

# NOTES

## MEDICAL TESTIMONY AND THE HEARSAY RULE

Since personal injury litigation<sup>1</sup> comprises a significant proportion of all civil actions,<sup>2</sup> and as a case involving injury or disease necessitates the presentation of reliable medical evidence to the trier of fact, the use of medical testimony has become increasingly important. It is especially significant when determining damages because the amount of compensation is generally dependent on the nature and duration of injuries. Inasmuch as the usual source of this information is the medical witness,<sup>3</sup> his testimony must necessarily be presented to the jury in a manner which neither prejudices the defendant nor deprives the plaintiff of just compensation.<sup>4</sup> Present rules of evidence, however, do not always achieve this result. Contemporary application of the hearsay rule in some jurisdictions prevents the medical witness from providing the jury with the data used by physicians for diagnosis and treatment.<sup>5</sup> This is particularly true with respect to the case "history,"<sup>6</sup> which is the physician's most important diagnostic aid with the possible exception of knowledge gained from his own examination.

The purpose of this note is to analyze the various situations in which the

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1. Although disputes about the evidentiary rules applied to medical testimony arise chiefly in personal injury cases, there are other actions in which the rules are also relevant: claims under health or life insurance policies, wrongful death actions, F.E.L.A. actions, competency proceedings, etc. The importance of the medical witness is self-evident.

2. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 159 (1963).

3. In certain circumstances lay witnesses may also give medical testimony. For example, any competent witness may testify about spontaneous exclamations (cries, groans, etc.) made by an afflicted person which are relevant to proving pain or suffering. However, an analysis of such evidence is not within the scope of this note. In certain situations it may be necessary to use a physician's office records as evidence, but since their admissibility is usually governed by the Uniform Business Records as Evidence Act or similar statutes, a discussion of the problems involved in the use of these records is not included in this note.

4. The importance of legal liability should not be minimized, but since this note is concerned chiefly with the admissibility of certain types of medical testimony, liability problems have not been discussed.

5. Several writers agree that injustice results from applying the hearsay rule too strictly to all medical testimony. See, e.g., 3 WIGMORE, EVIDENCE § 688 (3d ed. 1940); Morgan, *Suggested Remedy for Obstruction to Expert Testimony by Rules of Evidence*, 10 U. CHI. L. REV. 285, 286 (1943); Ray, *Restrictions on Doctors' Testimony in Personal Injury Cases*, 14 SW. L.J. 133, 134 (1960); Note, 35 So. CAL. L. REV. 193, 197 (1962).

6. "History" as used in this context includes declarations of the patient about present and past symptoms, as well as a general medical biography complete with prior ailments, injuries, etc. A thorough medical record is not only a useful diagnostic aid, but it may also facilitate an accurate prognosis.

hearsay rule is applied to a medical witness's testimony about declarations made by the patient. Application of the rule in Missouri will be given particular emphasis.

Patient declarations will be considered in the following categories: (1) present conditions and symptoms; (2) past conditions and symptoms connected with the injury or ailment in question; (3) general medical history antedating the affliction for which treatment or diagnosis is sought; (4) the cause and circumstances surrounding the onset of the injury or disease. Generally, such evidence is offered either to prove the truth of the facts asserted by the patient, or to show the basis<sup>7</sup> for the doctor's opinion about the nature and duration of the patient's injury or ailment.<sup>8</sup> Many courts, however, have failed to distinguish the two uses. Consequently, the hearsay rule has been imposed upon the latter as well as the former.<sup>9</sup>

### I. PRESENT SYMPTOMS

Patient declarations concerning present symptoms offered to prove the actual existence of the symptoms are hearsay and without more are inadmissible.<sup>10</sup> However, statements of this type may be admitted under an exception to the hearsay rule for bodily conditions.<sup>11</sup> The rationale for this exception is based on two general principles: necessity and circumstantial guarantees of trustworthiness.<sup>12</sup> Where the exception is recognized, the statements are admitted because medical science is unable to determine

7. See Rheingold, *The Basis of Medical Testimony*, 15 VAND. L. REV. 473 (1962) which states:

The function of the basis of testimony thus is primarily to support the opinion offered. Explanation helps the physician to make his opinion clear and convincing. It helps the trier of fact to understand the opinion, to evaluate it, and to resolve conflicting opinion evidence (to the extent laymen ever can). Subsidiary functions involve the facilitation of cross-examination, the facilitation of trial court and appellate review, and the presentation of facts upon which subsequent medical witnesses can rely. *Id.* at 474. (Footnote omitted.)

8. Ray, *supra* note 5, at 134.

9. If hearsay is defined as a statement or assertive conduct made or occurring out of court that is offered in court to prove the truth of the fact asserted, then, technically speaking, testimony about any assertive statement or conduct is not hearsay unless it is offered to prove the truth of the fact asserted. Thus, a medical expert's testimony about patient declarations, when offered to prove the truth of the declarations, is clearly hearsay. However, it is not hearsay when used only to show the basis of medical opinion since its purpose is merely to establish the reliability of medical opinions and not to prove truth.

10. *Meaney v. United States*, 112 F.2d 538, 540 (2d Cir. 1940); 6 WIGMORE, EVIDENCE § 1715 (3d ed. 1940); see note 9 *supra*.

11. 1 GREENLEAF, EVIDENCE § 162 b (16th ed. 1899); 6 WIGMORE, EVIDENCE § 1714 (3d ed. 1940); Ray, *supra* note 5, at 135.

12. 6 WIGMORE, EVIDENCE §§ 1714, 1722 (3d ed. 1940); Note, 35 SO. CAL. L. REV. 193, 206 (1962).

the existence of subjective symptoms without indications by the person experiencing them, *i.e.*, no other evidence is available. Moreover, it is assumed that statements motivated by existing pain or suffering result from a desire to be cured rather than from a motive to create evidence.

Voluntary statements by a patient which assert present subjective symptoms must be distinguished from involuntary exclamations such as cries, moans, grimaces, movement and other manifestations of pain or bodily conditions. Because the latter are non-assertive, they are not hearsay and are always (or should be) admissible as circumstantial evidence of a bodily condition.<sup>13</sup>

In many jurisdictions the admission of patient declarations about present symptoms is not based solely on the bodily condition exception but rather is dependent upon the type of doctor to whom the statements were made.<sup>14</sup> The distinction most often drawn is between an attending physician and a nonattending physician. When this distinction is applied, an attending physician is allowed to relate the patient's declarations as evidence of the facts asserted in the declarations,<sup>15</sup> while a nonattending physician may only base his opinion on such patient statements.<sup>16</sup> However, an accurate categorization of all the cases is not possible because many reports fail to designate the evidentiary purpose for which the patient's statements were offered.<sup>17</sup>

The attending-nonattending physician distinction is based upon the principle that one who consults a doctor for treatment tells the truth because he knows that his treatment may depend upon his statements. Therefore, the desire to be cured is considered a sufficient guarantee of trustworthiness to allow an attending physician to rely on the patient's statements.<sup>18</sup> On the other hand, statements made to a nonattending phy-

13. Ray, *supra* note 5, at 134; 6 WIGMORE, EVIDENCE § 1715 (3d ed. 1940). These indications of pain come within the strict application of the *res gestae* notion which is more fully explained in text accompanying notes 41-45 *infra*.

14. For a collection of cases, see Annots., 130 A.L.R. 977 (1941); 67 A.L.R. 10 (1930).

15. *Meaney v. United States*, 112 F.2d 538, 539-40 (2d Cir. 1940); McCORMICK, EVIDENCE §§ 266-67 (1954); 6 WIGMORE, EVIDENCE § 1720 (3d ed. 1940); Rheingold, *supra* note 7, at 494. Even in most jurisdictions using this rule, lay witnesses may relate assertive patient statements of existing conditions. See 6 WIGMORE, EVIDENCE §§ 1719-20 (3d ed. 1940). In New York, however, only pain assertions made to a physician during consultation are admissible. *Ibid.* Unfortunately, the admissibility of assertions of present symptoms has often been justified by *res gestae* language which confuses the assertive statements with non-assertive exclamations. See authorities cited notes 41-45 *infra* and accompanying text.

16. McCORMICK, EVIDENCE § 267 (1954).

17. Rheingold, *supra* note 7, at 494 n.124.

18. *Meaney v. United States*, 112 F.2d 538, 539-40 (2d Cir. 1940); *Petersen v. De-*

ician are presumed devoid of such a guarantee because the probability of a patient making a self-serving statement increases as trial draws near.<sup>19</sup> This presumption is particularly strong when a nonattending physician is consulted solely for the purpose of preparing expert medical testimony. It is less relevant when a nonattending physician is consulted to give additional prescription or aid an attending doctor in diagnosis. Consequently, a plaintiff's attorney may be precluded from using well known or so called "super" medical experts at trial if it is necessary for such a witness to relate a patient's statements.<sup>20</sup>

Although this distinction appears logical, there are arguments to the contrary. For example, there is some measure of trustworthiness even in the case of a nonattending doctor since he has been trained to detect lying and malingering by patients<sup>21</sup> and will presumably not rely on statements he feels have been colored or exaggerated. The presumption disregards, of course, the possibility of the attending physician giving perjured testimony. Furthermore, if the distinction is based on the tendency of patients to create evidence for themselves, it should be noted that the inducement to falsify arises with the injury or illness and does not necessarily exist only after suit has begun.<sup>22</sup> In addition, a rule of evidence based on the assumption that plaintiffs will create claims by prevarication seems unreasonable.

Jurisdictions which apply this distinction to all types of statements, for whatever purpose the testimony is offered, represent a small minority. Illinois, Texas, Washington and Wisconsin are the only states listed by Professor McCormick which limit the testimony of nonattending physicians to facts obtained by personal examination.<sup>23</sup>

Missouri courts will allow any medical witness to relate and rely on a patient's statements concerning present symptoms and conditions.<sup>24</sup> The

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partment of Labor & Indus., 36 Wash. 2d 266, 217 P.2d 607 (1950); McCORMICK, EVIDENCE § 266 (1954).

19. See the collection of cases cited note 14 *supra* in which this reasoning is discussed. See also Rheingold, *supra* note 7, at 495-96.

20. WRIGHT, IMPARTIAL MEDICAL TESTIMONY 73 (1956); Ray, *Medical Proof of Symptoms in Personal Injury Cases*, 3 J. PUB. LAW 605, 608 (1954); Rheingold, *supra* note 7, at 497.

21. *Stackpole v. Northern Pac. Ry.*, 121 Fed. 389, 394 (C.C.D. Ore. 1903); *Campanale v. Metropolitan Life Ins. Co.*, 290 Mass. 149, 194 N.E. 831 (1935). See *Edwards v. Druien*, 235 Ky. 835, 32 S.W.2d 411 (1930).

22. *Cunco Press Co. v. Industrial Comm'n*, 341 Ill. 569, 173 N.E. 470 (1930).

23. McCormick, *Direct Examination of Medical Experts*, 12 LA. L. REV. 264, 267 (1952). Even these jurisdictions will allow such witnesses to give opinions based on hypothetical questions.

24. See, *e.g.*, *Berry v. Kansas City Pub. Serv. Co.*, 343 Mo. 474, 121 S.W.2d 825 (1938).

attending-nonattending physician distinction is not recognized.<sup>25</sup> Nor do Missouri cases distinguish the introduction of medical testimony as substantive evidence from its introduction as the foundation of expert opinion.<sup>26</sup>

## II. PAST SYMPTOMS

If a medical witness is allowed to relate any patient statements at all, (*i.e.*, the attending doctor in those jurisdictions using the nonattending doctor rule) then it seems that nearly all states will allow him to base an opinion upon past symptoms or conditions which occurred in connection with the present injury or illness but prior to consultation.<sup>27</sup>

The Missouri rule, based solely on the distinction between past and present symptoms, is illustrated by *Gladney v. Mutual Life Ins. Co.*:<sup>28</sup> "The dividing line between symptoms related to the doctor which may be relied upon and those which may not be relied upon is merely the line which divides the present from the past."<sup>29</sup>

A few jurisdictions other than Missouri prohibit reliance on past symptoms on the belief that there is an insufficient guarantee of trustworthiness; it is assumed that the patient will not be motivated to tell the truth in order to recover.<sup>30</sup> The necessity requirement, however, is the same in both cases since both past and present conditions may relate to subjective symptoms for which no other evidence is available. Moreover, founding this distinction on lack of trustworthiness is not necessarily sound logic. A patient consulting a doctor for treatment surely is aware that an accurate diagnosis enhances the chance for recovery and that correct diagnosis and treatment may depend in part on past symptoms.<sup>31</sup> Contrary reasoning

25. See, *e.g.*, *London Guar. & Acc. Co. v. Woelfle*, 83 F.2d 325 (8th Cir. 1936) (attending doctor); *Bennett v. Myres*, 21 S.W.2d 943 (Mo. Ct. App. 1929) (attending doctor); *Phares v. Century Elec. Co.*, 131 S.W.2d 879 (Mo. Ct. App. 1939) (non-attending doctor). The same rule was applied to both types of physicians. *But see* note 39 *infra*.

26. See, *e.g.*, *Berry v. Kansas City Pub. Serv. Co.*, 343 Mo. 474, 121 S.W.2d 825 (1938); *Holloway v. Kansas City*, 184 Mo. 19, 82 S.W. 89 (1904). *But see* *Corbett v. Terminal R.R. Ass'n*, 336 Mo. 972, 82 S.W.2d 97 (1935). The Missouri rule which is based on the type of statement is considered in section II of the text.

27. *Hartford Acc. & Indem. Co. v. Baugh*, 87 F.2d 240 (5th Cir. 1936); *Cain v. Steely*, 173 Kan. 866, 252 P.2d 909 (1953).

28. 186 S.W.2d 538 (Mo. Ct. App. 1945).

29. *Id.* at 544.

30. *Hartford Acc. & Indem. Co. v. Baugh*, 87 F.2d 240 (5th Cir. 1936). *Berry v. Kansas City Pub. Serv. Co.*, 343 Mo. 474, 121 S.W.2d 825 (1938). Usually the Missouri cases do not indicate why past symptoms are not allowed but merely state the rule. See also 3 WIGMORE, EVIDENCE § 688 (3d ed. 1940) which states that the principle is the same for present and past symptoms.

31. The lack of trustworthiness argument does apply to nonattending doctors to some extent, but this is no sound reason for prohibiting all doctors from relying on past history.

seems to disregard the purpose for which doctors and hospitals, where more is at stake than the outcome of litigation, keep accurate medical records.<sup>32</sup> An Alabama court in *State Realty Co. v. Ligon*,<sup>33</sup> recognized this reliance by medical science, by stating:

[I]n the practice of medicine, a diagnosis of the ailment may include a personal examination of the patient by all the methods known to science, and also the history of the case, as given by the patient or other examining physicians.

This history may include a statement of present and past symptoms, the incidents connected with the beginning of the trouble, such as injury by accident, and the findings of other physicians . . . . A professional opinion as to the nature, cause, and extent of the ailment, based upon all these matters in connection with and as part of the personal examination of the patient, is competent evidence. Necessarily the information coming to the physician may be largely hearsay. An exception is made . . . because the patient's statements are presumed to be made to aid a correct diagnosis and cure . . . .<sup>34</sup>

The Missouri rule does not merely affect the weight to be given to an opinion by an expert medical witness but rather controls the admissibility of the opinion itself.<sup>35</sup> As early as 1904, the Supreme Court of Missouri, in *Holloway v. Kansas City*,<sup>36</sup> stated that the rule was "well settled" that the opinion of an expert witness is permissible when based upon a witness's personal knowledge, but that the patient's statements concerning past physical condition are mere hearsay and should not be relied upon by an expert in expressing his opinion about the patient's physical condition at the time of trial.<sup>37</sup> The rule found contemporary reaffirmance in *Murphy v. S. S. Kresge Co.*,<sup>38</sup> in which the court allowed a medical witness to relate and base an opinion upon patient statements about physical conditions existing at the time of the examination, but did not permit him to relate

32. Since the use of such statements by medical science is known by anyone who has ever consulted a doctor for treatment, it is difficult to understand why the courts ever made a distinction between past and present symptoms. One explanation is that past symptoms are not part of the *res gestae* as that term is applied by Missouri courts. Another reason might be that courts are fearful of prejudicing the defendant.

33. 218 Ala. 541, 119 So. 672 (1929).

34. *Id.* at 543, 119 So. at 674. This case, with its encompassing statements, is not a recent decision, but its reasoning may be even more sound today.

35. *E.g.*, *Holmes v. Terminal R.R. Ass'n*, 363 Mo. 1178, 257 S.W.2d 922 (1953). Even though the admission of an opinion based on past history is reversible error, a defective admission can later be cured without the necessity of a new trial if the trial judge instructs the jury to disregard the defective opinion. *Evans v. Missouri Pac. R.R.*, 342 Mo. 420, 116 S.W.2d 8 (1937) (not error to refuse to grant a mistrial).

36. 184 Mo. 19, 82 S.W. 89 (1904).

37. *Id.* at 30-31, 82 S.W. at 91.

38. 239 S.W.2d 573 (Mo. Ct. App. 1951).

or base an opinion upon statements of past symptoms and conditions. The case involved a nonattending medical witness but the prohibition was not invoked for that reason.<sup>39</sup>

While Missouri cases tenaciously hold to the rule, reasons for its continued existence are not readily discernable since most decisions have not attempted to justify the position on grounds other than *stare decisis*.<sup>40</sup> One early Missouri case, *Goss v. Missouri Pac. Ry.*,<sup>41</sup> did analyze the problem. The Kansas City Court of Appeals, although noting that the "usual expressions" of bodily or mental feelings are original and competent evidence, held that those expressions must relate to present and not past feeling since they are part of the *res gestae*. According to the court, if the declaration and the fact to be proved are so closely connected that the declaration can be said to be spontaneous, then it is a verbal act and may be said to be part of the main act.<sup>42</sup> The case illustrates judicial confusion between spontaneous exclamations (cries, groans, etc.) and verbal declarations which are assertive. If an assertive declaration is admitted as part of the *res gestae* and not as a hearsay exception, then any declaration not contemporaneous in point of time with the actual symptom or condition is inadmissible because it is not part of the *res gestae*.

In *Gibler v. Quincy, O. & K.C.R.R.*,<sup>43</sup> the St. Louis Court of Appeals also discussed the admissibility of assertive declarations in *res gestae* language. The *Holloway* case and Greenleaf's *Treatise on Evidence* were cited as authority.<sup>44</sup> Although Greenleaf does indeed refer to the past-present distinction as the "correct rule,"<sup>45</sup> his justification is based not on the *res gestae* notion but upon a definite exception to the hearsay rule. He is un-

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39. Although the rule with its distinction between past and present conditions is indeed "well settled," at least one Missouri case has applied the attending-nonattending physician rule. *Coghill v. Quincy, O. & K.C. Ry.*, 206 S.W. 912 (Mo. Ct. App. 1918). That case, decided by the Kansas City Court of Appeals, held that an attending doctor's testimony was admissible even though made up in part of statements made by the patient-plaintiff to the doctor. It is interesting to note that the physician in *Coghill* was classified as an attending doctor even though he did not treat the plaintiff until a year after the accident. In *Evans v. Missouri Pac. R.R.*, 342 Mo. 420, 116 S.W.2d 8 (1937), the Supreme Court of Missouri intimated that there may be a difference between an attending and a nonattending doctor in regards to the admissibility of testimony. However, since there was no specific objection about that point (the witness was a nonattending doctor) the court refused to reverse the decision.

40. See, e.g., *Sparks v. Harvey*, 214 S.W. 249 (Mo. Ct. App. 1919).

41. 50 Mo. App. 614 (1892).

42. *Id.* at 615.

43. 129 Mo. App. 93, 107 S.W. 1021 (1908).

44. *Id.* at 95, 107 S.W. at 1024

45. 1 GREENLEAF, EVIDENCE § 162 b (16th ed. 1899).

willing to extend the exception to statements of past conditions. In fact, he expressly states that to admit statements of present condition under the *res gestae* notion is unsound, since such statements are not actually indirect or circumstantial evidence.<sup>46</sup>

*Res gestae* in situations of this type should technically apply only to spontaneous exclamations and statements produced by existing pain or suffering, and not to later verbal assertions made in response to questions asked by a doctor. An accurate implementation of the *res gestae* limitation would require Missouri courts to reject medical testimony which relates or relies upon *any* assertive patient statements made after the symptom has ceased. Missouri courts, however, do allow a physician to relate and rely on assertive patient statements, even those made in response to his questions, provided they relate to "present" symptoms which include those occurring shortly before, but not necessarily existing when, the statement is made. Therefore, it is evident that Missouri courts, although they follow the past-present rule which was originally justified on *res gestae* grounds, have not felt bound by the logical limitations of the *res gestae* theory.<sup>47</sup>

The Missouri rule, however, is not inexorable. Various methods have been devised by which exclusion is circumvented. The most frequently used is the hypothetical question in which the basis of the expert's opinion is a hypothesis posed by the attorney.<sup>48</sup> A medical expert is permitted to rely on the "history" stated by the attorney because it is assumed to be true for the purpose of the hypothetical.<sup>49</sup> A second method is illustrated in *Rodefeld v. St. Louis Pub. Serv. Co.*<sup>50</sup> The trial court allowed plaintiff's medical witness to relate the "history" of the case as given to him by the plaintiff and to base his opinion upon this "history." Nevertheless, the appellate court refused to reverse a judgment for the plaintiff because the "history" was composed solely of facts not in controversy and which had been admitted by defendant's medical witness.<sup>51</sup> *Heiter v. Terminal R.R.*

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46. *Id.* at § 162 a.

47. The possibility that the rule is apt to be around even longer is indicated by the case of *Krug v. Mutual Benefit Health & Acc. Ass'n*, 120 F.2d 296 (8th Cir. 1941) (applying Missouri law), wherein it is stated that the rule will be applied even if the patient's declarations were made under circumstances negating any intent to fabricate evidence. The court also said that the rule had been long established and any change should be made by the legislature.

48. *E.g.*, *Lyons v. Metropolitan St. Ry.*, 253 Mo. 143, 161 S.W. 726 (1913); *Franklin v. St. Louis & M.R.R.*, 188 Mo. 533, 87 S.W. 930 (1905).

49. See note 61 *infra* and accompanying text for restrictions on the use of the hypothetical question.

50. 275 S.W.2d 256 (Mo. 1955).

51. This refusal to reverse a judgment on the grounds that an error was committed at trial, when the error did not prejudice the non-prevailing party, also applies



*Ass'n*<sup>52</sup> reached a similar result on the ground that the plaintiff had testified previously to the same facts on which the medical witness based his opinion. The effectiveness of these methods in modifying the rule and thus achieving equitable results in all cases will be considered in Section V below.

### III. STATEMENTS OF PAST HISTORY

Most jurisdictions, with the exception of Missouri, allow a medical witness to rely on a past history related to him by the patient unless the witness is prohibited from repeating any type of patient statement by the nonattending physician rule.<sup>53</sup> For example, those jurisdictions which allow an attending physician to rely on patient statements concerning present or past conditions or symptoms do not prohibit him from relying on a "history" given by the patient even though the "history" concerns medical facts antedating the present illness or injury.

The necessity and trustworthiness requirements, essential to the admissibility of statements about past and present symptoms, have equal application to statements of past history. The necessity requirement is always satisfied when considering subjective symptoms. Similarly, the motive to recover is still present since treatment may be based to some extent on the patient's past history. Perhaps past history is not as important to a medical practitioner as symptoms of the present illness; nevertheless, physicians attempt to obtain past history to discover or eliminate possible contributing factors, or to ascertain how the patient will respond to treatment. This point was discussed by a California court in *People v. Brown*:<sup>54</sup>

It cannot be doubted that a physician's diagnosis as to an injury will usually be based . . . in part upon the history given by the patient.

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to other procedural and evidentiary errors, and therefore cannot be attributed solely to a desire on the part of courts to circumvent the rule governing admissibility of medical evidence.

52. 275 S.W.2d 612 (Mo. Ct. App. 1955). See also *Cruce v. Gulf, M. & O.R.R.*, 361 Mo. 1138, 238 S.W.2d 674 (1951), where it was held not to be error to admit a doctor's opinion, even though he stated he took a "history," when the doctor explicitly testified that he based his opinion only on his personal examination.

53. The rules applicable to past history are, generally speaking, the same as those applied to past symptoms and conditions. Allowing declarations about past matters: *Martin v. United States*, 284 F.2d 217 (D.C. Cir. 1960); *Hillman v. Utah Power & Light Co.*, 56 Idaho 67, 51 P.2d 703 (1935); *Atlantic Ins. Co. v. Bayette*, 342 S.W.2d 379 (Tex. Civ. App. 1961); *Ynsfran v. Burkhart*, 247 S.W.2d 907 (Tex. Civ. App. 1952). For a collection of cases see *Annots.*, 51 A.L.R.2d 1051 (1957); 130 A.L.R. 977 (1941); 80 A.L.R. 1527 (1932); 67 A.L.R. 10 (1930); 65 A.L.R. 1217 (1930); 64 A.L.R. 557 (1929); see also 6 WIGMORE, *EVIDENCE* § 1722 b (3d ed. 1940). Not allowing declarations about past matters: *Berry v. Kansas City Pub. Serv. Co.*, 343 Mo. 474, 121 S.W.2d 825 (1938); *Chavaries v. National Life & Acc. Ins. Co.*, 110 S.W.2d 790 (Mo. Ct. App. 1937).

54. 49 Cal. 2d 577, 582, 320 P.2d 5, 10 (1958).

And the physician should be allowed to testify to all the facts upon which he based his opinion, including the case history given him by the patient . . . . Therefore, declarations . . . concerning physical condition prior to an accident . . . and declarations as to the history of an accident . . . have been admitted as a basis for the opinion of a physician to whom the declarations were made.

As noted in the previous section, the Missouri rule prohibits a physician from relating or relying on statements concerning past history.<sup>55</sup> However, he may testify to such matters in response to a hypothetical question<sup>56</sup> or by relating or basing his opinion upon prior testimony<sup>57</sup> or upon facts not in dispute.<sup>58</sup>

#### IV. STATEMENTS CONCERNING THE CAUSE AND CIRCUMSTANCES SURROUNDING THE COMMENCEMENT OF THE AFFLICTION

Although it would seem that patient statements concerning the cause and the circumstances of an injury or ailment are as important in a physician's diagnosis as the case history, such testimony has been generally excluded even when offered as the basis of an opinion.<sup>59</sup> It may be declared inadmissible by one of the rules previously mentioned (*e.g.*, the Missouri rule), or because it invades the province of the jury or unduly prejudices the defendant.<sup>60</sup> The latter reasoning becomes particularly compelling when

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55. *E.g.*, *Bennett v. Myres*, 21 S.W.2d 943 (Mo. Ct. App. 1929) (attending physician); *accord*, *Murphy v. S. S. Kresge Co.*, 239 S.W.2d 573 (Mo. Ct. App. 1951) (nonattending physician); *Freese v. St. Louis Pub. Serv. Co.*, 58 S.W.2d 758 (Mo. Ct. App. 1933) (attending physician).

56. *Adams v. Carlo*, 101 S.W.2d 753 (Mo. Ct. App. 1937).

57. *Schwinegruber v. St. Louis Pub. Serv. Co.*, 241 S.W.2d 879 (Mo. Ct. App. 1951).

58. *Lesch v. Terminal R.R. Ass'n*, 358 S.W.2d 686 (Mo. 1953).

59. *E.g.*, *Commonwealth v. Dawn*, 302 Mass. 255, 19 N.E.2d 315 (1939); *Pope v. St. Louis Pub. Serv. Co.*, 341 S.W.2d 123 (Mo. 1960); *Huffman v. Terminal R.R. Ass'n*, 281 S.W.2d 863 (Mo. 1955); *Boulanger v. McQuestin*, 79 N.H. 175, 106 Atl. 492 (1919). See the cases collected in *Annot.*, 130 A.L.R. 977 (1941).

60. Prejudicial testimony, although technically admissible for a limited purpose, was excluded in *Shepard v. United States*, 290 U.S. 96 (1933). In discussing the inability of the jury to distinguish between certain types of uses, Justice Cardozo stated:

Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds. It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed. They have their source very often in considerations of administrative convenience, or practical expediency, and not in rules of logic. When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out. *Id.* at 104.

These same policy considerations have undoubtedly influenced Missouri courts to exclude evidence which was technically admissible. However, a frank acknowledgment of the real reasons for exclusion, rather than illogical reliance on the hearsay rule, would do much to clarify the law.

the testimony goes to the question of legal liability. However, a limited number of courts have admitted this testimony as the basis for medical opinion. Admissibility was justified on the ground that the statements were useful in diagnosis or for other medical reasons.<sup>61</sup>

#### V. THE HYPOTHETICAL QUESTION

As was previously noted, the harsh effects of the Missouri rule may be avoided in some instances by the use of a hypothetical question. Generally, a hypothetical may include only "competent evidence" and is inadmissible if phrased in a manner which enables a physician to base his opinion on other facts. However, Missouri not only requires the hypothetical to contain facts which in themselves are "competent evidence," but also requires such facts to have been introduced into evidence.<sup>62</sup> For example, in *Oesterle v. Kroger Grocery and Baking Co.*,<sup>63</sup> a doctor was allowed to base his opinion on a hypothetical which included a "history" of the case only because the "history" was "competent evidence" and had been introduced.<sup>64</sup> Therefore, a hypothetical question only circumvents the Missouri rule when "competent evidence" is available. However, death of the patient may make "competent evidence" unavailable. Death of an attending physician poses a similar problem. In *Meaney v. United States*,<sup>65</sup> the court was faced with both situations. The case arose upon an appeal from a jury verdict dismissing an action to recover for the insured's death under a policy of war risk insurance. A second attending physician (the first attending physician was deceased) was allowed to testify to what he found by his own examinations, but was prohibited from relating what the insured had told him concerning the "history" of the case. Judge Learned Hand, reversing on the ground that the second attending doctor should have been allowed to relate the insured's declarations as original evidence, stated:

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

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61. McCORMICK, EVIDENCE 290 (1954); 3 WIGMORE, EVIDENCE § 688 (3d ed. 1940).

62. *E.g.*, *Bennett v. Myres*, 21 S.W.2d 943 (Mo. Ct. App. 1929) (hypothetical question about the effects of arsenic was incompetent since there was no evidence that patient had drunk arsenic).

63. 346 Mo. 321, 141 S.W.2d 780 (1940).

64. *Id.* at 323, 141 S.W.2d at 782.

65. 112 F.2d 538 (2d Cir. 1940).

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. . . . [I]t 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.<sup>66</sup>

This case illustrates that a hypothetical question does not solve all the problems created by the restrictive Missouri rule since the result in *Meaney* would apparently have been contrary if tried under Missouri law. This same defect is likewise inherent in the other methods by which Missouri courts and attorneys attempt to circumvent the rule.

#### CONCLUSION

The Missouri rule which excludes testimony by a medical witness, even when used as a basis for an opinion, in which he relates patient statements of past occurrences, not only runs counter to the majority of American jurisdictions but also disregards the realities of medical science. Missouri courts could ameliorate this difficulty by recognizing the distinction between patient statements offered as substantive evidence and their use to show the basis of expert opinion.<sup>67</sup> In the latter case a medical expert's testimony is not technically hearsay and should not be subject to a hearsay objection. If the distinction were logically applied, Missouri courts could admit patient statements solely to show the trier of fact the foundation for the medical expert's opinion and then instruct the jury to restrict their use of the testimony to evaluating the physician's opinion, and to disregard it when determining the truth of the facts asserted in the patient's statement.

On the other hand, when such testimony is offered as substantive evidence, although it is technically hearsay, it would seem that the attending physician rule could be applied, in the discretion of the trial judge, as a reasonable exception to the hearsay rule.

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66. *Id.* at 539-40.

67. Several Missouri cases have recognized that the hearsay rule is not applicable to extrajudicial utterances offered without reference to the truth of the matter asserted. *Bond v. Wabash R.R.*, 363 S.W.2d 1 (Mo. 1962); *Mash v. Missouri Pac. R.R.*, 341 S.W.2d 822 (Mo. 1960). These cases involved extrajudicial statements used to show state of mind or motive but their reasoning applies with equal force to evidence offered to show the basis of a physician's opinion.