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gal searches can reduce the chances of conviction.[64] The court concluded that: "The result of applying an exclusionary rule to cases such as the one at Bench would be to free a guilty man without any assurance that there would result any counterbalancing restraint on similar conduct in the future."[65] The *Nelson* court did not consider the question of the effectiveness of exclusionary policy in deterring private illegal searches—certainly if exclusion does not deter them, the *Nelson* rule will significantly handicap law enforcement while providing little additional protection for potential victims.

Certainly the *Nelson* rule is not designed simply to set guilty shoplifters free; rather the court has tried to strike a closer balance between the security requirements of merchants and the rights of their customers to be free from unreasonable searches.[66] The new rule does not encompass all private searches but instead applies only to those initiated by a private party acting under some statutory authorization. Louisiana courts in the future may choose to limit this rule to article 215 detention cases, or, still further, to actions by large security forces under article 215.[67] Nonetheless, while the size of the step has yet to be determined, the Louisiana Supreme Court has stepped away from the previously strict rule that the constitutional standards governing search and seizure do not apply to searches by private persons.

Shaun B. Rafferty

MEDICAL MALPRACTICE IN LOUISIANA—THE REJECTION OF THE LOCALITY RULE AS APPLIED TO SPECIALISTS

The wife and children of the decedent sued his cardiovascular surgeon for wrongful death. Although the defendant had complied with local practices,[1] the testimony of a specialist

64. 250 Cal. App. 2d at 482-83, 58 Cal. Rptr. at 416. *See also* State v. Mora, 307 So. 2d 317 (La. 1975), wherein Justice Summers, in dissent, argued that exclusion does not deter private unconstitutional conduct.

65. People v. Botts, 250 Cal. App. 2d 778, 482-83, 58 Cal. Rptr. 412, 416 (1967).

66. Note, *supra* note 35, at 964.

67. See note 57, *supra*.

1. Ardoin v. Hartford Accident and Indem. Co., 360 So. 2d 1331, 1333 (La. 1978).

from another, but similar, community indicated that such practices were negligent.[2] Both the trial court and the Third Circuit Court of Appeal held the evidence inadmissible under the "locality rule."[3] The supreme court reversed and *held* that the duty of a specialist is governed by the standard of care practiced within the specialty itself, regardless of the standard of the locality. *Ardoin v. Hartford Accident and Indemnity Co.*, 360 So. 2d 1331 (La. 1978).

The basis for all delictual responsibility in Louisiana is article 2315 of the Louisiana Civil Code,[4] which requires every person to repair the damage caused by his fault. Fault is defined by article 2316 as encompassing negligence, imprudence, or want of skill.[5] Fault has also been described by the courts as the breach of a legal duty owed by one party to another.[6]

Louisiana law imposes upon a physician the duty to exercise reasonable care and skill in the treatment of his patients.[7] In medical malpractice actions, the fact that the patient died does not result in a presumption that the physician was negligent;[8] on the contrary, the physician is presumed to have treated the patient in the "usual and customary" manner.[9] To overcome this presumption, the plaintiff must establish the required standard of care[10] and prove the physician's failure to

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2. *Id.*

3. *Meyer v. St. Paul-Mercury Indem. Co.*, 225 La. 618, 623, 73 So. 2d 781, 782 (1953), sets out the locality rule as follows:

> A physician, surgeon, or dentist . . . is not required to exercise the highest degree of skill and care possible. As a general rule it is his duty to exercise the degree of skill ordinarily employed, under similar circumstances, by the members of his profession in good standing in the same community or locality, and to use reasonable care and diligence, along with his best judgment, in the application of his skill to the case.

See also Comment, *The Medical Malpractice Action in Louisiana*, 33 LA. L. REV. 420 (1973).

4. Langlois v. Allied Chem. Corp., 258 La. 1067, 1074, 249 So. 2d 133, 136 (1971).

5. LA. CIV. CODE art. 2316.

6. Callais v. Allstate Ins. Co., 344 So. 2d 692 (La. 1976); Langlois v. Allied Chem. Corp., 258 La. 1067, 249 So. 2d 133 (1971); *see also* Comment, *supra* note 3, at 421.

7. *See, e.g.*, Phelps v. Donaldson, 234 La. 1118, 150 So. 2d 35 (1963); Dowling v. Mutual Life Ins. Co., 168 So. 2d 107 (La. App. 4th Cir. 1964).

8. *See, e.g.*, Freche v. Mary, 16 So. 2d 213 (La. App. Orl. Cir. 1944); Mournet v. Sumner, 19 La. App. 346, 139 So. 728 (Orl. Cir. 1932).

9. Mournet v. Sumner, 19 La. App. 346, 350, 139 So. 728, 730 (Orl. Cir. 1932).

10. LA. R.S. 9:2794 (Supp. 1975). Generally the plaintiff has to use expert testimony to establish the physician's standard of care, but there are some situations where expert testimony is not necessary. See notes 25-31, *infra*, and accompanying text.

meet that standard.[11] Failure by the plaintiff to meet either burden will result in a summary judgment or a directed verdict for the defendant.

The standard of care for a physician, prior to *Ardoin,* was set out in *Meyer v. St. Paul-Mercury Indemnity Co.*[12] as the duty to exercise the degree of skill ordinarily employed, under similar circumstances, by the members of his profession in good standing in the same community or locality. A physician was further charged to use reasonable care and diligence, along with his best judgment, in applying his skill to a case. The "locality rule" espoused in *Meyer* resulted in geographical limitations on the admissibility of evidence concerning the physician's duty of care.

The line of decisions which culminated in the locality rule in *Meyer* is interesting. The first attempt to place limits on the duty owed by a physician to his patient was *Stern v. Lang,*[13] which held that an oculist must exercise the care and skill usually exercised by oculists in good standing within the profession. *Stern* was not cited in *Roark v. Peters,*[14] the court's next attempt to limit the physician's duty of care. Rather, the authority cited by the court in reshaping this duty was a common law encyclopedia.[15] In *Roark* the court went much further than *Stern* and stated that testimony concerning the standard required of a profession would be limited to opinions of experts from "similar localities."

Lower courts' views of a physician's duty to his patients varied, even after *Roark.* One court, citing the same common law authority as *Roark,* limited the physician's duty to the practices usually followed in the *same or similar* communities.[16] Other courts still held to the *Stern* standard requiring the care and skill usually exercised by physicians in good standing within the profession, without restricting it to the practices usually employed in the same or similar communities.[17] Yet

11. LA. R.S. 9:2794 (Supp. 1975).

12. 225 La. 618, 623, 73 So. 2d 781, 782 (1953).

13. 106 La. 738, 31 So. 303 (1901).

14. 162 La. 111, 110 So. 106 (1926).

15. *Id.* at 115, 110 So. at 108. The court cited the Cyclopedia of Law and Procedure, 30 CYC. *Physicians and Surgeons* 1570 (1908).

16. Mournet v. Sumner, 19 La. App. 346, 139 So. 728 (Orl. Cir. 1932).

17. Brashears v. Peak, 19 So. 2d 901 (La. App. 1st Cir. 1944); Freche v. Mary,

another court, citing *Roark* as authority, restricted the physician's standard of care to the practices usually employed within the *same* community.[18] Under this stricter rule, evidence of practices in other communities, even if they were similar to the community involved, was not admissible to prove the physician's duty to his patient.[19]

This confused state of the law formed the backdrop for the decision in *Meyer*.[20] *Meyer* held that a physician's duty of care to his patient is limited to the customary practices in the *same* community. The court was not confronted with the admissibility of practices in similar communities as the plaintiff had no evidence other than the injury itself of improper conduct by the physician. Further, it did not openly acknowledge any deviation from prior jurisprudence and indeed cited *Stern* and *Roark* as authority for its pronouncement.

Uncertainty as to whether the "same community" standard was to be strictly applied resulted in haphazard application of the standard. The First Circuit[21] and the Louisiana Supreme Court[22] allowed testimony by New Orleans physicians regarding their standard of practice at the trial of a Baton Rouge physician. However, the trial court and the Third Circuit in *Ardoin*[23] strictly followed *Meyer* and held that evidence of the practices of a Baton Rouge specialist was inadmissible at the trial of a Lafayette specialist.

While "same" is a more extreme limitation than "similar," both involve the inadmissibility of evidence from outside certain communities. Such restrictions on the availability of expert testimony help to foster a "conspiracy of si-

16 So. 2d 213 (La. App. Orl. Cir. 1944); Comeaux v. Miles, 9 La. App. 66, 118 So. 786 (Orl. Cir. 1928).

18. Wells v. McGehee, 39 So. 2d 196 (La. App. 1st Cir. 1949).

19. *Id.*

20. In *Meyer*, a surgeon and an anesthetist failed to examine plaintiff's teeth closely for looseness before commencing a nasal endotracheal intubation preparatory to the extraction of all her teeth. Apart from the question of causality, the court found that while one tooth dislodged and fell into her lung, the defendants did all that reasonably careful practitioners skilled in their professions could have done. 225 La. at 629, 73 So. 2d at 785.

21. Henry v. McCool, 239 So. 2d 734 (La. App. 1st Cir. 1970).

22. Uter v. Bone & Joint Clinic, 249 La. 851, 192 So. 2d 100 (1966).

23. 350 So. 2d 205 (La. App. 3d Cir. 1977), *rev'd*, 360 So. 2d 1331 (La. 1978).

lence,"[24] because the testimony must come from physicians who come from the same area as the defendant and who are reticent to testify against their colleague. The more stringent the restriction, the more difficult it is for the plaintiff to obtain the expert testimony he needs.

To ameliorate the substantial burden that is placed on the plaintiff, the judiciary and the legislature have devised ways to circumvent the need for expert testimony. The application of the doctrine of res ipsa loquitur is one judicially accepted way of escaping a summary judgment or a directed verdict for the defendant when the plaintiff's injury is his only evidence of the physician's negligence. However, the doctrine's application has been restricted in medical malpractice actions to cases where the facts suggest the defendant's negligence as the most plausible explanation for the plaintiff's injury.[25] Additionally, although use of the doctrine may allow the plaintiff to escape a summary judgment or a directed verdict, it does not automatically result in a favorable decision.[26]

Another device aiding malpractice plaintiffs was employed in a First Circuit case which treated certain actions of physicians and surgeons as negligent as a matter of law, even if they were shown to be customary practices.[27] If a customary practice subjects a patient to an unreasonable risk of harm,[28] then the

24. Ardoin v. Hartford Accident and Indem. Co., 360 So. 2d 1331, 1337 (La. 1978).

25. *The Work of the Louisiana Legislature for the 1976 Regular Session—Torts*, 37 LA. L. REV. 112, 122 (1976). The judiciary has applied res ipsa loquitur to a variety of situations: *See, e.g.*, McCann v. Baton Rouge Gen. Hosp., 276 So. 2d 259 (La. 1973) (an injury suffered to a part of the body not directly involved in the treatment); Grant v. Touro Infirmary, 254 La. 204, 223 So. 2d 148 (1969) (a sponge pad unintentionally left in body after surgery); Chappetta v. Ciaravella, 311 So. 2d 563 (La. App. 4th Cir. 1974) (a sponge pad unintentionally left in body after surgery); Davis v. Southern Baptist Hosp., 293 So. 2d 238 (La. App. 4th Cir. 1974) (an unintended burn suffered during medical care); Andrepont v. Oschner, 84 So. 2d 63 (La. App. Orl. Cir. 1955) (an explosion or fire caused by a substance used in the treatment).

26. Regardless of the quality of the defendant's rebuttals, res ipsa loquitur merely infers negligence on the part of the defendant, and it is up to the fact finder, after consideration of all the evidence, to decide if the inference is strong enough to warrant a recovery for the plaintiff. Malone, *Res Ipsa Loquitur and Proof by Inference—A Discussion of the Louisiana Cases*, 4 LA. L. REV. 70, 90 (1941).

27. Favalora v. Aetna Cas. & Sur. Co., 144 So. 2d 544 (La. App. 1st Cir. 1962). Here, the court found that the failure to take precautions to keep a woman with a history of fainting spells from falling during an X-ray was negligence as a matter of law, regardless of local practices.

28. *Id.*

court will disregard the custom and say what standard is required.[29] This is obviously a much stronger judicial reaction to a defendant's conduct than merely permitting an inference of negligence; no amount of expert testimony on the standard of care will change the result. A recent example of how courts apply the negligence per se test is *Helling v. Carey*,[30] in which the failure to timely administer an eye pressure test which would have disclosed glaucoma resulted in irreparable eye damage. The customary practice of opthalmologists had not called for administering the test to people under the age of forty because glaucoma occurs only once in every 25,000 people under that age. The plaintiff was only twenty-two years old when she first experienced difficulty with her eyes and consulted the defendant specialists. The court held that the failure to administer the eye test was negligence as a matter of law, finding that the test was simple and inexpensive to administer and that there was no doubt that evidence of glaucoma could have been detected by its use.[31]

Supplementing these judicial devices designed to ease the plaintiff's burden is legislation that was passed in 1975. Revised Statutes 40:1299.47 established a procedure whereby pretrial screening panels review medical malpractice claims.[32] Each panel is comprised of three physicians and a nonvoting attorney.[33] Since service on the panel is mandatory, and since the panel is required to render an expert opinion on whether the health care provider was negligent, this statute helps break through the conspiracy of silence.

The instant case[34] involved a coronary artery by-pass operation. The patient's heart was being connected to a heart-lung

29. The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932). In this case the court stated:

> [I]n most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.

Id.

30. 83 Wash. 2d 514, 519 P.2d 981 (1974).

31. *Id.* at 516-17, 519 P.2d at 983.

32. 1975 La. Acts, No. 817, *adding* LA. R.S. 40:1299.47. *See* Comment, *Recent Medical Malpractice Legislation—A First Checkup*, 50 TUL L. REV. 655, 679 (1976).

33. *Id.*

34. 360 So. 2d 1331 (La. 1978).

machine. The tubes to be connected with the patient's heart either sucked blood or pumped air, depending on how the highly trained attendant attached them to the patient's heart; they pumped air instead of sucking blood, and Mr. Ardoin died instantly from a massive air embolism. Since the functioning of the tubes can be checked by dipping their ends into the pool of blood in the patient's open chest cavity, or in some other sterile liquid, the surgeon was asked why he had not done this. His defense was that the customary practice of the community did not require it. When evidence was offered to show that the customary practice of a *similar* community did require checking the tubes, the evidence was excluded as inadmissible under the locality rule.

The court in *Ardoin* held that Louisiana courts were no longer to be governed by the locality rule in determining whether an act of a medical specialist that causes damage to his patient constitutes fault. In reevaluating Louisiana's position on the locality rule, the court noted that the rule was being applied inconsistently,[35] that it was based on the common law of Louisiana's sister states,[36] and that it was being abandoned by courts throughout the country.[37] The court's conclusion that the locality rule should be dispensed with was based on a review of the Louisiana Civil Code[38] and the retroactive application of a recent statute.[39]

35. See text at notes 20-23, *supra*.

36. See note 15, *supra*.

37. Ardoin v. Hartford Accident and Indem. Co., 360 So. 2d 1331, 1338 (La. 1978). The court noted that many jurisdictions are aligning themselves with the position advocated by the American Law Institute and abandoning entirely the locality rule as applied to specialists. *See* RESTATEMENT OF TORTS (SECOND) § 299A, comment (d) (1965). The court further noted that those states which apply the "same locality" rule are a distinct minority. 360 So. 2d at 1337-38.

38. LA. CIV. CODE arts. 2315, 2316.

39. 1975 La. Acts, No. 807, *adding* LA. R.S. 9:2794. The statute provides:

> A. In a malpractice action based on the negligence of a physician licensed under R.S. 37:1261 et seq., . . . the plaintiff shall have the burden of proving:
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> (1) The degree of knowledge or skill possessed or the degree of care ordinarily exercised by physicians or dentists practicing in the same community or locality to that in which the defendant practices; and where the defendant practices in a particular specialty and where the alleged acts of medical negligence raise issues peculiar to the particular medical specialty involved, then the plaintiff has the burden of proving the degree of care ordinarily practiced by physicians or dentists within the involved medical specialty.

In disposing of the notion that stare decisis controls in Louisiana, the court reasoned that while case law is invaluable as previous interpretation of the legislative will, it is nevertheless secondary authority.[40] Accordingly, the court looked first to the broad standard of article 2315.[41] Neither it, nor article 2316 which defines fault, places geographical or occupational limits on the notion of fault or on the standard of care against which a person's actions are measured. A review of the legislation revealed no such restrictions on a physician's standard of conduct. Beside this void of legislative mandate for the locality rule was placed a basic tenet of our legal philosophy, that civil and criminal sanctions imposed for socially unaccepted conduct should be applied equally throughout the state to all citizens within the same class or set of circumstances.[42] The court concluded that localized definitions of negligence should not be allowed to contravene this basic policy unless there is clear evidence of legislative will to the contrary.[43]

The search for legislative expression was not limited to the Civil Code. The court examined the medical malpractice legislation which had been passed in 1975, subsequent to Mr. Ardoin's death, but prior to the adjudication of the instant case. In particular, Revised Statutes 40:2794 was scrutinized closely. The lower court had read the statute as codifying the locality rule as to general practitioners and specialists.[44] However, the supreme court concluded that the statute unambiguously abrogated the locality rule as applied to specialists.[45] The court appeared to be influenced by the fact that special treatment would run counter to the general policy of having a uniform standard of care.[46]

40. 360 So. 2d at 1336. *See also* Barham, *Methodology of the Civil Law in Louisiana*, 50 TUL. L. REV. 474 484 (1976).

41. LA. CIV. CODE art. 2315. *See* Langlois v. Allied Chem. Corp., 258 La. 1067, 249 So. 2d 133 (1971). *See also* Stone, *Tort Doctrine in Louisiana*, 17 TUL. L. REV. 159, 163 (1942).

42. 360 So. 2d at 1336.

43. *Id.*

44. 350 So. 2d 205, 219 (La. App. 3d Cir. 1977), *rev'd*, 360 So. 2d 1331 (La. 1978). The Third Circuit opinion read the statute as codifying the locality rule as to all physicians, including specialists. *Id.* For the text of section 2794, see note 39, *supra*.

45. 360 So. 2d at 1335.

46. *Id.* at 1336. The court stated:

If the legislature were to act contrary to this policy by establishing a different

In its comparative analysis, the court consciously disregarded *Meyer;* indeed, it chastised the lower court for considering section 2794 as affecting *Meyer.* It may be in keeping with proper civilian analysis to deprecate reliance on judicial decisions; they are, after all, merely interpretations of the legislative will.[47] However, interpreting new legislation only as it affects prior legislation, without taking into consideration the judicial gloss placed on such prior legislation, may not always lead to an accurate picture of the legislature's intent. This is particularly true when the prior legislation is article 2315. This article was written broadly in recognition of the unlimited number of factual situations involving delictual responsibility that can arise. Rather than attempt to anticipate these situations, the legislation presents a very broad statement of one's responsibility to others, thereby inviting judicial interpretation and entrusting to the courts the task of keeping the concept of fault up to date.[48]

In the face of a trend in other states away from a strict locality rule,[49] the Louisiana legislature passed section 2794. While interpretation of the statute as abrogating the locality rule as to specialists is not clearly erroneous, it does not appear to have been the intent of the legislators. However, the supreme court did not consider the statute ambiguous, hence, it did not discuss legislative intent.[50]

The statute that resulted from the legislature's efforts perhaps provides a lesson in drafting a bill. The original version

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definition of negligence, imprudence or want of skill by a medical specialist within each locality, the lawmaking body would express its intention explicitly. Since La. R.S. 9:2794 contains no such expression pertaining to medical specialists, the statute should not be given the effect of Balkanizing those representing themselves as having superior skill or knowledge beyond that common to the medical profession by the application of varying geographic standards of fault.

47. *Id. See* Barham, *supra* note 40, at 484.

48. Langlois v. Allied Chem. Corp., 258 La. 1067, 1078, 249 So. 2d 133, 137 (1971).

49. See note 37, *supra.*

50. Civil Code article 18 commends investigation into legislative intent as an aid in the interpretation of ambiguous legislation. It states that "[t]he universal and most effectual way of discovering the true meaning of a law, *when its expressions are dubious,* is by considering the reason and spirit of it, or the cause which induced the Legislature to enact it." LA. CIV. CODE art. 18 (emphasis added). However, it is not appropriate to look to intent unless the words are ambiguous. *See* Nash v. Whitten, 326 So. 2d 856 (La. 1976); Whitney Nat'l Bank v. James, 189 So. 2d 430 (La. App. 1st Cir. 1966).

of the statute simply mandated that physicians and dentists exercise "the degree of care ordinarily exercised by physicians or dentists practicing the same specialty in similar communities to that in which the defendant practices."[51] However, in an effort to make the bill more closely track the jurisprudence, a friendly amendment was offered and accepted.[52] This version ultimately became section 2794, but it unintentionally abrogated the locality rule as applied to specialists.[53] That the legislature was attempting to codify the locality rule as to all physicians becomes clear when this statute is compared with Revised Statutes 40:1299.41(A), another part of the 1975 legislative package containing section 2794.[54] This provision was authored by the same person who authored section 2794, and in codifying the locality rule for health care providers, it included specialists.[55] Thus, interpreting section 2794 as abrogating the

51. La. H.B. 637, 1st Reg. Sess. (1975).

52. OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF LOUISIANA, 1st Reg. Sess. at 1520 (June 19, 1975). The bill as originally introduced simply provided that the plaintiff had the burden of proof as to "the degree of knowledge or skill possessed or the degree of care ordinarily exercised by physicians or dentists practicing *the same specialty* in similar communities to that in which the defendant practices." La. H.B. 637, 1st Reg. Sess. (1975) (emphasis added). An amendment was offered and accepted which deleted the words "the same specialty" and added new language after "practices" concerning specialists. The new language required proof of the standard of care within a specialty, but did not place any geographical limitations on this proof. Apparently this change was intended to insure that a general practitioner could not testify as to the standard of care of a specialist, a continuation of prior jurisprudence.

53. In 1977 it became apparent that the statute could be viewed as abrogating the locality rule as to specialists. *See* Percle v. St. Paul Fire & Marine Ins. Co., 349 So. 2d 1289 (La. App. 1st Cir. 1977). The representative who had offered the friendly amendment to the statute in 1975 introduced House Bill 635 to correct his mistake. This bill failed, but it would have clearly codified the locality rule as to specialists. La. H.B. 635, 4th Reg. Sess. (1978), provided:

> [W]here the defendant practices in a particular specialty and where the alleged acts of medical negligence raise issues peculiar to the particular medical specialty involved, then the plaintiff has the burden of proving the degree of care ordinarily practiced by physicians or dentists in the same community or locality to that in which the defendant practices within the involved medical specialty.

54. LA. R.S. 40:1299.41 (A) (Supp. 1975).

55. *Id.* Section 1299.41 (A)(7) provides:

> 'Tort' means any breach of duty or any negligent act or omission proximately causing injury or damage to another. The standard of care required of *every* health care provider, except a hospital, in rendering professional services or health care to a patient, shall be to exercise that degree of skill ordinarily employed, under similar circumstances, by the members of his profession in

locality rule for specialists is inconsistent with section 1299.41(A).[56]

The court's decision in *Ardoin* further eases the plaintiff's burden, giving him greater access to expert testimony. The locality rule was abandoned in recognition of the changing realities of the medical field, because, as the court noted, whatever may have justified a locality rule in the past no longer holds true today.[57] Advances in communication and education have dissipated the disparities in heath care that once existed between the various communities to the point where physicians can no longer legitimately claim the protections afforded by the locality rule.[58]

In evaluating the effect of *Ardoin,* it should be noted that its impact may be negated by the operation of Revised Statutes 40:1299.47. The mandatory pretrial screening panels set up by section 1299.47 consist of three *local* physicians, and the prejudicial effect of an adverse panel report at a subsequent trial might be virtually impossible for a plaintiff to overcome.[59] This could effectively retain the locality rule in fact, though not in law.[60]

One possible effect of the court's decision may be that the exception to the locality rule for the specialist will swallow the rule. In this age of specialization, the only one presently able to utilize the locality rule, the general practitioner, is being replaced by the specialist in family care. Since the family care

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good standing in the same community or locality, and to use reasonable care and diligence, along with his best judgment, in the application of his skill. (Emphasis added).

56. In 1978, shortly after the court's decision in *Ardoin,* the legislature passed Act 611, which amended Revised Statutes 40:1299.39 (Supp. 1975). This statute dealt with the state's malpractice liability for state services. Modeled much like section 1299.41, which dealt with medical malpractice generally, it too, had defined the standard of care of health providers in terms of the locality rule. Now, however, Act 611 draws a distinction between health care providers in general and those practicing in a recognized field of specialty. The locality rule remains applicable to general health care providers, but the specialist is to be judged by the general standard of care practiced within the medical specialty.

57. 360 So. 2d at 1337.

58. *Id.*

59. Comment, *supra* note 32, at 681.

60. *Id.* The court might choose to follow the lead of Florida in this regard. Florida only admits the panel's conclusions of law at the trial; its findings of fact are excluded in an attempt to downplay any possible prejudicial effects. *Id.* at n.120.

specialist is subject to uniform education, testing, and certification procedures as in any recognized medical specialty, he should logically be covered by the *Ardoin* rule, too. If this happens, the locality rule will no longer apply to anyone.

The retroactive application of section 2794 is a disturbing aspect of *Ardoin*. The difficulty in applying the statute retroactively is that the locality rule is both a rule of substantive law and a rule of evidence. Article 8 of the Louisiana Civil Code specifically states that "[a] law can prescribe only for the future, it can have no retrospective operation . . . ." Exceptions to this general prohibition have been recognized by the judiciary, and statutes remedial or procedural in nature are generally given retroactive effect, unless there is language to the contrary.[61] This exception would include that part of the locality rule which addresses itself to the admissibility of evidence, since that part is clearly procedural. However, that part of the rule which limits a physician's duty to his patient to the practices usually employed by local physicians is closer to a substantive rule. The actions of a doctor occurring before *Ardoin* will now be judged by a standard of care of which no doctor could have been aware prior to this litigation. There was no warning of the need to comply with practices being utilized by specialists throughout the nation.

Even if there had been no locality rule, it seems doubtful that the specialist in the instant case would have acted differently. However, the next decision which applies this statute retroactively may work a real injustice. If a defendant would have adjusted his conduct to nationwide standards in order to avoid liability, then it is not fair to penalize him for actions which he did not know were wrongful. This seems to be exactly the situation which Civil Code article 8 was enacted to avoid.

There were ways for the *Ardoin* court to avoid the possible injustice of retroactively applying section 2794. The court could have prospectively overruled *Meyer* and then placed an effective date on its interpretation of the statute.[62] The court could also have held that the defendant specialist was negligent as a

61. Dowie v. Becker, 149 La. 160, 88 So. 777 (1921); Hammond Asphalt Co., Inc. v. Joiner, 270 So. 2d 244 (La. App. 1st Cir. 1972).

62. Great N. Ry. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358 (1932); *see also* Barnett v. Develle, 289 So. 2d 129 (La. 1974).

matter of law, without referring to the standards of the profession, local or otherwise. This would have obviated the need for a discussion of the locality rule and the effects of recent legislation upon it. The rationale of *Helling v. Carey*[63] could have been adopted, because the test of the machine's functioning was simple to administer, involved no extra cost to the patient, and almost certainly would have prevented the fatal air embolism.[64] However, the court chose a different route and, instead, remanded the case to let a new jury hear all pertinent evidence unburdened by the locality rule restrictions. The court may have felt that it was time to discard the locality rule and the results that it tends to promote.

As for the future, the court has made it very clear that unless the legislature reacts and passes legislation which unmistakably codifies the locality rule for specialists, they will be held to a standard of care as practiced within their particular medical specialty. From the standpoint of predictability, the court has made itself very clear, and that is to be commended.

Gordon Terry Whitman

63. 83 Wash. 2d 514, 519 P.2d 981 (1974). For a discussion of practices determined to be negligent as a matter of law, see text at notes 27-31, *supra*.

64. See text at note 30, *supra*.