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EXPERT TESTIMONY BY PHYSICIANS AND SURGEONS

In the field of expert witnesses, there is considerable confusion on the qualifications one needs to possess in order that his testimony be admissible. The reason for this is that the appellate courts have failed to establish criteria by which the trial courts can be guided. The purposes of this article are to discuss briefly the basis of the use of expert witnesses and to discover the best criteria which ought to be established as to physicians' qualifications to testify as experts on matters of general medical opinion and in malpractice cases.

EXPERT WITNESSES IN GENERAL

The first consideration in a survey of expert witnesses is a general definition of an "expert." That term designates one who possesses a special skill or knowledge on a particular matter which is so superior to the knowledge of men in general as to that particular matter that his formation of a judgment is a fact of probative value.¹ Experts have also been described as men of science educated in the arts or individuals who have acquired special or peculiar information from practical experience.²

The function of an expert witness is best described in these words:

"The test to determine whether a witness is qualified as an expert is to inquire whether his knowledge of the matter in relation to which his opinion is asked is such that it will probably aid the trier of the question to determine the truth."³

The jury or court is often confronted with issues that can be properly understood only by those having specialized knowledge and which cannot be accurately determined by deductions and inferences drawn from the facts using ordinary knowledge and usual practical experience. On such issues, testimony of one possessing special knowledge or skill is required to arrive at just and intelligent conclusion.

As to what qualifications one must possess to be considered an expert, there is great diversity of opinion.⁴ The courts have set no exact requirement as to the mode in which this skill or experience must have been acquired.⁵ To manifest the inconsistency in the attempted limitation as to these requirements, the Wisconsin courts have held that knowledge acquired solely through study will not qualify one as an

¹ 32 C. J. S. EVIDENCE §457.

² *Empire Oil and Refining Co. v. Hoyt*, 112 F. 2d 356 (6th Cir. 1940). See MODEL CODE OF EVIDENCE, Rule 402 (1942).

³ *Olgiate v. New England Box Co.*, 80 N.H. 399, 117 Atl. 735 (1922).

⁴ 3 JONES, EVIDENCE § 1315 (2nd Ed.) ; 22 C. J. EVIDENCE §608.

⁵ 20 AM. JUR. EVIDENCE §784.

expert,⁶ while our sister state of Michigan states study alone is a sufficient source.⁷ And New Jersey rules that one may be qualified to testify as expert either by study without practice, or practice without study.⁸ Appellate courts of several states have seen this lack of a definite criterion so clearly that they have remarked of it in their decisions.⁹

But while there is considerable question on the criteria necessary for the qualification of expert testimony, the general and universally accepted rule is expressly stated in two recent Wisconsin cases to be:

"The question of whether a witness possesses sufficient knowledge to qualify as an expert is generally one for the trial court and unless it appears that in its determination the trial court is guilty of an abuse of discretion, his ruling will stand."¹⁰

Nevertheless there is no universal rule as to the test which the trial court should apply as to expert witnesses generally. So this article shall confine itself to two major classes of experts. First the qualifications required of physicians and surgeons to enable them to testify in ordinary medical matters will be discussed. Then the qualifications necessary to enable physicians and surgeons to testify as expert witnesses in malpractice cases will be explained.

PHYSICIANS AND SURGEONS IN GENERAL AS EXPERTS

The main problem as to the qualification of a physician or surgeon as an expert is whether the physician must have had a case concerning the same or a similar problem. While the decisions as to this are not harmonious, many early cases set down the rule that a physician is competent to testify as an expert even though he has had no experience in a similar case.

That is exemplified in *Kelley v. United States*¹¹ where a physician was asked about elevation of a pistol necessary to inflict a certain wound. His testimony was held competent by reason of his general professional studies and experience though he had not made any special study of nor had any experience with gunshot wounds.

In a North Carolina case,¹² the testimony of a physician that drowning was the cause of death was held competent although he had

⁶ *Luning v. State*, 1 Chand. 264, 2 Pin. 284 (1849); *Kath v. Wis. Cent. R. R. Co.* 122 Wis. 503, 99 N.W. 217 (1904).

⁷ *People v Thacker*, 108 Mich. 652, 66 N.W. 562 (1896); *accord*, *Delaney et al. v. Morris* 193 Okl. 589, 145 P. 2d 936 (1944).

⁸ *Fenias v. Reichenstein*, 124 N.J.L. 196, 11 A. 2d 10 (1940).

⁹ *Kelley v. Richardson*, 69 Mich. 430, 37 N.W. 54 (1888); *Strutters v. Philadelphia & D.C. R. Co.* 174 Pa. 291, 34 Atl. 443 (1896); *Sioux City R. R. Co. v. Finlayson*, 16 Neb. 578, 20 N.W. 860 (1884).

¹⁰ *Anderson v. Eggert*, 234 Wis. 348, 291 N.W. 365 (1940); *Morrill v. Komanski*, 256 Wis. 417, 41 N.W. 2d 620 (1949). See 166 A.L.R. 1067 and 32 C.J.S. EVIDENCE §449, 458b.

¹¹ *Kelley v. United States*, 27 Fed. 616 (1st Cir. 1885).

¹² *State v. Wilcox* 132 N.C. 1120, 44 S.E. 625 (1903). *accord*, *State v. Megordin*, 49 Ore. 259, 88 Pac. 306 (1907); *People v. Phelan* 123 Cal. 551, 56 Pac. 424 (1899).

never examined the body of one who had drowned and based his opinion on authorities he had read.

In cases of poisoning, the general rule is that a physician who is a graduate of a medical college and is engaged in general practice is competent to testify as to the effect of a certain poison although in his own practice he has not seen a person affected by that poison.¹³ This is clearly illustrated in *People v. Thacher*,¹⁴ where the Michigan court held that a graduate of a medical school who was practicing medicine could testify in a case of poisoning, though he had never treated one who had been poisoned nor seen such a person. That court ruled that the jury should be allowed to consider such testimony and then give it the weight it deserves in light of the other evidence presented.

In Wisconsin, the basic requirement for a physician to qualify as an expert is stated in the statutes to be a license.¹⁵

In addition to that, the Wisconsin court has held as a general rule on expert testimony that one cannot testify to what he has learned entirely from books and study.¹⁶ Following this basic rule, the Wisconsin court in *Soquet v. State*¹⁷ held that a physician whose knowledge in respect to arsenic poisoning was derived, not from personal observation or experience, but wholly from medical or scientific books or instruction is not competent to testify as an expert as to the symptoms of such poisoning. This rule was referred to in a later Wisconsin case¹⁸ which held that in order that the rule be applied and testimony excluded it must be affirmatively shown by the objecting party that the experts had had no practical experience.

Here to show the strict application of this criterion in Wisconsin, *Zoldoske v. State*¹⁹ and *Bowers v. State*²⁰ are cited. In the first case, a physician who had previously attended one case of strychnine poisoning before his graduation from medical school was held competent to testify as an expert in another such case. The other case held that a physician who had had seventeen years of medical practice and had treated many bruises and wounds of the head was competent to testify as a witness

¹³ *Germania Life Ins. Co. v. Ross-Lewin*, 24 Colo. 43, 51 Pac. 488 (1897); *Rice v. State*, 49 Tex. Crim. 569, 112 S.W. 299 (1907); *Boswell v. State*, 114 Ga. 40, 39 S.E. 897 (1901).

¹⁴ *People v. Thacker*, 108 Mich. 652, 66 N.W. 562 (1896).

¹⁵ WIS. STAT. (1951), sec. 147.14 (2). "No person violating subsection (1) [pertaining to the practice of medicine without a license] of this section shall have the right to collect by law any compensation for professional services, or to testify in a professional capacity as a medical or osteopathic physician or practitioner of any form or system of treating the affected, or as an insanity expert; . . ." *Infra*, note 42.

¹⁶ *Supra*, note 6.

¹⁷ *Soquet v. State* 72 Wis. 659, 40 N.W. 391 (1888).

¹⁸ *Kath v. Wisconsin Cent. R. Co.* 121 Wis. 503, 99 N.W. 217 (1904).

¹⁹ *Zoldoski v. State*, 82 Wis. 580, 52 N.W. 778 (1892).

²⁰ *Bowers v. State*, 122 Wis. 163, 99 N.W. 447 (1904).

concerning fractures of the skull, because it was not shown that he had never treated a skull fracture.

It would seem that since all testimony is to be weighed by the jury in their determination of the facts and that they are the ultimate judge of its credibility and weight, all physicians who are licensed so as to fulfill the statutory requirement ought to be allowed to testify as experts. Then the extent of their practical experience and knowledge would be considered by the jury in weighing the testimony. In 1923, the Wisconsin court in *Manna v. State*²¹ stated, in answer to an objection as to the testimony of two physicians on the type and effect of a gunshot wound on the ground that neither had had experience with such a wound, that such experience was unnecessary to qualify those men because of their other experience and knowledge of anatomy.

There are two practical considerations which support this new Wisconsin trend and the majority rule. The first is the problem raised in *Germania Life Ins. Co. v. Ross Lewin*.²² The court stated that in the case of a newly discovered poison, expert testimony would be excluded if a physician must have practical experience with the poison before he is qualified to testify as an expert.

The other is the reluctance of members of the medical profession to testify in court cases. While this is especially true in malpractice cases,²³ it is somewhat applicable in all cases. By setting the criteria for qualification at possession of a medical license, more physicians would be eligible to testify as experts as to general medical matters, and this second problem would be overcome.

PHYSICIANS' TESTIMONY IN MALPRACTICE CASES

Malpractice is defined as:

" . . . bad, wrong, or injudicious treatment of a patient, professionally and in respect to the particular disease or injury, resulting in injury, unnecessary suffering or death to the patient, and proceeding from ignorance, carelessness, want of proper professional skill, disregard of established rules or principles, neglect or a malicious or criminal intent."²⁴

The problem which is raised in a majority of malpractice cases is what constitutes "ignorance, carelessness or want of proper professional skill."²⁵ The criterion is not the highest skill medical science knows; the law requires physicians to possess and use that reasonable degree of skill, knowledge, and care usually possessed and exercised by other

²¹ *Manna v. State*, 179 Wis. 384, 192 N.W. 160 (1923).

²² *Germania Life Ins. Co. v. Ross-Lewin*, *supra*, note 12.

²³ *Tadlock v. Lloyd*, 65 Colo. 40, 173 Pac. 200 (1918); *Johnson v. Winston*, 68 Neb. 425, 94 N.W. 607 (1903).

²⁴ BLACK'S LAW DICTIONARY 1149 (1933).

²⁵ *Supra*, note 24.

physicians under similar circumstances.²⁶ This standard has been limited somewhat to general medical custom in the same vicinity²⁷ or the same or similar communities.²⁸ The theory supporting this is that a physician in a small or rural community who does not have the opportunity or ability to keep up to date with advances in his profession should not be held to the same standard of care as physicians in large communities who have that opportunity.²⁹

In Wisconsin, two additional factors have been added so that due care is now defined as:

“that degree of care, diligence, judgment, and skill which physicians in good standing in the same school of medicine usually exercise in the same or similar localities under like or similar circumstances, having regard to the advanced state of medical or surgical science at the time he has discharged his legal duty to his patient.”³⁰

The rule as to the same school of medicine is that a licensee of one school of medicine cannot testify as to conduct of a person licensed in another school of medicine.³¹ This was interpreted not to exclude the testimony of members of another school as to a method of treatment on which the theories of the schools do or should concur.³² It has also been construed as not placing a physician at his own peril when he must choose one of two accepted methods of treatment based on theories of opposing schools,³³ and not excluding testimony of a physician of one school who is sufficiently acquainted with the doctrines of the other school when his testimony is based on the premises of the other school.³⁴ The function of the other factor, due regard to the advanced state of the medical profession at the time in question, is to forbid physicians in small communities to hide behind their culpable ignorance though it

²⁶ 41 AM. JUR. PHYSICIAN & SURGEONS §82.

²⁷ *Trindle v. Wheeler*, 23 Cal. 2d 330, 143 2d (1943); *Iterman v. Baker*, 214 Ind. 308, 15 N.E. 2d 365 (1938).

²⁸ *Thomason v. Hethcock*, 7 Cal. App.2d 634, 46 P. 2d 832 (1935); *Iterman v. Baker*, 214 Ind. 308, 15 N.E. 2d 365 (1938). See 8 A.L.R. 2d 772.

²⁹ *Warnoch v. Kraft*, 30 Cal. App. 2d 1, 85 P. 2d 505 (1938).

³⁰ *Nelson v. Harrington*, 72 Wis. 591, 40 N.W. 228 (1888); *Kuechler v. Volgmann*, 180 Wis. 238, 192 N.W. 1015 (1923); *Kuehnemann v. Boyd*, 193 Wis. 588, 215 N.W. 455 (1927).

³¹ *Morrill v. Komasinski*, *supra*, note 10.

³² *Treptau v. Behrens Spa Inc.* 247 Wis. 438, 20 N.W. 2d 108 (1945), where a chiropractor in treating an injured foot with a diathermo—heat treatment was held to have entered the general field of medicine and physicians were allowed to testify as to due care which the chiropractor should have used because when there is an invasion of the field of medicine the rule confining the inquiry as to due care to the rules and principles of chiropractic or the particular school of medicine to which he belongs does not exclude testimony of others on a point in relation to which the principles of the schools do or should concur.

³³ *De Bruine v. Voskuil*, 168 Wis. 104, 169 N.W. 288 (1918); *Holton v. Burton*, 197 Wis. 405, 222 N.W. 225 (1928).

³⁴ *Swanson v. Hood*, 99 Wash. 506, 170 Pac. 135 (1918).

does not place the same burden of skill on them as on those in larger communities.

Courts in the United States have generally held that expert testimony by witnesses qualified by knowledge and experience to define due care under particular facts and circumstances is pre-eminently necessary in malpractice cases.³⁵ The reason for this is the same as the basis of all expert testimony, that ordinary knowledge is not a sufficient foundation upon which the jury can establish its determinations.

But while the above considerations are accepted, the criteria for the qualification of expert witnesses in malpractice cases are in conflict as evidenced by two recent cases. In a 1952 California, District Court of Appeal decision,³⁶ the criterion by which the trial court was to be guided was stated to rest primarily on occupational experience which has been described as:

"a practical knowledge of what is usually and customarily done by physicians under circumstances similar to those which confronted the defendant charged with the malpractice . . . is of controlling importance in determining competency of the expert to testify to the degree of care against which the treatment given is to be measured."³⁷

The reason for this criterion is that the essential factor in qualification is knowledge of the standard appropriate to circumstances of the particular case, the essential factor being a similarity of conditions.³⁸ The application of that factor was exemplified in *Bickford v. Lawson*,³⁹ where a physician's testimony as to the necessity of using x-ray pictures and use of the tension method in case of a fractured limb was properly excluded because it was based on his own judgment and not on the customary practice of physicians in Willows or similar communities, of which the witness testified he had no knowledge. However, this application is not a purely geographical one as pointed out by *Lewis v. Johnson*,⁴⁰ where a physician was considered qualified to testify as to standard of care in Long Beach when he came from Los Angeles because these were similar metropolises, and are located in the same county. This is not limited to California but is also followed in New Hampshire⁴¹ and Iowa.⁴²

³⁵ 7 WIGMORE, EVIDENCE §2090 (a) (3rd ed. 1940); Hall vfl Plume, 131 N.J.L. 511, 37 A. 2d 3 (1949); McGraw v. Kerr, 23 Colo. App. 163, 128 Pac. 870 (1912); Kuehnemann v. Boyd, *supra*, note 30. See Note, 21 Miss. L. J. 291 (1950).

³⁶ *Pierce v. Linde*, 248 P. 2d 506 (Cal. 1952).

³⁷ *Huffmann v. Lindquist*, 37 Cal. 2d 465, 234 P. 2d 34 (1951).

³⁸ Note, 23 So. CALIF. L. REV. 138 (1950).

³⁹ *Bickford v. Lawson*, 27 Cal. App. 2d 416, 81 P. 2d 216 (1938).

⁴⁰ *Lewis v. Johnson*, 12 Cal. 2d 558, 86 P. 2d 99 (1939).

⁴¹ *Michael v. Roberts*, 91 N.H. 499, 23 A. 2d 361 (1941). In that case the testimony of a physician as to due care in Rochester was properly excluded since the expert practiced in Boston notwithstanding the fact that he lived in Revere, Mass. which is similar in size and resources to Rochester.

⁴² *Kerchner v. Dorsey and Dorsey*, 226 Iowa 283, 284 N.W. 171 (1939).

But in a New Jersey decision,⁴³ it was held that the trial court erred in excluding the testimony of an eighty-two year old specialist in gynecology who was licensed in New York but had performed no operations for twenty years and had witnessed ten to fifteen operations per year for those twenty years except the last year and had kept up with medical progress by reading. While following the same general rule as do the California courts,⁴⁴ that court insists on a liberal construction in stating:

"A trial court should have regard for the proof difficulties adverted to and to the fundamental concept that where a right exists the law would be deficient if there were no remedy for violation of that right, and consequently should exercise his discretion liberally toward the acceptance of the qualifications."

They conclude that if in addition to the license there is some reasonable evidence of qualification, the expert should be allowed to testify, and the jury should weigh the testimony in the light of his experience.

The weakness of this liberal construction in malpractice cases is discussed by Justice Waesche in his dissenting opinion.⁴⁵ He points out that the basis of due care testimony is knowledge of what other physicians in the same or similar circumstances in the same or similar community would do. Since the expert had not practiced for twenty years, had had no hospital experience for that period of time, and since there was no indication of any such experience since his early training in this type of case, the witness was held by the trial judge and by the dissenting judge not to qualify as an expert.

In malpractice cases, the Wisconsin Supreme Court in an early case,⁴⁶ held it was not error to allow physicians, who lived thirty miles from the place of treatment, to testify as experts when they qualified themselves as being familiar with the practice of medicine and customs of their profession in the place of treatment. That appears to be the only decision in which Wisconsin took a stand on this question, although they have often stated the general rules applicable.⁴⁷

But in order to give a complete picture of the Wisconsin law, a recent decision there should be considered.⁴⁸ In that case, an osteopath licensed in Michigan but not in Wisconsin was allowed to testify as to the due care which a Wisconsin physician ought to exercise in the diagnosis and treatment of a bone fracture where the witness testified he knew of the usual practice of surgery in similar communities in Michigan and the plaintiff was unable to obtain medical witnesses in her

⁴³ *Carbone v. Warburton*, 91A. 2d 518 (N.J. 1952).

⁴⁴ WIGMORE, *EVIDENCE*, *supra*, note 31.

⁴⁵ *Supra*, note 39.

⁴⁶ *Allen v. Voje*, 114 Wis. 1, 89 N.W. 924 (1902).

⁴⁷ 2 CONRAD, *WISCONSIN EVIDENCE* §4446, 4447.

⁴⁸ *Morrill v. Komaskinski*, *supra*, note 10.

behalf. Our statute authorizes the admission of the expert testimony of a physician from another state when one of the parties is unable to secure testimony from physicians of this state or the physician was in actual consultation in the case.⁴⁹ The admission of this testimony did not violate the rule that testimony of a physician from one school is inadmissible against a physician of another school,⁵⁰ because the court considered that surgery was a common field on which both could testify because there was a close similarity in their educational background and experience and both schools are licensed to perform surgery.⁵¹

OPINION OF A PHYSICIAN NOT A SPECIALIST

The basic rule on the use of testimony by a physician who is not a specialist in the particular field about which he testifies is that a physician or a surgeon, regardless of his practice and experience, is an expert and his opinion on questions concerning his profession and practice is admissible in evidence. But if he has specialized, his opinion may be of more value than that of one who has not.⁵² This is in accord with the great weight of authority up to the present time.⁵³

Wigmore on this question of comparing the testimony of general practitioners and specialists states:

"Here the Courts seem not to have taken a sufficiently firm stand against the narrow objections frequently raised. It is not that the rulings themselves are illiberal, but that narrow doctrines are not repudiated with sufficient positiveness. The liberal doctrine should be insisted on that the law does not require the best possible kind of a witness, but only persons of such qualifications as the community daily and reasonably relies upon in seeking medical advice. Specialists are in most communities few and far between; the ordinary medical practitioner should be received on all matters as to which a regular medical training necessarily involves some knowledge."⁵⁴

The real problem consists of the weight which ought to be given a specialist's testimony in comparison with that of a general practitioner. The cases state that the testimony of a specialist *may* be given more weight than that of a general physician but no definite standard has

⁴⁹ WIS. STAT. (1951), sec. 147.14 (2), . . . and that practitioners in medicine, surgery or osteopathy licensed in other states may testify as experts in this state when such testimony is necessary to establish the rights of citizens or residents of this state in a judicial proceeding and expert testimony of licensed practitioners of this state sufficient for the purpose is not available." WIS. STAT. (1951), sec. 147.19 (1); *Landrath v. Allstate Inc. Co.* 259 Wis. 248, 48 N.W. 2d 485 (1950).

⁵⁰ *Supra*, note 34 and 43.

⁵¹ *Supra*, note 31.

⁵² LAWSON, *THE LAW OF EXPERT AND OPINION AND EVIDENCE* 136 (2nd Ed. 1900).

⁵³ *Germania Life Ins. Co. v. Ross*, *supra*, note 13; *supra*, note 39. See Notes, 54 A.L.R. 861, 14 ANN. CAS. 137, 20 AM. JUR. EVIDENCE §865.

⁵⁴ 2 WIGMORE, *EVIDENCE* §569 (3rd Ed. 1940).

been established.⁵⁵ Wigmore believes that there are no rules in our system of evidence stating the precise effect or weight any general or special class of evidence ought to be given by the jury.⁵⁶ In his revision of Branson's *Instruction to Juries*, Justice Reid states this as the rule:

"Expert testimony, when admissible at all, must go to the jury like any other testimony in the case without discrimination by the court as to its weight."⁵⁷

This does not mean that no instructions can be given, but that such instructions must not invade the jury's right to make a final determination.

Among the approved instructions which are cited in that work, there are none which attempt to answer the problem specifically. In the most specific example⁵⁸ the court instructed that the medical experts, because of their training, knowledge, and experience in the medical and surgical professions, are permitted to express opinions which the ordinary lay witness is not allowed to do. This testimony should be used insofar as it aids the jury's deliberations. The testimony of these expert witnesses should be given such weight as their skill, training, knowledge, and veracity entitle them to receive.

That instruction could be applied to the testimony of a specialist. The jury could then decide whether the particular additional knowledge and experience the witness has had makes his opinions more valuable just as they do in a case involving a witness with one year's experience as a hand writing expert and a witness with thirty years of similar experience. The instruction merely points out that greater degrees of experience or specialization may be considered by the jury.

CONCLUSION

The establishment of a definite criterion to guide trial courts in admitting or excluding the testimony of physicians and surgeons as expert witnesses would be a great aid to the trial courts and would also reduce the burden of appellate courts in appeals on this question.

As to testimony of physicians on general matters, the Wisconsin rule in demanding practical experience on the particular subject matter is too strict. The better policy would be to allow all physicians who are licensed to testify on these matters. Then as in the case of specialists, the jury can weigh the testimony taking into consideration the experience and practice of these witnesses and its effect on their opinions. Practical experience on these general matters is not vital to the issue and is often largely irrelevant.

⁵⁵ *Supra*, note 52.

⁵⁶ 1 WIGMORE, EVIDENCE §26 (3rd Ed. 1940).

⁵⁷ 1 BRANSON, INSTRUCTIONS TO JURIES §35 (3rd Ed., Reid, 1936).

⁵⁸ 4 BRANSON, INSTRUCTIONS TO JURIES §2587 (3rd Ed., Reid, 1936). *Misrach v. Epperson*, 32 Ohio App. 451, 168 N.E. 230 (1929).

In malpractice cases, a stricter policy should be followed. Practical experience in the exact field of testimony is necessary in those cases because due care is based on the particular circumstances and the practice in the same or similar communities. The function of an expert witness in a malpractice case is to testify as to due care. Without practical knowledge of what is usually done in a particular case, a physician will do nothing more than confuse the issues before the jury and cloud their minds with unnecessary medical opinion not applicable to the particular case.

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