Michigan Law Review

Volume 36 | Issue 1

1937

EVIDENCE - EXCEPTIONS TO HEARSAY RULE - PHYSICIAN'S TESTIMONY AS TO STATEMENTS OF SYMPTOMS MADE BY PATIENT

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EVIDENCE — EXCEPTIONS TO HEARSAY RULE — PHYSICIAN'S TESTIMONY AS TO STATEMENTS OF SYMPTOMS MADE BY PATIENT—Plaintiff, while in the employ of the defendant, was injured when a ditch he was engaged in digging caved in upon him. Defendant alleged that the shock made active theretofore dormant pulmonary tuberculosis. He received treatment from a physician at the time of the injury. Upon plaintiff's suit under the Texas Workmen's Compensation Act,[1] the physician was allowed to testify, over defendant's objection, that about a month and a half after the injury, the plaintiff had come to the physician's office, and reported that his sputum was stained with blood. On appeal, it was *held*, one judge dissenting, that the statement was properly admitted. *Hartford Accident & Indemnity Co. v. Baugh*, (C. C. A. 5th, 1936) 87 F. (2d) 240.

In Anglo-American law, hearsay statements have, from an early date, been held inadmissible because the declarant is neither under oath nor subject to cross-examination when the statements are made.[2] However, exceptions to the hearsay rule have long been recognized.[3] Professor Wigmore has said that two principles characterize the exceptions to the hearsay rule: first, that the evidence have a circumstantial guarantee of trustworthiness, and, second, that there be a necessity for the reception of the evidence in question.[4] Statements by an injured or diseased person, as to his condition and symptoms at the time, on his examination by a physician for the purpose of treatment, are admissible under a well settled exception to the hearsay rule.[5] The circumstantial guarantee of trustworthiness in such a case is that the patient's self-

[1] Tex. Civ. Stat. (Vernon, 1928), art. 8306 et seq. There is no express provision in this statute that the rules of evidence are to be relaxed in determining cases under the act.

[2] 10 R. C. L. 958 (1915); 3 WIGMORE, EVIDENCE, 2d ed., § 1362 (1923).

[3] 3 WIGMORE, EVIDENCE, 2d ed., § 1426 (1923).

[4] 3 WIGMORE, EVIDENCE, 2d ed., § 1425 (1923).

[5] Fay v. Harlan, 128 Mass. 244, 35 Am. Rep. 372 (1880); 67 A. L. R. 10 (1930).

interest in receiving competent medical treatment creates the probability that he will report his condition and symptoms correctly.[6] Where the examination takes place for the purpose of enabling the physician to testify, rather than to receive medical aid, this guarantee of trustworthiness is not present, and accordingly statements made by the patient during such an examination are inadmissible.[7] The same applies to statements regarding the cause of an injury or sickness.[8] The necessity for the reception of this species of hearsay evidence was originally that the patient was incompetent to testify in a suit involving his sickness or injury because of interest.[9] The bar to testimony by a party has now uniformly been done away with by statute.[10] Yet this sort of evidence is still admitted,[11] the necessity therefor not being clearly articulated by the courts. The best rationalization of the necessity principle, as applied to this exception today, seems to be that the relative value of the statements made by the patient to the physician at the time of the injury or illness are immensely superior to statements as to his past condition or symptoms made by the patient during litigation.[12] Thus it is not necessary that the patient be unavailable as a witness before the physician's statements can be admitted.[13] The necessity principle as thus stated does not seem to apply with equal force to narrative statements of symptoms made to a physician during examination; and when this exception is confused, as it so often is, with the omnibus concept, res gestae, and the analogous exception of statements of present pain and suffering, uniformly held admissible on the circumstantial guarantee of truthfulness that the statements are spontaneous,[14] it can be seen why narrative statements are

[6] Barber v. Merriam, 11 Allen (93 Mass.) 322 (1865); State v. Gedicke, 43 N. J. L. 86 (1881) (dictum); Omberg v. United States Mutual Assn., 101 Ky. 303, 40 S. W. 909 (1897); Shaughnessy v. Holt, 236 Ill. 485, 86 N. E. 256, 21 L. R. A. (N. S.) 826 (1908); Helminsky v. Ford Motor Co., 10 N. J. Misc. 1042, 162 A. 189 (1932); Delaware, L. & W. R. R. v. Roalefs, (C. C. A. 3d, 1895) 70 F. 21.

[7] Shaughnessy v. Holt, 236 Ill. 485, 86 N. E. 265 (1908).

[8] Helminsky v. Ford Motor Co., 10 N. J. Misc. 1042, 162 A. 189 (1932); 67 A. L. R. 10 at 25 (1930).

[9] Caldwell v. Murphy, 11 N. Y. 416 (1854); Werely v. Persons, 28 N. Y. 344 (1863).

[10] 1 WIGMORE, EVIDENCE, 2d ed., § 578 (1923).

[11] Delaware, L. & W. R. R. v. Roalefs, (C. C. A. 3d, 1895) 70 F. 21; 67 A. L. R. 10 (1930).

[12] 4 CHAMBERLAYNE, EVIDENCE 3590, note 3 (1913); 3 WIGMORE, EVIDENCE, 2d ed., § 1714 (1923). This is hardly necessity in the strict sense. It is sometimes said that the fact that the symptoms are internal makes it necessary that hearsay statements in relation thereto be admitted. But if the patient can testify at the trial, the force of the argument is not seen. Yet, little direct evidence of symptoms is available, and, due to the exigencies of proof, there is probably a necessity, in the less stringent sense, for the admission of this type of evidence.

[13] Northern Pac. Ry. v. Urlin, 158 U. S. 271, 15 S. Ct. 840 (1895); 3 WIGMORE, EVIDENCE, 2d ed., § 1714, p. 679 (1923).

[14] Atchison T. & S. F. R. R. v. Johns, 36 Kan. 769, 14 P. 237 (1887); 3 WIGMORE, EVIDENCE, 2d ed., § 1718 (1923).

uniformly excluded.[15] The instant case is on the borderline. The statement in question is not a statement of present pain. Further, so far as can be gathered from the report, the statements were not made for the express purpose of instant treatment, but were more in the nature of a report to the physician of later symptoms, the patient previously having been examined. It is not definitely shown whether it was a present or past symptom. Yet it can fairly be construed to come within the exception under discussion. Also, because of the fact that the plaintiff was suing under workmen's compensation laws, where the triers of fact are more skilled in sifting fact from fiction than in the usual case before a jury, and because of the dubious value of the hearsay rule itself,[16] it is thought that the court acted properly in admitting the statement.

Benjamin H. Dewey

[15] Helminsky v. Ford Motor Co., 10 N. J. Misc. 1042, 162 A. 189 (1932); 67 A. L. R. 10 at 22 (1930). It is not seen why narrative statements of symptoms should be excluded. They have the circumstantial guaranty of trustworthiness in that they are made to a physician with the self-interest of getting adequate and accurate medical treatment. There is the same necessity as in the case of present symptoms—there is no other evidence nearly so adequate as these statements. See CHAMBERLAYNE, TRIAL EVIDENCE, Tompkins ed., 780 (1936). Yet it is said that the narrative statements are "mere hearsay" or "purely hearsay" and are excluded.

[16] 4 CHAMBERLAYNE, EVIDENCE 3474 (1913).