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EVIDENCE - JUDICIAL NOTICE OF MEDICAL FACTS - JUDGE'S RIGHT OF PRIVATE INVESTIGATION

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EVIDENCE — JUDICIAL NOTICE OF MEDICAL FACTS — JUDGE'S RIGHT OF PRIVATE INVESTIGATION — A recent case, *Anderson v. Jersey Creamery Co.*,[1] invokes a discussion of the problems of judicial knowledge particularly as it is pertinent to cases involving medical science. This was an action under the Survival Act for electrocution of defendant's employee, who, while working in a wet truck, came in contact with a charged conduit. To maintain the action it was necessary to show that the death was not instantaneous. The father of the deceased testified that he saw his son's face twitch and fingers move while resuscitation was being attempted with a pulmotor. The plaintiff produced no medical testimony to show that the acts testified to were evidences of life. Verdict for the plaintiff. The trial judge granted a motion *non obstante veredicto*, concluding, after an examination of the law and an extensive "independent investigation" upon the general subject of electrocution, that death was instantaneous. Held, inter alia, that the trial court erred in basing its decision upon the contents of scientific books.[2]

[1] 278 Mich. 396, 270 N. W. 725 (1936).

[2] In support of its decision on the point, the court cites People v. Millard, 53 Mich. 63, 18 N. W. 562 (1884), to the effect that an expert witness cannot read scientific books to the jury but should express his opinion on their contents. There

Two aspects of the problem will be presented. First, the extent to which a court may go in taking judicial notice of facts which involve medical science,[3] and, second, the aid which judges are permitted to obtain from a perusal of scientific works.

I.

In general, the purpose of the doctrine of judicial notice is to prevent unnecessary delays by obviating the formal necessity for proof where the matter does not require proof.[4] Numerous statements of the theoretical limitations of its use have been propounded, the most common being that a court may properly take judicial notice of a fact which is of common everyday knowledge in the community.[5] It is often stated that in addition to this test of notoriety, there is the further limitation that the matter must be indisputable.[6] But this test does not have universal recognition,[7] and, it would seem, the broader test of notoriety would ultimately include within its scope a consideration of disputability.

The courts have been exceedingly liberal in their interpretation of what constitutes common knowledge. When it is considered that courts have taken judicial notice of the height of the tallest man in history;[8] that dynamic radio completely superseded the magnetic, the transition beginning in the fall of 1928;[9] that the passage of the National Industrial Recovery Act was justified;[10] that pneumatic tires are more dam-

was no attempt here by the trial court to read texts to the jury. To the same effect the court cites De Haan v. Winter, 258 Mich. 293, 241 N. W. 923 (1932); City of Detroit v. Porath, 271 Mich. 42, 260 N. W. 114 (1935). In People v. McKernan, 236 Mich. 226, 210 N. W. 219 (1926), also cited, the court in its opinion quoted from medical texts books as did the trial court in the Anderson case.

[3] In 5 WIGMORE, EVIDENCE, 2d ed., § 2566, p. 568 (1923), it is suggested that when, in a situation like that presented in the Anderson case, the court gives effect to a matter capable of being judicially known, it is in truth a question of power and duty of the court in hearing a motion, though the title judicial notice is anomalously applied to it, and the same problems are presented.

[4] Varcoe v. Lee, 180 Cal. 338, 181 P. 223 (1919); 44 YALE L. J. 355 (1934). See THAYER, A PRELIMINARY TREATISE ON EVIDENCE 299 (1898), for a discussion of the maxims upon which judicial notice is founded.

[5] 23 C. J. 59 (1921). In International Harvester Co. v. Industrial Comm., 157 Wis. 167 at 179, 147 N. W. 53 (1914), the court said, "A fact must be pretty well known and pretty obvious besides before it can be taken judicial knowledge of."

[6] 91 CENT. L. J. 353 at 354 (1920); HAMMON, EVIDENCE 420 (1907).

[7] THAYER, A PRELIMINARY TREATISE ON EVIDENCE 308 (1898); Fort Worth & R. G. Ry. v. Fleming, (Tex. Civ. App. 1919) 212 S. W. 233.

[8] Hunter v. New York, O. & W. Ry., 116 N. Y. 615, 23 N. E. 9 (1889).

[9] Queen City Woodworks & Lumber Co. v. Crooks, (D. C. Mo. 1934) 7 F. Supp. 684.

[10] Morrison v. Gentler, 152 Misc. 710, 273 N. Y. S. 952 (1934).

aging to highways than hard rubber tires;[11] and of the characteristics and properties of atmospheric electricity,[12] there is little wonder that they have elicited the remark that the people in the community must have been "happily enlightened."[13]

Although there is some suggestion to the contrary,[14] there is no exception to the rule of common knowledge in taking judicial notice of scientific matters.[15] However, the courts have gone farther in declaring facts to be of common knowledge in medical science than in any other field. It is impossible to make any practical application of the test of common knowledge in this branch of judicial notice.[16] For example, judicial notice has been taken that syphilis may be contracted without sexual commerce,[17] but has been denied to show that gonococcus infection is not communicable except by actual contact.[18] Courts have judicially known that while chronic nephritis may remain dormant for a time, it may suddenly become active and cause death;[19] that inguinal hernia generally results from inherited or acquired weakness;[20] and that incipient tuberculosis is curable.[21] But, although it may hardly be contended that they are any less of common knowledge, courts have refused to judicially know that thickening of the skull would have any connection with an increase of inter-cranial pressure;[22]

[11] Bevard v. Baughman, 167 Md. 55, 173 A. 40 (1934).

[12] Madura v. City of New York, 238 N. Y. 214, 144 N. E. 505 (1924); Buhrkuhl v. F. T. O'Dell Const. Co., (Mo. App. 1936) 95 S. W. (2d) 843; but contra, Netherton v. Lightning Delivery Co., 32 Ariz. 350, 258 P. 306 (1927).

[13] 15 IOWA L. REV. 210 (1930).

[14] People v. Garcia, 1 Cal. App. (2d) 761, 32 P. (2d) 445 (1934); People v. Associated Oil Co., 211 Cal. 93, 294 P. 717 (1930) (in which it is said that courts may take judicial notice of all matters of science). See also, 45 HARV. L. REV. 190 (1931).

[15] 1 JONES, EVIDENCE, 2d ed., § 450 ff. (1926); 15 R. C. L. 1128 (1917) (for rule as to medical science).

[16] This seems to be true generally in matters of judicial notice. Since notoriousness of truth varies so much in different places, and many of the facts of which judicial notice is taken are not likely to arise again, and, since the exercise of judicial notice is a matter of discretion with the court, the use of decided cases as precedents of judicial notice for a particular fact has been considered erroneous by Dean Wigmore [5 WIGMORE, EVIDENCE, 2d ed., § 2580 (1923)] and condemned in 12 TEX. L. REV. 361 (1934). In 44 YALE L. J. 355 (1934), it is stated that this very fact enhances its usefulness.

[17] People ex rel. Langdon v. Waldo, 158 App. Div. 936, 143 N. Y. S. 818 (1913).

[18] In re Johnston, 40 Cal. App. 242, 180 P. 644 (1919).

[19] Sovereign Camp of the Woodmen of the World v. Daniel, (Ariz. 1936) 62 P. (2d) 1144.

[20] Meade v. Wisconsin Motor Mfg. Co., 168 Wis. 250, 169 N. W. 619 (1918); Cavalier v. Chevrolet Motor Co., 189 App. Div. 412, 178 N. Y. S. 489 (1919).

[21] Hirt v. United States, (C. C. A. 10th, 1932) 56 F. (2d) 80.

[22] Halnan v. New England Tel. & Tel. Co., (Mass. 1936) 5 N. E. (2d) 209.

that sarcoma is a form of cancer;[23] or, that congestion of the lung could be caused by a blow from a three hundred and fifty pound beer barrel.[24]

The inadequacy of the common knowledge test to determine when a court should or should not take judicial notice is manifest. The primary purpose of the doctrine of judicial notice is to make presentation of certain evidence unnecessary. It seems expedient, therefore, to determine when a court should take judicial notice, not by whether the matter is deemed to be of common knowledge, but in accordance with the manner in which this purpose may be accomplished.

In the situation in which evidence of medical experts has been presented to establish a fact, there should be little doubt that such is not a proper place for the use of judicial notice. An illustration of such an abuse of the doctrine is found in *Lidwinofsky's Petition.*[25] The court, disregarding a certificate of a physician to the contrary, took judicial notice that varicocele (varicose veins in the region of the scrotum) would not incapacitate a man from doing manual labor. Likewise, a court should not dispense with proof by taking judicial notice of a fact when a party has made an offer to produce evidence to the contrary.[26] A further abuse of the doctrine is evinced when the court takes judicial notice of a fact concerning which there has been a conflict in the testimony of medical experts. An example is found in *Equitable Life Assur. Co. v. Burns.*[27] The plaintiff was afflicted with an inflamed condition of the ear canal, pyorrhea of the gums, and varicose veins of the right leg. Physicians testifying disagreed as to whether he was permanently disabled. The court took judicial notice that these conditions are curable and would not produce permanent disability to earn a living. The jury ought to be allowed to decide such disputed questions of fact arising through conflict in testimony.

In the above situations, the exercise of judicial notice is disapproved because its proper function is not to displace evidence which has in

[23] Smardon v. Metropolitan Life Ins. Co., 243 Mass. 599, 137 N. E. 742 (1923).

[24] Koprivica v. Standard Accident Ins. Co., (Mo. App. 1920) 218 S. W. 689. [In considering the citations in notes 22, 23 and 24, it should be borne in mind that the refusal of one court to take judicial notice of a particular fact is not necessarily authority that a court which did judicially notice such fact was in error, for no court is compelled to take judicial notice of a fact on which it feels any doubt and it can always insist on the fact being proved.]

[25] 7 Pa. Dist. 188 (1890). See also El Paso Electric Co. v. Cannon, (Tex. Civ. App. 1934) 69 S. W. (2d) 532 (judicial notice that limb amputation is painful years afterward, despite testimony of physicians that plaintiff had entirely recovered from his injury).

[26] Texas Company v. Brandt, 79 Okla. 97, 191 P. 166 (1920), noted in 91 CENT. L. J. 353 (1920).

[27] 254 Ky. 487, 71 S. W. (2d) 1009 (1934).

fact been presented. Where, however, its use is for the purpose of supplying some omission of evidence or proof of fact in order to accomplish justice, its exercise is commendable. A common use of judicial notice falling within this category is presented by the situation in which counsel asks the court to take judicial notice of some matter which, though clearly provable, would consume considerable time on the trial. The appellate court's aid is often invoked to provide a necessary fact which has been omitted in the trial court proceeding, in order to save a just decision from reversal for failure of proof.[28] The doctrine is also applied by the appellate court where the trial court has erroneously held a piece of evidence inadmissible.[29] There are certain types of cases within this division of omissions of proof which are particularly apropos to cases involving medical science. It often happens that counsel has neglected to qualify his expert witness before having him testify to a particular fact; the testimony is erroneously allowed and exception taken. The appellate court, by taking judicial notice of the fact concerning which the witness was allowed to testify, can save the error from being prejudicial.[30] There is another group of cases where the testimony of a physician has been omitted entirely. This may have been because counsel mistakenly believed that the matter did not require expert testimony, or in the hopes of saving the expense of such testimony, or through plain neglect. In such a situation the doctrine may again lend its assistance. Hence in *People ex rel. Langdon v. Waldo*[31] the court took judicial notice that syphilis could be contracted by one innocent of sexual commerce in order to prevent the unjust dismissal of a police officer charged with unbecoming conduct, where no evidence concerning the communicability of syphilis had been presented.

A further class of cases for the effective use of judicial notice is presented when there has been some expert medical testimony but no such testimony on a particular point. The cases are likely to arise when counsel has not realized the importance of this particular phase of the medical problem and failed to ask the proper questions. Or, he may have believed that it was adequately presented in the mass of medical testimony. Suits under insurance policies, the death acts, and under workmen's compensation statutes, where certain technicalities concerning disease or injury must be compiled with, are typical of cases

[28] 45 HARV. L. REV. 190 (1931); Hunter v. New York, O. & N. Ry., 116 N. Y. 615, 23 N. E. 9 (1889); Varcoe v. Lee, 180 Cal. 338, 181 P. 223 (1919).

[29] Hilton v. Roylance, 25 Utah 129, 69 P. 660 (1902).

[30] People v. Garcia, 1 Cal. App. (2d) 761, 32 P. (2d) 445 (1934).

[31] 158 App. Div. 936, 143 N. Y. S. 818 (1913). See also Shaw v. Tague, 257 N. Y. 193, 177 N. E. 417 (1931).

within this category. Generally, the result is either that the plaintiff, who really has a good case, is saved from defeat by judicial notice of the omitted fact, or that the jury is prevented from being unduly influenced by evidence which has no medical testimony to support it.[32] *Wells v. Clark & Wilson Lumber Co.*[33] is an example of the former type of case. In that case, though an abundance of medical testimony had been produced to show that abdominal operations would most probably obviate the injuries which the plaintiff had sustained, no testimony had been presented to show the danger of such operations and hence whether the plaintiff should reasonably have submitted to them. The court, however, took judicial notice that large incisions into the walls of the abdomen, as would be required, are operations attended by danger to which the plaintiff could not reasonably be required to submit.

Anderson v. Jersey Creamery Co., the case stated at the beginning of this comment, is of the latter type. There had been medical testimony of the results of the autopsy to the effect that death had been by electrocution and was most likely instantaneous. The plaintiff had produced no medical testimony to show that the twitching face and moving fingers, as testified to by deceased's father, were evidences of life. The jury's verdict was that death had not been instantaneous. The trial judge, believing the jury had been unduly influenced by this lay testimony, in granting motion for judgment notwithstanding the verdict, judicially knew that death, in legal contemplation, had been instantaneous. It would seem that this was a proper use for judicial notice provided that, on investigation by the court, that which was judicially known was ascertained to be a fact. The test of the Michigan courts[34] in determining instantaneous death in these cases is whether the active cause of death continued to operate directly upon the injured person until life was extinct. Hence the inquiry is whether deceased was dead by the time he was removed from the conduit. The conduit was charged with an industrial current of one hundred and ten volts.

[32] Innumerable cases have recently arisen in the federal courts involving war risk insurance policies where the policy holder has died of tuberculosis. In the cases where the insured has failed to pay premiums, it is necessary for the plaintiff to prove that at the time of discharge from service the insured was totally and permanently disabled. Abundant testimony can be found to show that at that time the deceased was suffering with tuberculosis; but it is practically impossible to adequately prove that at that time he was totally and permanently disabled. The courts, recognizing this, have taken judicial notice that tuberculosis in its incipient stages is curable and have directed a verdict rather than to allow the jury to exercise its natural predilection in favor of the policy holder. A compilation of the cases involving this point may be found in the case of Parrigan v. United States, (D. C. Ky. 1933) 6 F. Supp. 333.

[33] 114 Ore. 290, 235 P. 283 (1925).

[34] See Ely v. Detroit United Ry., 162 Mich. 287, 127 N. W. 259 (1910).

The authorities cited by the trial judge[35] agree that it may be possible for an electric current of enormous intensity and electromotive force to produce instantaneous death either because of fibrillary contractions of the heart or on a theory of heat coagulation of the cellular constituents of the body. They also agree that normal industrial currents do not kill instantly, though as a result of their action, under favorable conditions, death may rapidly occur, probably through secondary anemia following cardiac fibrillations of the heart. From a scientific point of view, it would be nearly impossible to ascertain whether death had occurred before the deceased was removed from the conduit. The trial judge, however, very properly points out that the legislature intended that to bring an action under the Survival Act there should be some evidences of life which would be recognized by the lay person to indicate life. He concludes that where one suffering from electric shock never gains consciousness, or heart beats, or circulation of the blood, or breathing, that in legal contemplation, death was instantaneous.[36] As pointed out above, the principal justification for the judicial notice is to offset the effect of the absence of medical testimony showing a connection, if any, between the twitching movements and life. From a layman's view point, the twitching and movements of the fingers a half hour after the shock would be evidences of life. Even from a scientific view such movements are apparently consistent with life, although there is considerable uncertainty about the matter.[37] The trial judge's opinion contains no references from which one could conclude that such twitching was not evidence of life. Hence it seems that the fact of instantaneous death, as judicially known by the court,

[35] The opinion of the trial court contains frequent references to HERZOG, MEDICAL JURISPRUDENCE (1931); PETERSON, HAINES and WEBSTER, LEGAL MEDICINE AND TOXICOLOGY (1923), particularly Vol. I., pp. 261 to 283; and an article by Cunningham in NEW YORK MEDICAL JOURNAL, Oct. 28, 1899, cited in PETERSON, HAINES and WEBSTER, op. cit., 278.

[36] The conclusion seems questionable due to the lack of certainty as to the borderlines separating the fatal cases from the recoverable and the recoverable from those in which, in fact, recovery was consummated. Recovery might have been accomplished in some cases if different methods had been used. It has been said [1 PETERSON, HAINES and WEBSTER, LEGAL MEDICINE AND TOXICOLOGY 282 (1923)] that no method used should be discontinued in less than three to six hours. In the Anderson case the pulmotor was applied for less than an hour.

[37] Shock causes a spasmodical contraction of muscles, which, in instantaneous death, relax immediately on removal from the charge [HERZOG, MEDICAL JURISPRUDENCE, § 365 (1931)] or, as testified to by the defendant's medical witness, within five minutes after the shock. The twitching, thirty minutes after death, could hardly be explained on this basis. Rigor mortis is not a jerky movement as is a twitch. But it is possible to have spontaneous muscular movements after death which are produced by some extraneous muscular irritability. 1 PETERSON, HAINES and WEBSTER, LEGAL MEDICINE AND TOXICOLOGY 186 (1923).

was not sufficiently established by the judge's investigation to warrant a use of the principle and that it would have been advisable, as the supreme court concluded, to have accepted the jury's finding on the question of fact.

The standard test of common knowledge cannot be ignored even though it is difficult to apply. But in the final analysis the determination of the use of judicial notice is dependent upon whether, by this means of establishing a fact, justice may be reached without a sacrifice of the ordinary principles of evidence and the right to a jury decision on the facts. Caution has frequently been suggested,[38] especially where the principle is used in contradiction to the evidence, since the court is then taking over substantive law, and, in effect, saying that the proof offered is immaterial. The need of caution may be partially offset by allowing the other party an opportunity to rebut that which has been judicially noticed. But where there has been a complete omission of evidence to establish that which is a fact, its use should be encouraged and "thus avoid much of the needless failures of justice that are caused by the artificial impotence of judicial proceedings."[39]

2.

In exercising the functions of judicial knowledge, what assistance is the judge permitted to obtain by private research on the fact to be judicially known? That a judge may not judicially know something which lies peculiarly within his own knowledge and is inaccessible to others is uncontroverted. The authorities also agree that because the judge does not at the time have actual knowledge of the matter, he is not precluded from a use of judicial knowledge. By the more conservative, he is permitted to resort to such sources as the dictionary and encyclopedia; but only when the matter is of such common knowledge that all persons are presumed to know it.[40] The investigation is permitted on the theory that the judge is merely refreshing his memory. But, as pointed out by Thayer,[41] the statement that a court may consult an almanac, dictionary, encyclopedia, and the like is an unnecessary and misleading specification of a particular sort of document that may be examined. And any examination of the cases will show that the theory of the judge refreshing his memory is pure fiction. It is

[38] HAMMON, EVIDENCE 421 (1907); 15 BOSTON UNIV. L. REV. 385 (1923); 15 IOWA L. REV. 210 (1930) (where it is suggested that if there are any doubts as to its proper use, evidence should be required).

[39] 5 WIGMORE, EVIDENCE, 2d ed., § 2583, p. 603 (1923).

[40] 15 R. C. L. 1061 (1917). See also annotation in 124 Am. St. Rep. 20 at 27 (1909).

[41] THAYER, A PRELIMINARY TREATISE ON EVIDENCE 307 (1898).

almost inconceivable that a judge would know or would have known, without research, all the things which he is called upon to judicially know, and especially is this so in matters of medical science. Reference to a few cases in which the court has taken judicial notice, but has made no mention of the source of its knowledge, will illustrate the point. Among other things, it has been judicially noticed that angina pectoris is not the only ailment resulting from high blood pressure;[42] that a rupture of a blood vessel of the brain immediately produces paralysis;[43] that cerebral softening is a progressive disease;[44] and, that apparently healthy men may die suddenly of arteriosclerosis.[45]

There has been a recognition of this fiction on the part of many text writers and courts and a realization that to give proper effect to the principle of judicial notice the court may inquire of learned men in the particular field, take time for private study, and refer to any recognized source to obtain the desired information.[46] There have been several cases involving electrical phenomena in which courts have cited the scientific authorities on which they have based their judicial knowledge.[47] The same is true as to other matters of general science.[48] Although in matters of medical science, as previously seen, the courts have judicially known facts which necessarily would require research, there are comparatively few cases[49] in which the courts have indicated such research by a citation of the scientific works scrutinized. It seems

[42] Mutual Life Ins. Co. v. Grimsley, 160 Va. 325, 168 S. E. 329 (1933).

[43] Stockman v. Tremont Lumber Co., (La. App. 1934) 155 So. 30.

[44] Childers v. National Life & Accident Ins. Co., (Mo. App. 1931) 37 S. W. (2d) 490.

[45] Aetna Life Ins. Co. v. Kelley, (C. C. A. 8th, 1934) 70 F. (2d) 589.

[46] HAMMON, EVIDENCE, § 123, p. 444 (1907); 1 GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE, 16th ed., p. 18 (1899) (a judge may resort to any source of information he deems authentic). See also late case of Buhrkuhl v. F. T. O'Dell Construction Co., (Mo. App. 1936) 95 S. W. (2d) 843 at 846, for excellent statement of the liberal view in allowing private investigation by the court.

[47] Consolidated Pipe Line Co. v. Mahon, 152 Okla. 72, 3 P. (2d) 844 (1931) (court lists numerous scientific articles concerning atmospheric electricity to substantiate its judicial knowledge); De Luca v. Park Commissioners, 94 Conn. 7, 107 A. 611 (1919); Emmick v. Hanrahan Brick & Ice Co., 206 App. Div. 580, 201 N. Y. S. 637 (1923).

[48] Tolfree v. Wetzler, (D. C. N. J. 1927) 22 F. (2d) 214 (judicial notice of matters concerning collodial chemistry, with nine text books cited on the subject); Werk v. Parker, (C. C. A. 3d, 1916) 231 F. 121 (patent infringement suit); People v. Associated Oil Co., 211 Cal. 93, 294 P. 717 (1930) (judicial notice of conditions in petroleum industry; eight scientific reports examined).

[49] In Shaw v. Tague, 257 N. Y. 193, 177 N. E. 417 (1931), Justice Pound, after examining MÜLLER, HAIR AND ITS PRESERVATION, and giving particular attention to a passage in Byron's "The Prisoner of Chillon," took judicial notice that gray hair may result from shock. See also Meade v. Wisconsin Motor Mfg. Co., 168 Wis. 250, 169 N. W. 619 (1918); Richardson v. Greenburg, 176 N. Y. S. 651 (1919).

advisable that such a citation of authorities should be in the record[50] so that an appellate court or the litigants may ascertain the basis of the judicial knowledge. The private investigation on the part of the trial judge in the *Anderson* case was extensive and replete with references to scientific works. Even though the result reached may be questionable, such industry on the part of the judge was proper and laudable.

It has frequently been stated,[51] by way of limitation, that the mere appearance of facts found in the text books is not conclusive of their existence and does not alone justify the exercise of judicial knowledge. It would seem, however, if a thorough investigation of the sources has been made, and the authorities are found to be in substantial agreement and certainty, that a court would be justified in taking judicial notice of a fact so found. Especially is this so when the parties have the opportunity to rebut that which is judicially known.

The test of judicial notice should no longer be said to depend upon whether or not the fact is of common everyday knowledge in the community. If common knowledge is to be the criteria, there should be a new conception of common knowledge. It is submitted that a rule more consistent with the decided cases would be that a court may take judicial notice of those facts which have been duly authenticated in repositories of facts accessible to those wishing to investigate.

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[50] This suggestion is made in 44 YALE L. J. 355 (1934) with reference to judicial notice by administrative tribunals.

[51] 15 R. C. L. 1061 (1917).