1960

Restrictions on Doctors' Testimony in Personal Injury Cases

Roy R. Ray

Follow this and additional works at: https://scholar.smu.edu/smulr

Recommended Citation
Roy R. Ray, Restrictions on Doctors' Testimony in Personal Injury Cases, 14 Sw L.J. 133 (1960)
https://scholar.smu.edu/smulr/vol14/iss2/1

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.
PERSONAL injury litigation continues to take an ever-increasing share of the trial dockets in all parts of the country. As this trend has grown the issue which has assumed more and more importance is the amount of damages. The question of defendant's liability is not to be minimized, but the great increase in the size of verdicts being rendered is dramatic evidence of the time and attention being given to this part of the case. The person who must usually be relied upon to furnish testimony as to the character and extent of the plaintiff's injuries is a physician who has examined the plaintiff either for the purpose of administering treatment or for the purpose of becoming an expert medical witness in the case. If this issue is to be properly resolved in the vast number of cases, i.e., if the plaintiff is to receive just compensation for his injuries and defendant is to pay no more than this, there must be a closer cooperation between the members of the medical and legal professions than exists at this time. Between lawyers who represent plaintiffs and defendants in personal injury actions on the one hand and doctors who are called upon to give testimony in such cases on the other, there is often a lack of understanding as to the function and method of operation of the other profession. Doctors do not understand the adversary system, and they are often embittered by their treatment on the witness stand at the hands of lawyers and judges. Lawyers often do not appreciate the

† The substance of this paper was the basis of a lecture given at a Southwestern Legal Foundation Institute on Personal Injury Litigation.

* A.B., Centre College; LL.B., University of Kentucky; S.J.D., University of Michigan; Co-author, The Texas Law of Evidence, 1937 (with C. T. McCormick), 2d ed. 1956 (with W. F. Young); Professor of Law, Southern Methodist University.

† Mettler, The Medical Source Book (1959). Dr. Mettler opens his preface with these words: "Between physicians and scientists on the one hand and persons concerned with the law on the other there exists a lack of understanding, a gap, recognized and acknowledged on both sides, which is essentially one of purpose and thus involves a basic difference in philosophy as well as in knowledge and method." This new book was written for the purpose of helping lawyers in their dealings with medical matters involved in personal injury cases. Dr. Mettler is Professor of Anatomy at the College of Physicians and Surgeons, Columbia University.
fact that a good doctor will invariably subordinate all other considerations to that of the welfare of his patient. They are also impatient with the reluctance of many competent physicians to testify in personal injury cases, and of others to give precise statements as to the nature, cause, and extent of plaintiff's injuries.

It is the writer's belief that a large part of the resentment on the part of doctors is due to the restrictions which the courts have placed upon their attempts to give the jury the benefit of their observations and opinions. A primary purpose of this paper will be to point out some of the restrictions which I consider both unreasonable and unnecessary. To accomplish this it will be convenient to consider the physician's testimony in three separate categories: (1) testimony of the doctor as to statements of the patient concerning his present and past symptoms, where these statements are offered as evidence of their truth; (2) the doctor's opinion as to the character and extent of plaintiff's injuries, including his pain and suffering; and (3) the doctor's recital of the data upon which he bases his opinion. The frequent failure of courts to differentiate between these three types of evidence has led to confusion in decisions.

I. Statements of Plaintiff as to Symptoms

A. Made to a Doctor Consulted for Treatment

First to be considered is the admissibility of statements of the patient about his condition, made to a physician whom he is consulting for treatment. These may relate to present condition or to past symptoms. Whenever such declarations are used to prove the truth of the facts asserted they are within the prohibition of the hearsay rule and must qualify under some recognized exception to the hearsay rule in order to gain admission. For example, if the victim of an automobile collision says to the doctor, "my back aches," and the doctor testifies to this statement for the purpose of proving that the speaker actually did have a backache, this is clearly hearsay. However, it comes into evidence under the well-recognized exception to the hearsay rule for statements as to bodily condition. From such statements evidence of conduct other than statements, as well as statements which are not assertive, must be distinguished. Illustrations of these are inarticulate cries, screams, groans, facial contortions, and like indications of pain or bodily conditions. These are not hearsay at all, and come in simply as circumstantial evidence of the bodily states

\[^{2}\text{Mettler, op. cit. supra note 1, at vii.}\]
indicated, assuming, of course, that they are relevant. The same is true of any statement from which a bodily condition may be inferred (other than a direct assertion of its existence) as, for example, a request for aspirin, which would indicate a headache.

Today practically all courts receive statements as to present pain and bodily conditions made to a doctor consulted for the purpose of treatment. It should be noted, however, that language is to be found in some opinions which would restrict such statements to those made involuntarily in the sense that they were made without reflection and under pressure of pain. This is believed to be too restrictive, since in the very nature of things most of the statements are made with more or less reflection and in answer to questions asked by the physician. In these situations it is the prompting of the bodily condition, and not the excitement from any startling event, which is important. Despite the restrictive language used by some courts, there are statements in several Texas cases indicating that the courts will admit any expression of present bodily sensations, though not involuntary, if made under circumstances which show that the patient was not consciously trying to create evidence for himself. However, in admitting such declarations the courts frequently have used the res gestae phrase, which unfortunately tends to associate this exception with that for spontaneous exclamations. For example, one Texas court used these words: “The evidence was not shown to be admissible as ‘Res Gestae’ of the original injury, but such declarations of pain and suffering and their locality were admissible as ‘Res Gestae’ of the pain and suffering of Adcock at the time they were made.” As a matter of fact, the use of res gestae in this connection means nothing more than a statement of present condition made under unsuspicious circumstances. Parenthetically it might be mentioned that in most jurisdictions complaints of present pain may be testified to by any witness who heard them.

3 United States Fid. & Guar. Co. v. Nettles, 21 S.W.2d 51 (Tex. Civ. App. 1929), rev'd on other grounds, 35 S.W.2d 1045 (Tex. Comm. App. 1931) (witness testified that he often heard moans and groans from appellee's room, which was just across from his room). See also Meaney v. United States, 112 F.2d 538 (2d Cir. 1940); International & N.G.R. Co. v. Cain, 80 S.W. 571 (Tex. Civ. App. 1904) (witness testified that plaintiff made a great deal of fuss in his sleep, groaning and rolling).


8 Wigmore, Evidence § 1719 (3d ed. 1940); Annot., 64 A.L.R. 517 (1929); McCor-
Statements of past symptoms, past pain and suffering, even though made to a physician consulted for treatment, are rejected by most courts when offered as evidence of their truth. Expressions to this effect are found in several Texas civil appeals cases. It is believed that this position is unsound. The reason usually given is that these statements lack trustworthiness, since they are merely reflective of past occurrences and are not evoked by present pain. Where such statements are made to a physician upon whom the declarant is calling for treatment which he knows will be based in considerable degree upon the statements, there is a very practical motive for telling the truth, namely, the desire for correct treatment. This reason, which seems to have been overlooked by many courts, affords ample justification for the admission, as an exception to the hearsay rule, of statements as to past condition made to a treating doctor. One of the leading opinions espousing this view was written by Judge Learned Hand of the Second Circuit in Meaney v. United States which involved an action on a policy of war risk insurance. The insured was mustered out in December, 1918, and the policy lapsed one month later. More than two years later he died of pulmonary tuberculosis. He had consulted one physician in 1919 and one in 1920 and they found that he had contracted tuberculosis and that it was already "moderately advanced." The government won in the district court and the only error considered on appeal involved a ruling made during the testimony of the physician who had examined him in 1920. The doctor said that he had been the assured's physician from the 1920 examination until death, except for a few months when the patient was in a sanatorium. The trial judge allowed the doctor to state the findings of his several examinations but refused to let him state what the assured had told him about the "history of the case." Since the first physician who had examined the assured was dead, the declarations which assured had made to the witness with respect to the time of the onset of the disease and its immediate severity were likely to determine the issue. Judge Hand said:

The insured's declarations seem to have been offered as a narrative of his past condition; so far as appears they were no part of the basis of the physician's opinion as to his condition; at least they were not offer-
ed as such. They were therefore hearsay, and moreover, they did not fall within the generally accepted exception in favor of spontaneous expressions of pain or the like. . . . The utterances of a patient in the course of his examination, so far as they are spontaneous, may be merely ejaculatory—as when he emits a cry upon palpation—or they may be truly narrative; it will often be impossible to distinguish rationally between the two; between an inarticulate cry, for example, and a statement such as: "That hurts". The warrant for the admission of both is the same; the lack of opportunity or motive for fabrication upon an unexpected occasion to which the declarant responds immediately, and without reflection. But most of what he tells will not ordinarily be of this kind at all; there may be and there is in fact good reason to receive it, but it is a very different reason. A man goes to his physician expecting to recount all that he feels, and often he has with some care searched his consciousness to be sure that he will leave out nothing. If his narrative of present symptoms is to be received as evidence of the facts, as distinguished from mere support for the physician's opinion, these parts of it can only rest upon his motive to disclose the truth because his treatment will in part depend upon what he says. . . . The same reasoning applies with exactly the same force to a narrative of past symptoms. . . . A patient has an equal motive to speak truth; what he has felt in the past is as apt to be important in his treatment as what he feels at the moment. It appears to us that if there is to be any consistency in doctrine, either declarations of all symptoms, present or past, should be competent, or only those which would fall within the exception for spontaneous utterances. Nobody would choose the second particularly as the substance of the declarations can usually be got before the jury as parts of the basis on which the physician's opinion was formed. . . . We hold that the insured's history of the case as narrated to the physician was competent and that its exclusion was error.

A holding to the same effect is found in a workmen's compensation case from Pennsylvania, where the doctor who first saw the injured person thirteen months after the accident was allowed to testify at length as to the history of the case given to him by the patient-plaintiff. There are several earlier Texas decisions in accord.

In Walker v. Great Atl. & Pac. Tea Co., where the patient became violently ill, his statement concerning what he had eaten for dinner was held admissible. But it seems doubtful that the Texas Supreme Court meant to hold that the declaration was receivable as independent evidence as distinguished from a basis for the doctor's opinion. In a more recent Texas civil appeals case, a doctor was allowed to

---

13 All physicians, in making a final diagnosis, place great value on the past medical history of a patient. I am advised by internal medicine specialists that in many cases it would be impossible to make an accurate diagnosis without a complete past history.
13 F.2d 338, 339-40 (2d Cir. 1940).
15 McCormick & Ray, op. cit. supra note 3, § 842 n.59; Rogers v. Crain, 30 Tex. 284 (1867); Kennedy v. Upshaw, 66 Tex. 442 (1886).
16 111 Tex. 117, 112 S.W.2d 170 (1938).
relate the history of a patient's suffering as given to him by the patient, but the testimony presumably was admitted only to show the basis of his opinion.\textsuperscript{17} It is interesting to note that some of the courts which purportedly exclude statements as to past symptoms evince a tendency to relax the rule on occasion. They will be found classifying as declarations of present symptoms descriptions which really include the past. For example, a physician's testimony that "he came to my office and told me that his sputum was stained with blood" was held admissible by the United States Court of Appeals for the Fifth Circuit.\textsuperscript{18} And in a Missouri case the patient's statement to his doctor, during treatment, that he had been unable to hold food on his stomach, was admitted.\textsuperscript{19}

The courts have almost uniformly rejected testimony of doctors as to statements describing external events such as the accident which allegedly caused the injury to the declarant, where these statements are offered as evidence of their truth.\textsuperscript{20} This is difficult for doctors to understand. It would seem that when such statements are made to a doctor who is consulted for diagnosis and treatment, the declarant's motive in describing the accident correctly for the physician's information is about as strong as in the case of past pain and symptoms. And furthermore, the dividing line between descriptions of external cause and of bodily effect is in practice frequently difficult to draw. Nevertheless, most courts, including those of Texas, refuse to relax the rule.\textsuperscript{21} Some authority to the contrary is found in other states.\textsuperscript{22}

\textsuperscript{17} Ynsfran v. Burkhart, 247 S.W.2d 907 (Tex. Civ. App. 1952).
\textsuperscript{18} Hartford Acc. & Indem. Co. v. Baugh, 87 F.2d 240, 241 (5th Cir. 1936), cert. denied, 300 U.S. 679 (1937). The physician actually testified: "In the latter part of January he (Baugh) spit up a little blood. He came to my office and told me that his sputum was stained with blood. I thought that sputum came from his lungs." The majority opinion stated that the statement related, not to a past, but to a present symptom, then existing. But as the dissenting judge points out, the doctor neither saw the patient spit blood nor saw the blood-stained sputum. It seems clear that the patient's statement referred to what had happened prior to the time he came to see the doctor.
\textsuperscript{19} McNicholas v. Continental Baking Co., 112 S.W.2d 849 (Mo. App. 1938).
\textsuperscript{20} Texas cases to this effect are numerous. A collection will be found in McCormick & Ray, op. cit. supra note 5, § 843 nn.59 & 60.
\textsuperscript{21} Newman v. Dodson, 61 Tex. 91, 95 (1884) (statement of plaintiff to physician as to how wound was received, held hearsay and inadmissible); Texas Employers' Ins. Ass'n v. Morgan, 187 S.W.2d 603 (Tex. Civ. App. 1945) error ref. w.o.m.
\textsuperscript{22} Stewart v. Baltimore & Ohio Ry., 137 F.2d 127 (2d Cir. 1943) (action for death of a railway hostler, allegedly due to exertion while throwing a switch; decedent's declarations to a doctor as to the nature and extent of his exertions held admissible, but his statement that the switch was out of order excluded); Hillman v. Utah Power & Light Co., 56 Idaho 67, 51 P.2d 703 (1935) (workmen's compensation; statement to doctor as to how accident occurred, by hitting head on regulator panel, admitted); Valentine v. Weaver, 191 Ky. 17, 228 S.W. 1036 (1921) (workmen's compensation; declaration of deceased that he stuck splinter in his hand, and time when, held admissible. However, the court excluded statement as to place where this occurred. This discrimination is too subtle for the present writer); Baker v. Industrial Comm'n, 44 Ohio App. 339, 186 N.E. 10 (1933) (declaration while seeking treatment for strangulated hernia, that condition was caused by fall, held competent in workmen's compensation proceeding).
Although rejected as evidence of their truth, such statements made by a patient to a physician regarding events causing the injury may be related by the physician in explanation of his expert opinion as to the cause, nature, and duration of the injury. Declarations as to external events may also qualify for admission as a spontaneous statement made under excitement, or in rebuttal of a claim of admission by silence.

B. Made to a Doctor Who Examines for the Purpose of Becoming a Witness

In some of the exceptions to the hearsay rule there is a hard and fast limitation that the declaration must have been made ante litem motam, that is, before the controversy about the subject matter arose. No such limitation is imposed on statements as to bodily condition, and usually the claim follows the injury so closely that such a rule would not be proper. However, in one instance a very rigid rule has been adopted in many jurisdictions. It is to the effect that statements to a physician who examines the litigant for the sole purpose of qualifying to testify as an expert witness are not admissible as independent testimony, i.e., to prove the truth of the facts stated to the doctor. The reason, of course, is that these declarations are suspect as evidence making. As one judge put it, "self interest becomes a motive for distortion, exaggeration and falsehood." In Texas this rule has been followed in numerous civil appeals decisions. In one case, for example, the plaintiff went to a doctor for examination about a year after the accident solely for the purpose of enabling him to qualify as an expert medical witness in plaintiff's behalf. The doctor was not permitted to testify that the plaintiff had complained to him about suffering with his knees and legs. Although the Supreme Court of Texas has never expressly decided the question, it has in dictum indicated its approval of the rule. However, even

---

26 McCormick & Ray, op. cit. supra note 1, § 919.
28 McCormick & Ray, op. cit. supra note 5, § 839 nn. 33 & 34. Collections of cases are found in 21 L.R.A. (N.S.) 826 (1908); Annot., 67 A.L.R. 15 (1930); Annot., 80 A.L.R. 1528 (1932); Annot., 130 A.L.R. 978 (1941).
29 See cases cited in McCormick & Ray, op. cit. supra note 5, § 838.
31 The question has been argued before the court.
under this rule testimony as to inarticulate groans, screams, and the like, produced by present pain may be received, though they occurred during examination by a doctor called in for the sole purpose of qualifying as a future witness. And on occasion the courts seem to stretch a point in calling statements spontaneous indications of present pain in order to bring them into evidence without admitting any relaxation of the usual rule. For example, in a Texas case the plaintiff was unloading mail from a car on a siding when another car bumped into it, knocking him to the ground. Defendant objected to the admission of statements of plaintiff concerning his physical condition made to a doctor to whom he went for the purpose of making him a witness in his behalf. The doctor's testimony was that plaintiff complained of dizziness when standing with his eyes closed, pain in muscles around his shoulders, spine, and back, and of popping in his ears at times. This was held to be admissible under the rule stated by the supreme court in the earlier case of Missouri, K. & T. R. Co. v. Johnson, admitting "spontaneous indications of pain" during an examination. Normally, however, evidence of statements as to past pain, external events, and seemingly even declarations of present pain will not be received as independent evidence under such circumstances unless they amount to involuntary reactions. The New Jersey Supreme Court excluded even a statement by the plaintiff of a present "ringing in the ears." It should be noted that the rule of exclusion just discussed does not apply where the physician is called for preparation as a witness and for treatment. It is now a rather common practice for personal injury plaintiffs, seeking to avoid the rule of exclusion, to call the doctor for both purposes and to have him actually prescribe for the patient. In such case it is not necessary that treatment actually be administered in order for the statement to be received.

II. Opinion of Physician Based on Statements of Patient or Other Persons

Where the doctor speaks from personal knowledge or observation, as, for example, where he has examined and treated a patient, he may express his opinion of the patient's physical condition, including the nature, cause, and extent of his injuries. But suppose

32 65 Tex. 409, 67 S.W. 768 (1902).
35 Austin Road Co. v. Thompson, 273 S.W.2d 521 (Tex. Civ. App. 1955) error ref. n.r.e.
his knowledge has been obtained in part from the statements or reports of third persons other than the patient. Does this prevent the use of the medical expert's opinion? The usual holding is that it does. This means that opinions of physicians based upon reports of examination by other doctors or upon hospital records disclosing the patient's symptoms and treatment are rejected. The writer regards this as a most unsound rule because such records normally have a very high degree of reliability and physicians themselves place great reliance upon them in making their own diagnosis and determining a course of treatment. One qualification of the rule was made by the Amarillo Court of Civil Appeals in a suit on an accident policy for a child's death. Without taking into consideration any history of the case, and basing his opinion solely on his examination of the child, the doctor testified that death could have been due to respiratory congestion as well as to accidental suffocation. But taking into consideration the history given him by the parents, he was of the opinion that death was caused by accidental suffocation. The court said the general rule of exclusion did not apply where statements as to history were shown to be true. And in this case there had been no dispute as to the facts surrounding the death when a former settlement had been made. Therefore, the court said, the doctor's opinion was admissible. Where information is supplied to the doctor by lay persons entirely outside the family circle his opinion based thereon would have little to recommend it. It may well be argued, however, that where the doctor has been given the history of the patient by a spouse or parent who had personal observation, his opinion based in some part thereon is entitled to consideration by the fact finder. Scattered cases approving the reception of the opinion in this situation may be found in other states. In a Maryland case involving a claim for injuries to a three-year-old child, the court admitted the opinion of an attending physician, which was based in part upon information received from the child's mother. The majority of courts categorically reject such opinions. An illus-

40 For a collection of cases from many jurisdictions see Annot., 175 A.L.R. 274 (1948).
tration of the extent to which the courts will go is furnished by a federal court of appeals case from the Fifth Circuit. Part of the evidence introduced by plaintiff was to the effect that deceased told his wife he had seen dark blood in his stool. All of plaintiff's evidence was put in a hypothetical question which was propounded to the doctor. The court held that deceased's statement to his wife should have been excluded as hearsay, and that the doctor's opinion based in part on the statement was also inadmissible. The wife was present at the trial, testified as to the statement and was cross-examined about it. Of course, it is difficult to tell to what extent the opinion was based on the statement, but it was included in the hypothetical question. The court reversed for this error, citing and relying on several Texas cases.

When the report upon which the physician partly bases his opinion comes from an attending doctor or nurse who had personal observation and an interest in learning and describing accurately, there is good reason for receiving the opinion. This was the position taken by the Austin Court of Civil Appeals in a recent case, John F. Buckner & Sons v. Allen. In that case Dr. Mee, a kidney and bladder specialist, had been called in to diagnose and treat the plaintiff. He saw and treated her three times over the period of a month. He testified that he looked at the bedside chart and went over the whole case with Dr. Swann, the attending physician, including plaintiff's injuries, to determine the possibility of kidney injuries. He was then asked: "As a result of that did you find out for yourself whether or not there had been any trauma or injury to any area of the body that might have some effect on the kidney or bladder or any part of the urinary tract?" This was permitted over objection that the question called for an answer based on hearsay and not on personal knowledge. In affirming, the court of civil appeals said: "Dr. Mee was simply getting the history of appellee's complaint of kidney ailment for the purpose of enabling him to diagnose the complaint and to form an opinion for treatment and not to give independent evidence." Every physician relies upon this kind of information in making a diagnosis and forming an opinion. It is well known that medical men base their opinions on many sources of information in addition to their objective findings. These include their medical studies, experience in other cases, medical treatises, scientific articles and results of research appearing in medical jour-

41 Standard Acc. Ins. Co. v. Terrell, 180 F.2d 1 (5th Cir. 1950).
43 Id. at 394.
44 Id. at 395.
nals, and reports of doctors and nurses, as well as statements of the patient. It is not feasible to determine the part each plays in the formation of the physician's opinion. But since these sources are accepted by the doctor as the basis for judgment upon which he acts in practicing his profession it would seem that they should be regarded by the courts as sufficiently reliable to justify the admission of the doctor's opinion for evaluation by the trier of the facts. In this connection it is interesting to note the treatment of a similar question by the El Paso Court of Civil Appeals in a case involving the opinion of a geologist. His opinion of the value of oil prospects was received though admittedly based in large part upon the report of other geologists. The court said: "The conclusions of an expert as to so technical a subject ... arrived at in part from study of unsworn reports prepared by other experts are analogous to the diagnosis by a physician based in part on unsworn reports of tests made by hospital technicians. Testimony of diagnoses based in part on such reports has been held to be admissible."

The situation most frequently arising in litigation is that of a physician who seeks to give an opinion based in part on the patient's statements of past symptoms. Where the statements are made to the doctor being consulted for the purpose of treatment, the Texas courts receive the opinion. And the fact that the doctor did not actually treat the patient has been held not to affect the admissibility of the opinion. One of the best statements on the subject is found in Texas Gen. Indem. Co. v. McNeill, where the court said:

The appellant ... complains that the expert medical evidence of Dr. McGrath on behalf of the appellee was insufficient to support the jury's verdict of temporary total disability resulting from the appellee's accidental injury. The gist of ... [appellant’s argument] is that Dr. McGrath testified that he examined the appellee and found two, possibly three fractured ribs, that the ribs had not healed at the time of the trial and that from the history of the accident given to him by McNeill it was his opinion that McNeill's condition resulted from his accidental injury in the mill, that he was totally and permanently disabled and that his condition was the result of such accidental injury; that since the doctor’s opinion was based partly on the history of the case given to him by the appellee it is hearsay and not sufficient to prove the cause

---

44 Id. at 670.
46 Austin Road Co. v. Thompson, 275 S.W.2d 521 (Tex. Civ. App. 1955) error ref. n.r.e.
of the injury. A number of cases are cited and quoted from by the
appellant in his brief to substantiate this argument. We believe, however,
that they are not in point and that appellant has overlooked the testi-
mony that appellee visited the doctor for the purpose of receiving treat-
ment, that the doctor examined him physically and also inquired of him
as to the history of the case, all for the purpose of treating him, and
thereafter did treat him. This state of facts takes the testimony of the
doctor out of the category of hearsay testimony. We believe the rule is
well established... that the opinion of a physician or surgeon as to the
condition of an injured or diseased person is not rendered incompetent
by the fact that it is based upon the history of the case given by the
patient to the physician or surgeon on his examination of the patient,
where the examination was made for the purposes of treatment and
cure of the patient.\(^\text{29}\)

The court held that Dr. McGrath's testimony was properly received.
Where the doctor examines an injured claimant solely for the
purpose of qualifying himself to testify in court as an expert witness,
his opinion based in any part upon the statements of the patient
as to subjective symptoms is rejected.\(^\text{30}\) In effect the courts have
made the admissibility of the opinion depend upon the admissibility
of the statements of the patient upon which it is partly based. This
appears to be an unfair limitation on a reasonable practice of per-
sonal injury claimants in preparing their cases for trial, namely,
that of securing eminent physicians to make an examination for
the purpose of later aiding the court and jury in understanding
the claimant's physical condition. Of course, the obvious motive for
such limitation is the court's fear of dishonesty. But honest experts,
whether employed by plaintiff, defendant, or the court, constitute
one of the most reliable sources for discovery of truth, frequently
superior to that of the treating or family doctor, who often makes
a very poor witness. That such medical experts of wide reputation
may be more effective as witnesses than differently qualified doctors
would seem to furnish no sound reason for excluding their evidence.
In short, the restriction is believed undesirable, and its enforcement
will merely cause plaintiff's counsel to seek means of circumventing
it. This may be accomplished by having the doctor selected as the
expert witness examine for prospective treatment and actually pre-
scribe such, or by having the claimant testify as to his symptoms
and then put this testimony in the form of a hypothetical question

\(^\text{29}\) Id. at 383.

1947) error ref. n.r.e.; Texas Employers' Ins. Ass'n v. Morgan, 187 S.W.2d 603 (Tex. Civ.
App. 1945) error ref. w.o.m.; Southern Underwriters v. Blair, 144 S.W.2d 641 (Tex. Civ.
App. 1940).
for the doctor. A wise treatment of this problem is found in the opinion of an Oregon judge in which he argued for admissibility of both statements and opinion. He said in part:

To me it seems that the authorities, which exclude the medical expert's opinion, lay undue emphasis upon the communications of the declarant; it is not the latter, but the physician's opinion which becomes the evidence. The opinion is not founded exclusively upon the narrative but upon the combined effects of that with his observation of the consultant, his schooling, experience and knowledge of similar cases. Experts are oft' times permitted to employ as a part of the material upon which they found an opinion, information which is ordinarily denominated as hearsay. . . . I believe that the objection to the opinion of the expert, based in part upon the history of the case, is applicable to its weight and not to admissibility. One who in good faith seeks the services of a medical expert as a witness would find it as impossible to communicate the facts of an internal disorder as another who seeks treatment. In these days when a tortious party frequently takes charge at once of supplying the injured one with medical treatment, a rigid application of the suggested rule might drive a plaintiff to the ranks of his adversaries' employees in order to prove an important feature of his case. Next, it seems to me that the skirmishes back and forth to exclude or admit such testimony are largely in the nature of sham battles, for, if the testimony should be excluded by the application of the rule suggested by the defendant, it would promptly make its appearance in the form of a hypothetical question accompanied by the physician's opinion-answer.

Since the courts are really concerned with fairness it would be well for the trial judge to have the discretion to exclude such opinions when offered by a claimant who has refused to permit a similar examination by reputable physicians selected by the defendant.

It is interesting to note that in a number of states where the rule excluding the doctor's opinion is purportedly accepted, the courts place various limitations upon its operation. In a relatively recent Texas case, the doctor testified that the only statement made by the plaintiff on which he relied was as to the part of the body he examined. The court held that the doctor's testimony was based on his objective findings. In Minnesota the courts admit the doctor's opinion when it is based on hypothetical questions embodying all symptomatic facts of which there is evidence. The Supreme Court of Tennessee, after stating the general rule, refused to reverse be-

---

53 Justice Rossman specially concurred in Reid v. Yellow Cab Co., 131 Ore. 27, 279 Pac. 635, 640 (1929).
cause the doctor based his opinion in part on what plaintiff told him when the doctor made his own examination. In Missouri a doctor who examines for the purpose of qualifying as a witness may give an opinion based on a statement as to present symptoms, but not as to past symptoms. Oklahoma apparently rejects the rule entirely, and permits the use of the opinion and the facts as to past history as the basis of the opinion.

III. Doctor's Recital of Statements on Which He Bases His Opinion

The general rule is that an expert who has given an opinion may either on direct or cross-examination, relate an account of the basis upon which his opinion is founded. If this testimony is competent as independent evidence upon the issues in the case, it is admissible in that role. Even if not admissible as independent evidence, it is normally admissible to explain the basis for the opinion previously expressed, thus enabling the jury to test the value of the opinion. Hence, where a doctor who has been consulted by a patient for the purposes of diagnosis and treatment testifies as an expert witness with reference to the nature and extent of the patient's injuries, his recital of the patient's statements upon which his opinion has been partly founded is admissible. In Pullman Palace Car Co. v. Smith, the Supreme Court of Texas said:

We find no error in the action of the court in permitting the physician who attended Mrs. Smith during her illness to state what she told him while he was treating her, about her exposure at the place where she left the train, in connection with his own opinion as to the cause of her sickness. The statement was made as the basis for the doctor's opinion, and not as independent evidence to establish the fact of exposure.

57 Murphy v. S. S. Kresge Co., 239 S.W.2d 173 (Mo. App. 1951), reviewing the Missouri cases; Holmes v. Terminal R. R. Ass'n, 363 Mo. 1178, 257 S.W.2d 922 (1953).
59 McCormick & Ray, op. cit. supra note 5, § 835.
60 Pullman Palace Car Co. v. Smith, 79 Tex. 468, 14 S.W. 993 (1890).
61 Ibid.
62 Id. at 994.
DOCTORS' TESTIMONY

In *Walker v. Great Atl. & Pac. Tea Co.*, the physician's testimony of what plaintiff told him he had eaten for dinner was held admissible as the basis for his opinion as to the cause of plaintiff's illness which the doctor diagnosed as ptomaine poisoning. A patient's statement, related by the doctor, may cover subjective as well as objective symptoms. For example, in *Norwich Union Indem. Co. v. Smith*, deceased, a painter, fell from a roof and sustained injuries from which he died. The doctor-witness took charge several weeks after the incident had occurred and testified in this case to facts he obtained from deceased to aid him in diagnosing the injury. These were held to be admissible, the court saying: "The weight of authority seems to be that a physician should be permitted to testify to both the subjective as well as objective symptoms on which he bases his professional opinion." Similar language was used by another court of civil appeals in *Texas Employers' Ins. Ass'n v. Marsden*, where the court said:

> Neither do we believe there was error in permitting Dr. O. Lindley, while testifying as an expert medical witness, to state the history of the case as given to him by appellee while undergoing examination. It is our understanding that physicians in making a diagnosis reach their conclusions based upon two sources of information, namely, the objective and subjective symptoms. The subjective symptoms must necessarily come from the patient and include in part at least some of the history of the case.

In a more recent case the Austin Court of Civil Appeals said: "We believe that the doctor could give his opinion as to the extent and cause of Mrs. Burkhart's injuries, and could relate the history of the injury given him by the patient." Since these statements are not offered as evidence of the facts declared but merely as an explanation of the opinion previously expressed by the doctor, they are not hearsay and should not be subjected to the restrictions which limit the use of hearsay declarations.

The Supreme Court of Texas has indicated by dictum that a doctor who is called in solely for the purpose of qualifying as an

---

63 131 Tex. 57, 112 S.W.2d 170 (1938). The court quoted from Pullman Palace Car Co. v. Smith, 79 Tex. 468, 14 S.W. 993 (1890).
65 3 S.W.2d at 121.
66 17 S.W.2d 900 (Tex. Civ. App. 1913), rev'd on other grounds, 127 Tex. 84, 92 S.W.2d 237 (1936).
67 Id. at 903. More recent cases are: Ynsfran v. Burkhart, 247 S.W.2d 907 (Tex. Civ. App. 1952) error ref. n.r.e.; Texas Employers' Ins. Ass'n v. Wilkerson, 199 S.W.2d 288 (Tex. Civ. App. 1946) error ref. n.r.e.
68 Ynsfran v. Burkhart, supra note 67, at 914.
expert witness will not be permitted to testify to statements made to him by the claimant, even as a part of the explanation of his opinion.65 This dictum creates some uncertainty, since the court does not distinguish between the use of the statement as independent evidence of its truth and its use in explanation of the opinion. Many general statements may be found in court opinions to the effect that what a patient tells a doctor with the sole view of qualifying him as a witness may not be received in evidence, but the courts seldom distinguish the possible uses of such testimony.66 Obviously, if the opinion of the physician called in for the express purpose of preparing himself to testify is to be rejected merely because it is based in part on the plaintiff's statements, then there is no opinion to explain. But if the courts would receive the opinion of the qualifying physician in such a situation, then in accord with the rule as to expert testimony generally, the physician should be allowed to recite, as a part of the basis for his opinion, the statements made to him by the plaintiff as to the history of the case. Moreover, such an explanation appears to be necessary for the jury to weigh the value of the opinion. If it be suggested that the jury may be inclined to give undue weight to statements made under these circumstances, I would answer that this danger is greatly exaggerated. However, to guard against such a possibility the opponent is certainly entitled to have the jury instructed not to consider the "history" as evidence of the facts recounted. Furthermore, if the evidence of the "history" given to the doctor by the patient-plaintiff is being elaborated by the doctor witness for the apparent purpose of giving independent force to these statements, the judge may, in his discretion, confine the doctor to a general statement of the "history."

IV. Conclusion

In the course of this paper the writer has attempted to show that the courts tend to fetter the testimony of physicians as to symptoms and diagnostic opinions with too many restrictions. These include the rejection of the following types of testimony: (1) statements of the claimant as to past symptoms offered as evidence of their truth, even when made to a treating doctor; (2) statements of the claimant.

65 Walker v. Great Atl. & Pac. Tea Co., 131 Tex. 57, 112 S.W.2d 170 (1938). This is the case where the ruling admitted a statement of what plaintiff had eaten for dinner, made when he was violently ill and seeking treatment.
as to the cause of injury offered as evidence of their truth, even when made to a treating doctor; (3) statements of the claimant made to a doctor who examines the litigant for the sole purpose of qualifying as an expert witness when offered as independent evidence of their truth; (4) opinion of a physician based in part on reports of other doctors or upon hospital records disclosing the claimant’s symptoms and treatment; (5) opinion of a physician based in part upon the history of an ailment or injury, given by a spouse or parent of the claimant; (6) opinion of a physician who examines claimant solely to qualify himself to testify as an expert witness, based in part on statements of the claimant as to past symptoms; and (7) recital as basis of opinion of statements made by claimant to doctor who examines solely for the purpose of qualifying as an expert witness.

The distinction so often drawn today between the treating doctor and the medical expert who examines for the purpose of qualifying as a witness in determining the admissibility of their opinions or statements made to them by the claimant is without support in reason or medical experience. Furthermore, its evasion is now so common as to demonstrate the utter futility of such a discrimination. The exclusion of opinions of doctors based partly on hearsay has been carried beyond all reason. If it were logically followed, no doctor’s opinion could be received, because every such opinion is honeycombed with hearsay, including his medical studies, medical treatises, research of others appearing in scientific and medical journals, and reports of other doctors and nurses as well as statements of the patient.

We should let the doctor give his testimony in the way most natural for him and with the least possible interference in the form of technical rules based upon outmoded concepts of the past. Where statements made to him as to past history, including reports of other doctors and hospital records and statements by the patient, are relied upon by him in the formation of his diagnosis, they should at least be received by the courts for consideration by the trier of the facts. Doctors are far more experienced in these matters than lawyers and are better judges of the reliability of such statements. This is an area in which we might well yield to our medical brethren. It is high time for the courts to recognize in testimonial rules the accepted practices of the medical profession and to accord greater respect to the judgments of our professional colleagues. When we do, I am sure we will find them ready to assume their share of the responsibility to society for the just disposition of personal injury claims.