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Evidence—Hearsay Rule—Expert Testimony by Physician in Insanity Proceedings

Defendant, charged with robbery, claimed that he did not remember committing the offense and pleaded not guilty by reason of insanity. A psychiatrist who examined the defendant prior to trial was asked by the defense to state from his examination whether he considered the defendant insane and also to state the basis for his conclusion. The trial court refused to admit the psychiatrist's testimony, sustaining the objection that it was based on self-serving statements made by the accused to the psychiatrist and consequently hearsay. *Held*: the re-

fusal to allow the psychiatrist to state his opinion concerning defendant's sanity was prejudicial error.¹

The hearsay rule states that no extra-judicial assertion offered as testimony can be received unless it has been open to test by cross-examination.² Since the hearsay rule often conflicts with the need of the court and jury to receive the benefit of expert evidence, an exception has been made in the case of opinion testimony of a physician based upon statements made to him by the patient in the course of treatment.³ The exception, however, will not allow the admission of the physician's testimony if the patient made statements to the physician solely to qualify the physician as a witness.⁴ The exception is further limited to the admission of statements made by the patient to the physician concerning symptoms of an injury or illness, and does not apply to statements concerning the cause of the injury or illness.⁵ While the physician's exception has been consistently applied in personal injury cases, courts have had difficulty applying it in insanity proceedings.⁶

Because a mental illness is more likely than a physical injury to go untreated until the need for expert testimony arises, courts which strictly apply the standard of the physician's exception in insanity proceedings are often without the benefit of expert testimony in a field that is becoming increasingly more complex. This presents the necessity of altering the exception to admit psychiatric testimony.

Another factor that supports a modification of this exception involves the effect and nature of the statements made by the patient to the physician. The psychiatrist is a practicaner specially trained to evaluate statements made by the patient—statements which may or may not be true—and from these statements, and the psychiatrist's expert knowledge of the functioning of the mind, he reaches a conclusion concerning the patient's mental condition. This should give more reliability to his testimony as compared to testimony of a physician who evaluates physical injuries on the basis of statements made by the patient concerning the nature and source of his physical injury.⁷

¹ *Lyons v. State*, 156 Neb. 550, 57 N.W.2d 82 (1953).

² 5 Wigmore, *Evidence* § 1362 (3d ed. 1940).

³ 3 *id.* §§ 688, 689. For an application of the physician's exception within the hearsay rule see 6 Wigmore, *Evidence* §§ 1718 to 1720 (3d ed. 1940). See *Turpin v. State*, 135 Neb. 389, 281 N.W. 800 (1938) (application of the physician's exception in Nebraska).

⁴ See cases cited in Note, 130 A.L.R. 973, (1941); Note, 80 A.L.R. 1520, 1527 (1932); Note, 67 A.L.R. 1, 10 (1930).

⁵ See note 4 *supra*; 3 Wigmore, *Evidence* § 688, p. 4-7, n. 2-6 (3d ed. 1940).

⁶ For a discussion of the legal tests for insanity and the burden of proof in criminal insanity proceedings see Note, 32 Neb. L. Rev. 489 (1953).

⁷ For a discussion of the problems of legal insanity and the psychiatrist

Some courts strictly applying the standard of the physician's exception in insanity proceedings hold the physician's testimony inadmissible on the theory that expert opinion based on statements made by others not in evidence is inadmissible.⁸ Other courts, realizing the greater need for expert opinion in insanity proceedings, have admitted the physician's testimony.⁹ One reason given by the courts for distinguishing expert-insanity-testimony and expert-personal-injury-testimony is that in the former cases statements made by the accused are not actually hearsay, because they are not admitted as proof of the facts stated and their evidentiary value lies in the fact that they were made.¹⁰ Another basis upon which the courts modify the physician's exception in insanity cases is that if it is necessary for the physician to show the basis of his opinion, and if the court thinks it is necessary to have expert evidence on the subject,¹¹ the testimony is heard on the theory that evidence admissible on any single ground must be received.¹²

The hearsay rule has been riddled with exceptions, and these exceptions are generally based upon the two policy factors of necessity and reliability.¹³ It appears in the instant case that the necessity of obtaining expert testimony¹⁴ and the generally reliability of this type

on the witness stand see Guttmacher and Weihofen, *Psychiatry and the Law* (1952).

⁸ *People v. Keough*, 276 N.Y. 141, 11 N.E.2d 570 (1937); *People v. Black*, 367 Ill. 209, 10 N.E.2d 801 (1937); *Ingles v. People*, 90 Colo. 51, 6 P.2d 455 (1931); *People v. Strait*, 148 N.Y. 566, 42 N.E. 1045 (1896).

⁹ *United States v. Roberts*, 62 F.2d 594 (10th Cir. 1932); *Fuller v. State*, 213 Ind. 144, 10 N.E.2d 594 (1936); *Spivey v. State*, 45 Tex. Crim. Rep. 496, 77 S.W. 444 (1903).

¹⁰ *United States v. Roberts*, 62 F.2d 594 (10th Cir. 1932). This seemed also to be the reasoning of the court in the instant case when it said, "Questioning of the patient... to find out if the mind works rationally is not a self-serving declaration within the ordinary concept of the term." *Lyons v. State*, 156 Neb. 550, 553, 57 N.W.2d 82, 83 (1953).

¹¹ It is generally held that if the physician is to give his opinion he must give the reasons therefore so the court may have a basis upon which to judge the acceptability of his testimony; see note 4 *supra*. Nebraska seems to require the physician to state the basis for his opinion in both personal injury and insanity proceedings, although in the instant case the court said that the physician has the option of stating the reasons for his opinion. See *Tvrz v. State*, 154 Neb. 641, 48 N.W.2d 761 (1951); *Turpin v. State*, 135 Neb. 389, 281 N.W. 800 (1938); *Torske v. State*, 123 Neb. 161, 242 N.W. 408 (1932).

¹² 1 Wigmore, *Evidence* § 13 (3d ed. 1940) (rule of multiple admissibility); 6 *id.* § 1720 (the author's argument appears to involve circular reasoning).

¹³ Leflar, *Theory of Evidential Admissibility—Statements Made Out of Court*, 2 Ark. L. Rev. 26, 37 (1947).

¹⁴ The Nebraska court has held that it is sufficient if a person has experience beyond that of an ordinary person to qualify as an expert for testimony in insanity cases. Here again necessity required that the standards not be too high or too few persons could qualify as experts, and the court would be generally without this aid. See *Braunie v. State*, 105 Neb. 355, 180 N.W. 567 (1920).

of hearsay evidence were the determining factors in the Nebraska Court's decision admitting psychiatric testimony even though the patient's visit to the physician was to obtain his expert testimony in court.

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