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Suel O. Arnold, Medical Evidence in Wisconsin, 39 Marq. L. Rev. 289 (1956).
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MEDICAL EVIDENCE IN WISCONSIN*

SUEL O. ARNOLD**

At the meeting of the Insurance Section of the American Bar Association held at San Francisco, September 15 to 17, 1952, Bolitha J. Laws, Chief Judge, U. S. District Court for the District of Columbia,1 posed the question whether the judicial systems, as they now function, meet today's needs. Among other things, Judge Laws said that one of the greatest menaces facing the courts today is the ever-increasing number of long drawn-out trials.2 On this point, Judge Laws said:

"I do not know whether you of the Insurance Law Section have had that experience or not, but the lawyers of Washington are learning to stretch the usual personal injury cases into a week or ten days. I just do not understand it. When I came to the bar we used to try such cases in a day or a day and a half. It is true that at the last meeting I had with an insurance group in Richmond they told me of $100,000 and $200,000 verdicts they getting against you lawyers. Maybe that is the way to do it, but it seems to me that the personal injury case should not require ten days, or fifteen days, to try."3

There was a personal injury case in the Circuit Court in Milwaukee County which, I believe, consumed thirty days of actual trial. It has become customary to have personal injury cases in the Circuit Courts drag from ten days to three weeks. Judge Laws is right when he says that we must find a remedy to shorten the trials.

The major portion of trial work today involves personal injuries. In the majority of these cases, the nature and extent of the injuries sustained by the plaintiff require expert medical testimony, which, in many cases, is sharply contradictory. Hence, it is not surprising to

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* An address delivered before the board of Circuit Judges of Wisconsin, Jan. 6, 1956.
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1 American Bar Association, Section of Insurance Law, 1952 proceedings, page 16.
2 Id., page 18.
3 Id., page 18.
see interest in medico-legal cases reflected in an increasing number of publications.4

The frequency of the introduction of medical evidence has led many of us to forget the basic principles of admissibility and non-admissibility. Justice Holmes with his usual facility of language best expressed the situation when he said in his dissenting opinion in Hyde v. U.S.:5

"It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis."

Judge Parnell, in a letter which he wrote me after I had consented to present this paper, stated that he had suggested the topic. He said that what he particularly had in mind and what he wished I would bear in mind was a manuscript that would be readily available to judges as cases are being tried. He explained that he had in mind the statutes that might be pertinent, the cases that pass on hypothetical questions, privileges, waiver of privileges, admission of hospital records, and inspection, and any phase of the subject of medical evidence which might come up on motions before trial and during the course of the trial. Judge Parnell said that he hoped the paper would be complete and would serve as a ready reference to the judge sitting on the bench during the course of the trial.

It is my hope to satisfy some of Judge Parnell's requirements. At any rate, his suggestions constituted a warning that the paper should be objective, and should not be either subjective or abstract. I shall, therefore, attempt to be specific and to present a paper which will answer practical everyday problems encountered by the Circuit Judges in the trial of personal injury actions.

4 (a) Expert Medical Opinion Evidence with Reference to Automobile Damage Cases by Oscar T. Toebaas; PROCEEDINGS OF THE SECTION OF INSURANCE LAW, AMERICAN BAR ASS'N. 1957, p. 130.
(b) Medical Evidence, BULLETIN WISCONSIN BAR ASS'N. Vol. 23, No. 3, August, 1950, by D. V. W. Beckwith.
(c) X-Ray Examination, BULLETIN WISCONSIN BAR ASS'N. Vol. 28, No. 2, April, 1955, by Dr. Hans W. Hefke.
(d) Report of the Annual Meeting of the American College of Trial Lawyers at Las Vegas, Nevada on April 4, 1955; THE LOW LUMBAR INTERVERTEBRAL DISC, by Louise J. Gordy, M.D., and THE STRUCTURE AND FUNCTION OF THE HUMAN HEART with an Introduction to Its Pathological Physiology by Leo Gelfand, M.D.
(f) FEDERATION INSURANCE COUNSEL QUARTERLY, Volume 6, p. 67; THE INSURANCE COMPANY AND ITS DOCTOR, by Frederick D. Lewis, which contains an excellent bibliography.
(g) INSURANCE COUNSEL JOURNAL, Volume XXII, p. 126; THE VALUE OF THE LAW—SCIENCE SHORT COURSES TO INSURANCE COUNSEL IN THE TRIAL OF PERSONAL INJURY CASES by Herbert Winston-Smith, LL.B., M.D.

5 225 U.S. 347, 391 (1911).
I

WHO MAY TESTIFY AS A MEDICAL EXPERT

Section 147.14(1) of the Statutes, as amended in 1953, enumerates the persons who shall practice and hold themselves out as authorized to practice medicine, surgery, and osteopathy. Not only has the Legislature expressly provided that no person may treat the sick unless he has been licensed by the State Board of Medical Examiners, but no person without such a license shall have the right to testify in a professional capacity on a subject relating to medical treatment as a medical or osteopathic physician or practitioner unless he possesses such license. The Legislature has provided an exception that a medical or osteopathic physician licensed to practice in another state may testify as the attending or examining physician or surgeon to the care, treatment, examination, or condition of sick or injured persons whom he has treated in the ordinary course of his professional practice for the sickness or injury which is the subject of the judicial inquiry in any action or proceeding in which he is called as a witness. Although the statute is not entirely clear, it is probable that only the non-resident physician who has treated the patient may testify. In other words, an expert who had not treated the patient probably could not testify.

Judge Tehan has for some time followed the rule in his branch of the District Court of the United States for the Eastern District of Wisconsin of permitting a non-resident doctor to testify in a personal injury case in his court. He does not impose any restrictions such as consultation with a Wisconsin physician or treatment of a Wisconsin resident.

Section 147.19 of the Statutes creates an exception to Sections 147.14 and 147.18 of the Wisconsin Statutes. These sections do not apply to medical or osteopathic physicians of other states or countries in actual consultation with resident licensed practitioners of this state. Under Section 147.19, a physician licensed in a sister state or in a foreign country who was in consultation with a Wisconsin physician concerning the treatment of a patient may testify in a personal injury action involving such patient. The Statute was applied literally in Landrath v. Allstate Insurance Co. In that case, a Wisconsin physician consulted with a Minnesota physician respecting the treatment of a patient. The court held that the Minnesota physician was competent to testify under subsection (1) of Section 147.19 of the Statutes.

Under the statute as it stood before it was amended by Chapters 342 and 459 of the Laws of 1953, a non-resident practitioner in medicine, surgery or osteopathy, licensed in another state might testify

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7 259 Wis. 248 (1951).
as an expert in this state when the testimony was 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 were not available. In *Morrill v. Komasinski*, the court held that a Michigan osteopath and surgeon, not licensed to practice in Wisconsin, might qualify as an expert in an action by a Wisconsin resident against Wisconsin doctors for malpractice in the diagnosis and treatment of a fracture of the humerus where the plaintiff had consulted such osteopath for the purpose of determining what course of treatment to follow and where it appeared that the plaintiff was unable to obtain a licensed practitioner of medicine and surgery in Wisconsin to testify.

The question may arise under the Statute with respect to the testimony of a non-resident medical expert in a case involving an accident which occurred before the amendment of the Statute in 1953. Since the qualification of the non-resident expert to testify involves a matter of procedure, it is my opinion that a non-resident medical expert can testify under the statute as it now stands and that the restrictions contained in the 1951 statute no longer apply.

Subsection (2)(b) contains a provision which can be troublesome. That section provides that the court may permit any person to testify as an expert on a medical subject in any action or judicial proceeding where proof is offered satisfactory to the courts that such person is qualified as an expert. This statute applies to a medical technician such as is found in hospitals and even in private laboratories. Such a technician is described in 39 O.A.G. 10. There the Secretary of State Board of Medical Examiners inquired of the Attorney General whether a graduate medical technologist in Milwaukee, who conducted her own laboratory but who also was not a person licensed to practice medicine, surgery or osteopathy, was practicing medicine within the meaning of Sections 147.14 and 147.02. The technician who was a graduate technologist made the following tests in her laboratory without supervision: Platelet count, bleeding and coagulation times, clot retraction, prothrombin time, sedimentation rate, hematocrit reading, urinalysis (including color, transparency, specific gravity, reaction—acid or alkaline, albumen, sugar and microscopic examination for blood cells and casts), basal metabolism, gastric analysis (including titrations for free and total acid, blood and bile tests, and lactic acid), blood sugar, glucose tolerance test, blood P.N., serum cholesterol, blood typing (for Landsteimer groups), RH typing, anti-RH titre, agglutination tests (Widal type), and heterophile antibody test. The sole function performed by the technologist was to conduct such tests and

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8 256 Wis. 417 (1949).
to furnish reports to physicians. She did not attempt to diagnose or treat any injuries or disease of any patient; she made the tests on the patients who were sent to her by physicians and transmitted the reports to the physicians. The Attorney General held that she was not practicing medicine and hence did not require a license or certificate from the State Board of Medical Examiners.

The technician referred to in the opinion of the Attorney General would be a person who was an expert on a medical subject and since it appeared that physicians relied upon her reports in treating patients, the court undoubtedly would permit her to testify. It would seem that roentgenological and bacteriological experts could also testify under the statute where the court was satisfied that they possessed the necessary qualifications. On the other hand, we may readily conjure a number of cases where the trial court would not permit an alleged expert to testify. For example, in a case recently tried before one of the Federal Judges, the plaintiff called a psychologist as a witness to testify to the results of the Rorschach test. The court pointed out that he could see no relevancy of such testimony and the offer was refused. I have heard, however, that at least one Circuit Judge in Milwaukee County permitted the psychologist to testify as a medical expert. Since a psychologist is not licensed to practice medicine and since no sanctions may be imposed because of the testimony given, it would appear to be dangerous to permit such testimony except perhaps in a very restricted field. Such testimony, at least at the present time, would very likely be in the same category as the testimony relating to the results of a lie detector test. Such evidence has not yet been permitted in Wisconsin.

In Wisconsin, the courts have been extremely liberal in permitting expert testimony by physicians who admittedly are not experts in the specialized field of medicine concerning which they are testifying. For example, the court in *Dabareiner v. Weisflog*, 9 upheld a verdict based upon the testimony of a doctor who, on cross-examination, testified that there were seven lumbar vertebrae, whereas it is a matter of common knowledge that there are only five lumbar vertebrae. In *Paepcke v. Sears, Roebuck & Co.* 10 the court held that an orthopedic surgeon could testify to personality changes. The qualifications of a surgeon to testify as an expert were discussed in the early case of *Lowe v. State*, 11 and *Plainse v. Engle*. 12

There is one limitation imposed upon the qualification of a physician to testify as a medical expert. In *Zoldoske v. State*, 13 the court

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9 253 Wis. 23, 27 (1948).
10 263 Wis. 290 (1953).
11 118 Wis. 641, 653 (1903).
12 262 Wis. 506, 514 (1952).
13 82 Wis. 580, 605 (1892)
held that a medical witness who has had no experience with the particular subject concerning which he is testifying and whose knowledge is derived entirely from reading scientific or medical books, is not qualified to express an expert medical opinion. The same rule was followed in *Kath v. Wisconsin Central Railway Co.*, and in *Zielsdorf v. Grotsky*.

There are two procedural matters which must not be overlooked in dealing with expert testimony. Suppose an expert refuses to appear in court at the request of a party. This situation occurs in some cases where the party calling the witness either refuses to pay the fee demanded for testimony or refuses to furnish security for payment satisfactory to the physicians. In Wisconsin, the rule is firmly established that an expert witness may be compelled to appear in court and testify pursuant to a subpoena to the same extent as a lay witness. *Bergstrom Paper Co. v. Continental Insurance Co. of City of New York*; *Philler v. Waukesha County*.

If a party desires to call a non-resident physician as a witness, he must serve a written notice on the adverse party five days in advance of the date on which the witness will be called, stating the name of the witness, his residence, and business address. For good cause shown, the trial court may shorten the notice to three days.

II

**UPON WHAT SUBJECTS MAY A MEDICAL EXPERT WITNESS TESTIFY**

The theory which permits the court to admit the testimony of experts is predicated upon the assumption that in order to reach a proper conclusion on scientific matters, the scientist must explain the technicalities of such matters. It follows, therefore, that a medical expert cannot testify as an expert except upon matters which require expert testimony. In an early Wisconsin case, a doctor testified as a medical expert. He had taken hair from the decedent's head and compared it with hair found on a wheelbarrow owned by the defendant and found on the defendant's premises after the death of the decedent. The doctor testified that as a result of the comparison of the hair, he concluded that it was from the head of the deceased. He did not base his conclusion upon any scientific test, but simply from the length, magnitude and color of the hair. The court held that such a comparison required no particular skill or scientific knowledge and held that the evidence was not admissible, first, because the evidence

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14 121 Wis. 503, 513 (1904).
15 195 Wis. 253, 258 (1928).
16 7 F.R.D. 548 (Dis.Ct., E.D. Wis.).
18 Wis. Stat. (1953) §147.14(2) (c).
19 Knoll v. State, 55 Wis. 249 (1882).
did not relate to a scientific subject and secondly, because the testimony invaded the province of the jury.

In Casson v. Schoenfeld,\textsuperscript{20} hypothetical questions were put to two doctors, asking whether in their judgment persons of ordinary intelligence and prudence should have known that a person named Brickman did not have sufficient mental ability to know what he was doing. The court held that this was not such a form of question as called for expert testimony because it permitted the witness to do just what the jury was expected and required to do. The court cited the following cases in support of its decision. Knoll v. State,\textsuperscript{21} Lomoe v. Superior W., L. & P. Co.,\textsuperscript{22} Mellor v. Utica,\textsuperscript{23} and McKone v. Metropolitan Life Ins. Co.\textsuperscript{24}

\textit{Anderson v. Eggert,}\textsuperscript{25} is the leading case on the subject. There, two physicists who were professors in the Department of Physics at the University of Wisconsin, testified about what would happen under different states of facts in the collision of automobiles. They did not, however, undertake to say where the collision took place. The court held, page 359, that whether in a particular case the opinion of a witness should be received is matter which rests very largely within the discretion of the trial court. It was contended that an expert witness could not testify to matters which the jury might be called upon to determine. The court at page 360, however, held that so long as the opinion of the expert was warranted by the evidence and was kept within the field of scientific knowledge, the evidence was not objectionable because the effect of the answer was to pass upon some ultimate question for solution. That was also the decision of the court in Marsh Wood Products Co. v. Babcock & Wilson Co.\textsuperscript{26} There the court held that the opinions of experts were admissible, even though they related to one of the ultimate facts to be passed on by the jury.

These cases mirror the general trend of appellate decisions to permit the trial court to determine in the exercise of sound discretion whether there is need for expert testimony in a particular case.

Attempts sometimes are made to have the medical expert testify to an opinion based on his opinion as to what happened at the time of the accident. It has long been well settled that the court will not sustain a finding based upon the opinion of an expert which is predicated in part upon the opinion of the expert as to what happened at the time

\textsuperscript{20}166 Wis. 401, 415 (1918).
\textsuperscript{21}Supra, note 19.
\textsuperscript{22}147 Wis. 5, 11 (1911).
\textsuperscript{23}48 Wis. 457 (1879).
\textsuperscript{24}131 Wis. 243, 253 (1907).
\textsuperscript{25}234 Wis. 348, 359-361 (1940).
\textsuperscript{26}207 Wis. 209, 229 (1932).
of the accident. The leading case on this subject is *Bucher v. Wisconsin Central Railway Co.*, 27 where the court stated:

"The verdict of a jury founded upon facts is entitled to great weight, and is almost conclusive upon this court if supported by any evidence. But the verdict of a jury founded only upon the opinion of experts concerning the cause of a condition, which condition is itself established by the opinion of experts, has no such weight . . . . So that obvious error of opinion, opinion based on insufficient data, or nonsense clothed in words of 'learned length,' may be disregarded by this court as a basis for supporting a verdict." 28

The *Bucher* case has been followed in a number of later decisions. In *McGaw v. Wassmann*, 29 the physician testified that his conclusion as to the condition of the plaintiff was based upon the physician's opinion as to what happened at the time of the accident. The doctor testified that in his opinion, the accident caused a severe blow to the plaintiff's head, but there was no evidence in the record to show that there was any such blow. The court held that the conclusion of the physician was as speculative as his conclusion as to what happened at the time of the accident. The court therefore held that the opinion could not support a verdict.

In *Vogelsburg v. Mason & Hanger Co.*, 30 the court held that since there was no direct evidence that there was any thrombosis or rupture or hemorrhage as a result of the accident, a medical opinion based upon the fact that there was a thrombosis, or rupture, or hemorrhage could not support a verdict. The court cited with approval *Bucher v. Wisconsin Central Railway Co.*, 31 and the later case of *Dreher v. United Commercial Travelers*. 32 In that case, the court held that the basis of the conclusion of the medical expert could not be deduced or inferred from the conclusion itself, that is, the opinion of the expert did not constitute proof of the existence of the facts necessary to support the opinion.

The latest case on the subject which I have found is *Hicks v. New Yorks Fire Insurance Company*. 33 In that case, the opinion of a heating engineer was based upon his unwarranted assumption that certain facts existed. The court held, page 189, that his testimony did not support the verdict.

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27 139 Wis. 597, 606 (1909).
28 at 606-608.
29 263 Wis. 486 (1953).
30 250 Wis. 242 (1947).
31 Supra, note 27.
32 173 Wis. 173, 178 (1921).
33 266 Wis. 186 (1954).
III

To What Extent May a Medical Witness Testify to the History Given Him and to Subjective Symptoms

The most vexing problem—and one which arises in every personal injury case where a medical expert testifies—relates to the admission of testimony of a physician concerning the history of the case and the subjective symptoms of the injured person. Questions involving history arise through the testimony of attending physicians and physicians who qualify solely as witnesses at the trial. The question of the admissibility of evidence relating to subjective symptoms arise with respect to the treating physician after he knows that a lawsuit is contemplated or has been instituted and with respect to the physician who qualifies as an expert witness.

Trial courts can avert a great deal of the difficulty by distinguishing between facts related by a physician which constitute affirmative or substantive evidence, as an exception to the hearsay rule, and facts which the physician takes into consideration in arriving at his conclusion. I appreciate that the courts in Wisconsin have not observed the distinction except as to one facet of the problem.

An excellent statement of the distinction appears in the concurring opinion by Justice Rossman in Reid v. Yellow Cab Company, where it is said:

"The prevailing opinion fails to recognize the distinction between receiving in evidence the communications of a patient to his physician as proof of the truth of the matter stated, and admitting them for the purpose of showing the basis of the physicians judgment. When received for the purpose first mentioned, the communications as repeated by the physician-witness, become evidence in support of the contention of the party; while in the second instance they go before the jury merely to show upon what information the medical man based his opinion."

The same distinction was drawn in Kraettli v. North Coast Transportation Co.

In Wisconsin, the general rule is that a physician who treats a patient may testify to the statements made by the patient in the form of a history which are necessary in order that the doctor may make a proper diagnosis and prescribe the necessary treatment. Such testimony constitutes affirmative evidence in the case.

34 131 Ore. 27, 279 Pac. 635, 67 A.L.R. 1, 5 (1929).
35 166 Wash. 86, 6 P.2d 609, 80 A.L.R. 1520 (1932).
36 Bridge v. Oshkosh, 67 Wis. 195, 197 (1886); Kreuziger v. C.&N.W.R. Co., 73 Wis. 158 (1888); Steward v. Everts, 76 Wis. 35 (1890); Abbot v. Heath, 84 Wis. 314, 319 (1893); Stone v. C.St.P.M.&Orr. R. Co., 88 Wis. 98 (1894); Curran v. A. H. Strange Co., 98 Wis. 598 (1898).
What constitutes facts necessary to diagnose a case and to equip the physician to render adequate treatment? The best way to enunciate the rule is by the process of exclusion rather than inclusion. Thus, a narrative by the patient of the manner in which the accident happened is not necessary for diagnosis or treatment, is hearsay, and therefore inadmissible. In *Wigmore on Evidence*, 3d Ed., Section 1722, pages 74-75, the great Master of evidence states:

"a. Statements of external circumstances causing the injury, namely, the events leading up to it, the immediate occasion of it (e.g. that the person was knocked down by a horse), or the nature of the injury (e.g. that a leg was broken), do not satisfy the necessity principle, because they do not relate to an internal state, and thus other evidence is presumably available; moreover they have not the usual condition of trustworthiness, because they are not naturally called forth by the present pain or suffering (though this latter reason is rarely noticed)."

In the leading case on the subject in Wisconsin, *Maine v. Maryland C. Co.*, the trial court refused to permit attending physicians to testify that some days after the accident, the injured party stated that he had injured himself by the moving of an icebox. The Supreme Court held that such declarations were clearly no part of the *res gestæ*, were hearsay and inadmissible.

In this case, the court put statements made to an attending physician as to the cause of an injury in the same category as corresponding statements made to a lay witness and therefore inadmissible. The *Maine* case was cited with approval and followed in *Shepard v. United States*. The question arose in *Kraut v. State*, which was a criminal action brought against a physician for an abortion, whether statements made by the deceased, upon whom the abortion was performed, could be proved by two attending physicians. These physicians testified over objection that the deceased stated she had great pain in the lower part of the abdomen and that she thought she had appendicitis; that she had known that she was pregnant and that she had an operation performed for the production of an abortion. The name of the defendant was not disclosed in connection with the testimony of either doctor. Both doctors testified that it was necessary for them to have the information contained in the statements of the deceased in order properly

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37 172 Wis. 350 (1920).
38 Andrews v. U.S. Casualty Co., 154 Wis. 82, 86 (1913); Brahmsteadt v. Mystic Workers of the World, 152 Wis. 580, 582 (1913); Hall v. The American Masonic Accident Association, 86 Wis. 518, 525 (1893); McKeigue v. Janesville, 68 Wis. 50, 57 (1887).
39 290 U.S. 96, 105 (1933).
40 228 Wis. 386 (1938).
to diagnose and treat the case. The court held the statements to be admissible as affirmative evidence.

In all civil cases, excepting those where the injured party has died, is insane, or incapacitated to testify or is a minor of tender years, the trial court can prevent a question from arising with respect to affirmative testimony on the part of the attending physician. The court can require, as many judges do, that before any medical testimony is introduced, the plaintiff must testify in chief, both as to direct examination, cross examination, and redirect examination. The plaintiff therefore can testify in detail concerning all matters relating to the history. The effect of the doctor’s testimony therefore can only be cumulative, and upon that basis alone, the trial court can prevent the physician from transgressing the rule against narrative hearsay. Even if the trial court does show extreme liberty in permitting the physician to testify as to the history, the court will not commit reversible error. In *Mader v. Boehm,* a physician who was not an attending physician testified to the history given him by the plaintiff. The court held that although the admission of the evidence constituted error, since the plaintiff had testified to the matters referred to in the history recited by the physician, the error was not prejudicial. The interdiction against narrative history, testified to by a physician, was observed in *Scott v. James Gibbons Co.*, and *Green v. City of Cleveland.* In the *Green* case, the history recited that the plaintiff fell off a streetcar and caught her heel. The court held that the statement was not admissible for any purpose and was not admissible against the patient because it was not a statement made incidental to treatment.

These cases are in line with the almost universal rule that statements made by an injured party to his attending physician as to the cause of the injury and the circumstances attending the accident, which are not a part of the *res gestae,* are inadmissible in evidence.

Where a physician makes an examination for the purpose of treatment and also testifying, he cannot testify either to a history or subjective symptoms. The rule applies where the injured party contemplates suit but has not actually brought suit. The statements made by the injured party are considered as *post litem motam* and are not admissible. *Kath v. Wisconsin Central Railway Co.*

As a corollary to this rule, it follows that where the physician makes the examination of the patient solely for the purpose of qualifying as an expert, he cannot testify either to a history or to subjective

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42. 213 Wis. 55 (1933).
43. 192 Md. 339, 64 A.2d 117 (1949).
44. 150 Ohio St. 441, 83 N.E.2d 63 (1948).
46. 121 Wis. 503 (1904).
symptoms. *Kath v. Wisconsin Central Railway Co.*,\(^4\) *Schields v. Fredrick.*\(^4\)

It is particularly annoying to a physician who testifies as an expert, after having examined an injured party, to be met with the objection that he cannot testify to subjective symptoms. The party calling the expert may avoid the difficulty by having the doctor testify first as to the information which he had at the time of the examination. Medical witnesses are not directed to make an examination blindly. In the majority of cases where a medical expert is called to testify, either the plaintiff's attending physician, or lawyer, or the defendant's claims representative, or attorney, tells the doctor why he is to make the examination. The doctor therefore knows before he undertakes the examination that, for example, the plaintiff was a truck driver who was involved in a collision with an automobile; that he was thrown from his truck to the pavement and was unconscious for a period of time; that he sustained a fracture of one of his legs and that he had a crushing injury to his chest and a severe head injury; that when he left the hospital he had a cast on his leg; that he had difficulty in obtaining a union of the bones; that he complained of headaches and dizziness and nausea upon arising in the morning; that at the time of the examination, which was a year after the accident, the injured party continued to make the same complaints, and that the injured party claims that his condition is becoming worse. Surely the doctor should be permitted to testify to the knowledge he had at the time of the examination, if for no other reason than to support his conclusion.\(^4\) The doctor can also be permitted to testify to a conclusion based upon a hypothetical question that assumes the truth of every item testified to by a physician as subjective symptoms. Why then should the doctor be prevented from testifying to the subjective symptoms? The whole difficulty can be eliminated just as it was in *Kraettli v. North Coast Transportation Co.*,\(^4\) where the court permitted the doctor to testify what the patient told him, although he examined the patient solely for the purpose of testifying. The court admitted such testimony, however, solely for the purpose of indicating the basis of the expert's opinion and not upon the basis of affirmative evidence.

The case sets forth a comprehensive form of instruction to the jury, advising them that what the doctor testified to was not affirmative evidence but constituted simply facts upon which the physician predicated his professional opinion.

\(^{46}\) *Ibid.*
\(^{47}\) 232 Wis. 595 (1939).
\(^{49}\) *Supra*, note 35.
There are, of course, cases where the history must be given to the attending physician by third parties. Typical examples are those where an infant has been injured and the parent, a witness, or an officer gives a history to an attending physician. Another typical case is where an injured party is rendered unconscious because of the accident and some third party gives the history to the physician. In such cases, the physician may testify to such statements to the same extent as he could if the patient had recited the history. That was the situation in *Leora v. M.St.P. & S.S.M.R. Co.* There, the physician who treated the plaintiff testified that his diagnosis of a fracture at the base of the brain was based partly upon an examination of the injured party, and partly upon a history of the accident as related to him by some person. The trial court permitted the introduction of the testimony over objection. The court said, page 395:

"... The objection is made that Dr. Urquhart should not have been allowed to state that in his opinion there was a fracture at the base of the brain because that diagnosis was based in part upon a history of the accident told him by some person, and that there is no proof that such history was truthful.

"The objection seems to us unsubstantial. Here was a youth unconscious, delirious, suffering from severe injuries, lacerations and contusions of the face, showing beyond question that he had fallen or been thrown on his face with violence. No credible history of the accident could have been much more or less than this. It is not claimed or suggested that the history given to the doctor was in any respect erroneous, and it would have been very easy to find out by a single question what the history was. Were it a case where the diagnosis must necessarily be founded on symptoms extending over a series of years or even months the objection would be more substantial . . ."


Where there were no compelling circumstances, the court in an earlier case held that an expert could not base his opinion on what third parties told him. *Kreusiger v. C.&N.W.R. Co.*

**IV**

**In What Form May Questions be Put to a Medical Expert Witness**

Ordinarily, the medical expert must express his opinion in response to a hypothetical question. Such response need not be based wholly upon a hypothetical question and in some cases, counsel need not

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50 156 Wis. 386, 8 N.C.C.A. 108 (1914).
51 213 F.2d 799, 801 (1st Cir. 1954).
52 175 Mass. 257, 56 N.E. 288, 290 (1900).
53 73 Wis. 158 (1888).
put a hypothetical question to the witness. It has been held in a num-
ber of cases that where the facts are undisputed, and the medical
witness is in the courtroom during the trial, the medical witness may
express an opinion without being asked a hypothetical question.
This, in Cornell v. State, the court said, page 537:

"From a careful comparison of the decisions of this court, the
following rule may be formulated: Where the evidence given
is not conflicting, and not so complicated or voluminous as to
make a difference of understanding of material facts probable,
an expert witness who has heard it all may be asked to predicate
his opinion thereon, on the assumption of its truth, without
rehearsing it in a hypothetical question; and that, unless such
conditions exist, a question should be put, embodying the facts
on which he is asked to base his opinion."

In Tendrup v. State, two doctors heard most of the defendant’s
testimony, and that which they did not hear was read to them. The
doctors were asked whether in their opinion the defendant was sane
or insane at the time of the killing for which he was being tried. They
based their opinion on the testimony of the defendant. The
court held that an expert witness could base his opinion upon un-
contradicted evidence which he has heard in court. To the same effect,
Dulhey v. State.

The procedure to be followed in asking the hypothetical question
is outlined in the two leading cases of Kieckhoefer v. Hidershie, and
Balthazor v. State. Chief Justice Rosenberry there made the
following statement:

"In Bennett v. State, 57 Wis. 69, 14 N.W. 112, it was held error
to permit an expert to answer this question: 'What, in your
opinion would all the facts as sworn to by the several witnesses,
if true, indicate as to the mental condition of the prisoner at the
time of the commission of the offense?' This was held erro-
neous because the evidence was voluminous, not entirely harmo-
nious, and to some extent contradictory.

The question here propounded did not ask the witness to
assume the truth of the testimony on the part of the State or
the truth of the testimony given on the part of the defendant,
but to base his opinion upon all of the evidence offered and
received in the case. It is impossible for the jury to know upon
what facts the expert bases his opinion when the expert is ex-
amined in this way. It is hardly necessary to point out that
where there are conflicting theories in a case and evidence to
support each theory, counsel in propounding a hypothetical
question to an expert may select any hypothesis fairly supported

54 104 Wis. 527, 535 (1899).
55 193 Wis. 482, 485 (1927).
56 131 Wis. 178, 188 (1907). See Also: Anno. 82 A.L.R. 1460.
57 113 Wis. 280 (1902).
58 207 Wis. 172, at p. 191 (1932).
by the evidence and call for the conclusion of the expert witness upon the basis of the facts stated in the hypothetical question. Kiekhoefer v. Hidershide, 113 Wis. 280, 89 N.W. 189. In that way the various theories in the case may be submitted to experts and their opinions had thereon because it is then left to the jury to decide what facts are established by the evidence and the jurors have the benefit of the expert's opinion upon the various theories of the case. Where the evidence given is not conflicting and is not so complicated or voluminous as to make a difference of understanding of material facts probable, an expert witness, who has heard it all, may be asked to predicate his opinion thereon, assuming it to be true. Where these circumstances are not present the facts should be embodied in a hypothetical question. Whether in a given case the testimony is such as to render a hypothetical question necessary is a matter which rests largely in the sound discretion of the trial court. Cornell v. State, 104 Wis. 527, 80 N.W. 745. For a discussion of this matter and citation of authorities, see 1 Wigmore, Evidence, (2d ed.), Sections 681, 682, and 683. See, also, note 39 L.R.A. 305.”

It is the duty of counsel to point out where a hypothetical question is improper. Cornell v. State.59

On cross-examination, an expert witness may be interrogated as to his opinion based upon a hypothetical question which does not include all of the facts. The hypothetical question, however, must include undisputed facts. Estate of Scherrer.60 Such question must also include all the facts necessary to be considered in arriving at a correct answer.61

On cross-examination, the medical expert cannot be questioned on a hypothesis having no foundation in the facts. He may be cross-examined on facts which the cross-examiner claims he has proved, provided such examination is confined within the possible or probable range of the facts. Zoedoske v. State.62

The general rule is that medical and scientific textbooks are not admissible in evidence, either independently or in connection with the testimony of an expert.63

Upon cross-examination, counsel may not introduce in evidence the contents of medical textbooks by reading excerpts to the witness or by asking whether the witness is familiar with statements made by certain authors. Bell v. Milwaukee E.R.&L. Co.64 In certain circumstances, an expert witness may be impeached by the use of textbooks.

59 Supra, note 54.
60 242 Wis. 211 (1943).
61 Ibid. at 223.
62 92 Wis. 580, 607 (1892).
64 169 Wis. 408 (1919).
For example, in *Bruins v. Brandon Canning Co.*, a medical expert testified that he knew of no authority which held that a sudden trauma might be followed by the development of a malignant growth. Counsel was permitted to impeach the expert by reading a short extract from a textbook showing that a reputable authority had made the statement that a sudden trauma might be followed by the development of a malignant growth. To the same effect: *Waterman v. The Chicago & Alton R. Co.*, *Ruck v. Milwaukee Brewery Co.*

So also may a medical expert be cross-examined concerning statements in medical texts where the physician testifies that his opinion is based partially upon textbooks which he has read.

The court will not take judicial notice of the contents of medical texts. In *Morrill v. Komasinski*, the appellants upon appeal asked the Supreme Court to take judicial notice of medical textbooks. The texts were not offered in evidence at the time of the trial and the court therefore held that they were not before the court on the appeal.

It is perhaps unnecessary to call attention to the fact that an expert witness cannot be asked his opinion of the entire case. *Maitland v. The Gilbert Paper Co.*

V

**To What Degree of Definiteness Must the Testimony of a Medical Witness Conform in Order to be Admissible**

Many of the courts have required medical experts to testify to a reasonable degree of medical certainty and will not permit the use of any other words. The cases in Wisconsin do not require a slavish adherence to the formula "to a reasonable medical certainty." The courts have repeatedly permitted the introduction of medical testimony where the doctor testified to a reasonable probability or that a condition was "likely" or "apt" to follow.

One of the earlier leading cases is *Hallum v. Omro*, which was decided in 1904. In that case, the court held, page 342, that there could be no recovery for permanent physical disability in the absence of competent evidence warranting a conclusion "with reasonable certainty" that the physical condition complained of will exist as a result of the accident; "but it is not necessary that opinion evidence should be confined to that high degree of certainty. Experts may properly testify to the mere probabilities of the case." The court cited *Block v. Milwaukee S.T.R. Co.*, where a physician was permitted to give

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63 216 Wis. 387, 403 (1934).
64 82 Wis. 613, 629 (1892).
65 144 Wis. 404, 410 (1911).
66 256 Wis. 417 (1949).
67 97 Wis. 476, 484 (1897).
68 122 Wis. 337 (1904).
69 89 Wis. 371 (1895).
his opinion of the "reasonable probabilities of the plaintiff's ultimate recovery from his injuries." The court concluded, page 344, that an examination of the cases showed that "probable," "likely," and "liable" had been treated as synonymous and that each dealt with reasonable probability and not with a possibility, and that what may probably or is likely to be the future result of a personal injury is competent evidence to prove what is reasonably certain in the matter.

In the leading case of Sundquist v. Madison Railways Co.\textsuperscript{72} in an opinion written by Judge Stevens, one of the great trial and Supreme Court judges, the court said:

"In order that his testimony may be admissible it is not necessary, often not possible, for a physician to state positively that disability followed directly from a given injury. A jury's finding of reasonable certainty may be based on testimony that such a result may 'probably' follow or is 'likely,' 'liable,' or 'apt' to follow the accidental injury. Hallum v. Omro, 122 Wis. 337, 342, 344, 345, 99 N.W. 1051; Faber v. C. Reiss Coal Co., 124 Wis. 554, 561, 102 N.W. 1049; Block v. Milwaukee St. R. Co., 89 Wis. 371, 375, 61 N.W. 1101.\textsuperscript{73}

In his dissenting opinion in Miller Rasmussen Ice & Coal Co. v. Industrial Commission,\textsuperscript{74} Justice Currie deals at length with the decision in Hallum v. Omro,\textsuperscript{75} and states that it has been cited in many subsequent decisions of the Supreme Court as setting forth the proper criteria for expert medical testimony.

Faber v. C. Reiss Coal Co.,\textsuperscript{76} was a case where the court approved questions put to a physician to ascertain whether or not the injuries to the skull were likely to result in current troubles or were apt to affect injuriously the other eye. The court predicated its findings upon the basis that the questions were framed to elicit the probabilities of future suffering as consequences of existing conditions and was therefore properly admitted in evidence.

In Vilter Mfg. Co. v. Industrial Commission,\textsuperscript{77} and Hafeman v. Seymer,\textsuperscript{78} the court held that a finding to a reasonable certainty may be based upon evidence which shows only a preponderance of probability. The court reached the same decision in Pfister & Vogel L. Co. v. Industrial Commission,\textsuperscript{79} where the physicians testified that it was more probable that a disease was contracted in a tannery than anywhere else.

\textsuperscript{72} 197 Wis. 83, 86 (1928).
\textsuperscript{73} See comment on this case in Anno. 135 A.L.R. 516, 529.
\textsuperscript{74} 263 Wis. 538, 550 (1952).
\textsuperscript{75} Supra, note 70.
\textsuperscript{76} 124 Wis. 554, 561 (1905).
\textsuperscript{77} 192 Wis. 362, 365 (1927).
\textsuperscript{78} 195 Wis. 625 (1928).
\textsuperscript{79} 194 Wis. 131, 133 (1927).
In *Ramsey v. Biemert*,\(^8\) where Justice Wickhem wrote the opinion of the court, the experts testified that an accident on a certain date might have been the exciting cause of the plaintiff's injuries and further testified that the probabilities were that the accident in suit was responsible. Upon the authority of *Hallum v. Omro*,\(^8\) it was held that experts may properly testify to the mere probabilities of the case, and upon the authority of *Vilter Mfg. Co. v. Industrial Commission*,\(^8\) the court held that a finding may rest upon a preponderance of probabilities. To the same effect: *Bruins v. Brandon Canning Co.*\(^8\)

In *Gmeiner v. Industrial Commission*,\(^8\) the Industrial Commission concluded that the preponderance of probabilities support an inference that the applicant for compensation was infected with tetanus acquired while engaged in his employment. The medical testimony was to the effect that a wound was the most likely place for germs to enter. The court talked about preponderance of probabilities and stated that literally it was impossible to have a preponderance of probability. The court defined the term to mean, page 4, that in a given situation, the inferences are strong enough to point to a fact as a probability and not a speculative possibility.

In *Creamery Package Mfg. Co. v. Industrial Commission*,\(^8\) the court distinguished between preponderance of mere possibilities and preponderance of probabilities. The court stated that mere possibilities leave the solution of an issue of fact in a field of conjecture and speculation to such an extent as to afford no basis for inferences to a reasonable certainty. Compare, however, *Nash-Kelvinator Corp. v. Industrial Commission*.\(^8\)

In *Gerber v. Wloszczynski*,\(^8\) the court held that an opinion of a physician that he believed a certain condition to be quite possible was not opinion evidence based upon a reasonable certainty.

In *Vogelsburg v. Mason & Hanger Co.*,\(^8\) the court set aside a verdict which was based upon testimony which was speculative and conjectural and was not competent or sufficient to establish a medical fact to a reasonable certainty. To the same effect, *Walraven v. Sprague, Warner & Co.*\(^8\)

Upon the basis of decisions of the Supreme Court, a question which does not call for a speculative or conjectural answer may prop-

\(^{80}\) 216 Wis. 631 (1935).
\(^{81}\) Supra, note 70.
\(^{82}\) Supra, note 77.
\(^{83}\) 216 Wis. 387, 400 (1934).
\(^{84}\) 248 Wis. 1 (1945).
\(^{85}\) 211 Wis. 326 (1933).
\(^{86}\) 253 Wis. 618 (1948).
\(^{87}\) 188 Wis. 344, 350 (1925).
\(^{88}\) 250 Wis. 242 (1947).
\(^{89}\) 235 Wis. 259, 268-269 (1940).
erly be addressed to a medical expert. Such question need not be in any stereotyped form. It may call for a medical opinion based upon a reasonable certainty, or to a reasonable probability. Such question may also be couched in such form as to permit the physician to testify that a certain condition is apt to follow or is likely to follow or is liable to follow.

VI

How Far Does the Privilege of a Physician Extend and How May a Party Compel Production and Inspection of Non-Privileged Matters

Section 325.21 of the Statutes provides for a privilege of physicians or surgeons not to disclose any information acquired in attending a patient in a professional character necessary to enable him professionally to serve the patient. There are four exceptions, none of which apply to the ordinary personal injury except that the personal representative of a deceased or disabled plaintiff and the plaintiff himself in a personal injury action may waive the privilege.

The rigor of the original statute has been softened by a number of amendments over the years. Such amendments make some of the earlier cases involving the privilege obsolete.

The present attitude of the Supreme Court towards the privilege is expressed in Prudential Insurance Co. v. Kozlowski, where the court said:

"The reason of the rule of the statute, as far as it has any, is that patients may be afflicted with disease or have vicious or uncleanly habits necessary for a physician to know in order to treat them properly, disclosure of which would subject them to humiliation, shame, or disgrace, and which they might refrain from disclosing to a physician if the physician could be compelled to disclose them on the witness stand. Boyle v. Northwestern Mutual Relief Asso, 95 Wis. 312, 70 N.W. 351. If the disclosures to the physician be such as not to subject the patient to shame or affect his reputation or social standing, there is no reason why a physician should not disclose them, and sound reason why in the interest of truth and justice he should be compelled to disclose them. The physician's exemption from disclosure should in reason be limited to such disclosures as would injure the patient's feelings or reputation. The statute too often works, as stated by Justice Owen in his dissenting opinion in Maine v. Maryland C. Co. 172 Wis. 350, 359, 178 N.W. 749, 'to cheat rather than to promote justice and to suppress rather than to reveal truth.'"

In Leusink v. O'Donnell, the court held that hospital records,
nurses records and reports, the testimony of the x-ray operator employed by the hospital and the x-ray plate made by the operator at the direction of the attending physician were not privileged. The decision represents the weight of authority.92

In *Kirkpatrick v. Milks*,93 the court held that the testimony of an attending physician relating to acts and admissions of the patient not necessary to enable him to discharge his professional relation to the patient, were not privileged.

In *Borosich v. Metropolitan Life Insurance Co.*,94 the court held that Section 325.21 did not bar the testimony of an intern, a nurse or attendant because they were not physicians within the meaning of the statute.

The statutes provide a method for inspection of non-privileged documents, and for a physical examination of the injured party. Section 269.57 confers upon trial courts in their discretion the power to order an inspection of medical documentary proof, and to order the injured party to submit to a physical examination. Although the language in the statute is permissive and not mandatory, the court in *Leusink v. O'Donnell*,95 held in effect that the statute was mandatory and not permissive. The decision is in line with the universal practice of trial courts to require an inspection of medical documentary proof and to compel the plaintiff to submit to a physical examination. In that case, it appeared that hospitals, including the Veterans Hospital at Wood, Wisconsin, had custody of the documentary proof. The court therefore ordered the injured party to sign a written consent to the examination of the records.

Section 269.57 of the Statutes confers upon the court the power to prescribe the terms and conditions upon which a party may require the production of documentary proof or inspection, and to compel the injured party to submit to a physical examination. It has become quite a general practice for the courts to require a copy of the report of the examining physician to be furnished to the injured party or to his attorney.

It should be noted in passing that when the injured party puts a medical witness on the witness stand, the privilege conferred by Section 325.21 no longer exists.96

92 Weiss v. Weiss, 147 Oh. St. 416, 72 N.E.2d 245, 169 A.L.R. 678 (1947) and anno. following the decision.
93 257 Wis. 549, 552 (1950).
94 191 Wis. 239, 242 (1926).
95 *Supra*, note 91, at 633.
The Joint Commission on Accreditation of Hospitals, through its Board of Commissioners, has proposed a revision of The Standards for Hospitals Accreditation throughout the United States and Canada, which it is expected will be approved in January, 1956.

Subdivision I C of the Standards for Hospital Accreditation specifies the standards for methods of procedure. Essential services which the hospital must maintain include the following:

"1. ***

"2. Medical Record Department
   a. Administrative Responsibilities
      1) There shall be a medical record maintained on every patient admitted for care in the hospital.
      2) Records shall be kept inviolate and preserved for a period of time not less than that determined by the Statute of Limitations in the respective state.
      3) Qualified personnel adequate to supervise and conduct the department shall be provided.
      4) A system of identification and filing to insure the rapid location of a patient's medical record shall be maintained. The unit number system is suggested; however, a serial number system or modification of this is acceptable.
      5) Records should be indexed according to disease, operation, and physician and should be kept up-to-date.
      6) All clinical information pertaining to a patient should be centralized in the patient's record.
      7) The Standard Nomenclature is preferred if medical records are coded.
   b. Medical Staff Responsibilities
      1) The medical record must contain sufficient information to justify the diagnosis and warrant the treatment and end results.
      2) Only physicians or house staff are competent to write or dictate medical histories and physical examinations.

97 The Joint Commission on Accreditation of Hospitals is a non-profit organization which is financed by the American College of Physicians, the American College of Surgeons, the American Hospital Association, the American Medical Association, and the Canadian Medical Association. The Joint Commission was organized in the Fall of 1951. It took over accreditation of hospitals which the American College of Surgeons had formerly conducted on the basis of a national program. The Commission has a board of twenty members all of whom, with the exception of two, are doctors. The Treasurer is Mr. S. K. Hummel, who is the Administrator of Columbia Hospital in Milwaukee. The object of the program carried on by the Joint Commission is to elevate the standards of treatment of hospital patients.
3) Current records and those on discharged patients should be completed promptly.
4) Records must be authenticated and signed by the physician.

c. The medical record should contain the following information:
   1) Identification data
   2) Complaint
   3) Present illness
   4) Past history
   5) Family history
   6) Physical examination
   7) Consultations
   8) Clinical laboratory reports
   9) X-ray reports
   10) Provisional diagnosis
   11) Tissue report: Gross
       Microscopic
   12) Treatment: Medical and Surgical
   13) Progress notes
   14) Final diagnosis
   15) Summary
   16) Autopsy findings

"3. **

"4. Laboratories

a. Clinical
   1) A clinical laboratory adequate for the individual hospital must be maintained in the hospital.
   2) Provision shall be made to carry out chemical, bacteriological, and serological examinations.
   3) Facilities should be available at all times.
   4) Personnel adequate to supervise and conduct the service should be provided.
   5) Urinalysis and at least a hemoglobin or hematocrit should be routine examinations on all admissions.
   6) Signed reports should be filed with the patient's record and duplicate copies kept in the department.

b. Pathological
   1) The services of a pathologist must be provided as indicated by the needs of the hospital.
   2) All tissues removed at operation should be sent for examination. The extent of the examination should be determined by the pathology department.
   3) Signed reports of tissue examinations should be filed with the patient's record and duplicate copies kept in the department.
   4) Tissue reports should be indexed according to pathologic diagnosis.

c. Blood Bank
   Facilities for procurement and safe-keeping of blood should be provided or readily available.
"5. Radiology
   a. The hospital must maintain radiological services according to the needs of the hospital.
   b. The radiology department shall be free of hazards for patients and personnel.
   c. The interpretation of radiological examinations shall be made by physicians competent in the field.
   d. Signed reports should be filed with the patient’s record and duplicate copies kept in the department.
   e. Reports should be indexed according to radiological diagnosis.

"6. * * *

Subdivision I D provides that the following services may be maintained:

"1. * * *
"2. Emergency Service. If a service is maintained:
   a. There shall be a well organized department directed by qualified personnel and integrated with other departments of the hospital.
   b. Facilities shall be provided to assure prompt diagnosis and emergency treatment.
   c. There shall be adequate medical and nursing personnel available at all times.
   d. Adequate medical records on every patient must be kept.
   e. * * *

Subdivision II A provides for a medical staff and outlines the responsibilities. Such responsibilities of the medical staff are in part as follows:

"1. * * *
"2. * * *
"3. * * *
"4. Maintenance of adequate medical records.
"5. Holding of necessary consultations. Except in emergency, consultation with another qualified physician shall be required in all first Caesarean sections and in all curettages or other procedures by which a known or suspected pregnancy may be interrupted. The same requirement shall apply to operations performed for the sole purpose of sterilization on both male and female patients. Included in consultations required under this Standard are all those which are required under the rules of the hospital staff. In major surgical cases in which the patient is not a good risk, and in all cases in which the diagnosis is obscure, or when there is doubt as to the best therapeutic measures to be utilized, consultation is appropriate. Obviously, judgment as to the serious nature of the illness and the question of doubt as to diagnosis and treatment rests with the physician responsible for the care of the patient. It is the duty of the hospital staff through its chiefs of service and Executive
Committee to see that members of the staff do not fail in the matter of calling consultants as needed. A consultant must be well qualified to give an opinion in the field in which his opinion is sought. A satisfactory consultation includes examination of the patient and the record and a written opinion signed by the consultant which is made part of the record. When operative procedures are involved, the consultation note, except in emergency, shall be recorded prior to operation."

Subdivision II C outlines the organization of the staff and provides for the following Committees:

"3. Committees
   * * *
   a. Executive Committee
      * * *
   b. Qualifications or Credentials Committee
      * * *
   c. Joint Conference Committee
      * * *
   d. Medical Records Committee
      The Medical Records Committee shall supervise and appraise the quality of medical records, and shall insure their maintenance at the required standard. The Committee shall meet at least once a month and submit to the Executive Committee a report in writing which will be made a part of the permanent record.
   e. Tissue Committee
      * * *

Subdivision II E provides for departments which may be maintained, as follows:

"1. Anesthesia
   The organization of the Department of Anesthesia shall be comparable to that of the other services of the medical staff. In addition, there shall be required in every case:
   a. Preanesthetic physical examination with findings recorded;
   b. Anesthetic record on special form;
   c. Postanesthetic examination, with findings recorded.

"2. * * *

"3. * * *

"4. Outpatient Department
   * * * *
   a. * * *
   b. * * *
   c. Medical Records
      Medical records shall be maintained and correlated with other hospital medical records."
Subdivision III provides for a nursing department. All hospitals must meet the following requirements for accreditation:

"* * *
C. Records
Adequate records shall be maintained.
* * *

The medical records which must now be kept by an accredited hospital do not differ greatly from those presently used by the larger hospitals in Milwaukee. These records present individual problems when an attempt is made to introduce them into evidence. The trial court can simplify many of these problems if it permits portions of the hospital records to be introduced into evidence with the understanding that the records shall not be sent to the jury room. Counsel may then read to the jury such parts only of the records as the court admits into evidence. If this plan is not followed, the greater portions of the records cannot be received in evidence for the reasons which I will later develop. For example, under identification data, the question is asked whether the patient is white or colored. The question is also asked about the religion of the patient. I need not labor the point that these matters should not be brought to the attention of the jury. The records contain the complaints of the patients. These complaints may or may not be relevant depending upon the person who prepares the record. If an intern prepares the record, the description of the complaints will be based largely upon his ingenuity and imagination. The same situation obtains with respect to present illness, past history and family history. Many details which are clearly irrelevant and some of which may be embarrassing and degrading to a patient appear under these headings.

Most of the hospital records in the City of Milwaukee contain a provisional diagnosis usually labeled "impressions." Because of the flexibility of the title used, it is obvious that many of these "impressions" have no relevancy.

From an evidentiary standpoint, hospital records present two legal problems: First whether they are admissible in evidence, and if so, what foundation must be laid for their admission, and, secondly, to what use may the records be put by a physician.

28 U.S.C.A., Section 1732, which was formerly Section 695, the so-called Federal Shop Records Act, contains provisions similar to those contained in Section 327.25 of the Wisconsin Statutes. The Congress included in the statute a provision that the term "business" shall include business, profession, occupation, and calling of every kind.
In Medina v. Erickson, the Circuit Court of Appeals of the Ninth Circuit held that two consultation reports made by doctors who had examined the plaintiff, and which formed a part of the hospital record of the plaintiff were admissible in evidence. The reports were made in accordance with the regulations of the hospital, which was a member of the American Hospital Association. The regulations required consultation reports to be made on a standard form at or about the time of the examination and filed as a part of the regular hospital records of a patient. Apparently the consultation form was similar to that which has been prescribed by the Joint Commission on Accreditation of Hospitals. The reports were made at the request of the attending physician. The Court of Appeals pointed out that there was nothing to indicate that the reports were made for the purpose of “litigating,” page 482, and that having met the test of Section 1732, the reports were admissible, even though they contained hearsay, and denied to the representative of the deceased patient the right of cross-examination.

In New York Life Insurance Co. v. Taylor, the court held that under the decision in Palmer v. Hoffman, only parts of the hospital records could be introduced as records. The court stated that the test of admissibility was whether the records related to a readily observable condition of the patient or of his treatment. The court further held that the admissibility of records containing a diagnosis must depend upon their character.

In Schaffer v. Seas Shipping Co., the court admitted a hospital record which contained the plaintiff’s “history of present illness.” The history read as follows: “PT. is a 27 yr. old Wh. A.S., fell on 24 April, 1951, & injured rt shoulder. Pt. was scuffling at the time—and fell back striking his Rt. joint(?) shoulders . . . ” The trial court rejected the history but the Court of Appeals held that the evidence was admissible.

In Masterson v. Penn R. Co., the court held that for medical records to be admissible in evidence, it must first be shown that the writing was made by or under the direction of the physician at or near the time of his examination of the patient, and that it was his custom, in the regular course of his professional practice, to make such a record (page 797).

The Federal Business Records Act is not, of course, binding upon the courts of the State of Wisconsin. It must be considered, however, in view of three decisions of our Supreme Court. In Beilke

98 226 F.2d 475 (9th Cir. 1955).
99 147 F.2d 297 (C.A. D.C. 1945).
100 318 U.S. 109 (1943).
101 218 F.2d 442 (3rd Cir. 1955).
102 782 F.2d 793 (3rd Cir. 1950).
v. Knaack, the defendants contended that the trial court erred in admitting over objection daily hospital records relating to the condition of the plaintiff and the treatment given to him. The sisters, who nursed the plaintiff and who in a large part kept the daily records were not produced upon the trial. No attempt was made to show that the sisters were beyond the jurisdiction of the court or insane as provided by Section 327.25 of the Statutes. The court held that the admission of the record was error but not prejudicial. The trial court admitted the records as a part of the testimony of the attending physician. The physician testified that from his observation the records were correct; that they were the records kept in the hospital and were kept under his direction; that he observed them twice every day and knew the records to be correct as far as they went. This is the only case I have been able to find directly passing upon the admissibility of hospital records in Wisconsin. Although the court there held the records to be inadmissible, it may reasonably be inferred that if the custodian of the hospital records had testified to a proper foundation, the records would have been admissible.

Some trial courts have permitted the introduction of hospital records as business records. In a case which I tried a couple of years ago, Judge Drechsler refused to permit the hospital records to be introduced in toto as business records.

The second case which indirectly involved the Federal Business Records Act is Stella Cheese Co. v. C. St. P. M. & O. R. Co. In that case, Justice Fowler, speaking for the court, held that Section 327.25 of the Statutes is in substantial accord with the Federal Act. There is a scholarly discussion of the broad subject of admissibility of business records at pages 200 and 202. Justice Fowler speaks of the problems for reform of the law of evidence suggested by Edmund M. Morgan of Harvard University, Edson R. Sutherland, and Professor Wigmore. Since the Federal Act applies in express language to professions, and since the court has held that Section 327.25 is substantially in accord with the Federal Act, the decisions in the Federal courts interpreting the Federal Act, while not controlling, should be studied in connection with the question of the admissibility of hospital records.

There is an interesting discussion of the scope of the decision in the Stella case in 1947 Wisconsin Law Review 96, 100, A Code on Evidence for Wisconsin by Philachek & Spohn.

Perhaps the most enlightening statement in connection with hospital records, although the admissibility of hospital records was not

103 207 Wis. 490, 495 (1932).
104 248 Wis. 196, 200-202 (1945).
105 Ibid.
There, Justice Stevens, whose judicial training consisted principally in many years of service as trial judge, speaking for the court said:

"(3) But it is urged that the testimony of the doctor who treated the plaintiff in Washington was not admissible because the doctor testified that he made his diagnosis of hysterical paralysis by the exclusion of other possible causes for plaintiff's condition, and that in so doing he relied upon the report of the result of examinations made by hospital technicians, such as are regularly made in modern hospitals, as well as upon the history of the case and what he found upon his examination of the plaintiff. Those who made these tests were not called to show how the tests were made or that the results of these tests were correctly recorded in these reports. The reports of these technicians were not received in evidence. Their contents were not disclosed to the jury.

"In order to say that a physician, who has actually used the result of those tests in a diagnosis and in the treatment of the plaintiff, may not testify what that diagnosis was, the court must deliberately shut its eyes to a source of information which is relied on by mankind generally in matters that involve the health and may involve the life of their families and of themselves,—a source of information that it is essential the court should possess in order that it may do justice between these parties litigant.

"In making a diagnosis for treatment physicians must of necessity consider many things that do not appear in sworn proof on the trial of a lawsuit,—things that mean much to the trained eye and touch of a skilled medical practitioner. This court has held that it will not close the doors of the courts to the light which is given by a diagnosis which all the rest of the world accepts and acts upon, even if the diagnosis is in part based upon facts which are not established by the sworn testimony in the case to be true. *Leora v. M., St. P. & S. S. M. R. Co.*, 156 Wis. 386, 395, 146 N.W. 520."

The weight of authority outside Wisconsin is contrary to the Sundquist decision. Three decisions, each well reasoned, support the Sundquist case: *U.S. v. Katz*, *National Bank of Commerce v. City of New Bedford*, and *Standard Oil Co. v. Sewell*. Justice Stevens was indeed farsighted when he wrote the decision in the Sundquist case. There is absolutely no reason why the reports of technicians on the interpretation of X-rays and on laboratory tests should not be admissible in evidence as a part of the hospital records without calling the individuals who made the various tests. A proper
foundation must be laid by showing through the attending physician that he relied upon the reports in making his diagnosis and in prescribing treatment for the patient. I realize that there may be exceptions to the general rule where the trial court will deem it necessary to call the persons who made the tests to lay a proper foundation. For example, there may be a question about the correctness of the interpretation of an X-ray plate. In my own experience, on one occasion, an orthopedic specialist testified to the possibility of a fracture line in a bone as disclosed in the X-ray. It later developed that there was a defect in the film and that there was in fact no fracture. But in an ordinary case, the fact that the attending physician relies on the report is a sufficient guarantee of its correctness.

In McCormick on Evidence, page 609-610, the author points out that modern hospital records are at least as trustworthy, if not more so, than business records, when he said:

"The safeguards of trustworthiness, however, of the records of a modern hospital are at least as substantial as the guarantees of reliability of the records of business establishments. With the progress in the science and skills of medicine and surgery goes a corresponding improvement and standardization of the practice of recording the facts about the patient—facts upon which the treatment of the patient, and hence his health and even his life, may depend. The scope of such records is shown by the Manual of Hospital Standardization of the American College of Surgeons.

"In the light of these developments, most courts would concede today that hospital records will be received upon the same conditions of meeting the requirements of regularity, present knowledge, contemporaneity, production of participants and the like, as are prescribed for business records."

The final diagnosis of the physician contained in the hospital records should not be received in evidence simply as a part of the hospital record. The decision in New York Life Insurance Co. v. Taylor,112 correctly holds that the diagnosis is a matter which should come into the case only through the testimony of the physician who made the diagnosis.

One of the most troublesome problems encountered with hospital records relates to the history. In many cases, such history is taken by the intern. Where the patient is unconscious, although the history usually bears the date of the admission of the patient, the history is obtained after the patient becomes conscious, or is obtained from relatives, friends, witnesses or officers. Such history, if admissible at all, should only be admitted through the testimony of the intern who wrote the history. A corresponding situation exists with reference to

112 147 F.2d 297 (C.A.D.C. 1945).
the "impressions" of the intern who in some cases is not a licensed physician.

There are a few cases holding that the "impressions" of an intern may be received as a part of the hospital records without producing the intern as a witness. In Reed v. Order of United Commercial Travelers, the intern wrote "well under the influence of alcohol." The history was held admissible. In Reed v. Order of United Commercial Travelers, the intern stated that on admission the patient did not appear to be acutely ill. The court held the statement admissible. In D'Amato v. Johnston, the hospital records contained an entry by an intern and a roentgenologist that the patient was intoxicated. The court held the record admissible. The court in Cowan v. McDonel, adhered to the same rule and permitted the impression of the intern that there was an odor of alcohol on the patient to be introduced in evidence.

I suggest that in all of these cases, the evidence with reference to the condition of the patient should be admitted only through the intern if admissible at all, and not as a part of the hospital records.

That part of the history relating to the accident itself and the manner in which the plaintiff received his injuries should not be admitted in evidence as a hospital record. I have pointed out earlier that such history cannot be admitted as substantive evidence as a part of the testimony of an attending physician. For a stronger reason, such history should not be admitted as a part of the hospital records.

The most recent case on the subject is Williams v. Alexander. In that case, the injured plaintiff sought to keep a hospital record out of evidence, although he had introduced that part of the record which bore upon his injuries and treatment. The record contained a statement allegedly made by the plaintiff to his attending physician that he sustained an injury when an automobile ran into the defendant's automobile causing it to strike the plaintiff. The evidence was offered in support of the defendant's contention that he was at a standstill waiting for the plaintiff to cross the intersection. The court, speaking through Fuld, J., said that a memorandum made in a hospital record of acts or occurrences leading to the patient's hospitalization, such as a narration of the accident causing the injury, was not germane to diagnosis and treatment and was therefore not admissible under the BUSINESS RECORDS ACT. The trial court admitted the evidence. Because of the error in such admission, the judgment of the trial court was reversed and the case remanded for a new trial. Three of the judges dissented.

113 123 F.2d 252 (2nd Cir. 1941).
114 117 F.2d 222 (2nd Cir. 1941).
115 140 Conn. 54, 97 A.2d 893 (1953).
In *Brown v. St. Paul City R. Co.*,\(^\text{118}\) the hospital record received in evidence stated that the plaintiff while boarding a streetcar on the 16th of May, 1950, was thrown from the step when the door was closed suddenly in her face; that she was thrown to the street and rolled to the curb; that she was taken to a store and then brought to the hospital. The court held that statements made by an injured person as to the cause of the injury and the circumstances attending the accident made to a physician so long afterwards as not to be part of the *res gestae*, were admissible. The court said, page 547 of 44 A.L.R. 2d:

> "We believe the better rule is that . . . hospital records and charts, properly identified, are admissible when not privileged to prove diagnosis, treatment, or medical history of the patient pertinent to the medical and surgical aspects of the case but that hearsay and self-serving statements contained therein are not admissible to prove how an injury occurred . . ."

There is an interesting discussion on limitations of use of hospital records in *Insurance Counsel Journal* Vol. XV P. 73 “Hospital Records in Evidence” by Raymond Icallen.

In the extensive annotation commencing at page 553 of 44 A.L.R. 2d the author cites and analyzes many cases involving the admission of portions of hospital records relating to the details of an accident. These cases almost uniformly hold that such narrative statements are not admissible as a part of the hospital records.

I have suggested that in no event should hospital records be sent to the jury room. One illustration, I think, will prove that the records will not assist the jury in reaching a verdict. I shall never forget a case which I tried many years ago where the doctor testified about the treatment he gave to the plaintiff. The plaintiff’s lawyer, who was one of the leading trial lawyers in the state, had the plaintiff’s doctor testify in detail about his treatment of the plaintiff. Time after time, the doctor testified that he treated the patient by prescribing acetylsalicylic acid. When the doctor testified, I had no idea what the substance was that the doctor talked about. Fortunately, I had an opportunity at recess before cross-examination to find out the definition of the term. To my amazement, I found that the word which the doctor used was the technical name for one of the commonest remedies known to everybody who has ever had a cold—aspirin. This is simply one illustration of the language found in hospital records. If the trial court will, at the next trial of a personal injury action, look at the hospital record it will find many technical words, even in the nurses progress notes, which require the use of a dictionary to define.

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\(^{118}\) 62 N.W.2d 688, 44 A.L.R. 2d 535 (Minn. 1954).
Even the diagnosis as it appears in most records is couched in mystical lan, age as far as a layman is concerned. Patently, such records cannot assist the jury in arriving at a verdict.

VIII

To What Extent May Demonstrative Evidence Be Used

It has been held since an early day that X-rays are admissible in evidence. Mauch v. City of Hartford.\textsuperscript{119}

In Dabareiner v. Weisflog,\textsuperscript{120} the court permitted the plaintiff to introduce into evidence charts of the human pelvis. The court ordered the charts to be sent to the jury room. The Supreme Court held that the necessity for the introduction of such exhibits was a matter resting within the sound discretion of the trial court (page 31).

We suggest that the introduction of such exhibits in evidence and especially the practice of permitting such evidence to go to the jury should seldom happen, and then only in selected cases. Such charts contain pictures of various anatomical structures identified and described by technical words and phrases wholly unintelligible to the average lay person.

The courts have permitted the display before the jury of various parts of the body of an injured party. Thus, a woman was permitted to display her foot and ankle to the jury. Jansen v. Herkert.\textsuperscript{121} The trial court permitted the display so as to afford to the doctor an opportunity to indicate the extent of the injuries of the plaintiff.

In Pargeter v. C.&N.W. R. Co.,\textsuperscript{122} and Hiller v. Johnson,\textsuperscript{123} the injured plaintiffs were permitted to move their arms up and down to demonstrate to the jury crepitation in such movements.

The court permitted the plaintiff, who was a boy, to show residuals of dog bites to the jury. The court held that the exhibiting of the injured portion of the boy’s body was within the trial court’s discretion. Tatreau v. Buecher.\textsuperscript{124}

In a case which I tried sometime ago, and which went up to the Supreme Court on a point not here involved, Judge O’Neill properly permitted the plaintiff, a young man about 23 years of age, to roll his trousers above his knees to show an all-male jury the extent of burns on his legs and to show the location of donor sites on his thighs from which skin had been taken for skin grafts made below his knees. The Judge, however, refused to permit colored photographs of the injured legs to be introduced in evidence.

\textsuperscript{119} 112 Wis. 40 (1901).
\textsuperscript{120} 253 Wis. 23 (1948).
\textsuperscript{121} 249 Wis. 124, 132-133 (1945).
\textsuperscript{122} 264 Wis. 250 (1953).
\textsuperscript{123} 162 Wis. 19 (1916).
\textsuperscript{124} 256 Wis. 252 (1949).
The question of the use of medical photographs has been the subject of a great deal of discussion recently. One of the articles which contains an extensive bibliography is found in the New York State Bar Bulletin for December, 1954. It is entitled "Medical Photographs as an Aid to Trial Lawyers." The author is Albert Averbach of the New York Bar. The extent to which such photographs may be used under the current decisions of appellate courts rests in the sound discretion of the trial court. Govier v. Brechler;225 Scott Photographic Evidence, page 473 et seq. I suggest, however, that in the ordinary case photographs are not necessary to establish the plaintiff's case. There will be, of course, exceptions where a physician has difficulty in describing the condition without the use of photographs. It is conceivable that cases may arise where a series of photographs or moving pictures might be required to enable a physician to demonstrate the extent of injuries and the surgical methods which he used to correct the injuries. This is particularly true in the field of plastic surgery. Plastic surgeons generally have adopted the practice of taking "before" and "after" photographs and sometimes take photographs during the progress of their treatment. I recently tried a case before Judge Shaughnessy who properly permitted the introduction in evidence of photographs of a woman plaintiff who had sustained serious lacerations to her face when her head struck the windshield.

Perhaps this part of the discussion can best be summarized by stating that the trial court should admit demonstrative evidence in the exercise of a sound discretion, and that in case of doubt, or in case there is a danger of exciting undue emotion, the evidence should be excluded.

IX

What Medical Proof Is Necessary to Sustain a Verdict
For Future Medical Attention, Future Permanent Disability and Future Pain and Suffering?

Only a medical expert can testify as to required medical cure. Wisconsin Telephone Co. v. Industrial Commission.126

Only a medical expert can testify to permanency of injuries and future pain and suffering. Diemel v. Weirich.127

In view of these decisions, the court cannot sustain a verdict of the jury based upon permanent injuries and inability to carry on a vocation with a consequent wage loss unless there is medical testimony which supports a finding of permanent injury. The same situation obtains with respect to future pain and suffering. Unless there is

125 159 Wis. 157 (1914).
126 263 Wis. 380 (1953).
127 264 Wis. 265 (1953).
competent medical testimony substantiating future pain and suffering, it is error to submit such a question to the jury.

X

Is Lay Testimony as to Pain and Suffering and the Condition of the Health of an Injured Person Admissible?

Trial courts must continually pass upon the admissibility of testimony of lay persons concerning pain and suffering and physical condition of an injured party. In *Ready v. Hafeman*,128 the court laid down the following rule: "Witnesses are not permitted to testify to complaints or statements of physical condition or feelings made by an injured person which were made in answer to a question or which are narrative in their nature and which are not a part of the *res gestae*.

In the early case of *Keller v. Gilman*,129 the court attempted to set forth some general rules affecting the admissibility of lay testimony. The court there held that any person may testify as to facts within his observation concerning the physical condition of another, e.g., whether a person appeared to be in good or bad health, sick or well, suffering from pain or disease, or enjoying life. In that connection, the court held that a lay witness was competent to testify to the apparent physical ability of the plaintiff to do lifting and to perform her household duties. With respect to bodily pain, the court held that all persons may testify as to expressions, gestures, or exclamations indicating present pain, whether made at the time of the injury, or afterwards. The court, however, held that lay witnesses could not testify to complaints or statements of physical conditions or feelings made by an injured person in response to a question or which were narrative in their nature.

In *Bredlau v. York*,130 the court permitted the plaintiff's daughter to testify as to expressions of pain uttered by her mother three days after the accident and that her mother appeared to be in pain.

It is for the court to determine whether the statements made by lay witnesses are narrative in their nature and therefore inadmissible.131

A physician may testify as a lay witness to acts, conditions and observations of a person.132

Conclusion

This is a scientific age. Just as the advances in medical science and

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128 239 Wis. 1, 10 (1941).
129 93 Wis. 9 (1896).
130 115 Wis. 554, 557 (1902).
131 Ready v. Hafeman, 239 Wis. 1, 10 (1941); Kressin v. C.&N.W.R. Co., 194 Wis. 480, 486 (1928).
132 Will of Williams, 256 Wis. 338, 351-352 (1949).
the keeping of hospital records has occasioned this paper today, so will the effect of the atom and hydrogen bombs and other scientific advancements call for additional papers tomorrow. The law must keep pace with the sciences. There must be a scientific method in the law as Urban A. Lavery, the former managing editor of the American Bar Association Journal so brilliantly stated in "Scientific Method in the Law—Its Uses and Limitations," 18 F.R.D. 123. There never can be certainty in law. If that time ever comes, the law will cease to serve a useful function as Judge Jerome Frank pointed out in "Law and the Modern Mind," pages 11-12. We must put to ourselves this question: Of what advantage is the modern scientific age if the law is unable to devise methods to utilize such scientific achievements in court?

I commenced this paper with a problem suggested by Judge Laws. I shall close by leaving you his solution:

"It has been my observation that no matter how many fine procedures there are, no matter how many fine rulings are written, the matter of disposition of business always requires effective personnel in order to accomplish it. We must have able lawyers. And if you tell me we must have able judges, I will agree with you. In order to move these trials we must have men who know how to try cases. We must have men who know how to introduce evidence in court, how to separate the wheat from the chaff, how to prevent the spread into collateral issues, how to stop an ambitious person from making a career out of a case, and finally how to stop men from over-trying cases. We need an enlightened and able bench and bar. When gigantic problems face the man of medicine, he does not entrust the operation to the interne, the general practitioner, or the diagnostician; he turns it over to the skilled hand of the surgeon."