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LEARNED TREATISES AS EVIDENCE IN WISCONSIN

MARVIN C. HOLZ*

Since *Lewandowski v. Preferred Risk Mutual Insurance Co.*,¹ learned treatises may be used as substantive evidence in direct examination as well as impeaching evidence on cross-examination. Their use as direct or corroborative probative evidence is the innovation; their use as contradictory evidence in cross-examination is the generally accepted rule.

Lewandowski changed the previous rule to permit the use of learned treatises prospectively as independent substantive evidence upon the laying of a proper foundation of reliability. Prior thereto only under circumstances in which a witness in some manner indicated that he had relied upon the written authorities could such authorities be used on cross-examination to impeach or discredit the witness if those authorities were in fact to the contrary of the witness's testimony.

In a very broad sense *Lewandowski* is a return to the original rule in Wisconsin. It was first held that the reading from medical or scientific works to the jury was within the discretion of the court.² Some 33 years later the Wisconsin court adopted the majority rule of excluding such evidence when offered as direct evidence.³ The cycle has now been completed; however, the present version is more sophisticated than its predecessor.

Although most of the students of the law of evidence have criticized the rule against the admissibility of learned treatises as direct probative evidence,⁴ only two other states give general application to the rule of admissibility. New Jersey is sometimes reported as having included rule of admissibility when it adopted new rules of evidence in 1967. Although such a rule was recommended by its Committee, the rule was deleted from the final code. The Supreme Court of Louisiana has stated in *State v. Nicolosi*,⁵ that it could see no reason why an expert could not read from a treatise to corroborate his testimony, but the effect of the decision as authority to admit such evidence as direct evidence is weakened by its holding that what was read was not prejudicial. Alabama has held authoritative medical books to be admissible as direct evidence

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¹ 33 Wis. 2d 69, 146 N.W.2d 505 (1966).

² *Luning v. State*, 2 Pin. (Wis.) 215 (1849); *Luning v. State*, 2 Pin. (Wis.) 285 (1849).

³ *Stelling v. Thorp*, 54 Wis. 528, 11 N.W. 906 (1882).

⁴ 6 WIGMORE, EVIDENCE, § 1691 (3d ed. 1940); Note, 46 IOWA L. REV. 463 (1961).

⁵ 228 La. 65, 81 So.2d 771 (1955).

since 1857.⁶ More recently the State of Kansas has done the same by the adoption of the Uniform Rules of Evidence.⁷ Massachusetts and Nevada have made limited concessions by permitting the use of treatises directly in medical malpractice cases.⁸ South Carolina authorizes their admissibility on issues involving sanity or poisoning.⁹ Statutes authorizing the admission of books of science or art as evidence of facts of general interest and notoriety have not been construed to embrace medical treatises.¹⁰

The purpose of this article is to assist trial courts and trial attorneys in the administration of the rules governing the use of learned treatises in trial. *Lewandowski* itself contains little guide to the handling of these problems. The case law of those jurisdictions which permit the use of learned treatises as substantive evidence is limited. Nevertheless reference to the existing case law and academic writings suggest many of the problems which will be encountered and provide some guidance. An understanding of the underlying objections to the use of such treatises as direct evidence will enable the court to administer the rules to avoid the consequences of valid objectionable features to such evidence and yet allow the court or jury to have the benefit of relevant evidence. Actual trial experience since *Lewandowski* demonstrates that it is the unusual medical or scientific case in which counsel will resort to learned treatises.

USE AS DIRECT SUBSTANTIVE EVIDENCE

Briefly stated the present rule is that when the foundation is laid that a work is authoritative, such works are admissible as independent evidence to prove the truth of the statement contained therein. The foundation may be laid by an expert in the field or by judicial notice. Proof that the work is recognized by the medical profession as authoritative or that it has an influence upon medical opinions is proof of its reliability.

Presumably the Wisconsin Supreme Court adopted Rule 63 (31) of the Uniform Rules of Evidence.

Rule 63 (31) of the Uniform Rules of Evidence reads as follows:

A published treatise, periodical, or pamphlet on a subject of history, science or art should be admissible in evidence as an exception to the hearsay rule to prove the truth of a matter stated therein if the judge takes judicial notice or a witness expert in

⁶ *Stoudenmeier v. Williamson*, 29 Ala. 558 (1857).

⁷ KANS. CODE OF CIVIL PROCEDURE § 60-401 (cc) (1964).

⁸ NEV. REV. STAT. § 51.040 (1957); MASS. ANN. LAWS, Ch. 233 § 79(c) (1956); see also, Kehoe, *Massachusetts Malpractice Evidentiary Statute—Success or Failure?*, 44 B.U.L. REV. 10 (1964); Note, 45 MINN. L. REV. 1019 (1961).

⁹ S.C. CODE § 26-142 (1952).

¹⁰ *Gallagher v. Market St. R.R. Co.*, 67 Col. 13, 6 P. 869 (1885); *Bixby v. Omaha & C. B. Rwy. & Bridge Co.*, 105 Iowa 293, 75 N.W. 182 (1898); *Van Skike v. Potter*, 53 Neb. 28, 73 N.W. 295 (1887).

the subject testifies that the treatise, periodical, or pamphlet is a reliable authority in the subject.

The Court's reference to Jones on Evidence and the Model Code of Evidence indicates that the rule will be applied within the framework of those authorities.¹¹

Pros and Cons

The usual principal objection to the admissibility of learned treatises as substantive evidence is that the facts or opinions contained therein are hearsay. As hearsay it constitutes testimony not given under oath and there is no opportunity to evaluate the credibility of the author by observance of his demeanor as if he were present in court. A more serious objection is the lack of cross-examination to determine how a stated opinion was reached, whether the author still believes in the concept or conclusion stated, or that his conclusions stated in the treatise would necessarily follow in the same factual situation as presented in the case being tried.

A second argument against admissibility is that scientific concepts and "facts" constantly change. Research and discovery continually alter accepted theory and opinion. What may have been standard last year is discarded this year.

Thirdly it is argued that extracts from such books can be used unfairly by the selection of passages out of context or without presentation of qualifying material contained therein which bear upon the issue.

A further argument against admissibility is that the reading of technical material without oral comment or expert explanation of a live witness may be confusing and misleading to the jurors.

A related and fifth argument is that the use of such extracts without explanation by an expert live witness offers counsel an opportunity to deliberately or innocently advance and argue unwarranted conclusions, interpretations or inferences from such data or opinion.

Quite out of harmony with current methods of medical practice and education today is the notion and argument found in older decisions that true medical knowledge is derived primarily from the personal experience of physician. A number of early Wisconsin cases held that an expert witness could not testify upon a subject if he had not had personal experience in reference to the matter at issue and his knowledge was derived only from medical or scientific books and instruction.¹²

¹¹ 2 JONES, EVIDENCE § 421 (5th ed. 1966 Supp.) provides that upon direct examination of an expert witness on medical science, extracts from treatises in that science which he states are recognized in his profession as authoritative and which have influenced or fended to confirm his opinion may be used. Rule 529 A, MODEL CODE OF EVIDENCE, is substantially the same as the Uniform Rules.

¹² Boyle v. State, 57 Wis. 472, 15 N.W. 827 (1883); Saquet v. State, 72 Wis. 659, 40 N.W. 391 (1888); Zoldoske v. State, 82 Wis. 580, 52 N.W. 778 (1892). Perhaps the premise of this concept rested upon the early method of medical education. In the 17th and 18th centuries medical education was by way of an apprenticeship system. The likely youth was indentured at an early age

A seventh contention against admissibility is that the printed word permits an undue psychological impact upon the jury. It is argued that the mere fact that the evidence appears in printed form lends a credence which is not accorded to the spoken word.

Finally it is claimed that the permitted use of learned treatises would turn a trial into a "battle of the books."

As previously suggested the opinion in *Lewandowski* did not present the counter-arguments in support of the rule or the decision. Justice Hallows merely observed that the adoption of the rule was "but another example of accepting the scientific process in the search for truth instead of reliance upon the efficacy of an oath as a guarantee of trustworthiness." This terse statement of course is a clear recognition that modern medical practitioner today derives a much larger portion of his knowledge than formerly upon the authoritative literature in the field. A doctor who seeks to provide the best medicine available today must in a great measure rely upon the professionally accepted literature as part of his continuing medical education. This is particularly true of the specialist who appears as an expert witness in complex medical litigation. Every medical witness when formulating his opinion relies upon a considerable body of literature in addition to his own experience. A New Jersey court has described this by saying "to the extent that he so relies on the literature in the field, his stated opinion is infected with hearsay."¹³ The court then observed that although his opinion was readily received, the literature upon which it rested was not.

Counter-arguments in behalf of admissibility are that (1) treatises recognized by the profession as authoritative are trustworthy, (2) the expense of producing a person truly qualified by personal experience in the areas of difficult medical litigation make it necessary to resort to writings as a resource, (3) such evidence may be sufficiently important to outweigh the dangers of its likelihood to mislead, confuse or prejudice the jury, and (4) those objections can be overcome by the proper administration of the rule permitting admissibility.

Proponents of the rule of admissibility argue that reliable treatises should be admitted as an exception to the hearsay rule because the writer had no motive to misrepresent. His work is not prepared for purposes of litigation. It is written with the foreknowledge that it will be subjected to high professional critical analysis and scrutiny. Accuracy is insured because the writing is intended to pass on knowledge to stu-

to a reputable practitioner to whom his service was "successively menial, pharmaceutical and professional." His training of course varied with the capacity and the conscientiousness of the master. However, in the early part of the 18th century there was a beginning of utilization of hospitals and lecture halls and eventual transition to current methods and standards. See Medical Education in the United States and Canada, a Report to the Carnegie Foundation for the Advancement of Teaching by Abraham Flexner, Bulletin No. 4, 576 5th Avenue, New York City.

¹³ *Ruth v. Fenchel*, 37 N.J. Super. 295, 117 A.2d 284, 294 (1955).

dents and practitioners. Professor Wigmore adds the consideration of necessity. He states that the ordinary expert witness frequently has gained a larger proportion of the knowledge of the subject upon which he will be questioned from study rather than personal observation. Thus the witness reproduces conclusions of others whose authority he accepts. The expense of producing such authorities at trial most frequently is disproportionately costly and inconvenient.¹⁴

In fact there is an anomaly in that although the expert's testimony itself is admissible the foundation of his testimony is not.¹⁵ Is it not better to permit the resource itself rather than the recollections of the witnesses of the source of his information? Science does not shift as quickly as the opponents of the rule for admissibility contend. Proper foundation that the book is authoritative and accepted as such by the profession is a condition for admissibility. Before new ideas in medicine are accepted professionally they are first presented to the profession and carefully considered.

The remaining objections concerning unfair use, dangers of confusion, undue psychological advantage and "battle of books" can be alleviated by the imposition of court rules of procedure and wise administration by the trial court. These procedural rules and methods of administering the rule will be discussed later.

The rule permitting admissibility also has a prophylactic effect in that it serves as a restraint upon the otherwise unrestrained professional witness who knows that he can be confronted with the written authorities to the contrary on cross-examination or rebuttal if he wanders too far afield from legitimate opinion.

Finally a rule of admissibility will eliminate attempts to get the contents of a written treatise into evidence by indirection through cross-examination. An examination of the law of the use of treatises on cross-examination in the various jurisdictions reveals that there is a lack of clarity and a good deal of sophistry in the decisions which invites attempts to get such material before the jury in one way or another.¹⁶ A rule permitting admissibility will help clarify the proper use of treatises on cross-examination and will lead to the incorporation of certain safeguards concerning the use of treatises in cross-examination which are insisted upon when such treatises are used in direct examination.

Foundation for Admissibility

The work must be shown to be authoritative, recognized by the medical profession or one which has influence upon medical opinion in order to be admissible as substantive evidence of the truth stated therein.

¹⁴ Note 4, *supra*.

¹⁵ VAND. L. REV. 473, 482-486 (1962).

¹⁶ See Note, 29 U. CINC. L. REV. 255 (1960); CROSS EXAMINING BY BOOKS, 41 J. CRIM. L., C. & P.S. 192 (1950-51).

It would appear that proof of the author's recognized leadership in his field and the current use of the writing as an authoritative source in the field are essential. In addition the judge has to make a determination that the offered extract is relevant. This will require a determination that the opinions in the offered extract relate to the same factual situation as the case being tried and do not involve a wholly unwarranted interpretation of technical data or opinion by counsel. Finally the Court must determine that the offered portion will be meaningful to the jury and therefore probative.

Proof of Reliability

Reliability is usually established by a doctor called by the proponent who will give testimony establishing the profession's reliance upon the treatise and that the book is a standard authority. Many times this will be by way of corroborating the witness's own testimony. Reliability can be established through the opponent's expert, but such is not always certain. Of course if he denies being conversant with a standard authority or having knowledge of its reliability he runs the risk of being shown to be medically illiterate upon rebuttal.

The Uniform Rules of Evidence permit reliability to be established by judicial notice when the work is so notorious that production of testimony establishing the required qualifications and acceptance is unnecessary. Generally the term "notorious" in this context, is defined as that which is commonly known and accepted as true and which is not the subject of intelligent dispute. The instances in which reliability can be established but judicial notice will be rare and confined to those situations where reliability is clearly indisputable.

Care should be exercised to distinguish between the reputation or reliability of a particular writing of the author and the author's general professional reputation itself. Periodicals and pamphlets are embraced within the rule as well as treatises. Most current writings appear in the former. Some of these may not yet have been accepted as authoritative by the profession or they may be outside of the expertise for which the author is recognized. Nevertheless, the opinion of an outstanding expert in the field may be given great weight though not generally accepted because of its newness. This would be particularly true when there is no established opinion to the contrary.

It would seem that a librarian of a medical school could establish reliability by testifying that a treatise is currently used as resource material in the courses taught. On the other hand medical-legal publications written for a particular segment of the Bar might be inadmissible because of the want of trustworthiness. It has been prophesied that adoption of a rule permitting admissibility of learned treatises as direct evidence will produce a harvest of literature written with an eye to litigation.

Medical treatises are not in themselves self-proving, that is to say, it must be shown that the work in question is recognized as a standard authority by the medical profession by way of competent testimony or judicial notice. Extracts from Gray's Attorney's Textbook on Medicine were not permitted to be entered into evidence because of the want of such proof.¹⁷ Biographical data such as is contained in the front of the book itself or in the publisher's notes on the paper jacket is not sufficient to establish the author's professional standing.¹⁸ For similar reasons medical directories including Who's Who are not sufficient to establish the author's qualifications. Statements concerning the author whether appearing in the book itself or in directories constitute hearsay which is not always trustworthy, are self-serving and are subject to puffing.¹⁹

For the reason that the attorney in the case is not a competent expert medical witness the assertions of counsel that the author is one of the recognized authorities is not sufficient.²⁰ The testimony of a single doctor is sufficient to establish that a particular work is or is not a standard authority.²¹ Standards for electroshock treatment prepared by a committee on therapy and approved by the Council of American Psychiatric Association acknowledged by the defendant's doctor as authentic and applicable were held to be sufficient to permit admission. In *Stone v. Proctor*,²² a malpractice case, the standards were found to be non-controversial and to reflect the consensus of those who practiced electroshock therapy. The defendant doctor acknowledged their authenticity and applicability.

Testimony that a treatise was a bit old, but was recognized as a good book has been held sufficient to establish authoritativeness.²³ Similarly, the testimony of a doctor that he examined a list of treatises, that he knew many of them, thought that the authors know their business permitted an appellate court to assume that the book received in evidence by the trial court was based upon a finding that it was authoritative and relevant has been held to be sufficient. The appellate court would not say as a matter of law upon appeal that the science of obstetrics had changed in the intervening ten years since the book was published so as to preclude a preliminary finding of relevancy.²⁴

The reliability of course is affected by the currency of the material. A writing may be outdated or might be too recent to have gained acceptance in the profession. Many courts have given as the reason for denying the admission of treatises that the medical science as an induc-

¹⁷ *Smarr v. State*, 260 Ala. 30, 68 So.2d 6 (1953).

¹⁸ *Reddington v. Clayman*, 334 Mass. 244, 134 N.E.2d 920 (1956).

¹⁹ Note 18 *supra*; *Ramsland v. Shaw*, 341 Mass. 56, 166 N.E.2d 894 (1960).

²⁰ *Laird v. Boston & M. R.R.*, 80 N.H. 377, 117 A. 591 (1922).

²¹ *Brodhead v. Wiltse*, 35 Iowa 442 (1872).

²² 259 N.C. 633, 131 S.E.2d 297 (1963).

²³ *Batson v. Batson*, 217 Ala. 450, 117 So. 10 (1928).

²⁴ *Thomas v. Ellis*, 329 Mass. 93, 106 N.E.2d 687 (1952).

tive science is constantly shifting because of new discoveries and revised conclusions.²⁵

On the other hand an article may be rejected because it was too recently written and upon a subject of recent discovery so that the conclusions are not given weight as yet by the profession.²⁶ Nevertheless, a court may determine the lack of currency or lack of acceptance because of recency may affect the weight rather than admissibility.

Relevancy

Ordinarily a court has little difficulty in determining an issue of relevancy. In complex medical questions the court is of course out of its field of expertise; hence it may experience difficulty in determining whether a given passage tends to prove or disprove a medical fact in issue. Two solutions present themselves to this problem.

First of all the Court may permit the extract to be read only if explained by a live expert witness. Professor Wigmore suggests that the proper rule is for the Court to allow the use of the printed treatise when approved and read aloud by a witness expert in that subject.²⁷

The other approach is to adopt a rule that notice prior to trial must be given to the Court and opposing counsel when it is intended that treatises will be used. Sufficient particularity should be required and arrangements made if necessary so that the Court has an opportunity to read the materials in context prior to trial. There is nothing improper for a judge to have some fundamental knowledge bearing upon such issues prior to the trial. Counsel for the parties undertake considerable study of the science involved in preparation for trial. Unless a judge has a basic understanding of the facts, opinions, and issues he cannot rule intelligently on objections as the case is presented and proceeds.

Both approaches have other advantages which will be discussed later in reference to some of the other problems and objections to a rule permitting admissibility.

Frequently learned treatises will contain tables which will be offered to support a contention in issue. Care must be exercised to insure that the data upon which the tables or charts were compiled is relevant and reflects conditions similar to those in issue.

Extrinsic Policies Affecting Admissibility

The opprobrious phrase "battle of books" implies that a number of objectionable effects would result from the adoption of a rule permitting the admissibility of learned treatises. Insofar as the phrase suggests the

²⁵ *Wilcox v. Crumpton*, 219 Iowa 389, 258 N.W. 704 (1935); *Washington National Bank v. Daily*, 166 Ind. 631, 77 N.E. 53 (1906); *Bixby v. Omaha & C. & B. Ry. & Bridge Co.*, 105 Iowa 293, 75 N.W. 182 (1898); *Johnston v. Richmond & D.R. Co.*, 95 Ga. 685, 22 S.E. 694 (1895); *St. Louis A. & T. Ry. Co. v. Jones*, 14 S.W. 309 Tex. (1890); *Banner Tobacco Co. v. Jenison*, 48 Mich. 459, 12 N.W. 655 (1882).

²⁶ *State v. Catellier*, 63 Wyo. 123, 179 P.2d 203 (1947).

²⁷ Note 4, *supra*.

use of great stacks of books, the Court within its discretion has considerable control in determining the extent to which cumulative evidence may be received and how it will be received. The Wisconsin law is that a trial court is not required to hear evidence which is merely repetitive and cumulative even on a controlling issue and at some point, dependent upon the circumstances, has discretion to end the procession of witnesses on adequately covered issues.²⁸

Other of the objections to the rule permitting admission of learned treatises may be mitigated or avoided by rules of the Court. In some cases the evidence itself may have to be excluded in the discretion of the Court because of these objections. Certain principles supporting these rules of court or the exclusion of such evidence are set forth in Rule 4 of the New Jersey Rules of Evidence.²⁹ Although these principles apply generally to the New Jersey rules of evidence, they have particular application to the use of learned treatises as evidence. Rule 4 is entitled "Discretion of Judge to Exclude Admissible Evidence" and is as follows:

The judge may in his discretion exclude evidence if he finds that it probative value is substantially outweighed by the risk that its admission will either (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury.

Another provision appearing in the original draft and which would have permitted the judge to exclude such evidence if it would unfairly and harmfully surprise a party who had not had reasonable opportunity to anticipate such evidence was deleted from the rule as adopted. Generally evidence cannot be excluded or trials held up merely on the basis of surprise, however courts do have the power to grant necessary continuances in the interest of justice.

No doubt the use of learned treatises in a frontier medical-legal issue can bog down a trial over and above the problem of cumulative evidence. Whether the time consumed by the introduction and use of such evidence becomes an undue consumption of time must be determined in the discretion of the court in the light of its relative importance. A "battle of experts" who are often times less objective than the written authorities produces the same trial problems.

The problem of undue consumption of time can be lessened by a court rule requiring timely notice prior to trial that counsel intends to use particular treatises. This notice should be given sufficiently prior to the trial or pretrial so that there can be a meaningful discussion of the use of such authorities at the pretrial. Such notice is required under

²⁸ *In re Kaiman's Estate*, 13 Wis. 2d 201, 108 N.W.2d 379 (1961); *Brandt v. Matson*, 256 Wis. 314, 41 N.W.2d 272 (1949); *Griswold v. Nichols*, 126 Wis. 401, 105 N.W. 815 (1906); see also, *Ruth v. Fenchel*, 37 N.J. Super. 295, 117 A.2d 284 (1955).

²⁹ N.J.S. Ann. 2A: 86A, Rule 4.

the Massachusetts and Nevada malpractice statutes. A New Jersey court has suggested that notice be given of intention to use a treatise in cross-examination.³⁰

First of all the collateral issue of reliability and authoritativeness may be disposed of at the pretrial. Ideally the books should be presented at pretrial and the exact passages to be introduced should be marked. As already observed this practice gives the Court an opportunity to read the materials prior to trial and to enable it to rule intelligently on relevancy and determine what other qualifying passages should be read. Very frequently counsel will stipulate that certain passages may be read if others are also read. The presentation of both passages at one time to the jury sometimes is more meaningful than if the qualifying passage is withheld until cross-examination. Such is particularly true if the direct examination is lengthy and protracted. Many times there will be agreement that both extracts should be read at one time. This in part depends upon the trial strategy of counsel; however the final determination of how it should be prevented lies within the discretion of the Court.

If the passages are marked or reproduced so that each counsel and the Court has a copy, such constitutes a great convenience at the trial. Many people absorb information through the written word more readily than if presented orally. If a copy is in the hands of the Court and counsel much time is saved by eliminating the necessity of having the reporter searching his notes to determine what the precise language was or how much was read.

The danger of misuse by reading out of context as has been already indicated can be remedied by the requirement of prior notice. Of course questions of what should be read to the jury can be handled in chambers during trial, but such needlessly consumes trial time. In addition, experts called by opposing counsel will quickly direct the attention of the jury to the qualifying passages of the treatise. Prior notice will permit the adversary process to ensure that the writer's views are fully put before the jury. The Court too has a role to see that the treatises are used fairly.³¹

When it is necessary that it is essential for the comprehension of the jury that there be oral explanation of the information because of technical terminology or complexity of fact contained in the learned treatise sought to be introduced, the Court can require that it be offered only in that manner.³²

The danger that the jury will place undue emphasis upon the printed word can be countered in a number of ways. First of all if prior notice

³⁰ Note 13, *supra*.

³¹ *Conn. Mutual Life Ins. Co. v. Ellis*, 89 Ill. 516 (1878).

³² See *Watkins v. Potts*, 219 Ala. 427, 122 So. 416 (1929); *Bixby v. Omaha & C. & B. Ry. & Bridge Co.*, 105 Iowa 293, 75 N.W. 182 (1898); *People v. Hall*, 48 Mich. 482, 12 N.W. 665 (1882); *Staudenmeier v. Williamson*, 29 Ala. 558 (1857); VI WIGMORE, EVIDENCE § 1691 (3rd. ed. 1940).

is given, opposing counsel has adequate opportunity to research the literature and present opposing written thought. The weight of the impersonal black type can be effectively minimized by the oral testimony of a knowledgeable live witness. Finally the extract should not go to the jury when it deliberates unless all of the evidence on the issue including the transcribed testimony be given to the jury. Obviously because of expediency considerations this is usually impossible. If a jury asks a specific question concerning the content of the extract it might be sufficient to call the jury back and read it to them. If the inquiry is more general, all evidence on the point might have to be read back to the jury.

Reliable writings like reliable oral testimony are entitled to be given the weight they deserve.

USE AS CONTRADICTORY EVIDENCE IN CROSS-EXAMINATION

Courts universally permit the use of learned treatises in cross-examination to attack an expert's credibility to show that the authorities upon which he relies do not support his views. This assumes of course that he has in some manner indicated in his direct testimony that particular authorities or the authorities generally sustain his position.

Some courts permit the introduction of such treatises on cross-examination simply on the basis that the witness acknowledges that the book offered by the cross examiner is a standard authority. Others allow such books to be used to attack the witness's qualifications by showing that standard authorities disagree with him.³³ To do either and yet deny the introduction of learned treatise as direct substantive evidence is inconsistent.

Wisconsin Law Prior to Lewandowski

Wisconsin law concerning the use of learned treatises prior to *Lewandowski* can be capsulized as follows: Medical treatises could be used to impeach or discredit a witness if he testified (1) that a particular authority supported his statement when in fact it did not (2) that the recognized authorities supported his view when in fact there were opinions to the contrary, (3) that he knew of no authority which supported a contrary theory to the one espoused by him, or (4) to show that he formerly expressed an opinion in a particular treatise with which he later differed. It was also held that when an expert testified entirely from his own knowledge and experience he could not be impeached by reading into the record from contradictory written authorities. Finally, extracts from treatises could not be used under the guise of cross-examination to place before the jury what was otherwise inadmissible.

It was earlier observed in this article that the first law in Wisconsin was that it was within the discretion of the Court to permit medical

³³ Note, 29 U. CINC. L. REV. 255 (1960); *Ruth v. Fenchel*, 37 N.J. Super. 295, 117 A.2d 284, 292-3 (1955).

books to be read to the jury be counsel.³⁴ Subsequently in *City of Ripon v. Bittel*,³⁵ the Supreme Court of Wisconsin conceded that perhaps the general rule was that treatises could not be admitted as evidence, but could be read to the jury only for the force and authority which the opinion of learned men may give. Actually this fuzzy distinction was of no real importance in establishing a rule or in determining the case because the Court added that the use of the books in the case was not error for the reason that opposing counsel had objected only to the materiality of the extracts rather than the competency. In addition the Court construed the record to indicate that the witnesses stated they founded their opinion upon treatises which in fact supported their testimony, but in truth the witnesses were mistaken in this regard. Consequently the admission was proper as impeaching evidence.

In any event, ten years later the Supreme Court reviewed the law and adopted the majority view that statements contained in medical treatises even though recognized as standard authorities were not admissible to corroborate a witness's testimony because they constituted hearsay.³⁶ In the same year it was held that opinions contained in medical treatises could not be read to discredit a witness who did not rely upon authorities to support his views, but relied solely upon his personal knowledge and experience.³⁷

Hence, it was also held in *Boyle v. State*,³⁸ to be error to ask a witness what the written authorities stated upon a subject or to permit counsel to read to a jury from a standard medical works in argument to the jury. It was reasoned that if treatises could not be read in evidence to the jury, witnesses could not be permitted to give extracts from memory. An additional reason for support of the rule that medical treatises could not be used was that "we should be inundated with books of we should hold otherwise." Concern was also expressed about the juror's ability to interpret such books, the fact that there are continual changes of the scientific opinion because of new discoveries, and that detached selected passages may be misleading.

In *Kreuzinger v. Chicago & Northwestern Ry. Co.*³⁹ it was held that an objection to such evidence could be waived by circumstances and by the failure on the part of counsel to make a proper and timely objection. Evidence as to the causes of a disease based upon a witness's reference to medical treatises and his opinion concerning the consensus of recognized authority was permitted because the objecting party waived the objection by first introducing such so that he had the benefit of such

³⁴ Note 2, *supra*.

³⁵ 30 Wis. 614 (1872).

³⁶ *Stelling v. Thorp*, 54 Wis. 528, 11 N.W. 906 (1882).

³⁷ *Knoll v. State*, 55 Wis. 249, 12 N.W. 369 (1882).

³⁸ 57 Wis. 472, 15 N.W. 827 (1883).

³⁹ 73 Wis. 158, 40 N.W. 657 (1888).

evidence and then did not raise the question of its competency or challenge it by an appropriate and timely objection later.

As a necessary corollary it was next held that medical witnesses could not testify as to the cause of death by poisoning if all of their knowledge upon the subject was derived from medical treatises or instruction.⁴⁰ On rehearing the Court distinguished testimony based upon knowledge gained from close attention and discriminating study and practical experience from knowledge merely gained by reading a particular authority.

The ruling that medical experts who had no experience in the matter could not testify from information solely derived from medical texts was repeated in *Zoldoske v. State*.⁴¹

In *Waterman v. Chicago & A. Ry. Co.*,⁴² it was held that medical texts could be referred to on cross-examination where the witness testified that recognized standard authorities laid down certain propositions when in fact other standard authorities did not do so. It was pointed out however that cross-examination could not be conducted in such a way as to get the contents of the books before the jury if they themselves were inadmissible.

Cross-examination to determine whether a witness formerly expressed approval of conclusions expressed in a certain text with which he now differs is permitted.⁴³ Where a witness testified that he knew of no authority for a certain proposition and that he was familiar with a certain text, such text may be offered to impeach his testimony if it is contrary to the witness's statement.⁴⁴

Effect of Lewandowski

The focusing upon some of the difficulties and problems encountered in the use of learned treatises caused by the adoption of a rule permitting their introduction as direct substantive evidence will serve to engraft many of these rules and considerations upon their use in cross-examination.

In most instances the treatises offered will be offered for the truth of what they contain. Consequently the problems of technical terms, unfair use, or undue consumption of time will be present in their use on cross-examination as well as direct. Similarly the same foundation of reliability is necessary. A medical book or treatise must be shown to be a recognized authority before it can be used in cross-examination.⁴⁵ All of the case decisions do not make this clear. An exception, of course, will be those instances when it is offered to impeach the witness's cred-

⁴⁰ *Soquet v. State*, 72 Wis. 659, 40 N.W. 391 (1888).

⁴¹ 82 Wis. 580, 52 N.W. 778 (1892).

⁴² 82 Wis. 613, 52 N.W. 247 (1892).

⁴³ *Ruck v. Milwaukee Brewery Co.*, 114 Wis. 404, 129 N.W. 414 (1911).

⁴⁴ *Bruins v. Brandon Canning Co.*, 216 Wis. 387, 257 N.W. 35 (1934).

⁴⁵ Note, 13 *supra*.

ibility where the witness testifies that a written work states certain facts or conclusions when in fact such treatise does not do so.

A new dimension added by *Lewandowski* in addition to the use of learned treatises as direct substantive evidence is that such treatises can be used to impeach the qualifications of a witness by showing that currently accepted authorities are contrary to the views he has expressed.

BEST EVIDENCE RULE

The best evidence rule requires that the contents of a writing must be proved by the introduction of the writing itself. Its purpose, of course, is to avoid either inadvertent or willful misstatement of a witness who testifies from his recollection. As applied to learned treatises the witness might misquote the work to which he refers, but more frequently the debate will be whether he has placed a proper construction upon the passages upon which he relies. Consequently because of both reasons it is necessary that the book itself be produced so the exact language can be examined.

As a practical matter at some point the knowledge an expert has gained from his personal experience and study will be undistinguishable from that which he may have obtained from a particular book. It will be recalled that the Supreme Court of Wisconsin in one of its earlier decisions distinguished knowledge gained from discriminating study and experience as against the reference to a specific authority.

Professor Wigmore states the rule to be that where a witness relies upon a specific book the book itself must be produced, but this does not preclude a witness from being asked a general question as to the opinion of the profession.⁴⁶ He criticized an Iowa decision for improperly applying the best evidence rule by sustaining an objection to a question which asked for the general consensus of medical authorities.⁴⁷ McKelvey makes the distinction between proving a fact which has been put in writing and proving the writing itself. He states that "because a fact has been described in writing such does not exclude other proof of the fact."⁴⁸

The problems involving the application of the best evidence rule may arise in a number of ways during the course of the trial dependent upon the posture of the expert's testimony. Reference to learned treatises by a witness will almost inevitably call for the production of the books themselves if they are relevant to any fact in issue.

TECHNIQUE IN USING LEARNED TREATISES

It already has been suggested that a rule requiring prior notice as a condition to the use of learned treatises as direct evidence serves to per-

⁴⁶ WIGMORE, EVIDENCE, § 1694 at 9 (3rd ed. 1940).

⁴⁷ *Ibid.*; Cf. *Brodhead v. Wiltse*, 35 Iowa 429 (1872), wherein the Iowa court held that the knowledge gained from scientific works is admissible without proving the works themselves.

⁴⁸ MCKELVEY, EVIDENCE, 609 (5th ed. 1944).

mit the court to educate itself in reference to the subject which it will litigate. This make for a more intelligently conducted trial. It also expedites the use of the treatises during the course of the trial. Prior notice might be excused when the treatise is offered on cross-examination or rebuttal to challenge a witness's testimony concerning a particular authority or the prevailing opinions of the authorities. This would be particularly justified when an expert witness has testified contrary to the generally accepted opinion in a manner which could not be reasonably anticipated and reference to learned treatises can resolve the issue simply and the production of a live witness would be inconvenient or unduly extend the trial.

It has been suggested that it might be appropriate that the various professional societies prepare and certify lists of accepted authorities for trial use. Such a certification is of course hearsay to which there could be valid objection and the procedure might be more burdensome and less efficient than having the written work qualified at the trial or agreed to at the pretrial conference.

Objections to the introduction into evidence of extracts should point out deficiency because they might be supplied when pointed out or simply go to weight rather than admissibility. Thus it has been held that the admission of an extract over a general objection was not error even though reliability had not been proved.⁴⁹

Once the Court has determined that an extract is admissible, the matter can be put directly to the jury by permitting counsel or the witness to read the passage. Usually the witness is asked if he has relied upon any authority in reaching his opinion or if his opinion is corroborated by any authorities. Ordinarily a party will not limit himself to treatise evidence alone, but will have an expert available to explain and interpret its more technical aspects.

Frequently it is helpful if not absolutely necessary for counsel to have the books before him to assist him in framing his questions. Many courts have held that counsel may use the treatises to aid him in framing questions to be asked.⁵⁰

In regard to counsel's use of books to interrogate a witness it was said in *Tompkins v. West*, as follows:

The motive was to, make the question more clearly intelligible, To require of counsel a learning in the technicalities of all the sciences, ample enough, without special preparation, to conduct intelligently a technical examination of an expert in such science, would not only practically deny his right to conduct an

⁴⁹ *Barfield v. So. Highland Infirmary*, 191 Ala. 553, 68 So. 30 (1915); also see, *Kreuzinger v. Chicago and N.W. Ry. Co.*, *supra*, note 39.

⁵⁰ *Tompkins v. West*, 56 Conn. 478, 16 A. 237 (1888); *State v. Coleman*, 20 S.C. 441 (1883); *Moore v. State*, 184 Ark. 682, 43 S.W.2d 228 (1931); *Conn. Mutual Life Ins. Co. v. Ellis*, 89 Ill. 516 (1878).

examination or cross-examination at all, but would virtually deny to a party the assistance of counsel in many scientific matters.⁵¹

Obvious reference to the book in the presence of the jury by counsel, for the ostensible purpose of framing questions, effectively places the contents of the book before the jury. Such questions as "Are you familiar with the fact that Dr. Blackwell states . . .?" is a more obvious illustration of the point. If the effect of whatever technique is used is to convey the impact of the treatise to the jury, the Court may have to make an *in camera* determination as to the reliability of the treatise.

The display of books on counsel's table and the framing of questions while holding such in his hand so as to impress the jury that such contained views of eminent writers contrary to the opinion of the witness has been held prejudicial error because the books were incompetent. The error might or might not be curable by an instruction to disregard the inference created.⁵² Professor Wigmore has referred to the exclusion of learned treatises as evidence, but the approval of their use in framing questions as a quibble.⁵³

The courts have recognized other possibilities of abuse and "great care should always be taken by the court . . . to see that the questions read to the witness are so fairly selected as to present the author's views on the subject of the examination."⁵⁴

While it may seem burdensome to require reproduction of the passages sought to be used, there are practical reasons for this suggestion in addition to these already suggested. If the trial is lengthy, and those in which such treatises are used usually are protracted, the Court can better control the final argument as to fairness and keep it within the record if it has the precise language conveniently before it. Wisconsin follows the general rule that an assertion made in an opening statement or in a closing argument need not be founded upon direct evidence provided that the fact so asserted may be inferred from the evidence.⁵⁵ This poses the additional problem that certain inferences and theories argues may be totally unwarranted medically although they may appear to be plausible to the layman. Counsel might have to be warned prior to trial that the Court will severely restrict the arguments or inferences and theories involving technical matters unless the inferences drawn are substantiated or verified by the expert testimony of live witnesses.

Although the practice of sending such exhibits to the jury room should be discouraged, reproduction might become essential in that case. The entire book is not in evidence and there is no assurance that a jury

⁵¹ 56 Conn. 478, 16 A. 237, 238-39 (1888).

⁵² *Allen v. Boston Elevated Ry. Co.*, 212 Mass. 191, 98 N.E. 618 (1912); *Briggs v. Chicago and Great Western Ry. Co.*, 238 Minn. 472, 57 N.W.2d 572 (1953).

⁵³ Note 4, *supra*.

⁵⁴ Note 31, *supra*, at 519-20.

⁵⁵ *Kink v. Combs*, 28 Wis. 2d 65, 135 N.W.2d 789 (1965).

will confine itself to only those pages in evidence if the book is given to the jury despite specific instruction. Finally copies of the extracts may have to be substituted for the originals pending the period in which either party has the right of appeal or in the case of appeal. Frequently these documents or books come from medical libraries or the offices of doctors who are most anxious to have them returned immediately after trial.

Conclusion

The trial process is vulnerable to some of the risks anticipated in the use of learned treatises as direct evidence. Actually the problems are no different in most instances when books are used in cross-examination. An experienced trial judge should have little difficulty in administering the rule if he is forewarned of the problems discussed. Certainly his problems concerning the proper use of treatises on cross-examination are now simplified.

When Justice Stone of the Alabama Court wrote the opinion in *Stoudenmeier v. Williamson*,⁵⁶ in 1857 approving the use of learned treatises as direct evidence he stated:

It is the boast of this age of advancing civilization, that, aided and facilitated by the printer's art, the collected learning of past ages has been transmitted to us. Shall we withhold the benefits of this heritage from the contests of the courtroom? We think not. . . .

Eighty-two years later another Alabama justice observed that Alabama had not found the ends of justice defeated by the rule nor the difficulties of its application very great.⁵⁷

⁵⁶ Note 6, *supra*, at 567.

⁵⁷ Note 13, *supra*.