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Evidence - Workmen's Compensation - Statement of Cause of an Accident to Physicians Admissible as Proof of Cause of Injury

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EVIDENCE—WORKMEN'S COMPENSATION—STATEMENTS OF CAUSE OF AN ACCIDENT TO PHYSICIANS ADMISSIBLE AS PROOF OF CAUSE OF INJURY—The Supreme Court of Pennsylvania has held that when, in a workmen's compensation proceeding, the board is dealing with an unwitnessed occurrence and the party involved has died, statements by the decedent to his doctor to enable the physician to make a proper diagnosis and treatment of decedent's injury and which relate the cause of the injury are admissible as long as there are no circumstances casting suspicion on the genuineness of the utterances.

Cody v. S.K.F. Industries, 447 Pa. 558, 291 A.2d 772 (1972).

Appellee's decedent had been employed by appellant for ten years as a chauffeur enjoying general good health and a good work record during that period. He returned home from work early one day, after complaining of feeling sick. When he arrived, appellee's decedent complained to his wife, the appellee, of head pains claiming that he had been struck in the head by an overhead garage door after exiting from one of appellant-employer's automobiles.[1]

Appellee's husband reported to work the next two days, but his head pains continued to worsen until he was confined to his bed on the evening of the second day. Three days after the accident the family physician was called and decedent described to him how he had been injured at work. Five days after the accident decedent was transferred to a hospital and was found to be suffering from high temperature, head pains, and delirium. He underwent surgery to alleviate an infection in his brain tissue. He died ten days later.[2]

Appellee instituted a fatal claim petition with the Workmen's Compensation Board[3] as provided by statute.[4] The appellant-employer contested the award of compensation by the Workmen's Referee[5] who

1. Cody v. S.K.F. Indus., 447 Pa. 558, 291 A.2d 772 (1972).
2. *Id.* at 561, 291 A.2d at 775.
3. S.K.F. Indus. v. Cody, 2 Pa. Cmwlth. 19, 276 A.2d 356 (1971), *aff'd*, Cody v. S.K.F. Indus., 447 Pa. 558, 291 A.2d 711 (1972).
4. PA. STAT. ANN. tit. 77, § 771 (Supp. 1973) provides:
All proceedings before the board or any referee and all appeals to the board, shall be instituted by petition addressed to the board. All petitions shall be in writing and in the form prescribed by the board.
5. Pennsylvania statutes provide for appeal from a referee's award where the parties fail to agree as evidenced in S.K.F. Indus. v. Cody, 2 Pa. Cmwlth. 19, 20, 276 A.2d 356 (1971). There, appeal was brought pursuant to PA. STAT. ANN. tit. 77, § 853 (Supp. 1973) which provides:
Any party in interest may, within twenty days after notice of a referee's award of disallowance of compensation shall have been served upon him, take an appeal to the board on the ground . . . (2) that the findings of fact and award . . . of compensation was unwarranted by sufficient competent evidence . . . .

found that decedent had been injured in the course of his employment with appellant. That finding was subsequently affirmed by the Workmen's Compensation Board,[6] the court of common pleas,[7] and the commonwealth court.[8] The supreme court granted allocatur and affirmed the judgment of the lower courts.[9]

The family physician testified at the hearing before the referee that decedent had told him, three days after the accident, that he had been struck over the head by a garage door at work.[10] Appellant's counsel argued on appeal that this evidence was incompetent as hearsay and that it was error for it to be admitted.[11]

On final appeal the supreme court ruled that the declarations of the deceased to his physician were inadmissible as a violation of the rule against hearsay and neither did they qualify under the *res gestae* exception to that rule.[12] However, by applying the "physician's exception" to the hearsay rule to testimony relating declarations of a patient to his physician on the cause of his injury, the Pennsylvania Supreme Court broadened that breach in the general prohibition against hearsay testimony.[13]

While the hearsay rule originally developed in England,[14] the "phy-

6. 2 Pa. Cmwlth. at 20, 276 A.2d at 356. The commonwealth court noted in the history of the case the affirmation of the referee's award by the Workmen's Compensation Board.

7. *Id.* at 20, 276 A.2d at 356. "Court of Common Pleas, of Philadelphia, May Term, 1970, No. 3774, in case of Carl Cody, Jr., deceased, Clara Cody, claimant v. S.K.F. Industries, Inc., and Liberty Mutual Insurance Co." *Id.*

8. *Id.* at 27, 276 A.2d at 360.

9. 447 Pa. at 571, 291 A.2d at 778.

10. *Id.* at 563-65, 291 A.2d at 774-75.

11. *Id.* at 563, 291 A.2d at 774.

12. *Id.* at 563, 291 A.2d at 774. The Pennsylvania Supreme Court relying on its past decisions in Hass v. Kasnot, 371 Pa. 580, 92 A.2d 171 (1952), and Allen v. Mack, 345 Pa. 407, 28 A.2d 783 (1942), explained that in Pennsylvania "res gestae" is a spontaneous declaration by one whose mind has suddenly been subjected to an over-powering emotion caused by an unexpected occurrence, which springs out of one transaction so as to be part of that transaction. For a general discussion of the "res gestae" rule see McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE §§ 288-89, 291-97 (E. Cleary, 2d ed. 1972) [hereinafter cited at McCORMICK].

13. 447 Pa. at 566, 291 A.2d at 776.

14. The hearsay rule developed in England in the sixteenth century. Before that time the concept of courtroom witnesses was not known since the jury gained its information outside the courtroom. By the sixteenth century juries for the first time began to depend on witnesses for the facts upon which they based their verdicts. In order to weigh the testimony, distinctions were made between what a witness knew from personal knowledge and what others told him had occurred. There was no general exclusion of this hearsay testimony, however, until the middle of the seventeenth century. By the end of that century the rules changed and hearsay was generally excluded. By the middle of the eighteenth century, the exclusionary principle was firmly established, with the primary concern being its exceptions, the majority of which were recognized in that period with a few, including the "physician's exception," being developed in the nineteenth century. *See* 5 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1722 (3rd ed. 1940) [hereinafter cited as WIGMORE].

sician's exception" to that rule first appeared in Pennsylvania in the case of *Lichtenwaller v. Lanback*.[15] In that case it was held that statements by a patient to his doctor as to his physical sensations and feelings, given in order to receive medical advice, were competent.[16] Admission of this testimony was justified by necessity since physical sensations and ailments could only be known by the patient and served as the basis for the opinion of the medical expert as to the injuries suffered by the decedent.[17] The court was adopting a rule already established in the Massachusetts case of *Barber v. Merian*.[18] The court there pointed out that it would be unreasonable to admit the opinion of the medical expert concerning plaintiff's injuries but exclude the grounds upon which it was based.[19] The court in *Barber* also spoke to the argument of possible deception and fraud by stressing that such statements are competent only when made to a physician who has the expertise to ascertain whether his patient's statements correspond with his condition.[20] The *Barber* court further noted that the strong personal concern of the patient for his health would mitigate any tendency to alter his descriptions of his present sensations and ailments.[21] Therefore, it was established early that the test for the competency of such statements was based on the twofold criteria of necessity and trustworthiness.

Pennsylvania limited the permissible scope of such statements to the conditions, symptoms, sensations, and feelings of the patient, and prohibited testimony as to the cause of the injury when that cause was the subject matter of the inquiry.[22] The court reasoned that statements of cause did not meet the necessity test since they did not relate to the internal state of the patient and therefore other extrinsic evidence would be available.[23] Any narration of past occurrences was excluded,

15. 105 Pa. 366 (1884).
16. *Id.* at 370.
17. *Id.*
18. 11 Allen 322 (Mass. 1865). *Cf.* Bacon v. Charlton, 7 Cush 581 (Mass. 1851).
19. 11 Allen at 324.
20. *Id.*
21. *Id.* at 325.
22. In *Cody*, the court noted the history of the "physician's exception" in Pennsylvania and cited Gosser v. Ohio Valley Water Co., 244 Pa. 59, 90 A. 540 (1914), and the other subsequent line of cases as the basis of the scope of the "physician's exception" at the time the *Cody* controversy reached the court.
23. Gosser v. Ohio Valley Water Co., 244 Pa. 59, 62, 90 A. 540, 541 (1914). In *Gosser* the court in discussing the necessity criterion quoted the following:

> Statements of the external circumstances causing the injury namely, the events leading up to it, the immediate occasion of it . . . or the nature of the injury . . . do not satisfy the necessity principle because they do not relate to an internal state, and thus other evidence is presumably available. . . .

but statements as to symptoms which indicated the cause of the injury were admitted.[24] The "physician's exception" was broadened slightly in *Boyle v. Philadelphia Rapid Transit Co.*,[25] wherein the statement of plaintiff that she received a blow was admitted when corroborated by physical bruises which constituted the basis of the physician's diagnosis.[26] The rule was later expanded to permit physicians to express an opinion that decedent's death was the result of complications from a blow to the chest, based upon the medical history of the decedent obtained in the course of clinical observations.[27] In *Cody* the court summarized these developments, finding that "statements to a doctor were admissible insofar as they were necessary and proper for diagnosis and treatment of the injury and referred to symptoms, feelings, and conditions."[28]

The court, however, ignored the case of *Ferne v. Chadderton*.[29] In *Ferne,* decedent's wife brought a wrongful death action for the death of her husband ten months after a truck collision. The court held that it was not reversible error to permit decedent's wife to testify that her husband told her he had an accident when opposing counsel failed to object.[30] The court also permitted a physician to testify to the history given him by decedent, that he was driving his truck when he sustained an injury to his chest.[31] The court in *Cody*, therefore, was not completely correct when it stated that the law prior to that case was that admissions which ". . . related to the cause of the injury were not admissible unless they were part of the *res gestae*."[32] The court, nevertheless, did explicitly carve out an exception in *Cody*.[33]

The exception was limited to workmen's compensation cases, where the occurrence is unwitnessed and the party has died.[34] The court justified this ruling on the grounds that there was a circumstantial

24. Eby v. Travelers Ins. Co., 258 Pa. 525, 102 A. 209 (1917). Bristles stuck in decedent's throat were admissible as a symptom but not as the cause of death or injury. *Accord,* Riley v. Carnegie Steel Co., 276 Pa. 82, 119 A. 832 (1923).
25. 286 Pa. 536, 134 A.2d 446 (1926).
26. *Id.* at 544, 134 A.2d at 448.
27. Foulkrod v. Standard Accident Ins. Co., 343 Pa. 505, 23 A.2d 430 (1942).
28. 447 Pa. at 566, 291 A.2d at 776.
29. 375 Pa. 302, 100 A.2d 854 (1953).
30. *Id.* at 304-05, 100 A.2d at 856.
31. *Id.*
32. 447 Pa. at 566, 291 A.2d at 776.
33. *Id.*
34. *Id.* One should note that workmen's compensation cases are heard under less restrictive evidentiary rules, as provided by PA. STAT. ANN. tit. 77, § 834 (Supp. 1973):
> Neither the board nor any of its members nor any referee shall be bound by the technical rules of evidence in conducting any hearing or investigation but all findings of fact shall be based only upon sufficient, competent evidence to justify the same.

guarantee of trustworthiness and necessity,[35] thereby explicitly rejecting Wigmore's contention that there is evidence available from other sources and that the statements are trustworthy.[36] The court based its reasoning on the arguments made by McCormick[37] that the patient will be aware that accurate statements to his physician are imperative for effective treatment of his injury. The court was careful, however, to limit the exception to cases where there are no circumstances that would cast suspicion on the genuineness of the patient's statements.[38] Similarly, the court met the necessity requirement by only permitting such evidence when it involves an unwitnessed occurrence.[39] The new rule was explicitly adopted on the precedent of the New Jersey case of *Greenfarb v. Arre*.[40]

In that jurisdiction, prior to *Greenfarb*, the rule had been that admissions or utterances by the patient to his physician, made to secure treatment, were admissible unless treatment had been previously discontinued, the statements were for the specific purpose of subsequent use in court, or were the portion of the patient's history dealing with the cause of the injury or the location of its occurrence.[41] That position was modified in *Bober v. Independent Plating Corp.*,[42] where the court admitted facts relating to decedent's work environment and its effect on his allergy condition reasoning that these external factors are necessary in the treatment of an allergy patient.[43] In *Greenfarb* the

35. 447 Pa. at 567, 291 A.2d at 776.

36. *Id.* at 568 n.3, 291 A.2d at 777 n.3. For Wigmore's approach *see* WIGMORE, *supra* note 15, § 1722.

37. MCCORMICK, *supra* note 12, § 292 states:

> In some cases the special assurance of reliability—the patient's belief that accuracy is essential to effective treatment—also applies to statemen's concerning the cause, and a physician who views this as related to diagnosis and treatment might reasonably be expected to communicate this to the patient and perhaps to take other steps to assure a reliable response.

Id.

38. 447 Pa. at 567, 291 A.2d at 776.

39. *Id.* at 568, 291 A.2d at 777.

40. 62 N.J. Super. 420, 163 A.2d 173 (Super. Ct. 1960), *certif. denied*, 33 N.J. 454, 165 A.2d 233 (1960).

41. The *Greenfarb* court noted the following cases as the authority for its prior rule on testimony as to cause related to a physician: Helminsky v. Ford Motor Co., 111 N.J.L. 369, 168 A. 420 (Ct. Err. & App. 1933); State v. Gruick, 96 N.J.L. 268, 114 A. 547 (Ct. Err. & App. 1921). In *Gruick* the court held, in a criminal abortion case, that the testimony of decedent-victim to an attending physician as to the cause of her condition was inadmissible as hearsay. *Id.* at 205, 114 A. at 548. Also, in *Helminsky* the court held that the testimony of the employee's physician that the employee told him that he had received his injury at the employer's plant was inadmissible, in a workmen's compensation case, to establish such an accident or to support an award of compensation. 111 N.J.L. at 371, 168 A. at 421.

42. 28 N.J. 160, 145 A.2d 463 (1958).

43. *Id.* at 171-72, 145 A.2d at 469-70.

court extended the *Bober* decision to include patients suffering from other types of illnesses, finding no rational distinctions in the external causes of illness between allergy patients and heart patients.[44] The court said that the central consideration was the trustworthiness of what the patient told his physician and consideration of circumstances such as the hiatus between the accident and the time the statements were made, the condition of the patient at the time and whether the purpose of the inquiry was to assist diagnosis and treatment.[45] The court noted the concurrence of McCormick and that of other states in its holding[46] and reasoned, "For the patient to state untruly to his doctor the cause of his physical debility would be directly against his most vital interest in saving his health and life."[47]

Although the extension of the "physician's exception" to declarations of cause has not been made by the majority of American courts,[48] it appears to be gaining wider acceptance.[49] There seems to be a marked readiness to make this broadening of the rule in the area of workmen's compensation.[50] Ohio, in an early decision by its court of appeals, held in the case of *Baker v. Industrial Commission*,[51] that the workmen's compensation law in that state modified the general rules of evidence excluding hearsay testimony, and noted that the failure to admit statements as to cause would result in a failure of justice.[52] In other jurisdictions, however, the exception has been carried beyond the narrow factual situation involving an unobserved injury to a worker.

The logical extreme of the rationale behind the "physician's exception" was previously reached by the Georgia courts.[53] The theory was

44. 62 N.J. Super. at 426-27, 163 A.2d at 177.
45. *Id.* at 434, 163 A.2d at 181.
46. *See, e.g.*, Latham v. Hartford Accident & Indem. Co., 60 Ga. App. 523, 3 S.E.2d 916 (1939); Hillman v. Utah Power & Light Co., 56 Idaho 67, 51 P.2d 703 (1935); Baker v. Indus. Comm'n, 44 Ohio App. 539, 186 N.E. 10 (1933); Hammond v. Indus. Comm'n, 84 Utah 67, 34 P.2d 687 (1935); C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 266 (1954).
47. 62 N.J. Super. at 436, 163 A.2d at 182.
48. The *Greenfarb* court cited McCormick for the proposition that the majority of American courts have thus far declined to permit such declarations as to cause when made to a non-party, even a physician. 62 N.J. Super. at 436, 163 A.2d at 182. *See* C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 266 (1954).
49. McCORMICK, *supra* note 12, § 292 states:
> The greater number of courts probably still adhere to a position requiring the exclusion of any statement related to cause, although the better view would seem to be that statements as to the inception or general nature of the injury should be admissible insofar as they were reasonably pertinent to diagnosis or treatment.

50. *See, e.g.*, Reynolds Metal Co. v. Indus. Comm'n, 98 Ariz. 97, 402 P.2d 414 (1965); Shell Oil Co. v. Indus. Comm'n, 2 Ill. 2d 590, 119 N.E.2d 224 (1954).
51. 44 Ohio App. 539, 183 N.E. 10 (1933).
52. *Id.* at 548, 183 N.E. at 14.
53. This line of reasoning (which culminated in the decision of Moore v. Atlanta

first advanced in a life insurance case to permit declarations of a decedent to his physician concerning the occurrence of an accident while on a business trip.[54] The courts then extended the exception to statements made to a decedent's wife, corroborated by statements to his physician concerning where and how an unwitnessed injury occurred in a workmen's compensation case.[55] The exception was then extended to what decedent had told his wife and son-in-law with no corroborating statements to a physician.[56] Later, statements of decedent made only to his wife, as to the cause of his injury, were held admissible.[57] Statements of a wife and one of her friends were even admitted where decedent made conflicting statements to his physician.[58] In *Moore v. Atlanta Transit System*,[59] the court admitted written statements, on the cause of plaintiff's injury, contained in a letter from defendant's physician (who had examined plaintiff's decedent, at defendant's request, a year and a half after the accident and six months before the action was filed). Although the Georgia Court of Appeals recognized that there is nothing less trustworthy than what a sick plaintiff relates concerning his own case when he is seeking damages, the court held it was up to the jury to determine the weight and credibility of those statements.[60] While the court in that case admitted that the Georgia decisions had reached what Professor McCormick calls the "borderland of hearsay,"[61] other jurisdictions have also broadened the rule.

New Jersey extended its holding in *Greenfarb* to a personal injury action against a common carrier where the plaintiff was suffering from

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Transit System, 105 Ga. App. 70, 123 S.E.2d 693 (1961), which was overruled by the Georgia Supreme Court in 1970) had been cited by the *Greenfarb* case as supportive of its decision. The latter New Jersey case was instrumental in the *Cody* decision.

54. Mutual Life Ins. Co. v. Davis, 488 Ga. App. 742, 173 S.E. 471 (1934).

55. Lathem v. Hartford Accident & Indem. Co., 60 Ga. App. 523, 3 S.E.2d 916 (1939).

56. City of Atlanta v. Crouch, 91 Ga. App. 38, 84 S.E.2d 475 (1954).

57. Flemming v. St. Paul-Mercury Indem. Co., 91 Ga. App. 582, 86 S.E.2d 637 (1955).

58. Smith v. U.S. F. & G. Co., 94 Ga. App. 509, 95 S.E.2d 35 (1956).

59. 105 Ga. App. 70, 123 S.E.2d 693 (1961), *rehearing denied*, 105 Ga. App. 84, 123 S.E.2d 702 (1961). This case was later overruled by Chrysler Motors Corp. v. Davis, 226 Ga. 221, 173 S.E.2d 691 (1970), where the court stated:

> We think such a ruling [in *Moore*] is not in accord with the law enunciated by this court and many others, as well as the best authorities on evidence. The error in the decision is in the conception that a mere showing of necessity is the only thing necessary to show the admissibility of the declaration. That fact, alone, is not enough to render the declaration admissible. The principle ingredient in this kind of evidence, required for its admissibility, is trustworthiness, and when the Court of Appeals took this requirement out, it took the heart out of the principle underlying the admissibility of such evidence.

Id. at 225-26, 173 S.E.2d at 694.

60. 105 Ga. App. at 83, 123 S.E.2d at 701.

61. *Id.* at 78, 123 S.E.2d at 698. *See* McCormick, *The Borderland of Hearsay*, 39 YALE L.J. 489 (1930).

amnesia.[62] Subsequently, the New Jersey courts choose to refuse to extend those holdings to include cases of auto accidents[63] or criminal prosecutions.[64]

There is support for this liberalization of the hearsay rule among the authorities on evidence. The Uniform Rules of Evidence recommends such a rule.[65] McCormick applauded that recommendation arguing that the reform could hardly be contended to have gone too far, especially in accident insurance or workmen's compensation cases where the victim was alone at the time of the accident.[66]

Pennsylvania did not take a drastic leap forward in *Cody*. The court was careful to limit admissibility of statements as to cause to cases where the injury is unwitnessed, the victim deceased and there is no evidence to indicate possible untrustworthiness. The distinction the court seemed to imply between admitting the patient's medical history and his specific statements as to cause is not a vivid one. The basis for the change was the contention that it is against human nature for an injured party to slant his narration of events causing an injury when he is seeking medical treatment. The validity of this contention would seem to depend on severity of the illness and the type of accident. In accidents where the patient is "claim conscious" such as automobile collisions, the tendency (unless the patient is severely injured) would seem to be to slant his declarations in his own favor. In contrast, in workmen's compensation where there is not necessarily another individual involved (and "claim consciousness" may be less) the tendency to color the facts surrounding the incident will probably be less pronounced. The Pennsylvania courts will be under increasing pressure from plaintiff's attorneys to extend the limits of the physician's exception until Georgia's former position is reached, where a statement of the injured party on causation involving almost any type of injury to almost anyone at anytime is admissible. Query whether that type of expansion of an exception to the hearsay rule really would aid the truthfinding goals of the adversary system.

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62. *See* Barrie v. Central R.R., 71 N.J. Super. 392, 177 A.2d 568 (Super. Ct. 1962).
63. *See* Pinter v. Parsekian, 92 N.J. Super. 392, 223 A.2d 635 (Super. Ct. 1966).
64. *See* State v. Taylor, 46 N.J. 316, 217 A.2d 1 (1966).
65. UNIFORM RULES OF EVIDENCE 63(4)(c) states:
If the declarant is unavailable as a witness, a statement narrating, describing, or explaining an event or condition which the judge finds was made by declarant at a time when the matter had been recently perceived by him and while his recollection was made clear, and was made in good faith prior to the commencement of the action . . . is admissible.
66. *See* McCormick, *Hearsay*, 10 RUTG. L. REV. 620 (1956).