jersey.[6] Nor does the size of the community make any difference, so long as it is shown that the standards for the general practitioner are comparable.

In the *Montgomery* case[7] the court also said that "Proximate cause does not change with the locality." A Georgia intermediate appellate court ruled, in a case involving an orthopedic surgeon's testimony in regard to a patient's treatment resulting in Volkmann's ischemic contracture, that the expert witness was clearly qualified by reason of education, training and experience, to testify as an expert. The reasons for the locality rule as to expert testimony no longer have any validity, except perhaps in those few areas of medicine where knowledge of proper treatment is limited geographically by presence of disease or because of special facilities for study.[8]

Nor is a physician incompetent to testify as an expert merely because he is not a specialist in the particular field involved, said the United States Court of Appeals for the District of Columbia Circuit.[9] A general practitioner was permitted to testify in a suit against a cardiologist who failed to diagnose a case of hypothyroidism over a period of six years. The court said that the training and specialization of a witness goes to the weight, not to the admissibility of his testimony.

It also would be well to examine at this time the physician-patient privilege rule (in most cases covered by statute) as it applies to medical testimony. A New York court dismissed a charge against a woman for criminally inducing an abortion on herself, because the evidence supporting the indictment came from the testimony of the woman's physician

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[4] Montgomery v. Stary, 84 So. 2d 34, 39 (Fla. 1955).

[5] Greenwood and Frederickson, Specialization in the Medical and Legal Professions, at 19 (1964).

[6] Carbone v. Warburton, 11 N.J. 418, 94 A. 2d 680, 683 (1953). See also Teig v. St. John's Hospital, 387 P. 2d 527 (1963), where experience of physician was sufficient to make him familiar with the standards of the general locality even though he lived 50 miles away in another city and another state, and had never been in the community involved, and Christopher v. U.S., 237 F. Supp. 787 (E.D. Penna. 1965), where an expert from Philadelphia, Penna., was permitted to testify in a Baltimore, Md. malpractice case.

[7] Montgomery v. Stary, *supra* note 4 at 40.

[8] Murphy v. Little, 112 Ga. App. 517, 145 S.E. 2d 760, 764 (1965).

[9] Baerman v. Reisinger, 363 F. 2d 309 (D.C. Cir. 1966).

before the grand jury.[10] Since he had acquired that information in the course of examining and treating the woman, the physician-patient privilege barred the disclosure before the grand jury, just as it would in a trial. In a workman's compensation case in the same state, the physician-patient privilege was waived because of the claimant's proof of the cause of death in support of the compensation claim.[11] This proof, said the court, opened the door. The patient also waives the physician-patient privilege by calling the physician to testify as to the extent and permanence of his injuries, and the physician could be cross-examined on *any* point that could have a bearing on the injured person's disability and the cause thereof.[12] The opposing party can call the attending physician as a witness even though the privilege is not waived, because the attending physician is not disqualified from giving expert testimony in response to proper hypothetical questions, provided that in answering he disregards what he learned and observed while attending the patient and his own opinion based thereon.[13] This decision really makes a mockery of the statute in Ohio providing for physician-patient privilege, even though it may aid in fostering justice. It would be quite easy for a skilled attorney to word hypotheticals in such a manner as to get the attending physician's true thoughts about the claimant's injuries across to the jury.

What kinds of testimony are physicians permitted to give? A New York court ruled that two physicians, against whom a suit for damages had been brought by a patient who developed peritonitis as a result of a fecal fistula occurring after an appendectomy, were required in a pretrial discovery proceeding, to answer those questions which called for an expression of expert opinion.[14] On the other hand, a physician can be forced to testify as an adverse expert witness against himself. An Ohio court said that a duty to testify is owed to society, not to individual parties, and a person has no right to obstruct the administration of justice by withholding information that is relevant to a judicial proceeding. A defendant physician may be compelled over his objection to provide that testimony.[15]

Nor can a physician refuse to testify because of lack of compensation, said a Georgia court.[16] An orthopedic surgeon was not allowed to testify as to the cause of an accident in which the one driver allegedly lapsed into a diabetic coma.[17] The physician admitted that he had never

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[10] N.Y. v. McAlpin, 270 N.Y.S. 2d 899 (App. Div. 1966).

[11] Beeler v. Hildan, Crown Container Corp., 271 N.Y.S. 2d 373 (App. Div. 1966).

[12] Scofield v. Haskell, 180 Neb. 324, 142 N.W. 2d 597, 601 (1966).

[13] Vincenzo v. Newhart, 7 Ohio App. 2d 97, 219 N.E. 2d 212 (1966).

[14] Rogotzki v. Schept, 91 N.J. Super. 135, 219 A. 2d 426, 436 (1966).

[15] Oleksiw v. Weidener, 207 N.E. 2d 375 (Ohio 1965).

[16] Logan v. Chatham Co., 113 Ga. App. 491, 148 S.E. 2d 471, 473 (1966).

[17] Arnold v. Loose, 352 F. 2d 959, 963 (3rd Cir. 1965).

read any text on diabetes and he did not know who the leading authority in the field was or which was the leading treatise. For any physician in this day and age to admit that he has not read any text on diabetes is incomprehensible. The cross-examination of a physician on the basis of a medical text which he has not read or of which he is not knowledgeable is not permitted.[18]

A physician who makes only a superficial examination of a body, and had never seen the decedent before, is not qualified to express an opinion as to the cause of death on the basis of his own findings.[19] He could, however, answer proper hypotheticals stating the nature of the injuries which would be used by him in forming a basis for an expert opinion. A coroner's testimony on the findings of a postmortem examination performed two days after death was properly admitted in a murder trial, even though no showing had been made that the body was in the same condition when he made the examination as it was immediately after the killing.[20] In a similar case the autopsy findings were admissible, even though the autopsy was performed by the County Medical Examiner and the witness was the Associate County Medical Examiner.[21]

A physician's testimony at a preliminary examination was properly admitted at a rape trial because the accused was represented by an attorney who cross-examined the physician at the preliminary hearing. The physician was not available for the trial because of his military obligations, but the reading of his testimony at the trial did not violate the accused's constitutional right to confrontation, because of the prior cross-examination.[22]

Whose testimony is entitled to greater weight? In a workman's compensation case, a Louisiana court said that where the injury for which recovery is sought falls within a particular field of medicine, testimony of a specialist in that field is entitled to greater weight than that of a general practitioner.[23] But the same court in another workmen's compensation case accorded greater weight to the testimony of a general practitioner who had an opportunity over a long treatment period to observe the patient.[24] The specialists in this case only saw the patient briefly, and chiefly for the purpose of testifying. It appears that the court in these cases did not establish any general rule as to the weight of a particular type of physician's testimony, but is in essence

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[18] Ward v. Lamb, 240 Ark. 850, 402 S.W. 2d 675 (1966).

[19] Branch v. Dempsey, 265 N.C. 733, 145 S.E. 2d 395, 405 (1965).

[20] Kemp v. Ala., 278 Ala. 637, 179 So. 2d 762, 765 (1965).

[21] Viser v. Texas, 396 S.W. 2d 867 (Tex. Crim. App. 1965).

[22] Mich. v. Dusterwinkle, 3 Mich. App. 150, 141 N.W. 2d 719 (1966).

[23] Ware v. Missouri Valley Dredging Co., 177 So. 2d 788 (La. Ct. App. 1965). See also Joyner v. Brewton Lumber Co., 171 So. 2d 811 (La. Ct. App. 1965).

[24] Gates v. Ashy Constr. Co., 171 So. 2d 742, 745 (La. Ct. App. 1965).

saying that the greatest weight will be given to the testimony of that physician who knows the most about the particular patient and his particular illness.

An attempt has been made to review what the courts have recently said about medical witnesses and their testimony. Many questions can be asked about particular decisions, and indeed, an entire article could be written about individual cited cases. The only purpose of this paper is to review the recent decisions in order to give you a panoramic view of the type of questions which the courts are being asked to answer about the medical witness and his testimony.