

# Recent Decisions: Evidence: Admissibility of a Doctor's Testimony as to His Patient's Subjective Symptoms

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attorney taking this type of beneficial interest under the will. In *State v. Horan*,<sup>25</sup> the court mentions as some of the considerations involved,

the conflict of interests, the incompetence of an attorney-beneficiary to testify because of a transaction with the deceased (sec. 325.16, Stats.), the possible jeopardy of the will if its admission to probate is contested, the possible harm done to other beneficiaries and the undermining of the public trust and confidence in the integrity of the legal profession. . . .<sup>26</sup>

In conclusion, in Wisconsin it appears that an attorney designated in a will as attorney for the executor takes an enforceable interest by reason of the designation if the executor's appointment is conditioned upon retention of the designated attorney. As yet, the precise nature of this interest has not been fully considered, nor have possible ramifications such as those discussed above. It would thus seem appropriate for the Wisconsin Supreme Court to reconsider at the first opportunity presented whether the attorney-designee should have a right to enforce his designation; and if so, on what basis.

JOHN P. FOLEY

**Evidence: Admissibility of a Doctor's Testimony as to His Patient's Subjective Symptoms:** In *Ritter v. Coca Cola Co.*,<sup>1</sup> plaintiff sued for psychological injuries that occurred when she drank a bottle of Coca-Cola and discovered portions of a decomposed mouse inside. Plaintiff retained counsel the next day and then consulted a doctor concerning any possible physical injuries, but none were found. Upon continuing emotional distress, she visited a psychiatrist and recounted to him her symptoms of loss of sleep, fear of mice, and fear of non-translucent liquids. At the trial, after the psychiatrist had testified in her favor, plaintiff recovered \$2,500 for the injuries incurred.

Defendant appealed the trial court ruling admitting into evidence the psychiatrist's testimony as to his patient's subjective symptoms. Defendant contended that to allow this doctor to testify after plaintiff retained counsel was in direct contravention of the court's previous holding in *Kath v. Wisconsin Cent. Ry.*<sup>2</sup> and other subsequent cases.<sup>3</sup> The supreme court affirmed, and expressly overruled the *Kath* case.

It has long been recognized as a valid exception to the hearsay rule, that a doctor may testify as to subjective symptoms which are related to him by his patient. It is asserted that declarations made by a person to his physician while receiving treatment are trustworthy and should

<sup>25</sup> 21 Wis. 2d 66, 123 N.W. 2d 488 (1961).

<sup>26</sup> *Id.* at page 70, 123 N.W. 2d at 490.

<sup>1</sup> 24 Wis. 2d 157, 128 N.W. 2d 439 (1964).

<sup>2</sup> 121 Wis. 503, 99 N.W. 217 (1904).

<sup>3</sup> See *Thompson v. Nee*, 12 Wis. 2d 326, 107 N.W. 2d 150 (1961); *Plesko v. City of Milwaukee*, 19 Wis. 2d 210, 120 N.W. 2d 130 (1963).

be admitted notwithstanding they are hearsay, for it is presumed that a person will not falsify his statements to a physician who is attempting to treat him. Professor Edmund M. Morgan, a leading authority on the law of evidence, finalizes the above exception in the following manner:

A patient who consults a physician or surgeon for treatment has every reason for answering truthfully all pertinent questions put to him concerning his . . . symptoms both subjective and objective. And generally speaking no medical attendant will treat or prescribe for a patient without hearing and considering the history of his condition. For this reason . . . courts have wisely held admissible, declarations as to . . . bodily condition when made to a medical attendant for the purpose of securing medical treatment.<sup>4</sup>

Although the Wisconsin Supreme Court early recognized this exception to the hearsay rule,<sup>5</sup> it soon sought to limit its scope and prevent possible abuse by holding in *Kath* that a physician could not testify as to the subjective symptoms of a patient if, in addition to seeking medical treatment, the patient intended that the doctor must also qualify himself as a witness for possible future litigation. The *Kath* case further restricted the exception by implying that if the doctor was consulted after the attorney was retained, it would be inferred that the patient sought the doctor for the dual purpose of treatment and testimony, and his testimony could not be received into evidence.

While the *Kath* case has been upheld in several subsequent decisions,<sup>6</sup> there have been definite inroads made which lessen the impact of the court's holding in the case.<sup>7</sup> An example of this lessening occurred in *Rasmussen v. Metropolitan Cas. Ins. Co.*<sup>8</sup> where the court held that the mere fact that the plaintiff had retained a lawyer before he consulted a doctor was not in and of itself proof enough to support an *inference* that he was seeking objectives other than treatment. This decision led the court in the principal case to hold that

the holding in *Kath* has been retained while at the same time allowing a doctor to testify as to a patient's subjective symptoms recited to the doctor during a consultation, which consultation, according to the evidence in the record, by inference, may have been arranged for the two-fold purpose of treatment plus examination prior to testifying but concerning which the trial court has ruled that the sole motivation of the claimant in arranging for the consultation was treatment. We see no logic in continuing in adherence to the *Kath* rule. . . .<sup>9</sup>

<sup>4</sup> 2 MORGAN, BASIC PROBLEMS OF EVIDENCE 287 (1954).

<sup>5</sup> *Keller v. Town of Gilman*, 93 Wis. 9, 66 N.W. 800 (1904).

<sup>6</sup> *Shield v. Fredrick*, 232 Wis. 595, 288 N.W. 241 (1939); *Thompson v. Nee*, *supra* note 3.

<sup>7</sup> *La Fave v. Lemke*, 3 Wis. 2d 502, 89 N.W. 2d 312 (1957); *Plesko v. City of Milwaukee*, *supra* note 3.

<sup>8</sup> 264 Wis. 432, 59 N.W. 2d 457 (1952).

<sup>9</sup> 24 Wis. 2d at 164, 128 N.W. 2d at 442.

The court in *Ritter* has now held that even though the plaintiff's aim is two-fold, if the consultation is for the bona fide purpose of treatment, the doctor's testimony is admissible. They are thus doing no more than recognizing that it is almost impossible to segregate the two motivations of treatment and testimony.

The majority of the other jurisdictions do not agree with this two-fold purpose doctrine which was upheld in our supreme court. To understand this whole problem of admissibility of testimony as to subjective symptoms, four categories have been utilized to illustrate how the various jurisdictions differ in their holdings. A doctor's testimony may be admissible (1) when patient relates *present* pain for *treatment* purposes only; (2) when patient relates *present* and *past* pain for *testimony* purposes only; (3) when patient relates *past* pain for *treatment* purposes only; or (4) when patient relates *present* or *past* pain and a two-fold purpose is admitted.

I. *Patient relating present pain for treatment purposes only.*

Statements by an injured person as to his *present* pains and symptoms during an examination by a physician for the purpose of *treatment* only are almost universally held admissible.<sup>10</sup> In this instance the doctor's testimony would be admissible as an exception to the hearsay rule since it forms part of the *res gestae*, and since the statements are made in the present, they are presumed free from all motives to misrepresent because it would be absurd for a patient to relate falsities to a physician who will need such information to treat the ailment and make him well. Wisconsin is in agreement with the majority rule.

II. *Patient relating past or present symptoms and pain for testimony purposes only.*

Statements by a patient as to his *present* or *past* pains or symptoms made to a physician examining him *solely* for the purpose of qualifying the doctor as an expert witness are by the universal rule inadmissible.<sup>11</sup> The courts feel that since the patient has no desire for treatment, there is no compelling reason for him to tell the truth to the physician as he would have to if he wanted the doctor to make him well. These courts also hold that the fact that a patient contemplated an action in court at the time his statements were made to a physician does not in and of

<sup>10</sup> *McDuffie v. Root*, 300 Mich. 286, 1 N.W. 2d 544 (1942); *Cuneo Press Co. v. Industrial Comm'n*, 341 Ill. 469, 173 N.E. 470 (1930); Annot., 130 A.L.R. 977 (1941); Annot., 80 A.L.R. 1527 (1932); Annot., 67 A.L.R. 10 (1930).

<sup>11</sup> *Kath v. Wisconsin Cent. Ry.*, *supra* note 2; *Kienninger v. Interurban St. Ry.*, 113 N.Y. Supp. 96 (Sup. Ct. 1908); *Yellow Cab Co. v. Henderson*, 183 Md. 546, 39 A. 2d 546 (1944); *Stewart v. Everts*, 76 Wis. 35, 44 N.W. 1092 (1890); *United States v. Neckle*, 60 F. 2d 372 (8th Cir. 1932); *Jensen v. Elgin, J. & E. Ry.*, 15 Ill. 2d 559, 147 N.E. 2d 204 (1957); *Stone v. Chicago, St. P., M. & O. Ry.*, 88 Wis. 98, 59 N.W. 457 (1894).

itself render his testimony inadmissible. Wisconsin follows the majority rule here.

### III. *Patient relating past pain for treatment purposes only.*

Statements by an injured person as to his *past* pains or symptoms are usually considered purely hearsay by the majority of the courts and deemed inadmissible.<sup>12</sup> There is, however, some support for the view that a statement concerning past pain and suffering made to a physician during the course of the examination should be admissible to the same extent as a statement of present pain and suffering.<sup>13</sup> The Wisconsin Supreme Court held to this latter view in *Keller v. Town of Gillman*<sup>14</sup> when it stated that "the statements and declarations of a patient as to his pains and feelings, when made to a physician for the purpose of treatment, may be given in evidence."<sup>15</sup> This minority rule was also followed in the case of *Brouwer v. Industrial Comm'n*.<sup>16</sup>

Mrs. Johnson testified that she became nauseated; she did not testify that she had vomited. Dr. Duncan testified that when he first examined her she told him [of vomiting]. The statement was made by her for the purpose of treatment and was properly received in evidence.

Leading authorities on the subject indicate that soon this will be the majority holding.<sup>17</sup> This author agrees with the authorities because if we assume that man has a basic desire to help the doctor help him get well, we must assume that he will tell the truth concerning the pain, whether it be present or past.

### IV. *Patient relating present or past pain and has a two-fold purpose of obtaining both treatment and expert testimony.*

This is a very definite minority holding and is the holding of the principal case. As was stated earlier, the principal case overturned *Kath* which held the majority view<sup>18</sup> that there should not be this two-fold purpose. The reasons were set forth in *Kath* as follows:

If he joins with that purpose [*i.e.*, treatment] an intention to call the physician as an expert upon the trial of his case, whether then pending or to be commenced, then there is distinctly present the temptation to manufacture testimony when stating his symptoms and feelings to the physician. An easy way is thus opened

<sup>12</sup> *Reid v. Yellow Cab Co.*, 131 Ore. 27, 279 Pac. 635 (1896); *Lowery v. Jones*, 219 Ala. 201, 121 So. 514 (1929); *Sund v. Chicago, R. I. & P. Ry.*, 164 Minn. 24, 204 N.W. 628 (1925).

<sup>13</sup> *Meaney v. United States*, 112 F. 2d 538 (2d Cir. 1940); Annot., 130 A.L.R. 975 (1941).

<sup>14</sup> 93 Wis. 9, 66 N.W. 800.

<sup>15</sup> *Id.* at 11, 66 N.W. at 801.

<sup>16</sup> 266 Wis. 73, 79, 62 N.W. 2d 577, 580 (1953).

<sup>17</sup> McCORMICK, EVIDENCE § 266 (1954); MORGAN, *op. cit. supra* note 4.

<sup>18</sup> *Told v. Madison Bldg. Co.*, 216 Ill. App. 29 (1919); Annot., 67 A.L.R. 15 (1930).

to put any quantity of self-serving *ex parte* statements before the jury, by simply employing an expert to give a few days' treatment to the patient, and then putting the expert on the stand in this dual capacity of expert and attending physician.<sup>19</sup>

The minority view is stated in the *Ritter* case and seems to be the main reason why these courts so hold:

The rationale of the *Kath* rule regards statements made by the patient to the physician as hearsay and in the nature of self-serving declarations. *Kath* allows testimony concerning such statements where made to a physician while undergoing treatment, but excludes the testimony where dual motivation is established. This distinction is unrealistic. If the testimony on statements made in one context is admissible then logically such testimony should also be admissible where the statements are made in the other context.

As long as a patient goes to a physician with the *bona fide* purpose of receiving treatment, the basic desire of a patient to get well, we believe, will generally motivate him to tell the truth and this is sufficient reason to allow the attending physician to testify about statements made to him which may touch on his history and his subjective symptoms. Cross examination and argument are available to opposing counsel as a means of testing such testimony.<sup>20</sup>

The Wisconsin Supreme Court in rendering this decision has done nothing more than to recognize that which it has side-stepped up to now. That is, to be able to tell the difference between when a man goes to the doctor for treatment only and when he goes for the dual purpose of treatment and testimony is for all practical purposes nearly impossible.

The court now must assume that the patient will not lie to a physician when his basic desire is to get well. This holding also means that the court relies on two checks to defeat the admission of untruthful statements: First, the belief that the physician will know if and when the patient is lying about pain or sickness, from his vast store of medical knowledge; secondly, the system of cross-examination which will glean out the inconsistencies in any testimony of a doubtful nature.<sup>21</sup>

TIMOTHY P. KENNY

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Code Practice: Pain and Suffering: Per Injury Argument: In *Doolittle v. Western States Mut. Ins. Co.*<sup>1</sup> the defendant's intestate collided with a vehicle in which the plaintiff, Myra Doolittle, was a

<sup>19</sup> 121 Wis. at 512, 99 N.W. at 220.

<sup>20</sup> 24 Wis. 2d at 165, 128 N.W. 2d at 443.

<sup>21</sup> *Felkl v. Classified Risk Ins. Corp.*, 24 Wis. 2d 595, 129 N.W. 2d 222 (1964); the supreme court affirmed its holdings in the *Ritter* case.

<sup>1</sup> 24 Wis. 2d 135, 128 N.W. 2d 403 (1964).