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Non-Resident Expert Testimony on Local Hospital Standards

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IN THE RECENT CASE of *Avey v. St. Francis Hospital and School of Nursing, Inc.*,[1] the Kansas Supreme Court dealt with an issue which has caused confusion and conflict in many jurisdictions over the past ninety years. This issue deals with the question of whether a medical expert witness need be a resident of the particular community in order to testify as to local hospital standards in that community.

Generally, in cases involving medical malpractice, the courts have held that the expert witness must have practiced in the "same" or "similar" locality as the defendant doctor in order that his testimony be held admissible to establish the standard of medical care against which the defendant is to be held.[2]

To date, the majority of cases which have grappled with this question of "locality" have involved the medical malpractice of physicians.[3] The *Avey* case deals with a slightly different subject, the medical negligence of hospitals. This article deals with several of the questions raised by the *Avey* case. Such questions as: Should the "same" or "similar" locality test be applied to malpractice cases involving hospitals? Should a new test be created?

Development of the Locality Test

The requirement that an expert witness must have practiced in the same or in a similar locality as the defendant in order to be deemed competent to testify as to local medical standards found its roots in *Small v. Howard.*[4] In this case a rural doctor attempted a difficult operation on his patient, one which the doctor had not previously conducted. The patient died and the doctor was sued. The Supreme Judicial Court of Massachusetts in holding for the doctor stated:

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1 201 Kan. 687, 442 P.2d 1013 (1968).

2 See, Lockhart v. Maclean, 77 Nev. 210, 361 P.2d 670 (1961); DiFilippo v. Preston, 53 Del. 539, 173 A.2d 333 (1961); Riggs v. Christie, 342 Mass. 402, 173 N.E.2d 610 (1961); Cavallaro v. Sharp, 84 R.I. 67, 121 A.2d 669 (1956); Fields v. Rutledge, 284 S.W.2d 659 (Ky. App. 1955).

3 *Ibid.* See also, McCoid, The Care Required of Medical Practitioners, 12 Vand. L. Rev. 549 (1959); Ames, Modern Technique and Trial of a Medical Malpractice Suit, 12 Vand. L. Rev. 649 (1959); Note, 60 N.W.U. L. Rev. 834 (1966); Annot., 8 A.L.R.2d 772 (1949); Note, 77 Harv. L. Rev. 333 (1963).

4 128 Mass. 131, 35 Am. Rep. 363 (1880).

> . . . he was bound to possess that skill only which physicians and surgeons of ordinary ability and skill, practicing in similar localities, with opportunities for no larger experience, ordinarily possess; and he was not bound to possess that high degree of art and skill possessed by eminent surgeons practicing in large cities, and making a speciality of the practice of surgery.[5]

The rationale of the *Small* case set forth a general rule designed to shield the country doctor against having his skill measured by the standards of doctors practicing in larger cities. The *Small* case held the doctor to the standards of ordinary skill and ability of physicians practicing in *similar* localities. Later decisions restricting this view, held that the expert witness must have practiced in the *same* locality as the defendant doctor in order for his testimony to be admissible.[6]

Some jurisdictions found this "same locality" rule too harsh or inapplicable, especially in communities where only one practicing physician was to be found. To what standard was he to be held? When faced with such a situation many jurisdictions rejected the "same locality" rule and adopted the "similar or like locality" test.[7] With the passing of time, courts which had originally adopted the "same locality" rule abandoned it because of its harshness, in favor of the "similar or like locality" view.[8]

A few jurisdictions which have retained the "same locality" rule found it practical and reasonable to extend the geographical boundaries of the given locality.[9] In *Geraty v. Kaufman*[10] the Connecticut Court viewed the locality rule in terms of a "medical neighborhood" which was necessarily wide enough, geographically, in that case, to embrace both New London and New Haven.[11] The California Supreme Court in *Sinz v. Owens*[12] extended the geographical limits of the particular locality. They allowed the plaintiff's expert witness, who came from a town within the common trade territory of a larger town which also

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[5] *Id.* at 365. Prof. Prosser points out that the original rationale for this rule was that in early America a country doctor did not have the facilities, contacts, or opportunities for learning and experience afforded by larger cities. Prosser, Law of Torts 166 (3d ed. 1964).

[6] Lockhart v. Maclean, *supra* note 2; Peterson v. Hunt, 197 Wash. 255, 84 P.2d 999 (1938); Mason v. Gedds, 258 Mass. 40, 154 N.E. 519 (1926); Burk v. Foster, 114 Ky. 20, 69 S.W. 1096 (1902); Force v. Gegory, 63 Conn. 167, 27 A. 1116 (1893). Hansen v. Pock, 57 Mont. 51, 187 P. 282 (1920).

[7] Cavallaro v. Sharp, *supra* note 2; Tvedt v. Haugen, 70 N.D. 338, 294 N.W. 183, 132 A.L.R. 379 (1940); Kirchner v. Dorsey & Dorsey, 226 Iowa 283, 284 N.W. 171 (1939).

[8] Lewis v. Johnson, 12 Cal.2d 558, 86 P.2d 99 (1939); Tennant v. Barton, 164 Wash. 279, 2 P.2d 735 (1931).

[9] Viita v. Dolan, 132 Minn. 128, 155 N.W. 1077 (1916); Geraty v. Kaufman, 115 Conn. 563, 162 A. 33 (1932); Sinz v. Owens, 33 Cal.2d 749, 205 P.2d 3, 8 A.L.R.2d 757 (1949).

[10] Gearty v. Kaufman, *supra* note 9.

[11] New London is approximately 45 miles east of New Haven.

[12] Sinz v. Owens, *supra* note 9.

encompassed the defendant's town, to testify as to the standard of reasonable care. The Minnesota Supreme Court in the case of *Viita v. Dolan*[13] suggested a further extension of the "same locality" rule. The Court commented: "If the same general locality is meant, as, for instance, the Northwest, or the state, no fault could be found with such a rule." [14]

Current Status of the "Locality" Rule

Due to the vast changes which have taken place in this country since the *Small* case (1880),[15] such as improved communications, improved medical education, rural population increases, to mention a few, the reasons for using the narrow "same" or "similar" locality rule no longer exist. Due to these advances, medical practices and standards of care are approaching more uniformity throughout the country. The West Virginia Court, in the recent case of *Hundley v. Martinez,*[16] stated that the reasons for the strict application of the locality rule requiring medical expert witnesses to be familiar with the local practices have almost disappeared, but the Court was careful to caution that the rule is not to be abolished in all instances.

There is some evidence that the local doctor may be held to a standard of practice actually greater than that which currently exists within his community, if he has the means of obtaining greater knowledge because of its close geographical proximity to a larger city. The Supreme Judicial Court of Massachusetts in the case of *Brune v. Belinkoff*[17] held that the standard of care of a specialist was *not* to be measured by the skill and ability of the average physician practicing the *specialty,* taking into account the advances in the particular *specialty* and the medical facilities available. In this case the defendant was an anesthesiology specialist practicing in New Bedford, Massachusetts, which is slightly more than 50 miles from Boston, one of the medical centers of the nation.[18] The defendant administered a spinal anesthetic to the plaintiff containing an excessive dosage of pontocaine causing subsequent numb-

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13 Viita v. Dolan, *supra* note 9.

14 Viita v. Dolan, *supra* note 9, at 1081.

15 Small v. Howard, *supra* note 4. Courts have noted changes in conditions of medical training and advances in communications and transportation which have taken place since 1880. See, for example, Gist v. French, 136 Cal. App.2d 247, 288 P.2d 1003, 1017 (Dist. Ct. App. 1955).

16 151 W. Va. 977, 158 S.E.2d 159 (1967).

17 235 N.E.2d 793 (Mass. 1968).

18 According to 1960 Census figures and later estimates derived from the Census Bureau, New Bedford, Mass., has a population of 102,477 while metropolitan Boston has a population of 3,174,000. The Court took judicial notice of the fact that Boston ranks as one of the nation's leading medical centers. According to figures released by the Boston Chamber of Commerce there are 53 major hospitals in the greater Boston area, with personnel totaling over 34,000.

ness and weakness in the plaintiff's left leg. The court, in holding for the plaintiff, specifically overruled *Small v. Howard.*[19] The Massachusetts Court stated: "We are of the opinion that the "locality" rule of *Small v. Howard* which measures a physician's conduct by the standards of other doctors in similar communities is not suited to present-day conditions." [20]

The Court took note of the fact that the defendant practiced only 50 miles from one of the nation's leading medical centers and held that he should be held to the higher standards of care prevailing in Boston. The Massachusetts Court seemed to be striving toward a uniform standard of care in the case of medical *specialties.* If the doctor holds himself out as a specialist in a particular field, it seems that he should be held to the high standards of care which generally prevail nationally in that *specialty.*

Other jurisdictions have abandoned the "locality" rule in cases involving the medical malpractice of specialists. The Supreme Court of New Jersey in *Carbone v. Warburton*[21] held the specialist to the special degree of skill which is normally possessed by the average specialist in that field. The Court allowed a New York doctor to testify as to the standards of care necessary for the treatment of a broken leg. The Court said that: "the testimony may be supplied by physicians qualified by their own knowledge and experience in the same profession." [22] The expert witness need not be from the same locality. In this case the Court specifically stated that the "locality" rule is not followed in the state of New Jersey.[23]

The "locality" rule was recently struck down in the state of Washington in *Pederson v. Dumouchel.*[24] This was an action brought by a patient against the physician, dentist, and hospital to recover for brain

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[19] Small v. Howard, *supra* note 4.

[20] Brune v. Belinkoff, *supra* note 17, at 798. In medical malpractice cases there is a present tendency to abandon the strict application of the locality rule. Courts instruct the jury to treat the size and character of the community as one factor to be taken into account in applying the general professional standard of care. See, McGulpin v. Bessmer, 241 Iowa 1119, 43 N.W.2d 121 (1950); Flock v. J.C. Palumbo Fruit Co., 63 Idaho 220, 118 P.2d 707 (1941); Hodgson v. Bigelow, 335 Pa. 497, 7 A.2d 338 (1939); Montgomery v. Stary, 84 So.2d 34 (Fla. 1955), (three Chicago doctors testified as to the standard of care pertinent to a case arising in Orlando, Florida; Curran, Tracy's, The Doctor as a Witness 164-165 (W. B. Saunders Co., 1965).

[21] 11 N.J. 418, 94 A.2d 680 (1953). Courts agree that a specialist may be held to a higher standard of skill and care than a general practitioner. See, for example, Ayers v. Parry, 192 F.2d 181 (3rd Cir. 1951), *cert. denied,* 343 U.S. 980 (1952). See also, Note, 14 Stan. L.R. 884 (1962).

[22] *Id.* at 683.

[23] Carbone v. Warburton, *supra* note 21. The locality rule has been modified by statute in Wisconsin. W.S.A. § 147.14 (b) provides, "A court may permit any person to testify as an expert witness on a medical subject in any action or judicial proceeding where proof is offered satisfactory to the court that such person is qualified as such expert."

[24] 431 P.2d 973 (Wash. 1967).

damage alleged to be a result of the operation. The Supreme Court of Washington stated that the "locality" rule has two practical faults: first, the lack of qualified experts in the locality who are willing to testify; and second, the possibility that a small group of careless physicians could establish a local standard of care that is far below that which the law requires. The Court stated: "Negligence cannot be excused on the ground that others in the same locality practice the same kind of negligence." [25] The Court went on to say:

> The "locality" rule has no present day vitality except that it may be considered as *one* of the elements to determine the degree of care and skill which is to be expected of the average practitioner of the class to which he belongs. . . . In other words, local practice within geographic proximity is one, but not the only factor to be considered. No longer is it proper to limit the definition of the standard of care which a medical doctor or dentist must meet solely to the practice of custom of a particular locality, a similar locality, or geographic area.[26]

The Court stated that this standard of care not only applies to physicians but also to hospitals.[27] The hospitals are similar to physicians in that they are members of national organizations and are subject to accreditation. The Washington Court held the hospital negligent in that it breached one of its own rules in allowing a surgical operation upon a patient under general anesthetic without the presence of a medical doctor in the operating room.[28]

The "Locality" Rule in Hospital Cases

The "locality" rule, as discussed above, had developed from cases involving the medical malpractice of physicians. This same rule has also been applied in cases involving the medical negligence of hospitals.

Courts have generally applied the "locality" rule, as it developed in physician malpractice cases, to cases involving hospitals. Many jurisdictions find the two situations analogous. As such, if the jurisdiction applied the strict, "same locality" rule in physician malpractice cases, it applied the same rule in hospital cases. In the early case of *Birmingham Baptist Hospital v. Branton,*[29] the Alabama Supreme Court, in a suit brought against the hospital by a father for injuries to his wife and newborn child, held that the hospital's duty is that degree of care

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[25] *Id.* at 977.

[26] *Id.* at 978.

[27] *Id.*

[28] Pederson v. Dumouchel, *supra* note 24. The Supreme Court of Washington followed the *Pederson* rule in the recent case of Douglas v. Bussabarger, 438 P.2d 829 (Wash. 1968), by holding that rural or small town doctors are not entitled to have a different standard of care than doctors in larger cities.

[29] 218 Ala. 464, 118 So. 741 (1928).

used by hospitals generally *in that community.* The "same" or "similar locality" rule as applied to physicians in New Hampshire was likewise applied to hospitals in *Carrigan v. Roman Catholic Bishop Sacred Heart Hospital.*[30] The New Hampshire Court said that the standard of care is neither doubtful nor disputed. The defendants "were required to possess the knowledge and to exercise the care and skill of the ordinary hospital or practitioner in the same or similar localities." [31]

The New Hampshire Court saw no distinction between the hospital and physician in the application of the "locality" rule.

The Supreme Court of Washington in *Teig v. St. John's Hospital,*[32] allowed testimony by a Portland, Oregon doctor in a malpractice action arising in Longview, Washington. Portland is 50 miles from Longview. Applying the "same" or "similar locality" rule to hospitals, the court allowed the testimony because the doctor answered to a direct question that he was familiar with the standard of practice of medicine and surgery in the general locality of Longview. In a later case, Washington disregarded the "locality" rule in cases involving the malpractice of physicians,[33] and then also disregarded it in cases where hospitals are involved.[34]

The current status of the "locality" rule as applied in hospital cases is very similar to the status of the same rule as applied in physician cases. Courts which have been reluctant to modify the "strict locality" rule in physician malpractice cases have consistently applied the same strict rule in hospital cases.[35] There does, however, seem to be a trend beginning wherein the hospital is likened to a physician practicing a specialty. As such, the standard of care required of a hospital, like the specialist, is relatively consistent over a wide geographical area.[36] This uniformity in the standard of care suggests that a non-resident, expert witness would be competent to testify as to local hospital standards notwithstanding the fact that he had never practiced in the local area.

This general line of reasoning was used by the Supreme Court of Appeals of West Virginia in the recent case of *Duling v. Bluefield*

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[30] 104 N.H. 73, 178 A.2d 502 (1962).

[31] *Id.* at 503.

[32] 63 Wash.2d 369, 387 P.2d 527 (1963).

[33] Pederson v. Dumouchel, *supra* note 24.

[34] *Ibid.*

[35] Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960); Garfield Memorial Hospital v. Marshall, 92 U.S. App. D.C. 234, 204 F.2d 721, 37 A.L.R.2d 1270 (1952); Simmons v. South Shore Hospital, 340 Ill. App. 153, 91 N.E.2d 135 (1950); Goff v. Doctor's General Hospital of San Jose, 166 Cal. App.2d 314, 333 P.2d 29 (1958).

[36] Carson v. City of Beloit, 32 Wis.2d 282, 145 N.W.2d 112 (1966). The court stated that the public had a right to expect high professional standards.

Sanitorium, Inc.[37] This was an action against a private hospital based upon the negligence of its nurses in failing to properly care for their patient, a young girl suffering from rheumatic fever. As a result of the nurses' negligence in failing to telephone the attending physician, the young girl suffered heart failure and died. The West Virginia Court permitted a doctor from New York to testify as to general hospital practices. The Court stated:

> In an action against a private hospital based upon negligence of nurses employed by the Hospital in failing properly to attend and care for a patient . . . it is proper to admit testimony of physicians, or of other qualified persons, concerning the usual standards employed by nurses in caring for patients in hospitals. Such standards need not relate merely to the general area in which the hospital is situated and it is not necessary that such witnesses reside in the general area in which the hospital is situated or that they be acquainted with such standards in that area.[38]

The West Virginia Court distinguished between this action against a hospital and an action against a physician for malpractice. The court apparently would apply the "locality" rule in a case involving a physician but not in a case involving a hospital. The Court stated that the trial court erred in excluding in its entirety the testimony of the expert witness from consideration by the jury merely on the ground that he was not acquainted with the proper and usual standards of accredited hospitals in the local community. The court emphasized that this case did not involve a medical malpractice action, but rather an action in negligence.[39]

There is some confusion as to what constitutes malpractice as opposed to negligence in cases involving hospitals. Some courts hold that if the hospital activity involved a nurse it is negligence and if it involved a physician it is malpractice.[40]

The distinction made between a medical malpractice action and a negligence action against a hospital in the *Duling* case is interesting in that it points out that hospitals are subject to a more uniform standard of care than are general practitioner physicians. This is especially true today where most reputable hospitals in the United States have been accredited by the Joint Commission on Accreditation of Hospitals.[41]

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[37] 149 W. Va. 567, 142 S.E.2d 754 (1965).

[38] *Id.* at 756-757.

[39] *Id.* at 765.

[40] See, G. G. Kinkela and R. V. Kinkela, Hospital Nurses and Tort Liability, 18 Clev.-Mar. L. Rev. 53 (1969); Appleman, Hospital Liability for Act of Non-salaried Staff Physician, Personal Injury Annual 189 (1964).

[41] The Joint Commission was organized in 1953 by the American Hospital Association, the American Medical Association, the American College of Surgeons, the American College of Physicians and the Canadian Medical Association. See, Report of Joint Commission on Accreditation of Hospitals, 167 J.A.M.A. 1940 (1958).

By adopting the Joint Commission's model by-laws and regulations an accredited hospital in one portion of the United States assumes a similar standard of care and conduct as do other accredited hospitals in other portions of the country. If the hospital community now recognizes, and operates under, a national standard of care, why shouldn't the courts recognize it as well? Under such a new rule, a non-resident, expert witness who is familiar with the standard of care used by hospitals generally would be competent to testify as to the local standard of care notwithstanding the fact that he had never practiced in that community.

It is interesting to note that the English courts follow this "national" rule in determining the standard of care required.[42] In England the same standard of care is applicable throughout the country. Lord Nathan in his treatise on Medical Negligence states that the "locality" rule has never been suggested in England.[43]

Several recent cases involving hospitals suggest that the "locality" rule is no longer applicable in this country. In *Darling II v. Charleston Community Memorial Hospital,*[44] an action was brought against the hospital whose alleged negligence caused the amputation of the plaintiff's leg. The Supreme Court of Illinois held that it was not error to refuse to instruct the jury that the customary standards of the community establish the duty of the hospital.[45] The court also found that evidence of state hospital regulations and national hospital accreditation standards was relevant to aid the jury in deciding what the hospital knew or should have known concerning hospital responsibilities for the care of their patients.[46] The hospital was charged with the duty to comply with every recommendation of the Joint Commission on Accreditation and the rules and regulations of the Department of Public Health of Illinois.[47] In disposing of the "locality" rule, the Appellate Court of Illinois, Fourth District, stated:

> . . . we believe that conformity with the standard of care observed by other hospitals in good standing in the same community cannot necessarily in itself be availed of as a defense in a negligence action where the criterion relied upon is shown to constitute negligence, in that it fails to guard against injuries to the patient in the failure to meet standards of care self-imposed or established. . . . The duty of a hospital may not be fulfilled merely by utilizing the means at hand in the particular city where the hospital is located.[48]

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[42] See, Fleming, Developments in the English Law of Medical Liability, 12 Vand. L.R. 633 (1959).

[43] Nathan, Medical Negligence 21 (Butterworth & Co., Ltd. 1957).

[44] 50 Ill. App.2d 253, 200 N.E.2d 149 (1964); *affd.*, 33 Ill.2d 326, 211 N.E.2d 253, 14 A.L.R.3d 860 (1965); *cert. denied,* 383 U.S. 946, 86 S. Ct. 1204, 16 L.Ed.2d 209 (1965).

[45] 33 Ill.2d 326, 211 N.E.2d 253, 14 A.L.R.3d 860 (1965).

[46] *Ibid.*

[47] *Id.*

[48] Darling II v. Charleston Community Memorial Hospital, *supra* note 44, at 200 N.E.2d 179.

The *Darling II* case held that the defendant hospital was to be judged by a standard of care created by the national accreditation rules and the rules and regulations of the state's department of public health.[49] Such a holding, obviously lends support to the proposition that a non-resident, expert witness would be competent to testify in a negligence case involving a hospital.

This same question was dealt with in the case of *Avey v. St. Francis Hospital & School of Nursing, Inc.*[50] The trial court refused to admit into evidence the testimony of the plaintiff's expert witness because he had never practiced medicine in the City of Wichita, Kansas, the location of the defendant hospital. The expert witness was licensed to practice medicine in Kansas and was otherwise qualified. The Supreme Court of Kansas reversed the trial court and held that such a non-resident, expert witness is competent to testify if he is familiar with the hospital standards in other, similar communities. The court noted that the standard of care required of hospitals has become more uniform in recent years and in their judgment the need for emphasis on locality no longer exists.[51] The standardization of hospital and nursing procedures, brought about by the Kansas statutes, and the standards of the joint commission on hospital accreditation, serve to de-emphasize the strict application of geographic locality.[52]

In the *Kapuschinsky v. United States,*[53] the Federal District Court of South Carolina followed the modern trend in favoring a "national" standard of care in cases involving hospitals. This action was brought against the United States under the Federal Tort Claims Act. The plaintiffs alleged that due to the negligence of the U.S. Naval Hospital, their new born baby was allowed to come in contact with pathogenic organism or "hospital staph." As a result, the baby suffered a permanent dislocation of the right hip and deterioration of the left hip. The court rejected the "locality" rule and allowed a non-resident expert to testify as to the desirability of certain hospital safeguards.[54] In disposing of the "locality" rule, the court cited the *Duling* case,[55] and noted, "it seems that in a negligence, as opposed to a malpractice, action against a hospital, national standards are relevant."[56]

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[49] *Ibid., supra* note 45.

[50] Avey v. St. Francis Hospital & School of Nursing, Inc., *supra* note 1.

[51] *Ibid.*

[52] *Id.*

[53] 248 F. Supp. 732 (D.C. S.C. 1966).

[54] *Ibid.*

[55] Duling v. Bluefield Sanitarium, Inc., *supra* note 37.

[56] Kapuschinsky v. United States, *supra* note 53, at 744. See also, United States v. Cannon, 217 F.2d 70 (9th Cir. 1954) court applied "similar" locality rule.

Conclusion

In the light of modern advances within the medical profession, the "locality" rule no longer seems applicable as a means of establishing the standard of care against which hospitals are to be measured. The nation-wide uniformity of hospital standards brought about by the Joint Commission on Hospital Accreditation, supports the proposition that the out-of-date "locality" rule should be replaced by a "national" rule in determining the hospital's standard of care. With the adoption of a "national" standard of care a non-resident expert witness would be deemed competent to testify as to hospital standards notwithstanding the fact that he never practiced in the particular community.