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Evidence--Medical Treatises To Be Admitted as Direct Evidence in Wisconsin--*Lewandowski v. Preferred Risk Mutual Ins. Co.*

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RECENT DEVELOPMENTS

EVIDENCE—Medical Treatises To Be Admitted as Direct Evidence in Wisconsin—*Lewandowski v. Preferred Risk Mutual Ins. Co.**

Defendant's attorney in a personal injury action sought on cross-examination to impeach plaintiff's physician regarding his determination of the degree of plaintiff's disability by referring to the medical standards set forth in the American Medical Association's *Guide to the Evaluation of Permanent Impairment—The Extremities and Back.*[1] Pointing to the physician's testimony that he had not relied on the *Guide* in making his evaluation, the trial court sustained plaintiff's objection that such cross-examination was not permissible. On appeal, the Wisconsin Supreme Court held that the trial court was correct in sustaining the objection in accordance with the established rule that it is not permissible to cross-examine with respect to a medical treatise on which the witness did not specifically rely in giving his direct testimony.[2] However, the court ruled prospectively that such cross-examination would be permitted, and, in addition, that medical treatises recognized by the medical profession as authoritative could be admitted as independent evidence "to prove the truth of a matter stated therein."

In announcing its new rule, Wisconsin joined Alabama as apparently the only states which, in the absence of express statutory authority, permit the introduction of medical treatises as affirmative substantive evidence.[3] With the exception of states which deal with

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* 33 Wis. 2d 69, 146 N.W.2d 505 (1966) [hereinafter cited as principal case; page cites are to the regional reporter].

1. J.A.M.A. (special edition Feb. 15, 1958) [hereinafter referred to as the *Guide*]. The *Guide* consists of disability percentage tables based on objectively determined measurements of restriction of motion.

Plaintiff suffered a rupture of two cervical discs, requiring ankylosis or surgical fusion of the two spinal vertebrae. Plaintiff's physician testified that the resulting disability involved 20% of the spine and 10% of the body, whereas defendant's witness estimated disability at 10 and 5% respectively. The *Guide*, however, sets only 3 to 7% spinal impairment and 2 to 4% bodily impairment as the result of ankylosis of any two cervical vertebrae. *Guide* 89, 103.

2. Prior to the principal case, the Wisconsin rule was that medical texts were inadmissible as independent direct evidence and, for purposes of cross-examination, could be used only to test the qualifications of a medical witness or to impeach a witness who had based his opinion on that particular treatise. Zoldoske v. State, 82 Wis. 580, 52 N.W. 778 (1892); City of Ripon v. Bittel, 30 Wis. 614 (1872). *See* note 8 *infra.*

3. Alabama first enunciated its rule that "medical authors, whose books are admitted or proven to be standard works with that profession, ought to be received in evidence" in Stoudenmeier v. Williamson, 29 Ala. 558, 567 (1857) (treatise on venereal disease admitted to dispute local expert's testimony that the disease could be transmitted by ordinary personal contact). Over eighty years later, the same court said "[w]e have not found the ends of justice defeated by our rule, nor the difficulties of its application very great." City of Dothan v. Hardy, 237 Ala. 603, 607, 188 S. 264,

the matter in statutory provisions,[4] the remaining jurisdictions, state and federal, follow the rule that medical treatises, being "hearsay,"[5] are not admissible as direct evidence "to prove the truth of the matter stated therein."[6] Learned treatises in such fields as mathe-

266-67 (1939); *accord*, Smarr v. State, 260 Ala. 30, 68 S.2d 6 (1953). Alabama has since codified its rule. *See* note 4 *infra*. Dean Wigmore, writing in 1940, discerned possible acceptance of the Alabama rule in Iowa. 6 J. WIGMORE, EVIDENCE § 1692 (3d ed. 1940); *see* Bowman v. Woods, 1 Iowa 441 (1848). However, although not specifically overruled, the case has not been followed by subsequent Iowa courts. *See, e.g.*, Morton v. Equitable Life Ins. Co., 218 Iowa 846, 254 N.W. 325 (1934).

4. Twelve states have statutes which purport to permit treatises as prima facie or presumptive evidence of "facts of general notoriety and interest" under varying circumstances. Eight of these statutory provisions are general in scope, *e.g.*, IDAHO CODE ANN. § 16-403 (1948) ("Historical works, books of science or art, and published maps or charts, made by persons indifferent between the parties, are prima facie evidence of facts of general notoriety and interest."). *See also* ALA. CODE tit. 7, § 413 (1960); IOWA CODE ANN § 622.23 (1950); MONT. REV. CODE § 93-1101-8 (1947); NEB. REV. STAT. § 25-1218 (1943); ORE. REV. STAT. § 41.670 (1965); UTAH CODE ANN. § 78-25-6 (1953). *Compare* CAL. EVID. CODE § 1341 (West 1966) which provides that such treatises "are not made inadmissible by the hearsay rule when offered to prove facts of general notoriety and interest." These statutes, owing to the qualifying clause "facts of general notoriety and interest," have, however, consistently been interpreted by the courts as not altering the common-law rule in the case of medical treatises. *See, e.g.*, Eckleberry v. Kaiser Foundation N. Hosps., 226 Ore. 616, 359 P.2d 1090 (1961).

Another four states have similar statutes, but these statutes are limited by their terms to certain categories of cases. MASS. ANN. LAWS ch. 233, § 79c (Supp. 1965) (malpractice suits); NEV. REV. STAT. § 51.040 (1963) (malpractice suits); PA. STAT. ANN. tit. 31, § 700j-801 (1958) (milk pricing hearings); S.C. CODE ANN. § 26-142 (1962) (sanity hearings). Where this type of statute is involved, the courts have been more likely to permit medical treatises as direct evidence in derogation of the common law rule. *See, e.g.*, Thomas v. Ellis, 329 Mass. 93, 106 N.E.2d 687 (1952). The application of such statutes, however, has been strictly confined to the cases specified in the statutes. *See, e.g.*, Baker v. Southern Cotton Oil Co., 161 S.C. 479, 159 S.E. 822 (1931).

In addition, three jurisdictions have enacted the Uniform Rules of Evidence, which provide that:

> A published treatise, or periodical, or pamphlet on a subject of history, science or art [shall be admissible as an exception to the hearsay rule] to prove the truth of the matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the treatise, periodical, or pamphlet is a reliable authority in the subject.

UNIFORM RULES OF EVIDENCE 63(31); KANSAS GEN. STAT. ANN. § 60-459(cc) (1964); C. Z. CODE § 2962(31) (1963); V. I. CODE tit. 5 § 932(31) (1957); *see* 9A UNIFORM LAWS ANNOTATED 591, 640 (1965). The Supreme Court of New Jersey, whose case law as recently as 1956 supported the majority medical treatise rule [Ruth v. Fenchel, 21 N.J. 171, 121 A.2d 373 (1956)], has adopted the Uniform Rules of Evidence almost without change as rules of court. N.J. SUP. CT. R. § 63(31) (1965).

5. Professor McCormick defines hearsay as "testimony in court or written evidence of a statement made out of court, such statement being offered as an assertion to show the truth of the matter asserted . . . ." C. MCCORMICK, EVIDENCE § 225 (1954). Dean Wigmore characterizes "hearsay" as "extra-judicial testimonial assertions" which cannot be admitted in evidence because the assertion is not made in court where it may be subjected to various "tests," chiefly cross-examination. 5 J. WIGMORE, EVIDENCE § 1361 (3d ed. 1940). Under either verbalization, however, the primary rationale for exclusion is the same—the not insignificant possibility of unreliability.

6. *E.g.*, Piotrowski v. Corey Hosp., Inc., 172 Ohio St. 61, 173 N.E.2d 355 (1961); Hopkins v. Gromovsky, 198 Va. 389, 94 S.E.2d 190 (1956). *See generally* C. MCCORMICK, EVIDENCE § 296 (1954); 32 C.J.S. *Evidence* § 718 (1964); 3 B. JONES, EVIDENCE § 621 (5th ed. 1958); A. MUNDO, THE EXPERT WITNESS 87-107 (1938); 6 J. WIGMORE, EVIDENCE § 1691

matics or chemistry, however, are more likely to be admitted as direct evidence, the courts drawing a distinction between "exact sciences" and "inexact sciences," the latter being characterized by inductive reasoning.[7]

In the area of cross-examination most courts have permitted the use of medical treatises notwithstanding their hearsay nature. Thus, medical treatises may usually be introduced for the limited purposes of testing a witness' qualifications or impeaching his credibility, provided that certain preconditions are met.[8] Some states, including Wisconsin prior to the principal case, hold that before a witness can be impeached by reference to a treatise he must be shown to have relied specifically on that particular treatise in giving his direct testimony.[9] Other states relax the requirement and permit such cross-examination when the witness has relied on any treatise

(3d ed. 1940); Annot., *Medical Books or Treatises as Independent Evidence*, 65 A.L.R. 1102 (1930), 84 A.L.R.2d 1338 (1962). It has been held, however, that such treatises may be admitted upon consent of the parties. Goldthwaite v. Sheraton Restaurant, 154 Me. 214, 415 A.2d 362 (1958); *cf.* Eagleston v. Rowley, 172 F.2d 202 (9th Cir. 1949). There is also some authority for the view that, notwithstanding the "no direct evidence" rule, counsel or an expert witness may read excerpts from a treatise to the jury. Most courts would not permit this, however, since it seems apparent that such an exception would amount to an emasculation of the rule. *See, e.g.*, Hopkins v. Gramovsky, *supra*. In Kaplan v. Mashkin Freight Lines, Inc., 146 Conn. 327, 150 A.2d 602 (1959), however, plaintiff's counsel read such excerpts during his closing argument from a treatise which had been used in both direct and cross-examination of the medical witnesses. The court ruled such evidence inadmissible since the treatises themselves had not been admitted as evidence, but went on to state that the treatise could have been so introduced. Since this position would appear to be the outer possible limit short of forthrightly adopting the Alabama rule, it is not surprising that some confusion exists as to the Connecticut position. See Annot., *Counsel's Right in Arguing Civil Case To Read Medical or Other Learned Treatises to the Jury*, 72 A.L.R.2d 931 (1960).

In the federal courts, FED. R. CIV. P. 43(a) provides that evidence admissible under United States statutes, federal equity rules "heretofore applied in the courts of the United States," or state rules of evidence shall be admitted, with the "rule which favors the reception" controlling. There is no provision in federal statute or equity rules for admitting such treatises, and thus, with the presumed exception of federal courts sitting in Alabama or one of the Uniform Rules jurisdictions, federal courts refuse to admit such evidence. *E.g.*, Stottlemire v. Corwood, 215 F. Supp. 266 (D.D.C. 1963). *See generally*, Orfield, *Uniform Federal Rules of Evidence*, 67 DICK L. REV. 381 (1963).

7. *E.g.*, United States v. Two Cases of Chloro Naptholeum Disinfectant, 217 F. 477 (D. Md. 1914) (chemistry book); Newman v. Blom, 249 Iowa 836, 89 N.W.2d 349 (1958) (actuarial table). *See generally*, Note, 46 IOWA L. REV. 463 (1961); Note, 26 MARQ. L. REV. 43 (1941); Note, 19 ST. LOUIS L. REV. 353 (1934).

8. As to rules governing the use of treatises in cross-examination, *see* 2 B. JONES, EVIDENCE § 437 (5th ed. 1958); 6 J. WIGMORE, EVIDENCE § 1700 (3d ed. 1940); Willens, *Cross-Examining the Expert Witness With the Aid of Books*, 41 J. CRIM. L.C. & P.S. 192 (1950); Comment, 12 S. CAL. L. REV. 424 (1939); Note, *Medical Treatises as Evidence—Helpful but too Strictly Limited*, 29 U. CINC. L. REV. 255 (1960); Annot., *Use of Medical or Other Scientific Treatises in Cross-Examination of Expert Witnesses*, 60 A.L.R.2d 77 (1958).

9. *See, e.g.*, Crowley v. Elgin, J. & E.R.R., 1 Ill. App. 2d 481, 117 N.E.2d 843 (1954), *cert. denied*, 348 U.S. 927 (1955); Ross v. Foss, 77 S.D. 358, 92 N.W.2d 147 (1958).

or treatises in general in reaching his conclusion.[10] A few states, yet more liberal, even permit impeachment by treatise on a showing, or on judicial notice, that the submitted treatise is "authoritative in its field."[11] The most permissive approach, of course, is that which is exemplified by the prospective rule announced in the principal case. This approach results in completely exempting learned treatises from the proscriptions of the hearsay rule. Such a result may be justified on the basis of at least two of the rationales lying behind all exceptions to the hearsay rule: the material contained in the treatises may be deemed trustworthy and may be otherwise unavailable for exposition at trial. Nevertheless, most courts cling to the notion that learned treatises, being a form of hearsay evidence, must be tightly restricted in use.

The courts' traditional wariness toward admitting the writings of learned medical authorities has, of course, not extended to hearing the same expert testify on the same matters from the witness stand. The distinction lies primarily in the opportunity to confront and cross-examine the expert who is present in court.[12] Confrontation of a witness by the court and jury, it is argued, permits observation of his demeanor and bearing—both being important factors in weighing the worth of evidence. More crucial, the "test of fire" in cross-examination, which is the very heart of the adversarial process, serves to expose weaknesses and clarify the substance of the testimony. Thus, the expert's credibility and reliability are tested in the presence, and for the benefit, of the finder of fact. To these arguments for the general exclusion of all forms of hearsay, including treatises, may be added the feeling that when the person whose assertion is to be submitted in evidence is not under oath, his personal trustworthiness is suspect.[13]

10. The justification often given for this particular use of a treatise was well stated in the leading case of Reilly v. Pinkus, 338 U.S. 269, 275 (1949):

> It certainly is illogical, if not actually unfair, to permit witnesses to give expert opinion based on book knowledge and then deprive the party challenging such evidence of all opportunity to interrogate them about other leading books.

Reilly, which dealt with the admissibility of medical treatises in the context of postal fraud, permits cross-examination using a treatise if the witness states that he has relied on *any* published work. See Note, 24 TUL. L. REV. 358 (1950). This rule is also followed in numerous state courts. *See, e.g.*, Stone v. Proctor, 259 N.C. 633, 131 S.E.2d 297 (1963); Dabroe v. Rhodes Co., 64 Wash. 431, 392 P.2d 317 (1964).

11. In Darling v. Charleston Community Mem. Hosp., Judge Schaefer stated that:

> [I]n our opinion expert testimony will be a more effective tool in the attainment of justice if cross-examination is permitted as to the views of recognized authorities, expressed in treatises, or periodicals written for professional colleagues. . . . The author's competence is established if the judge takes judicial notice of it, or if it is established by a witness expert in the subject.

33 Ill. 2d 326, 336, 211 N.E.2d 253, 259 (1965), *cert. denied*, 383 U.S. 946 (1966).

12. C. MCCORMICK, EVIDENCE § 224 (1954); 5 J. WIGMORE, EVIDENCE § 1362 (3d ed. 1940).

13. *Id.* Dean Wigmore views the oath as merely an adjunct to the primary protection of cross-examination since a statement made under oath but out of court, *e.g.*, an affidavit, is "equally obnoxious to the hearsay rule."

Apart from these considerations, which apply to hearsay evidence in general, some commentators have urged other, more specific, rationales in support of the exclusion of affirmative evidence drawn from medical treatises.[14] It is pointed out that the language of scientific journals, and medical journals in particular, is highly technical and would be difficult for a fact-finder unfamiliar with such material to understand. In addition, the treatise may be written imprecisely, and thus be of questionable evidentiary value: shades and nuances perhaps not important in the medical school classroom may assume monumental proportions in the courtroom. Moreover, in such an inductive discipline as medical theory, it is inevitable that there will be controversy on a fair number of important points, with eminently respectable schools of opinion on both sides of a question. Thus, the admission of treatises would simply lead to a "battle of the books," with each side marshalling impressive-looking lists of publications and authors. Furthermore, with the constant evolution and re-evaluation of medical theories and techniques, the mere passage of a few years' time may lead to modifications or reservations in the author's mind concerning what he had previously written. Thus, there is the risk that what is written in the treatise is not the same as what the author would testify in court. Finally, it may be noted that "learned treatises" are almost never substantially based on the author's personal investigation and observation of the facts, but rather are usually a compilation of a compilation—"hearsay upon hearsay." This multiple hearsay increases the probability of inaccurate and unreliable testimony from a treatise.

Most of the legal textwriters,[15] led by Dean Wigmore and the drafters of the Model Code of Evidence and the Uniform Rules of Evidence,[16] have criticized the majority "learned treatise" rule and

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Other considerations sometimes urged in support of the hearsay rule generally, such as the possibility that the out-of-court assertion may be inaccurately transcribed and testified to in court, do not seem applicable to the treatise question, since the material is in printed form and, unless the printer has erred, we know precisely what the author has "said."

14. *See* C. McCORMICK, EVIDENCE § 296 (1954); 6 J. WIGMORE, EVIDENCE § 1691 (3d ed. 1940); Dana, *Admission of Learned Treatises in Evidence*, 1945 WIS. L. REV. 455; Annot., *Medical Books or Treatises as Independent Evidence*, 65 A.L.R. 1102 (1930) 84 A.L.R. 2d 1338 (1962). *Compare* Grubb, *Proposed "Learned Treatise" Rule*, 1946 WIS. L. REV. 81.

15. *See* C. McCORMICK, EVIDENCE § 296, at 621 (1954); 6 J. WIGMORE, EVIDENCE § 1691, at 5 (3d ed. 1940); McCormick, *Direct Examination of Medical Experts in Actions for Death and Bodily Injuries*, 12 LA. L. REV. 264, 268 (1952). *See also* LADD, CASES ON EVIDENCE 661 (2d ed. 1955).

16. MODEL CODE OF EVIDENCE R. 529A (1942); UNIFORM RULES OF EVIDENCE § 63(31) (1953); 9A UNIFORM LAWS ANNOTATED 591, 640 (1965). Uniform Rule § 63(31), adopted in three jurisdictions, is substantially identical to the older Model Code R. 529A which has not been adopted in any jurisdiction. *See* note 4 *supra*. However, the Model

urged the adoption of the contrary view. The primary purposes of confrontation and cross-examination, they point out, is to test the witness' qualifications, probe the consistency and truth of the testimony presented, and bring out any information not adequately explored on direct examination. These purposes, it is urged, are not subverted by permitting medical treatises to be admitted as direct evidence. As regards the "witness' " qualification, the treatise may not even be considered unless the work is recognized by the profession and the court as authoritative.[17] In addition, the author of such a treatise is subject to the detailed analysis and rebuttal of his colleagues in professional journals; thus, weaknesses in factual data or conclusions will be exposed. In this way, learned treatises are subjected to treatment which serves amply as a substitute for cross-examination. As to the requirement that a witness be under oath, other types of hearsay evidence not under oath have been freely admissible when it could be shown that there was no motive for, and little danger of, misrepresentation.[18] Here, the scholarly author is intellectually committed to the search for truth; he has no motive to conceal or misrepresent for partisan purposes as he perhaps would on the witness stand. Moreover, the "intellectual cross-examination" of the scholarly process minimizes the danger that the treatise evidence will be untrustworthy. The problem of confusing the jury with the technical language of a medical treatise is simply met: a local expert might be called to interpret and explain the meaning and conclusions of the author. This, seemingly, would be the best of both worlds, since the research, reputation, and conclusions of the author would be made freely available to the fact-finder in terms which he could understand. Guarding against the possibility of an inadequate or slanted interpretation of the work is, of course, the adversarial system itself. In addition, any reluctance of medical authorities to testify as to their own conclusions in a given case might be abated somewhat by requesting them merely to interpret another's opinion. Furthermore, concern about a "battle of the books" seems incongruous in the face of the present majority

Code requires only that the "writer" be recognized as authoritative, whereas the Uniform Rules require that the "writing" itself be so recognized.

17. UNIFORM RULES OF EVIDENCE § 63(31) specifies that as alternate conditions precedent to admissibility, a court may take judicial notice of the reliability of an authority or require that an expert in the field testify to the same effect. Alabama's practice is similar but may not provide for judicial notice. For example, in Smarr v. State, 260 Ala. 30, 36, 68 S.2d 6, 12 (1953), the court pointed out that treatises are "not in themselves self-proving, but are admissible only when recognized and approved by the medical profession as standard."

18. *E.g.*, statements made by a patient to his doctor concerning a presently existing physical condition are generally admissible, the theory being that the patient has a certain vested interest in his good health which he probably would not jeopardize by giving misleading statements to his doctor. C. MCCORMICK, EVIDENCE § 266 (1954); 6 J. WIGMORE, EVIDENCE §§ 1718-23 (3d ed. 1940).

rule which has led to a "battle of the experts."[19] If competing theories exist, it may be more desirable that the "battle" take place on paper rather than in a personal confrontation.

The opinion of the treatise writer, developed and recorded in the detached aerie of academe, is more likely to be presented accurately to the court in written form than it would be if the presentation were made in the emotional atmosphere of litigation. Cross-examination may be a useful tool in determining the accuracy of a witness' testimony as to facts, but it may well distort an opinion based on scholarly research. The objection that the treatise author's own views may have changed since he wrote the book can be remedied effectively by opposing counsel's alert recognition of this possibility. Finally, the argument that the work may be merely a collection of the opinions of others and not based on the personal observations of the author ignores the fact that all such treatises must be recognized as authoritative by the profession before the trial judge can permit its introduction in evidence. In any event, the treatise is probably no worse than the expert witness himself, whose opinions are, presumably, at least partially based on what he learned from his medical school professors, textbooks, and professional journals.

If these arguments are deemed to rebut the proposition that medical treatises are an unreliable source of direct evidence, then an argument can be made for admissibility based on the principle that all competent evidence, not otherwise excluded, pertaining to the issue at hand should be made available to and be considered by the fact-finder.[20] In addition, several more positive arguments can be made in support of the position prospectively adopted by the court in the principal case. First, it is less expensive to assemble books than experts, who may require travel fare, lodging, and meals in addition to their normal consultation fee. This lower cost benefits not only the particular litigant, but also broadens the scope of

19. Although earlier writers conceded that there were problems in connection with the oral testimony of experts at trial, in the main they concluded that it is best "to let well enough alone." *See* Foster, *Expert Testimony—Prevalent Complaints and Proposed Remedies*, 11 HARV. L. REV. 169, 185 (1897). *See also*, Rosenthal, *The Development of the Use of Expert Testimony*, 2 LAW & CONTEMP. PROB. 403 (1935). However, in light of the growing complexity of personal injury actions as well as easier accessibility and transportation of experts to court, contemporary writers have recognized that serious distortions to a fair trial may exist. Professor Morgan writes that "the abuse of expert opinion evidence in modern litigation . . . has become in many states a scandal, for the expert witness has become in truth an advocate for the party who presents him, rather than a witness." Morgan, *Practical Difficulties Impeding Reform in the Law of Evidence*, 14 VAND. L. REV. 725, 733 (1961) reprinted in ESSAYS ON PROCEDURE AND EVIDENCE 3, 11 (Roady ed. 1961).

20. As stated in 1 J. WIGMORE, EVIDENCE § 10, at 293 (3d ed. 1940): "The second axiom on which our law of Evidence rests is this: *All facts having rational probative value are admissible, unless some specific rule forbids.*"

sources available for consideration by the fact-finder. More important, it may be difficult or impossible to obtain testimony from a true "expert" if he happens to reside outside the jurisdiction.[21] It may be possible, of course, to obtain a deposition from the learned author, but this again entails added cost and inconvenience. The limitations of process and cost, then, may restrict the litigant to the services of the local expert, who, in certain fields at least, probably knows much of what he does about the subject through the very writings of the expert whose treatise is barred from evidence by the majority rule. Furthermore, in certain cases, unless the court admits treatises, there is a difficulty in obtaining any other type of medical testimony: reluctance and equivocation on the part of medical witnesses in certain suits often causes hardship for the plaintiff, who actually may have a meritorious cause of action.[22]

Regrettably, except for a brief notation of this last argument, the Wisconsin Supreme Court in the principal case did not discuss any of the conflicting considerations involved on either side of the question. Yet, although open to criticism for its methods in reaching its conclusion,[23] the court took a bold departure from its prior precedents in adopting the Alabama rule. Indeed, so that no mistake could be made as to the scope of its ruling,[24] the court pointed to

21. *See* 6 J. WIGMORE, EVIDENCE § 1691 (3d ed. 1940).

22. In medical malpractice suits it is generally the rule that the plaintiff must obtain expert medical testimony—another physician—in order to maintain his burdens of proof as to the proper standard of care for the locality and the defendant's breach of that standard. If the plaintiff cannot obtain such medical testimony on his behalf, his cause of action will fail. *See, e.g.*, Riley v. Layton, 329 F.2d 53 (10th Cir. 1964). *See generally*, 70 C.J.S. *Physicians and Surgeons* § 62(2) (1951).

23. It would appear that the court, while enunciating a sound rule of law, misread or misunderstood the state of existing precedent, for it stated that: "[w]here the foundation is laid that the work is authoritative, recognized by the medical profession, and one which has influence on medical opinions, *such works have now been admitted as independent evidence.*" Principal case at 509 (emphasis added). To the contrary, the only authority for this proposition cited by the court, 2 B. JONES, EVIDENCE § 421 (Supp. 1964), indicates that: "[u]pon the direct examination of an expert witness on medical science, extracts from treatises in that science which he states are recognized by his profession as authoritative and which have influenced or tended to confirm his opinion *may be used.*" [Citing Kaplan v. Mashkin Freight Lines, Inc., 146 Conn. 327, 150 A.2d 602 (1959).] (Emphasis added.) To say that a treatise *may be used* on direct examination is not the equivalent of saying that it has *now been admitted as independent evidence.* In fact, *Kaplan* did not permit the introduction of medical treatises as independent evidence, but merely said that where there is a proper showing that the treatise is a "recognized authority," counsel could use it in direct examination of his expert witness and read from it during the course of his closing argument. *See* note 6 *supra.* Furthermore, a glance at the topic heading in the Jones text reveals that the statement cited pertains to cross-examination of an expert witness, whereas the inadmissibility of treatises as "independent evidence" is postulated at 3 B. JONES, EVIDENCE § 621 (5th ed. 1958).

24. One aspect of the case in particular detracts from its appropriateness as a leading precedent for the admissibility of medical treatises. Strictly speaking, the *Guide* here involved is not a treatise, but rather a committee-compiled pamphlet in the nature of a standard of measurement, a category more susceptible of admissibility than

and specifically adopted Rule 63(31) of the Uniform Rules of Evidence,[25] which unequivocally permits introduction of treatises as direct, substantive evidence. In view of the reliability and trustworthiness of such treatises and the practical problems of obtaining qualified expert witnesses, the admission of such writings is not out of line with the policies behind allowing exceptions to the hearsay rule.

As in so many areas of the law, the question eventually comes down to a balancing of opposing interests—here, the justifiable suspicion of the reliability and trustworthiness of out-of-court statements must be balanced against the desirability or necessity of having the most complete, competent evidence available before the fact-finder. While the value of cross-examination in open court as an instrument of ferreting out the truth and insuring reliability should not be understated, it seems that suspicions should be eased by taking into account the painstaking approach of the scholarly process. In any event, it is not entirely helpful to lump a carefully written treatise in the same category as that of the eavesdropper or even that of the ordinary publication. In addition, it may still be noted that a considerable need exists for this sort of evidence. Supplementing the arguments already mentioned,[26] is that plain fact that treatise evidence will often help the fact-finder to give due weight to expert testimony. Admittedly, even where a medical treatise is written in terms susceptible of comprehension by the jury, it seems unlikely that counsel would not seek to buttress his case with a live expert to tie the conclusions of the text to the specific facts at hand. Yet the mere presence of treatises, especially when they are in agreement, seems to make the standards used more objective and less likely to sway to the rhythms of litigation. In fact, it may be argued that those courts espousing the more liberal cross-examination rules, including the United States Supreme Court,[27] must implicitly recognize that authoritative treatises have value as something more than merely a test for qualification or impeachment

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treatises. *See, e.g.*, McComish v. De Soi, 42 N.J. 274, 282, 200 A.2d 116, 120-21 (1964). Another limiting factor is that the issue in the principal case arose in a cross-examination setting, not on direct examination.

25. Principal case at 509. This approach of using a Uniform Rule as a source of common law may hold implications for the future of the Uniform Rules. While it was the intent of the drafters that the Rules should be adopted as a unified whole [*see* Commissioner's Prefatory Note, 9A UNIFORM LAWS ANNOTATED 503 (1965)], it may be that such piecemeal incorporation by reference will facilitate future adoption of the whole. *See generally* Orfield, *Can Rules of Evidence Be Codified?*, 42 N.D.L. REV. 13 (1965); Orfield, *Uniform Federal Rules of Evidence*, 67 DICK. L. REV. 381 (1963); Swearingen, *How the Adoption of the Uniform Rules of Evidence Would Affect the Law of Evidence in Oregon: Rules 62-66*, 42 ORE. L. REV. 200 (1963).

26. *See* text accompanying notes 21 & 22, *supra*.

27. *See* note 10 *supra*.

of the witness: when examination is permitted with the use of a treatise which was not specifically relied upon by the witness, the result, in effect, is to pit one authority against the other on almost equal terms. In reality, since it seems likely that a jury does not precisely fathom the distinction between introduction for impeachment purposes and introduction for substantive purposes, it is but a "short evolutionary step"[28] from the liberal cross-examination rules to the rule adopted in the principal case.

28. *See* Swearingen, *supra* note 25, at 246.