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# The Basis of Medical Testimony

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*Motivated in part by what he feels to be the unrealistic and impractical state of the law, the author has systematically categorized the various bases of medical testimony and the legal rules applicable to each. From this he draws certain conclusions both as to what the law is at present in this field, and what it ought to be. Of special interest is the wealth of detailed note material.*

## I. Introduction

Like any other expert, the medical witness is brought into court to render an opinion upon technical issues involved in a case. Fundamental to the opinions or conclusions which the medical witness renders is a matrix of data learned, observed or related, both fact and opinion. These subsidiary items, taken together, are commonly referred to as the *basis* of expert testimony.[1] Thus a doctor, in testifying on the cause of a patient's condition, for example, might refer to and rely upon what he has observed in examining the patient, upon what the patient has told him of his symptoms, and upon the results of medical tests performed upon the patient. He might add to this information which he has learned in medical school and in practice, information from medical texts, and even material that has come to him as part of the ensuing litigation.[2]

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1. Terms used synonymously with "basis" include predicate, foundation, grounds, data and reasons. See Ladd, *Objections, Motions and Foundation Testimony,* 43 Cornell L. Q. 543 (1958).

2. See, *e.g.,* State v. Beckwith, 243 Iowa 841, 53 N.W.2d 867 (1952). The medical wituess may, of course, state certain facts within his personal knowledge without offering an opinion based upon these facts. For example, a family physician may be called merely to tell what he observed in his patient, followed by the specialist who renders an opinion on these facts. No careful distinction has been made here between the two uses since the actual use to which the basic facts have been put is often obscured in the decision, and the practice of using medical witnesses for lay fact testimony is quite rare. And, as a fundamental matter, the fact-opinion distinction is of little validity. See note 361 *infra.*

A significant difference, however, does lie between medical facts used as bases to support opinion evidence and those used as independent evidence introduced for their direct persuasive weight. Every attempt has been made to keep these two situations separate, primarily because it is believed that strict rules relating to evidence per se should not be applied to basis usage. See Maguire & Hahesy, *Requisite Proof of Basis for Expert Opinion,* 5 Vand. L. Rev. 432 (1952) [hereinafter cited as Maguire]; State v. Parker, 357 P.2d 548 (Ore. 1960).

There is, of course, no one basis for an opinion; rather, opinion testimony is multibased, a mixture of material which when examined and weighed gives rise to the physician's ultimate conclusion.[3] The rendering of an opinion thus involves not only the substratum of data but also the various stages of inferences and reasoning which link data with conclusion. It is profitable perhaps to consider reasoning, in some senses at least, as part of the basis of testimony.[4]

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).[5] 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.

While there is a great deal of attention being paid of late to medical testimony, relatively little examination (at least in any systematic way) has been made of the component parts of this branch of expert evidence, and especially of the *basis* of medical testimony.[6] This article attempts not only to delineate the types of bases used by doctors (by dividing them

3. See Commonwealth v. Logan, 361 Pa. 186, 63 A.2d 28 (1949). Nevertheless, as will be shown, unscrambling this egg has been required of the medical witness. See section of this article entitled "Requirement that the Basis be Recited," *infra*.

4. Thus, in the hypothetical question the predicate given for the doctor is the "basis" of his opinion, while his explanation for his opinion would constitute "reasons." See Squire v. Industrial Comm'n, 70 N.E.2d 95 (Ohio App. 1946); discussion of hypothetical questions at pp. 522-26 *infra*. See also the following cases and materials which either sanction or require the giving of reasons by an expert: Amburgey v. United States, 189 F. Supp. 689 (D.D.C. 1960); Dorsey v. Muilenberg, 345 S.W.2d 134 (Mo. 1961); Commercial Standard Ins. Co. v. Robinson, 137 Tex. 184, 151 S.W.2d 795 (1941); Osborn, *Reasons and Reasoning in Expert Opinion*, 2 LAW & CONTEMP. PROB. 488 (1935); Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 428 (1952).

5. As to use for "testing" the opinion, see Atlantic Ins. Co. v. Boyette, 342 S.W.2d 379 (Tex. Civ. App. 1961).

Although the question of the influence of basic facts as compared to the ultimate opinions upon the trier is a matter potentially subject to behavioral science research, no comprehensive study has yet been completed. Empirically, though, it would seem safe to conclude that the subsidiary medical facts of the case are accorded great weight, since they are meaningful and readily remembered. This is notably so in the case of psychiatric testimony, where study has already demonstrated that the basis facts—case history, statements made by the patient, and the like—assume equal importance with the ultimate psychiatric opinion on sanity. See James, *Jurors' Evaluation of Expert Psychiatric Testimony*, 21 OHIO ST. L. J. 75, 95 (1960). It is also fair to say that full attention to the underlying facts is one of the aims of the *Durham* Rule. See the opinion of Judge Bazelon in Briscoe v. United States, 248 F.2d 640 (D.C. Cir. 1957).

6. The most able and thoughtful article is Maguire. Two good student notes are in 9 OKLA. L. REV. 425 (1956) and 39 B.U.L. REV. 207 (1959). Perhaps the most rounded consideration is CURRAN, LAW AND MEDICINE ch. 4 (1960). The various treatises on expert testimony predate the modern interest in the subject. Key numbers in West Publishing Co.'s American Digest System are *Evidence* 508-60; *Criminal Law* 482-94; *Workmen's Compensation* 1395-96, 1415-20.

somewhat artificially into categories) but also to examine the legal rules attendant to their use. These legal rules primarily involve questions of admissibility or propriety of use; to a lesser extent they also raise issues of weight and sufficiency of basis supporting medical testimony.

Perhaps the most pressing reason, indeed, for undertaking a systematic analysis of the rules relating to the reliance upon and utilization of basis material by physicians is the highly unrealistic and impractical state of these rules today. Rules of evidence, developed years ago and applicable supposedly to all witnesses, absorbed with questions of admissibility and not with proof, persuasion and the discovery of truth, are being imposed in many jurisdictions to prevent that free and full use of basic facts necessary to reach a correct and just solution of a case involving a medical issue.[7]

## II. Requirement That the Basis Be Recited

Assuming that the basis material is proper for a doctor to rely upon, the question has often arisen whether the doctor *must* state that material. The converse question, whether the doctor will be allowed to recite foundational material whenever he desires, has also arisen, and is treated after a consideration of the main question.

Of course, the doctor will often want to give the bases or reasons for his opinion, or at least his attorney will encourage him to do so. In many cases involving medical issues the testimony will be made more meaningful and persuasive to the lay trier if it is fully stated. Thus, many practitioner articles advise the doctor to recite his bases.[8] But, equally true, there are many times when a doctor (or his attorney) does not wish to state the whole basis for his opinion. This may be because he realizes that under the circumstances the recital will only create confusion by virtue of its being a matter of technical observation or explanation, meaningless to the lay trier beyond the ultimate conclusion drawn from it.[9] Or tactical matters may dictate against reciting some or all of the foundation.

The courts have not always been willing to accord discretion to the

7. Critics in agreement on the present state of the law of evidence as applied to expert medical testimony include 3 Wigmore, Evidence § 688 (3d ed. 1940) [hereinafter cited as Wigmore]; Morgan, *Suggested Remedy for Obstructions to Expert Testimony by Rules of Evidence,* 10 U. Chi. L. Rev. 285 (1943); Maguire 450; Ray, *Restrictions on Doctors' Testimony in Personal Injury Cases,* 14 Sw. L.J. 133 (1960).

8. DeParcq, *The Uniform Rules of Evidence: A Plaintiff's View,* 40 Minn. L. Rev. 301, 333 (1956); Pederson, *The Opinion-Evidence Rule in Oregon as It Relates to Cases Involving Medical Matters and Insanity,* 33 Ore. L. Rev. 243 (1954); Ladd, *supra* note 4; McCormick, *Direct Examination of Medical Experts in Actions for Death and Bodily Injuries,* 12 La. L. Rev. 264 (1952).

Recital of bases may also be required to give the necessary weight to a case to avoid dismissal or a directed verdict. See note 336 *infra* and accompanying text.

9. As stated in People v. Youngs, 151 N.Y. 210, 45 N.E. 460, 462 (1896), even when an expert is allowed to explain, "the facts are of such a character that they cannot be weighed or understood by the jury . . . ."

physician in the matter of recital.[10] By the law of many states—perhaps the majority, as represented by appellate decisions[11]—the doctor must state the basis for opinion upon direct examination.[12] A summary of the reasons usually given for this rule was offered in *Western Union Telegraph Co. v. Morris*:[13]

> It is not proper to permit the witness to array in his mind facts, and then declare from such array his conclusions therefrom, because he may introduce into this list some things which are not facts—some things which would not be competent to be considered in arriving at his conclusion. The opposite party is entitled to know the things considered by the expert witness in arriving at such conclusions, in order that such party may introduce experts who will occupy the same standpoint, and deduce their conclusions from the same facts, as did the former expert.

Recital is also often required of psychiatrists in will contests[14] and criminal responsibility cases.[15] It is apparent also that the rule requiring *lay* opinion witnesses to detail their basis has influenced these courts.[16] Other courts, instead of refusing to allow an opinion without foundation, declare that such an opinion "lacks weight" or is "speculative."[17]

A few jurisdictions (notably New York[18]), however, have accorded the

10. See generally 2 WIGMORE § 675 (recital requirements); MCCORMICK, EVIDENCE 29-30 (1954).

11. MCCORMICK, *op. cit. supra* note 8, at 268; Annot., 82 A.L.R. 1338-44 (1933).

12. Leading cases include Raub v. Carpenter, 187 U.S. 159 (1902); Lippold v. Kidd, 126 Ore. 160, 269 Pac. 210 (1928); Delaware, L. & W.R.R. v. Roalefs, 70 Fed. 21 (3d Cir. 1895); Foster v. Fidelity & Cas. Co., 99 Wis. 447, 75 N.W. 69 (1898); Annot., 82 A.L.R. 1338-44 (1933) (cases cited). There is no issue, of course, when the basis is a hypothetical question (see pp. 522-26 *infra*) or prior testimony (see pp. 517-22 *infra*). As to when the basis must be stated, it is usually said that somehow during the testimony it must be recited; other courts would require it to precede the opinion. See 32 C.J.S. *Evidence* § 536 (1942); 20 AM. JUR. *Evidence* § 796 (1939).

13. 67 Kan. 410, 73 Pac. 108, 109 (1903).

14. *E.g.*, West v. Fidelity-Baltimore Nat'l Bank, 219 Md. 258, 147 A.2d 859 (1959); Prewitt v. Watson, 317 S.W.2d 954 (Tex. Civ. App. 1958).

15. *E.g.*, Lyles v. United States, 254 F.2d 725 (D.C. Cir. 1957), *cert. denied*, 356 U.S. 961 (1958); Briscoe v. United States, 248 F.2d 640 (D.C. Cir. 1957); People v. Keough, 276 N.Y. 141, 11 N.E.2d 570 (1937).

16. That rule, a wise one when an exception is made to allow unskilled witnesses to testify, does not by its rationale cover the present situation.

17. *E.g.*, Giant Food Stores, Inc. v. Fine, 269 F.2d 542 (D.C. Cir. 1959); Amburgey v. United States, 189 F. Supp. 689 (D.D.C. 1960).

18. People v. Youngs, 151 N.Y. 210, 45 N.E. 460, 462 (1896) ("[A]nd we think that, when it is shown that a medical expert has made the proper professional examination of the patient in order to ascertain the existence of some physical or mental disease, he is then qualified to express an opinion on the subject, though he may not yet have stated the scientific facts or external symptoms upon which it is based."); People v. Faber, 199 N.Y. 256, 92 N.E. 674 (1910); Garner v. Allegheny Ludlum Steel Corp., 6 App. Div. 2d 263, 176 N.Y.S.2d 734 (1958); Payton v. Shipley, 80 Okla. 145, 195 Pac. 125 (1921). In Vermont recital is not required by statutory modification, VT. STAT. ANN. tit. 12, § 1643 (1959); this law is based upon MODEL EXPERT TESTIMONY ACT § 9 (approved in 1937 by the National Conference of Commissioners on Uniform State Law, and redesignated in 1943 as a model act). See the

doctor discretion in recital of his basis facts. These courts recognize that the opportunity to bring out the bases of the recital is always present on cross-examination, and that the trial court can require some elucidation when the situation requires. Many of the commentators have favored this rule.[19]

The other jurisdictions which have considered this problem have required recital in some situations but not in others. Many courts allow the doctor who has made personal observations (often the attending doctor[20] who has obtained statements directly from the patient-plaintiff) to escape from recital requirements, but not those who are personally uninformed.[21]

A partial reconciliation of these various rules—and of the gap between law and practice—can be achieved when we look behind the label "recite," for that term can refer merely to the characterizing of the basis type or to the actual detailing of the minutiae of the basis. Perhaps what many of the courts have meant is only that it must appear what *type* of information is back of the opinion or the extent of the expert's knowledge.

It is certainly a reasonable requirement to tell the type of basis. Wigmore ably demonstrates that the real reason for a rule of recital is proof of the expert's testimonial qualifications; it is not a deduction from the opinion rule.[22] The way is thereby opened to examine the propriety of the basis (on an initial examination by the judge) and to permit cross-examination (a

substantially similar UNIFORM RULES OF EVIDENCE 56-58. The application of the Uniform Rules to expert testimony is discussed by Tyree, *The Opinion Rule*, 10 RUTGERS L. REV. 601 (1955).

MODEL EXPERT TESTIMONY ACT § 9 is as follows: "(1) An expert witness may be asked to state his inferences, whether these inferences are based on the witness' personal observation, or on evidence introduced at the trial and seen or heard by the witness, or on his technical knowledge of the subject, without first specifying hypothetically in the question the data on which these inferences are based. (2) An expert witness may be required, on direct or cross-examination, to speeify the data on which his inferences are based."

19. See Tyree, *supra* note 18; Slough, *Testamentary Capacity: Evidentiary Aspects*, 36 TEXAS L. REV. 1 (1957); MCCORMICK, EVIDENCE 30 (1954); 2 WIGMORE §§ 655, 672-84; 7 *id.* § 1975 (but note comment at 6 *id.* § 1720 on dangers of a doctor, under guise of reciting basis, in actnality detailing facts as if evidence per se); Guttmacher & Weihofen, *The Psychiatrist on the Witness Stand*, 32 B.U.L. REV. 287 (1952).

20. For an extensive discussion of the types of doctors and the legal use made of this line, see note 126 *infra*.

21. Commonwealth v. Johnson, 188 Mass. 382, 74 N.E. 939 (1905); Commonwealth v. Vaughn, 329 Mass. 333, 108 N.E.2d 559 (1952); Commonwealth v. Logan, *supra* note 3; State v. Foote, 58 S.C. 218, 36 S.E. 551 (1900); Tucker v. Jollay, 311 S.W.2d 324 (Tenn. App. E.S. 1958). Other courts have specifically refused to make this distinction, adhering to the majority view discussed in note 12 *supra* and accompanying text. See Raub v. Carpenter, *supra* note 12; Rathjen v. Woodmeu Acc. Ass'n, 93 Neb. 629, 141 N.W. 815 (1913); Louisville, N.A. & C.R.R. v. Falvey, 104 Ind. 409, 4 N.E. 908 (1886); *cf.* Northwest States Util. Co. v. Brouilette, 51 Wyo. 132, 65 P.2d 223 (1937). Another distinction—whether the basis is otherwise in evidence or not—though of some importance, has not been a factor in the cases.

22. 7 WIGMORE § 1927; 2 *id.* §§ 672-84.

matter of tactics for the opponent).[23] As has already been pointed out, opinion testimony is multibased and partly an irretrievable, judgmental process.[24] Further, the folly of the rule requiring complete recital of basis is the impossibility of knowing whether the doctor has complied with the rule. The doctor should be *encouraged* to give the trier all the facts that he has available which he believes to be pertinent and helpful, but be *required* to indicate only the general type and sources of information.

The converse problem has been presented where the doctor desires to refer to the basis of his opinion but is challenged by the opposing attorney or the judge because of the nature of the basis material. This challenge of impropriety is most frequently founded upon hearsay grounds, such as patients' statements. A number of cases have resolved this problem by allowing the doctor to render his opinion but not permitting him to recite the material deemed improper.[25] This view, however, manifests a distrust for the jury which can be settled by proper instructions. The more common judicial approach, and the more sensible one, is to allow the basis if the opinion is allowed, and to strike the whole opinion if it lacks a proper basis. The great weight of cases and commentators thus favor the right to recite.[26]

## III. THE INDIVIDUAL BASES OF MEDICAL TESTIMONY[27]

### *A. General Knowledge Gained Prior to Case in Question by Education, Training and Experience*

When the physician takes a particular case it is axiomatic that his approach is a product of what has gone before. In diagnosis, management

23. See discussions in 2 WIGMORE, *op. cit. supra* note 22; Tyree, *supra* note 18; MCCORMICK, EVIDENCE 19 (1954); see also Freeman v. Loyal Protective Ins. Co., 196 Mo. App. 383, 195 S.W. 545 (1917); Selleck v. City of Janesville, 100 Wis. 157, 75 N.W. 975 (1898); United States v. White, 124 F.2d 181 (2d Cir. 1941).

24. See p. 474 *infra.*

25. Mary Helen Coal Corp. v. Bigelow, 265 S.W.2d 69 (Ky. App. 1954); Hinderstein v. Equitable Life Assur. Soc'y, 45 N.Y.S.2d 633 (New York City Ct. 1943), *aff'd,* 53 N.Y.S.2d 311 (Sup. Ct. 1945); *accord,* Murphy's Ex'r v. Murphy, 23 Ky. L. Rep. 1460, 65 S.W. 165 (Ct. App. 1901); Mayor of Jackson v. Boone, 93 Ga. 662, 20 S.E. 46 (1894); Commonwealth v. Tucker, 189 Mass. 457, 76 N.E. 127 (1905). Or it is said that the doctor may paraphrase but not actually recite. See Maguire 439. And, strangely enough, the rule in Texas may he that the attending doctor can recite, but not the specialist. See Pullman Palace-Car Co. v. Smith, 79 Tex. 468, 14 S.W. 993 (1890). See Tyree, *supra* note 18, at 612-14; note 51 *infra.*

26. See People v. Brown, 49 Cal. 2d 577, 320 P.2d 5 (1958); People v. Cravens, 13 Cal. Rep. 510 (Cal. App. 1961); State v. Nicolosi, 228 La. 65, 81 So. 2d 771 (1955); Dean v. Wabash R.R., 229 Mo. 425, 129 S.W. 953 (1910). See also MCCORMICK, EVIDENCE § 267 (1954); Ray, *Testimony of Physician as to Plaintiff's Injuries,* 26 TUL. L. REV. 60 (1951); commentators cited note 19 *supra.*

27. The division here of basis material is more complex than the usual classification. MODEL EXPERT TESTIMONY ACT § 9, *supra* note 18, makes a tripartite division. Cases frequently refer to observations, material put into evidence by others, and hypotheticals. "The education and experience which have made and kept [the doctor] an expert;

and prognosis he relies upon his fund of general information—a composite of formal medical school education, internship and residency, continuing education received from reading books and journals, and various informal sources of conferences and conversations. Such general knowledge is inevitably part of the basis of a medical expert opinion and yet, of the four classes of bases here discussed, it is the one least referred to by the doctor and least subject to litigation. The doctor probably assumes that it is understood that he is relying upon these general principles. Also, this class of basis closely resembles the doctor's *qualifications* which, not being a matter of proof, are not in issue once the doctor is qualified.[28] This class of basis, however, has upon occasion been challenged by the adversary and therefore must be briefly examined.

### *1. Education, Training and Subsequent Learning*

Generally, what the doctor has been taught—his "fundamental school precepts"[29]—may be freely used as a basis of his testimony,[30] on the rationale that his education is an accurate and reliable source of information and that it would be practically impossible to require the doctor to segregate in his mind all that he learned about the case.[31] Negative decisions have involved the special situation where some more proper and logical information, such as experience, is not present and education is unsuccessfully urged as an alternative.[32]

When formal, systematic education is not relied upon, but it is rather the informal continuing education that the medical profession so commonly receives, closer questions have arisen. Examples are courses and symposia, meetings of various medical societies, hospital rounds, observations of

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[the] relevant particulars immediately relating to the topic or matter at issue; and relevant particulars pertaining . . . to analogous topics or matters . . . ." is the summary of MORGAN, MAGUIRE & WEINSTEIN, CASES ON EVIDENCE 232 (4th ed. 1957).

28. Although qualifications and basis are technically different matters, in many instances the same matter may be both, as illustrated by the cases next considered. See also Maguire 433.

29. MORGAN, MAGUIRE & WEINSTEIN, *op. cit. supra* note 27; see also 2 WIGMORE § 556.

30. Hope v. Arrowhead & Puritas Waters, Inc., 174 Cal. App. 2d 222, 344 P.2d 428 (1959) (in forming his opinion, doctor is not confined to facts personally known to him, and may consider products of his education and study of his profession); Prokop v. Houser, 245 Iowa 480, 62 N.W.2d 781 (1954); *In re* Ambrose's Case, 335 Mass. 121, 138 N.E.2d 630 (1956); Rice v. State, 49 Tex. Civ. App. 569, 94 S.W. 1024 (1906); People v. Thacker, 108 Mich. 652, 66 N.W. 562 (1896); State v. Mares, 113 Utah 225, 192 P.2d 861 (1948) (course in anatomy).

31. Ray, *Medical Proof of Symptoms in Personal Injury Cases*, 3 J. PUB. L. 605 (1954).

32. Rush v. Cress, 181 Minn. 590, 233 N.W. 317 (1930) (doctor not allowed to testify about allopathic approach in malpractice case on basis of having used allopathic text in medical school); *but see* Kershaw v. Tilbury, 214 Cal. 679, 8 P.2d 109 (1932) (testimony allowed since no one could be expected to know about defendant-doctor's unique and quack "radio method" treatment).

treatment rendered by other doctors and conversations with other doctors and with detail men. On the whole, however, reliance on this sort of information has been upheld against challenge.[33]

*2. Experience*

Experience becomes a basis for testimony as the doctor utilizes the past as an analogous comparison with the present.[34] Generally, explicit reliance on experience has received judicial sanction.[35] This issue has often arisen in the malpractice area where the doctor seeks to rely on his experience as a basis of knowledge for evaluating the defendant-doctor's practices, in lieu of any formal training in the defendant's specialty.[36] As for substituting education or reading for experience, such a practice has been allowed where the substituted basis is deemed an adequate basis for the opinion

33. Davis v. State, 35 Ind. 496 (1871) (attended lectures on insanity); People v. Thacker, *supra* note 30; Sanzari v. Rosenfield, 34 N.J. 128, 167 A.2d 625 (1961) (discussions with dentists); Bryant v. Briggs, 331 Mich. 64, 49 N.W.2d 63 (1951) (attended osteopathic clinics and talked with practicing osteopaths); Isenhour v. State, 157 Ind. 517, 62 N.E. 40 (1901) (chemist, talked with doctors); Watterson v. Conwell, 258 Ala. 180, 61 So. 2d 690 (1952) (orthopedic book by doctor-defendant); Perkins v. United States, 228 Fed. 408 (4th Cir. 1915) (association with other doctors); *cf.* Mirich v. Balsinger, 53 Cal. App. 2d 103, 127 P.2d 639 (1942) (watched a good surgeon work); Alexander v. Covel Mfg. Co., 336 Mich. 140, 57 N.W.2d 324 (1953) (lectures); *but see* Pearce v. Linde, 113 Cal. App. 2d 627, 248 P.2d 506 (1952). It should be noted that it is a different situation when there is conversation about the case itself. See pp. 505-08 *infra.*

34. *E.g.*, Sullivan v. Boston Elevated Ry., 185 Mass. 602, 71 N.E. 90 (1904) (100-200 appendectomies). A coroner-surgeon who performed over 40,000 autopsies in 25 years in office is described in McCoid, *The Care Required Of Medical Practitioners*, 12 VAND. L. REV. 549, 616 (1959).

35. Sanzari v. Rosenfield, *supra* note 33; Safeway Stores, Inc. v. Combs, 273 F.2d 295 (5th Cir. 1960); Armbruster v. Sutton, 362 Mo. 740, 244 S.W.2d 65 (1951) (Question: whether one characteristic of paranoids is suit against persons placing them in institutions; Answer: yes, one of my former patients has sued me); People v. Powell, 202 P.2d 837 (Cal. App.), *aff'd*, 34 Cal. 2d 196, 208 P.2d 974 (1949); Meiselman v. Crown Heights Hosp., 285 N.Y. 389, 34 N.E.2d 367 (1941); Williams v. Charles Stores Co., 209 N.C. 591, 184 S.E. 496 (1936); Napier v. Ferguson, [1878] 2 P. & B. 415 (Canada). See 2 WIGMORE, §§ 555-69.

Three cases *contra*, Ricard v. Prudential Ins. Co., 87 N.H. 31, 173 Atl. 375 (1934); Laird v. Boston & M.R.R., 80 N.H. 377, 117 Atl. 591 (1922); United States v. Wier, 281 F.2d 850 (5th Cir. 1960), justify their denial by citing from 3 WIGMORE § 687 a statement made in a different connection and never intended to cover this situation: "To allow any physician to testify who claims to know solely by personal experience is to appropriate the witness-stand to impostors."

As to how recent such experience must be see Carbone v. Warburton, 22 N.J. Super. 5, 91 A.2d 518 (Super. Ct. 1952), *aff'd*, 11 N.J. 418, 94 A.2d 680 (1953) (allowed though 16 years elapsed).

36. Montgomery v. Stary, 84 So. 2d 34 (Fla. 1955); McGulpin v. Bessmer, 241 Iowa 1119, 43 N.W.2d 121 (1950); Pierce v. Paterson, 50 Cal. App. 2d 486, 123 P.2d 544 (Dist. Ct. App. 1942); Drucker v. Philadelphia Dairy Prods. Co., 35 Del. 436, 166 Atl. 796 (1933); Malila v. Meachem, 187 Ore. 330, 211 P.2d 747 (1949); *cf.* Sinz v. Owens, 33 Cal. 2d 749, 205 P.2d 3 (Sup. Ct. 1949). See also 2 WIGMORE § 569; 3 *id.* § 687.

rendered.[37] A right result has also been reached in the case where the defendant doctor has evolved an unorthodox, usually cultist, method of treating that no other doctor could reasonably be expected to have experience with.[38] This is not the same situation as that where a doctor testifies that he has never seen a similar case, offered as some evidence of its rareness or unusualness, which is regularly allowed.[39]

There is, however, some hesitation at the trial level in asking a doctor a question based upon his *specific* prior experiences, a question phrased such as, "Have you ever seen a case of this before?" or "Was this characteristic also of other cases you have had, Doctor?"[40] Why there should be this hesitation—among both trial practitioners and judges—is unclear, although the reasoning may be that the prior experience is an out-of-court event and thus hearsay,[41] or merely that the matter is not in point.[42] Any such ban on the use of prior experience must be regarded as unrealistic, however, since experience does and must continue to constitute a part of the doctor's process of reaching an opinion, and experience is based upon a series of individual, specific events.[43]

37. *Allowing:* Prokop v. Houser, 245 Iowa 480, 62 N.W.2d 781 (1954); Carbone v. Warburton, *supra* note 35; Lone Star Gas Co. v. Thomas, 345 S.W.2d 844 (Tex. Civ. App. 1961); Wilson v. State, 181 Md. 1, 26 A.2d 770 (1942); Woelfle v. Connecticut Mut. Life Ins. Co., 103 F.2d 417 (8th Cir. 1939); Gray v. Pet Milk Co., 108 F.2d 974 (7th Cir.), *cert. denied,* 309 U.S. 688 (1940); Illinois Steel Co. v. Fuller, 216 Ind. 180, 23 N.E.2d 259 (1939); Sturge v. Haldemint, [1848] 11 L.T.O.S. 28 (N.P.); *cf.* United States v. Marymount, ACM 16273, AFCJA 23/4 (1960) (Dr. Francis E. Camps, noted student in legal medicine, was challenged as lacking experience with patients who had been poisoned but was allowed to testify on the basis of study of records—of cadavers, his life's work). This type of holding was more common in earlier days where the fund of medical knowledge of the general practitioner was smaller: Germania Life Ins. Co. v. Ross-Lewin, 24 Colo. 43, 51 Pac. 488 (1897); People v. Thacker, *supra* note 33; Hardiman v. Brown, 162 Mass. 518, 39 N.E. 192 (1895); Boswell v. State, 114 Ga. 40, 39 S.E. 897 (1901); Tullis v. Kidd, 12 Ala. 648 (1848).

*Not allowing:* Huffman v. Lindquist, 37 Cal. 2d 465, 234 P.2d 34 (1951); Culver v. Prudential Ins. Co., 36 Del. 582, 179 Atl. 400 (1935); Emerson v. Lowell Gas Light Co., 88 Mass. 146 (1863); *cf.* Lockart v. Maclean, 361 P.2d 670 (Nev. 1961).

38. Kershaw v. Tilbury, 214 Cal. 679, 8 P.2d 109 (1932) is representative of malpractice cases. In the food and drug cases, in addition to the discussion at p. 486 *infra* see United States v. One Device, 160 F.2d 194 (10th Cir. 1947); John J. Fulton Co. v. FTC, 130 F.2d 85 (9th Cir. 1942); Kar-Ru Chem. Co. v. United States, 264 Fed. 921 (9th Cir. 1920).

39. See, *e.g.,* Ray v. J. C. Penney Co., 274 F.2d 519 (10th Cir. 1959) (one in a million).

40. See, recognizing that they were dealing with the problem, Perez v. Baltimore & O.R.R., 24 Ill. App. 2d 204, 164 N.E.2d 209 (1960); Shutts v. Siehl, 109 Ohio App. 145, 164 N.E.2d 443 (1959) (both excluding or objecting); *cf.* Mayor of Jackson v. Boone, 93 Ga. 662, 20 S.E. 46 (1894).

41. English cases seem to justify avoidance of this type of question by the "similar facts doctrine." BURROWS, EVIDENCE (9th ed. 1952).

42. See Forrest v. Fink, 71 Cal. App. 34, 234 Pac. 860 (Dist. Ct. App. 1925).

43. As was allowed in Safeway Stores v. Combs, *supra* note 35; Guerriera v. Universal Terminal Stevedore Co., 9 App. Div. 2d 984 (N.Y. 1959); Sneed v. Goldsmith, 343 S.W.2d 345 (Mo. App. 1961); Cordiner v. Los Angeles Traction Co., 5 Cal. App. 400,

### 3. *Medical Books and Periodicals*

Certainly a major source of information of every physician is what he reads.[44] His materials range from the standard treatises and monographs to the medical journals both of the medical profession generally and of his own particular specialty.[45] Analytically, the reading can be divided into that which is done generally and preceding the actual case in question, and that which is done after the case is presented and a question has arisen. A doctor would not, however, find this distinction meaningful; the courts as well have not found occasion to consider whether the reading is of a background nature or related to the case.[46]

When the doctor has stated that he has "relied"[47] in giving his opinion upon what he has read the objection of hearsay has often been used. But an overwhelming majority of cases permit such use. An earlier line of cases traces from the 1831 decision in *Collier v. Simpson.*[48] There the court held, somewhat restrictively, that a doctor can use books so long as they form only part of the basis of his opinion and so long as he does not purport merely to restate what the author's views are.[49] The modern American

91 Pac. 436 (Ct. App. 1907); Alberti v. New York, L.E. & W.R.R., 118 N.Y. 27, 23 N.E. 35 (1898). See Tyree, *supra* note 18, at 612-14.

44. Perhaps no better declaration on the value of the doctor's reading has been made than that by Friend: "Every physician will make, and ought to make, observations from his own experience; but he will be able to make a better judgment and juster observations by comparing what he reads and what he sees together. It is neither an affront to any man's understanding, nor a cramp on his genius, to say that both the one and the other may be usefully employed, and happily improved in searching and examining into the opinions and methods of those who lived before him, especially considering that no one is tied up from judging for himself, or obliged to give into the notions of any author, any further than he finds them agreeable to reason, and reducible to practice." Friend, *History of Physic,* cited in OSLER AEQUANIMITAS AND OTHER ADDRESSES 292 (3d ed. 1932).

Note that reading, as a means of keeping abreast of medical advances, has been called a duty of the physician in malpractice cases. McCoid, *supra* note 34, at 575. As was stated in McCandless v. McWha, 22 Pa. 261, 269 (1853), "The physician or surgeon who assumes to exercise the healing art, is bound to be up to the improvements of the day. The standard of ordinary skill is on the advance; and he who would not be found wanting, must apply himself with all diligence to the most accredited sources of knowledge."

45. More than 500 medical magazines and newspapers were being published during 1961. New Medical Material, March 1961, p. 5.

46. Such a distinction could be meaningful in law, however, if on analogy to patient statements (see pp. 494-99 *infra*), secondary sources could be relied upon only if consulted *ante litam motem.*

47. The term "reliance" is used here as a general term covering a number of basis uses of the material read. The term has the following shades of meaning: indefinite reference to "reading," naming the book read, summarizing its contents, actual recital of the contents as basis, and reading in the guise of evidence per se. These varieties of meaning are legally considered similar and therefore are joined together herein, except for the special situation of actual recitation (see note 51 *infra*).

48. 5 C. & P. 73 (N.P. 1831).

49. *English and Commonwealth cases:* Nelson v. Bridport, 50 Eng. Rep. 207, 8 Beav. 527 (1845); Napier v. Ferguson, [1878] 2 P. & B. 415 (Canada); Collier v.

authority dates from *Finnegan v. Fall River Gas Works Co.*,[50] in which Justice Holmes succinctly but perceptively declared that:

> [A]lthough it might not be admissible merely to repeat what a witness had read in a book, not itself admissible, still, when one who is competent on the general subject accepts from his reading as probably true, a matter of detail which he had not verified, the fact gains an authority which it would not have had from the printed page alone, and, subject, perhaps, to the exercise of some discretion, may be admitted.[51]

The view expressed by Holmes has been adopted by many jurisdictions, and has spread from authoritative, standard treatises[52] to journals,[53] statis-

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Edinburgh Magistrates, [1952] S.C. 34 (Scotland).

*American cases:* People v. Wheeler, 60 Cal. 581 (1882); Mayor of Jackson v. Boone, *supra* note 40; Boswell v. State, 114 Ga. 40, 39 S.E. 897 (1901); Bloomington v. Shrock, 110 Ill. 219 (1884); State v. Baldwin, 36 Kan. 1, 12 Pac. 318 (1886); Pierson v. Hoag, 47 Barb. 243 (N.Y. 1866); Melvin v. Easley, 46 N.C. 1 (1854).

50. 159 Mass. 311, 34 N.E. 523 (1893).

51. *Ibid.* The issue in *Finnegan* was whether plaintiff's decedent, a meter reader, suffered from conscious pain before being asphyxiated by defendant's negligently released gas; plaintiff's witness, a general practitioner, relied on what he had read about the effect of gas since he had had no experience personally; to have denied him this reading might well have deprived plaintiff, who was from a small town, of the necessary proof to make out a prima facie case.

See also National Bank of Commeree v. New Bedford, 175 Mass. 257, 56 N.E. 288 (1900), wherein Holmes re-expressed his view in a nonmedical case.

Is there an ambiguity in Justice Holmes' terse prose? Apparently there is, for Professor Maguire reads it as being as much a red light as a green one. The doctor may "rely" but he may not restate. Maguire 438. When a Massachusetts evidence teacher, Hughes, gets to the case it is almost all red light. HUGHES, MASSACHUSETTS EVIDENCE 410-15 (1961). The case is a "blanket rejection of proof of underlying hearsay when offered in support of expert evidence." *Id.* at 412. Hughes says that while Holmes had in mind that a doctor could *refer* to what he read, he could not, under the guise of fortifying his opinion, read it into evidence. It is submitted that both professors have read *Finnegan* and *National Bank* too narrowly. They have constructed a dichotomy between mere reference and reading under the guise. But note that many gradations in use exist (see note 47 *supra.*) What most doctors do in fact is something in between: they paraphrase and perhaps read some parts directly if they happen to have the book along with them. If they, or their counsel more likely, are seeking to create evidence, the judge will intercede; this is what Holmes meant by "discretion." On this admittedly improper use see notes 66-68 *infra*; note 19 *supra.* Certainly it was not meant that the doctor should do no more than state the type of basis. See the criticism of that type of case at p. 478 *supra.* Reading *Finnegan* in this more liberal light see 3 WIGMORE § 687.

52. Brown v. Los Angeles Transit Line, 35 Cal. App. 2d 709, 287 P.2d 810 (Dist. Ct. App. 1955); Coastal Coaches Inc. v. Ball, 234 S.W.2d 474 (Tex. Civ. App. 1950); State v. Goettina, 61 Wyo. 420, 158 P.2d 865 (1945); Illinois Steel Co. v. Fuller, *supra* note 37; Nicotra v. Bigelow, Sanford Carpet Co., 122 Coun. 353, 189 Atl. 603 (1937); Howson v. Foster Beef Co., 87 N.H. 200, 177 Atl. 656 (1935); Laird v. Boston & M.R.R., 80 N.H. 377, 117 Atl. 591 (1922); Hardiman v. Brown, 162 Mass. 585, 39 N.E. 192 (1895); Drucker v. Philadelphia Dairy Prods. Co., *supra* note 36; *cf.* Garfield Memorial Hosp. v. Marshall, 204 F.2d 721 (D.C. Cir. 1953).

53. State v. Goettina, *supra* note 52; United States Health Club, Inc. v. Major, 297 F.2d 665 (3d Cir. 1961) (post office's doctor read literature for nine months); Boardman Co. v. Eddy, 363 P.2d 821 (Okla. 1961).

tical records[54] (including life expectancy tables[55]), the results of experiments,[56] and even to information on how to perform tests.[57] Indeed, this simple concept has become the rationale for allowing reliance on many types of medical and nonmedical evidence that might otherwise be barred as hearsay.[58]

This sweeping result, making the law clearer in this area than perhaps any other considered herein, has been accomplished without much attention to basic rules of evidence. The practice of relying on books has generally been sustained simply on the need of the doctor.[59] A few courts have referred to reliance as a hearsay exception,[60] while others have characterized it as nonhearsay.[61] Justification has also been made by referring to the basis as merely "refreshing the memory,"[62] or "amplifying" or "corroborating" an opinion which the doctor already holds,[63] although these are not particularly illuminating explanations.

A very few cases have held that reliance upon what has been studied or read was improper,[64] either because the doctor lacked other sufficient bases, such as experience,[65] or because he did not in fact render a new opinion. Another set of cases involve the situation where the medical authorities are directly (and often at length) read to the trier of the fact, either by the doctor in upholding his opinion or by the lawyer in examining his witness. A few decisions have upheld the practice, finding it no different from the common situation of reliance already discussed.[66] But

54. Forrest v. Fink, *supra* note 42; United States v. Marymount, *supra* note 37.

55. Glover v. Berger, 72 Wyo. 221, 263 P.2d 498 (1953); Fournier v. Zinn, 257 Mass. 575, 154 N.E. 268 (1926); 20 AM. JUR. *Evidence* § 872 (1939). See also Crum v. Ward, 122 S.E.2d 18 (W. Va. 1961).

56. Woelfle v. Connecticut Mut. Life Ins. Co., *supra* note 37.

57. State v. Sturtevant, 96 N.H. 99, 70 A.2d 909 (1950).

58. See the extensive discussion at pp. 527-31 *infra.*

59. See the excellent discussions in Coastal Coaches v. Ball, *supra* note 52; State v. Goettina, *supra* note 52.

60. Dinner v. Thorp, 54 Wash. 2d 90, 338 P.2d 137 (1959); Kern v. Pullen, 138 Ore. 222, 6 P.2d 224 (1931).

61. Woelfle v. Connecticut Mut. Life Ins. Co., *supra* note 37.

62. Murphy's Ex'r v. Murphy, 23 Ky. L. Rep. 1460, 65 S.W. 165 (Ct. App. 1901).

63. State v. Nicolosi, 228 La. 65, 81 So. 2d 771 (1955).

64. Soquet v. State, 72 Wis. 659 (1888) (based upon a restrictive reading of Collier v. Simpson, *supra* note 48); Mitchell v. Leech, 69 S.C. 413, 48 S.E. 290 (1904); Kath v. Wisconsin Cent. Ry., 121 Wis. 503, 99 N.W. 217 (1904); Thompson v. Ammons, 160 Ga. 886, 129 S.E. 539 (1925). See WIEHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 275 (1954) (as applied to psychiatrists). Note the restrictive language in Corley v. Andrews, 349 S.W.2d 395 (Mo. App. 1961).

65. See the complementary discussion at notes 36-37 *supra.*

66. Eagleston v. Rowley, 172 F.2d 202 (9th Cir. 1949); Fidelity & Cas. Co. v. Meyer, 106 Ark. 91, 152 S.W. 995 (1912); State v. Nicolosi, *supra* note 63; State v. Baldwin, *supra* note 49. Perhaps Connecticut has gone the farthest. See, *e.g.*, Kaplan v. Mashkin Freight Lines, 146 Conn. 327, 150 A.2d 602 (1959); Tompkins v. West, 56 Conn. 478, 16 Atl. 237 (1888). In the former case the doctor was read two extracts and asked if they had influenced him or tended to influence him; he replied affirmatively. The practice was upheld even though he had changed his opinion from a

other courts have condemned the practice, distinguishing it from the *Finnegan* situation on the ground that here the book is virtually being made independent evidence.[67] These views can be readily reconciled by a rule according discretion to the judge to refuse reliance where it is patently an attempt to introduce the book into evidence but to allow it where it is in fact merely being read to indicate basis.[68]

When on cross-examination a book is read to a doctor or hitherto unacknowledged reliance on authority is revealed, issues of basis, similar to those above, are involved, and the same types of solutions are applied.[69]

There can be little question but that by some means or another the doctor should be allowed to rely in court upon what he has read and relied on in his private practice.[70] The recent statutory modifications[71] and proposed model code provisions[72] would obviate the problem by admitting the book itself as evidence. But it would appear that the justification so handily worked out by Justice Holmes is the most simple and accurate. Wigmore has demolished two arguments sometimes raised against free reliance, namely (a) that the doctor must not be very good if he has to read (a matter of qualification, not basis); (b) that it is out-of-court hearsay (only a basis question).[73] Another losing argument is the suggestion that the jury may be unduly swayed, either by virtue of the force of the printed word,[74] or because of the similarity of basis material to independent evidence.[75] Again, the courts can ill afford to bar in the courtroom[76] that

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pretrial report because of reading these books, which had been brought to his attention the day before the trial by the attorney utilizing him.

67. Eckleberry v. Kaizer Foundation Northern Hosps., 359 P.2d 1090 (Ore. 1961); Allison v. State, 203 Md. 1, 98 A.2d 273 (1953); Thompson v. Ammons, *supra* note 64; *accord*, State v. Catellier, 63 Wyo. 123, 179 P.2d 203 (1947); Grantham v. Goetz, 401 Pa. 349, 164 A.2d 225 (1960). This is precisely the point made and argued in note 51 *supra*.

68. See 6 WIGMORE § 1700.

69. See generally 6 *id.* § 1700(b); DAVIDSON, FORENSIC PSYCHIATRY 293 (1952); Annot., 60 A.L.R.2d 77 (1958).

70. Justice Lumpkin in Mayor of Jackson v. Boone, *supra* note 40, quoted from a treatise which quoted from an early English case in which a medical witness said, "[N]either do I see any reason why I should not quote the fathers of my profession in this case, as well as you gentlemen of the long robe quote Coke upon Littleton in yours . . . ." *Id.* at 47.

71. See 2 U.C.L.A.L. REV. 252 (1955). Of course, these statutes will work only in proportion to the courts' liberality, which at times is small.

72. MODEL CODE OF EVIDENCE 529; UNIFORM RULES OF EVIDENCE 63(d).

73. 3 WIGMORE § 687. A more harmless requirement was set forth in State v. Sturtevant, *supra* note 57: the doctor should have some personal observation so as to be able to evaluate the writings of another.

74. Note the criticism of this argument in Maguire & Hahesy, *Requisite Proof of Basis of Expert Opinion*, 5 VAND. L. REV. 432, 440 (1952) [hereinafter cited as Maguire]. See the discussion of cases allowing opinion recital without bases at p. 478, *supra*.

75. Maguire 437-41. The giving of proper instructions should, under current judicial concepts, prevent any ambiguity.

76. Favoring free use is MCCORMICK, EVIDENCE 268 (1954); 6 WIGMORE § 1700;

which doctors routinely do, and the law in other contexts requires of them.[77]

*4. Scientific Principles and Facts, General Medical Knowledge, Statistical Information, Methodologies of Tests*

Not infrequently a court will characterize the basis for an opinion as "general medical knowledge," "scientific principles," "consensus of medical opinion" or the like.[78] Usually all that is implied is a summary of the various types of background information which the physician typically has at hand.[79] In other cases, however, the court by this language is referring to specific medical facts or principles utilized by the doctor, such as the accepted causes of a disease, blood grouping, heredity, the mechanics of X-rays or the like. Such principles and facts are sprinkled liberally throughout all medical testimony and most commonly serve as a substratum or secondary basis upon which the more obvious bases are built. Of the cases in which explicit consideration has been given to these basic facts, however, the great majority have deemed as proper material[80] theories and principles,[81] methodologies for performing tests,[82] or scientific facts.[83] This is rightfully considered personal knowledge.[84]

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WEIHOFEN, *op. cit. supra* note 64, at 275.

77. See note 44 *supra.*

78. One of the enumerated bases of the MODEL EXPERT TESTIMONY ACT § 9, *supra* note 18, is "technical knowledge of the subject."

79. Many examples of testimony set upon this general ground may be found in the cases involving Food and Drug Administration action in which the government's experts testify to the lack of therapeutic value of defendant's product. See, *e.g.*, United States v. 354 Bulk Cartons, 178 F. Supp. 847 (D.N.J. 1959); United States Health Club v. Major, *supra* note 53; Besearch Labs., Inc. v. United States, 167 F.2d 410 (9th Cir.), *cert. denied*, 335 U.S. 843 (1948); United States v. Dr. David Roberts Veterinary Co., 104 F.2d 785 (7th Cir. 1939); Charles of the Ritz Distrib. Corp. v. FTC, 143 F.2d 676 (2d Cir. 1944); United States v. Hoxsey Cancer Clinic, 198 F.2d 273 (5th Cir. 1952). Among the non-food and drug cases see Jack Cooper Transp. Co. v. Griffin, 356 P.2d 748 (Okla. 1959); Leftwich v. Wesco Corp., 119 S.E.2d 401 (W. Va. 1961); Brouillette v. Weymouth Shoe Co., 157 Me. 143, 170 A.2d 412 (1961); People v. Cravens, 13 Cal. Rep. 510 (App. 1961).

80. That this might be hearsay, in a collective sense, seems not to have disturbed the courts (fortunately); in any case, as pointed out by Maguire 443, it is especially reliable hearsay.

81. In an early case, Rex v. Pembroke, 6 Howell St. Tr. 1337 (1678), testimony as to the cause of death was based upon the general medical proposition that a man could not die of wounds without a fever. See also *In re* Lauth's Estate, 180 Cal. App. 2d 313 (1960); United States Health Club v. Major, *supra* note 53; Riggs v. Gasser Motors, 22 Cal. App. 2d 636, 72 P.2d 172 (Dist. Ct. App. 1937) ("we" of the medical profession); Coover v. Painless Parker, Dentist, 105 Cal. App. 110, 286 Pac. 1048 (Dist. Ct. App. 1930); Derrick v. St. Paul C. Ry., 252 Minn. 102, 89 N.W.2d 629 (1958); Marshall v. Brown, 50 Mich. 148, 15 N.W. 55 (1883).

82. State v. Sturtevant, *supra* note 57; State v. Haner, 231 Iowa 348, 1 N.W.2d 91 (1941) (conclusions on blood alcohol tests "accepted by physiologists").

83. Hanley v. Boston & M.R.R., 286 Mass. 390, 190 N.E. 501 (1934); Spears v. Stone & Webster Eng'r Corp., 161 So. 351 (La. App. 1935); State v. Coettina, *supra* note 52; Emerson v. Lowell Gas Light Co., 88 Mass. 146 (1863). Cases involving reliance on statistics as a type of medical fact are considered at notes 54-55 *supra.* See

More difficult problems arise when the concepts or facts upon which the doctor relies are not commonly or wholly accepted by the medical profession, for here it is not the application of set principles to the individual cases that causes dispute but the very existence of the basic suppositions. Will a blow or cigarette smoking cause cancer? How reliable are narcoanalysis and lie detectors? In some situations the courts have refused to allow a doctor to base his testimony upon scientific methods or procedures, such as narcoanalysis, lie detectors or hypnosis, where there was not a commonly accepted medical belief as to their validity or at least reliability; in other cases the testing device utilized has not met the minimal requirements of acceptability.[85] Some courts in reaching a decision have permitted medical testimony which affirmed both the basic principles and their application to the case at hand; often this was done without particular concern for the problem at hand.[86] In a few cases the courts have allowed the physician to use, in lieu of an accepted medical principle, a statistical

also 20 AM. JUR. *Evidence* § 795 (1939). Distinguish the problem of reliance upon the results of tests as a basis, discussed at p. 491 *infra.*

84. 3 WIGMORE § 795; 2 *id.* § 665a.

85. An example of this is the "lie detector" area. This philosophy is aptly illustrated in Frye v. United States, 293 Fed. 1013, 1014 (D.C. Cir. 1923): "Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized . . . ."

The differing philosophies were delineated in the recent case of People v. Williams, 6 N.Y.2d 18, 159 N.E.2d 549, 187 N.Y.S.2d 750 (1959), in which the majority rejected expert medical testimony upon the effects of a drug upon a witness's veracity because it was not made clear that there was a scientific consensus on the reliability of the drug or proof that the scientific method involved was of value. The dissent believed that the testimony should have been allowed, at least as long as the underlying principles were not totally irrational or obviously outside any known area of expert testimony. The majority at least acknowledged that there is generally no requirement that an expert demonstrate that most all or many other experts would agree with his basic suppositions. See also People v. Williams, 331 P.2d 251 (Cal. App. 1958) (Nalline test for detection of narcotics; expert testimony on validity of test admitted though test was generally unknown to medical profession).

It should not be forgotten that other tests, now fully accepted, had to win their spurs in the courtroom; among them are photographs, X-rays, and electroencephalograms. See note 88 *infra.*

86. See the following cases which allow testimony based upon statements made while the patient was under the influence of narcoanalytic drugs. People v. Jones, 42 Cal. 2d 219, 266 P.2d 38 (1954); People v. Cartier, 51 Cal. 2d 590, 335 P.2d 114 (1959); Lemmon v. Denver & R.G.W.R.R., 9 Utah 2d 195, 341 P.2d 215 (1959); *cf.* State v. Sinnott, 24 N.J. 408, 132 A.2d 298 (1957); Freeman v. N.Y. Cent. R.R., 112 Ohio App. 395, 174 N.E.2d 550 (1960); *contra,* Dugan v. Commonwealth, 333 S.W.2d 755 (Ky. 1960) (doctor apparently failed to state that tests had general scientific acceptance).

Food and drug cases have also tended to involve questions of the validity of underlying assumptions. See the cases cited note 78 *supra.* Earlier in the food and drug cases the doctrine reigned that there could be no action for fraud if the government's evidence was based upon *opinion,* since opinions as to products differed so greatly. This rule, announced by American School of Maguetic Healing v. McAnnulty, 187 U.S. 94 (1902) (post office cases), is now generally excepted and discredited. See Re-

approach if a high degree of probability could be made out.[87] In this extraordinarily complex area, the courts owe a duty to attorneys constantly faced with these problems to develop a rule as to what methods have not been sufficiently accepted by the medical profession to be the basis for medical testimony.[88]

### *B. Personal Observations and Knowledge Gained Before Trial*

What the physician knows from personal observation and investigation is probably his most commonly recognized source of knowledge and often the most sure.[89] It is also probably the most meaningful basis to the lay trier. Besides the examination of the patient, which is the most common of observations making up personal knowledge,[90] the doctor may have learned a great number of other things at first hand. For example, the doctor may know the patient's course of treatment; the patient's response to drugs and

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search Labs, Inc. v. United States, and United States Health Club v. Major, *supra* note 79.

In Puhl v. Milwaukee Auto. Ins. Co., 8 Wis. 2d 343, 99 N.W.2d 163, 169 (1959), in which it was claimed that a prenatal accident caused the plaintiff's child to be born a mongolian, the court declared: "True, there is usually no requirement that before an expert may give an opinion he must demonstrate that most, or all, or many, other experts would agree with his opinion. However, the medical testimony given here is not of an expert in this field of medicine, and his opinion was based on the views of one authority out of several. When scientific or medical theories or explanations have not crossed the line and become an accepted medical fact, opinions based thereon are no stronger or convincing than the theories."

87. See, allowing the use of statistics and inferences drawn therefrom in application to a particular patient's case, McAlister v. United States, 207 F.2d 952 (2d Cir. 1953) (polio); Travelers Ins. Co. v. Donovan, 125 F. Supp. 261 (D.D.C. 1954), *aff'd*, 221 F.2d 886 (D.C. Cir. 1955) (tuberculosis); Ayers v. Hoage, 63 F.2d 364 (D.C. Cir. 1933) (tuberculosis; in lieu of personal knowledge); *contra*, on their facts, Miller v. National Cabinet Co., 8 N.Y.2d 277, 168 N.E.2d 811, 204 N.Y.S.2d 129 (1960) (leukemia); Howley v. Kantor, 105 Vt. 128, 163 Atl. 628 (1933) (cancer; even though a 80% certainty). See also pp. 480-82 *supra*. Practically the only discussion is in STASON, ESTEP & PIERCE, ATOMS AND THE LAW 421-65 (1959) (demonstrating that statistics are behind all medical testimony and indeed even behind legal rules, *e.g.*, *res ipsa loquitur*, the common knowledge rule and circumstantial evidence principles).

88. See RICHARDSON, MODERN SCIENTIFIC EVIDENCE chs. 4-6 (1961); 3 WIGMORE § 875; STASON, ESTEP & PIERCE, *op. cit. supra* note 87. As an alternative to a more liberal approach to certainty of fundamental principles, the courts have allowed plaintiff's lower quanta of proof occasionally. See, *e.g.*, Brett v. J. M. Carras, Inc., 203 F.2d 451 (3d Cir. 1953) (since no one knows what causes Padget's disease, plaintiff's theory will be as good as any; courts cannot allow limits of scientific knowledge to prevent the claims of injured persons).

89. See generally WHITE & GESCHICKTER, DIAGNOSIS IN DAILY PRACTICE (1947); MCCORMICK, EVIDENCE 19-20 (1954); 2 WIGMORE § 478. Another class of personal (in distinction to secondhand) information is considered at pp. 515-16 *infra*, personal knowledge at trial.

90. As to the nature of the medical examination, see CURRAN, LAW AND MEDICINE ch. 2 (1960); METTLER, THE MEDICAL SOURCEBOOK 87 (1960). On the role of patient observations in psychiatry, see MEZER, DYNAMIC PSYCHIATRY IN SIMPLE TERMS ch. 1 (2d ed. 1960); Guttmacher & Weihofen, *The Psychiatrist on the Witness Stand*, 32 B.U.L. REV. 287 (1952).

therapy, or his progress of recovery;[91] and the results of clinical tests that he has performed or the results of experiments that he has made with drugs and other medical products, especially allegedly deleterious substances.[92] These observations are frequently characterized by the courts as "objective" information, in contrast to the "subjective" information that a doctor receives from other sources.[93]

*1. Personal Observation*

Personal observation is a perfectly acceptable basis legally,[94] and indeed has sometimes been called the most desirable of all bases.[95] Certain limits on the use of this material have sprung up occasionally, however. There must have been sufficient opportunity to enable the doctor to form a valuable opinion, and the right matter must have been observed.[96] Courts

91. *E.g.*, Hamilan Corp. v. O'Neill, 273 F.2d 89 (D.C. Cir. 1959) (observed emotional change over period of 75 visits); *In re* Greer, 356 P.2d 356 (Okla. 1960) (response of patient before and after surgery, convalescence, eventual absence of complaint).

92. See cases p. 491 *infra*.

93. Most courts have drawn a wavering, indefinite line between "objective" and "snbjective" symptoms for the purpose of excluding the latter. The first problem with such a rule is to distinguish between the two. While the medical profession would distinguish between what a doctor can see for himself and what he knows about only through his patient's statements (the difference roughly between signs and symptoms), the courts have not followed the line. See, *e.g.*, cases at note 114 *infra* (holding body movements to be subjective). See also Bonin v. Sam Carline, Inc., 117 So. 2d 312 (La. App. 1959) (patient statements objective since there were existing residuals in soft tissue of leg); Lambert v. Wolf's Inc., 132 So. 2d 522 (La. App. 1961) (objective findings in neuroses).

The broader problem is whether any such line should be drawn at all, since *in practice* the doctor does not draw such a distinction; he would rely upon a subjective complaint as he would what he wituesses, or at least make use of both to build his diagnoses and control his treatment. Exclusion of the subjective may also deprive the trier of meaningful and convincing evidence. For an excellent discussion of this problem by a doctor, ending with the opinion that no doctor, in the neurological area at least, can form a valid medical opinion on objective material alone, see Pollock, *Examination of Motor and Sensory Functions as Related to Opinion Evidence*, 1 CLINICS 1424 (1943). See also note 173 *infra*. On signs and symptoms generally see MACBRYDE, SIGNS AND SYMPTOMS (3d ed. 1957); METTLER, *op. cit. supra* note 90.

94. Many cases are collected in Annots., 66 A.L.R.2d 1082, 1093 (1959), 136 A.L.R. 965, 974 (1942). Among the leading or recent cases favoring personal observations are: Coastal Tank Lines, Inc. v. Canoles, 207 Md. 37, 113 A.2d 82 (1955) (88 calls); Goldberg v. Capitol Freight Lines, Ltd., 382 Ill. 283, 47 N.E.2d 67 (1943); Taylor v. Monongahela Ry., 155 F. Supp. 601 (W.D. Pa. 1957); Fuller v. State, 213 Ind. 144, 10 N.E.2d 594 (1937). Criminal aspects are covered in 2 WHARTON, CRIMINAL EVIDENCE § 519 (12th ed. 1955). See also 2 WIGMORE § 478; 3 *id.* 689; Busch, *First Hand Knowledge and Opinions*, 38 Ill. B.J. 402 (1950).

95. Quackenbush v. Vallario, 114 Conn. 652, 159 Atl. 893 (1932); MCCORMICK, EVIDENCE 29-32 (1954). It is also one of the recognized bases in MODEL EXPERT TESTIMONY ACT § 9, *supra* note 18; UNIFORM RULE OF EVIDENCE 56(2).

96. Marshall v. Sellers, 188 Md. 508, 53 A.2d 5 (1947) (extensive, brilliant discussion by Delaplaine, J.); Freeman v. Loyal Protective Ins. Co., 196 Mo. App. 383, 195 S.W. 545 (1917); Guidry v. Michigan Mut. Liab. Co., 130 So. 2d 513 (La. App. 1961) (though examination was only 45 minutes, medical witness himself stated time

have also formulated rules as to the time periods within which the observation must have been made in order to be relevant.[97] Special problems have also arisen at times as to the application of a physician-patient privilege statute to matters which the doctor has observed. The split in the decisions would seem to be partially due to the difference in statutes.[98] Also troublesome legally is the situation where the doctor visits the scene of the injury and then seeks to use what he saw as the basis of an opinion, a common example being dermatitis or dust inhalation cases.[99]

If an expert has adequate personal knowledge to form a basis, he need not speak hypothetically.[100] There is no requirement, however, that he speak from personal observation; the alternative is that he speak hypothetically,[101] even though it does not seem to be particularly advantageous to do so, since testimony of a hypothetical nature is generally less meaningful

adequate). The rule stated in the body is merely an application of the rules of recital of basis. See pp. 475-78 *supra*. In an occasional case the court will declare that without any personal observation the doctor was not competent to testify or at least that his testimony, once received, was due little or no weight. See Jiminez v. O'Brien, 117 Utah 82, 213 P.2d 337 (1949); cases cited at note 336 *infra*.

97. (a) At what point after an injury has too much time elapsed for a doctor to examine the patient to determine the cause and nature of the injury? See Gallihue v. Autocar Co., 169 Pa. Super. 303, 82 A.2d 73 (1951) (7 months); Vosberg v. Putney, 78 Wis. 84, 47 N.W. 99 (1890) (2 weeks—not allowed). (b) At what point after examination has too much time elapsed for a doctor to testify as to what he observed? Quirk v. Schramm, 333 Ill. App. 293, 77 N.E.2d 417 (1948) (1 year, 7 months); State v. Jackson, 346 Mo. 474, 142 S.W.2d 45 (1940) (17-21 years—not allowed). (c) At what point before or after an act, whether civil or criminal, has too much time elapsed for a psychiatrist to testify about the state of mind at the time of the act? *In re* Lauth's Estate, *supra* note 81 (some time after will—proper); Harriford v. Harriford, 336 S.W.2d 113 (Mo. App. 1960) (year before—too remote); Weihofen, *op. cit. supra* note 64, at 277 (on psychiatry and criminal cases).

98. When the statute speaks in terms of "information," observations are readily protected, Smoot v. Kansas City, 194 Mo. 513, 92 S.W. 363 (1906), as are the results of tests, Hansen v. Sandvik, 128 Wash. 60, 222 Pac. 205 (1924); and even if the statute speaks only in terms of "communications" observations have been shielded, Burns v. City of Waterloo, 187 Iowa 922, 173 N.W. 16 (1919); *contra*, People v. De France, 104 Mich. 563, 62 N.W. 709 (1895). See MCCORMICK, EVIDENCE 213-14 (1954) (from which above is adapted); WEIHOFEN, *op. cit. supra* note 64, at 296.

99. Massachusetts has refused reliance upon such observations, Farren's Case, 290 Mass. 452, 195 N.E. 738 (1935). Another common problem is that in which a doctor relies upon familiarity with the patient's activities, occupation, home life and the like. Normally reliance here has been allowed, *e.g.*, Shivers v. Carnaggio, 223 Md. 585, 165 A.2d 898 (1960); cases cited note 117 *infra*.

100. Boardman v. Woodman, 47 N.H. 120 (1866); Foster's Ex'rs v. Dickerson, 64 Vt. 233, 24 Atl. 253 (1891); De Donato v. Wells, 328 Mo. 448, 41 S.W.2d 184 (1931); Commonwealth v. Logan, 361 Pa. 186, 63 A.2d 28 (1949). But it has been said that if the material is too complicated or voluminous the expert must speak hypothetically. Langenfelder v. Thompson, 179 Md. 502, 20 A.2d 491 (1941); Van Deusen v. Newcomer, 40 Mich. 90 (1879); Chicago Union Tractor Co. v. Roberts, 229 Ill. 481, 82 N.E. 401 (1907).

101. Marshall v. Sellers, *supra* note 96; Feldstein v. Harrington, 4 Wis. 2d 380, 90 N.W.2d 566 (1958); Robertson v. Mutual Life Ins. Co., 232 Iowa 743, 6 N.W.2d 153 (1942). Many cases are collected in Annot., 82 A.L.R. 1338 (1933). See generally Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 425 (1952); 2 WIGMORE §§ 672-86.

and persuasive to the jury.[102] If a doctor has some personal knowledge and yet lacks certain information, he often has been allowed to mix both bases.[103] A court's allowance of such a mixture must mean that the hypothetical premise need not restate the personal part of the doctor's knowledge, although it is hard to find a holding to this effect.[104] A few courts have held that a doctor cannot mix the two, probably out of fear of not knowing what was relied upon silently.[105]

*2. Tests and Investigations*

The physician conducts and determines the results of many tests, experiments and investigations as a part of his routine practice. These include simple office tests,[106] special diagnostic devices often involving complicated apparatus,[107] pathological studies,[108] and experiments made in the laboratory.[109] Where the doctor does his own work the courts have regarded his information as first-hand and allowed the usage.[110] Attack upon the use has been correctly limited to the reliability of the testing device and the conditions of its administration.[111] When the test is performed on the human body against the person's consent, such as the taking of a blood sample for an alcoholic content test, constitutional questions peculiar to the situation have also arisen.[112]

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102. See the discussion of the hypothetieal question as a basis at pp. 522-26 *infra*. McCormick has referred to it as a "muffled, abstract form." MCCORMICK, EVIDENCE 32 (1954).

103. Spivey v. Newman, 232 N.C. 281, 59 S.E.2d 844 (1950); Birmingham Elec. Co. v. Farmer, 251 Ala. 148, 36 So. 2d 343 (1948); Coastal Tank Lines v. Canoles, *supra* note 94; Hunter v. Village of Ithaca, 141 Mich. 539, 105 N.W. 9 (1905); *cf.* McKinley v. Slenderella Systems, Inc., 63 N.J. Super. 571, 165 A.2d 207 (Super. Ct. 1960).

104. Sneed v. Goldsmith, 343 S.W.2d 345 (Mo. App. 1961); Hunter v. Village of Ithaca, *supra* note 103; Wells v. Davis, 22 Utah 322, 62 Pac. 3 (1900); Stadefer v. Flemming, 298 S.W. 134 (Mo. App. 1927).

105. Skaggs v. Junis, 27 Ill. App. 251, 169 N.E.2d 684 (1960); State v. Welsor, 117 Mo. 570, 21 S.W. 443 (1893); Bramble v. Hunt, 68 Hun 204, 22 N.Y. Supp. 842 (1893); *cf.* Watson v. State, 161 Tex. Crim. 5, 273 S.W.2d 879 (1954) (with critical dissent). See further discussion at note 325 *infra*.

106. *E.g.*, temperature, pulse, respiration, blood pressure, reflexes. See Lee & McGehee, *The Office Laboratory*, Clinics, Nov. 1960.

107. *E.g.*, X-rays, myelograms, blood tests, electroencephalograms.

108. *E.g.*, autopsies, tissue studies, organ studies.

109. *E.g.*, food poisoning tests, food and drug tests, blood spot experiments.

110. Admissibility was affirmed or implied in such cases falling within the above categories as Swift & Co. v. Morgan & Sturdivant, 214 F.2d 115 (5th Cir. 1954); People v. Carter, 48 Cal. 2d 737, 312 P.2d 665 (1957); Petrosino v. Public Serv. Coordinated Transp., 1 N.J. Super. 19, 61 A.2d 746 (1948). Where the tests are performed or interpreted by another the legal result can be different, however; see pp. 508-12 *infra*.

111. See 3 WIGMORE § 795; 2 *id.* 665a. As to the fundamental reliability of testing procedures used, see pp. 487-88 *supra* and p. 511 *infra*.

112. *E.g.*, Gephart v. State, 157 Tex. Crim. 414, 249 S.W.2d 612 (1952); People v. Coterno, 170 Cal. App. 2d 817, 339 P.2d 968 (1959) (both collecting many cases); *cf.* on observations per se, Commonwealth v. Butler, 405 Pa. 36, 173 A.2d 468 (1961)

### 3. *Body Movements*

One variety of observation which has raised special legal problems is the viewing of the movements of the body: the jerks and twitches given involuntarily or as a result of manipulation by the doctor (such as reflex tests), or the claimed inability to move a part through normal range and planes. Many cases have freely admitted opinions based on this sort of observation;[113] in others the dangers of feigning the movements or the inability to move has been dwelt upon and often characterized as hearsay, and the basis barred accordingly.[114] A few cases, on analogy to patient statements, have allowed the attending doctor to refer to mobility but not the nontreating doctor.[115] While the possibility of feigning or malingering is, of course, always present, the doctor is trained to detect it and to rely on only that which is medically consistent.[116]

### 4. *Prior Acquaintance*

Another source of personal knowledge preceding the actual case in litigation is prior acquaintance with the patient or his family. Cases involving the doctor's reliance on such background material have allowed the practice, often without objection, on a wide variety of issues including heredity, pre-existing conditions and prior psychic development.[117]

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(characteristics and behavior of defendant observed by psychiatrist and psychologist for prosecution).

113. Gulch Lumber Co. v. Fields, 193 Tenn. 365, 246 S.W.2d 47 (1952); Spalding v. Dep't of Labor & Indus., 29 Wash. 2d 115, 186 P.2d 76 (1947); Fuller v. State, 213 Ind. 144, 10 N.E.2d 594 (1937); Biddle v. Riley, 118 Ark. 206, 176 S.W. 134 (1915); Missouri K. & T. Ry. v. Johnson, 95 Tex. 409, 67 S.W. 768 (1902); *accord,* Ward v. Sears, 247 Iowa 1231, 78 N.W.2d 545 (1956); Atlantic C.L.R.R. v. Marshall, 93 Ga. App. 134, 91 S.E.2d 96 (1955); Washington v. Quality Constr. Co., 124 So. 2d 151 (La. App. 1960); Goldberg v. Capitol Freight Lines, Ltd., 382 Ill. 283, 47 N.E.2d 67 (1943) (appears to be contrary to general Illinois view, *infra* note 114).

114. Greinke v. Chicago C. Ry., 234 Ill. 564, 85 N.E. 327 (1908); Gulf Ref. Co. v. Frazier, 83 S.W.2d 285 (Tenn. App. M.S. 1934); Comstock v. Georgetown, 137 Mich. 541, 100 N.W. 788 (1904). See generally 3 WIGMORE § 688; MCCORMICK, EVIDENCE 470 (1954); KING & PILLINGER, LAW OF OPINION EVIDENCE IN ILLINOIS 103 (1942).

115. Higgins v. Steide, 335 S.W.2d 533 (Tenn. App. W.S. 1959); Mary Helen Coal Corp. v. Bigelow, 265 S.W.2d 69 (Ky. 1954). This distinction is discussed at length at note 126 *infra.*

116. See the critical views of Pollack, *supra* note 93.

117. Hamilan Corp. v. O'Neill, 273 F.2d 89 (D.C. Cir. 1959) (14 years); Ruegamer v. Haynes Stellite Co., 167 N.E.2d 725 (Ind. App. 1960) (5 years); Vitale v. Vitale, 147 Cal. App. 2d 665, 305 P.2d 690 (Dist. Ct. App. 1957) (20 years); State v. Eggleston, 161 Wash. 486, 297 Pac. 162 (1931) (15-20 years); Pete v. Lampi, 150 Minn. 423, 185 N.W. 653 (1921) (20 years); Prewitt v. State, 106 Miss. 82, 63 So. 330 (1913) (whole life); Raub v. Carpenter, 187 U.S. 159 (1902) (Chief Justice Fuller remarked that if a doctor were to rely on knowledge gained from observing the behavior of his great uncle he should detail what facts he has observed); *cf.* Hoener v. Bertinato, 67 N.J. Super. 517, 171 A.2d 140 (1961) (doctors testified that unborn child would probably be RH negative on basis of mother's prior pregnancies).

### C. Knowledge About Case Received Secondhand and Before Trial

Much of the physician's knowledge about his case does not come from personal sources but from information related to him by others—from the patient himself, from his relatives, from the medical personnel, even from the attorney who employs him.[118] The doctor's utilization of this information is necessitated by the difficulty of obtaining complete and accurate information firsthand; furthermore, he would probably not regard material gained secondhand as any the less reliable, accurate or necessary than his own observations.[119]

This information relayed to him from the observations of others has never been as acceptable to the courts, however, as information gained firsthand or even general background knowledge. Its secondhandedness immediately raises the flag of hearsay with its attendant banners of fear of inaccurate perception and fear of lack of sincerity of the declarant or one observed. While the application of these restrictive requirements must be considered separately for each type of secondary information, the observation must be that generally the rules are too restrictive, and, taken literally, could only have the cumulative effect of preventing just determination of disputed cases.

#### 1. From Patients

An integral part of the initial phase of a doctor's examination is the taking of statements from the patient—statements which cover his present symptoms, his past medical history, and the medical history of his family. Together these constitute the "case history" of the patient, and as such they become part of the basis upon which the doctor will draw conclusions as to diagnosis and type of treatment required.[120] Routine in the cases with even the most obvious, objective sort of injury or disease, such information is essential in the area of subjective symptoms and in psychiatry.[121] Thus it is only natural for the physician, when called to testify, to rely upon what his patient has told him; such testimony has been frequently challenged and has engendered much appellate litigation; the courts have failed to agree on even fundamental principles.[122] Reduction of the problem to

118. Other types of secondhand information, learned for the first time at trial, are considered at p. 515 *infra*.

119. See Ray, *Restrictions on Doctors' Testimony in Personal Injury Cases*, 14 Sw. L.J. 133, 138 (1960); METTLER, *op. cit. supra* note 90, at 94.

120. See WHITE & GESCHICKTER, *op. cit. supra* note 89, at 38; METTLER, *op. cit. supra* note 90, at 94.

121. Cases in these areas covered in note 143 *infra*.

122. On patient statements see generally MCCORMICK, EVIDENCE 561-66 (1954); 3 WIGMORE § 688; 6 *id.* §§ 1718-23; Ray, *Testimony of Physician as to Plaintiff's Injuries*, 26 TUL. L. REV. 60 (1951); see materials cited note 74 *supra*; Annots., 51 A.L.R.2d 1051 (1957), 65 A.L.R. 1217 (1930). Individual state practices are covered in Arnold, *Medical Evidence in Wisconsin*, 39 MARQ. L. REV. 289 (1956); Longan, *Preparation of Medical Testimony*, 17 MONT. L. REV. 121 (1956); Doelle, *Opinion Evidence From Medical Experts*, 32 Mich. S.B.J. 9 (1953).

its minimal essentials is thus required, although a certain length and oversimplification is thereby produced.

Notwithstanding the statement made in a case annotation and by some writers,[123] there is no simple consensus of courts allowing a physician, regardless of type, to rely on a patient's statements, regardless of type, for the stated, limited purpose of demonstrating the basis of his testimony.[124] There is, however, an extremely strong, well-reasoned line of cases which favorably distinguish such use as basis from use as independent evidence.[125] The greater number of cases, on the other hand, must be considered in the following paragraphs; in these cases the issue has turned upon the type of statement, the time and motive when told, the type of physician, or some other individual factor in the case.

*(a) Type of Physician; Time and Motive When Told.*—Literally hundreds of appellate cases have drawn a fundamental distinction between the attending doctor and the nonattending doctor, allowing the former to use many types of medical bases—including patient statements, but denying the same privilege to the latter. It should be noted that this line has been

123. Annots., 130 A.L.R. 977, 979 (1941) (a "general legal proposition"), 80 A.L.R. 1527, 1528 (1932), 67 A.L.R. 10, 18 (1930); MCCORMICK, EVIDENCE 565 (1954) (weighing cases as follows: majority allow doctor to rely on statements as basis; remainder allow attending doctor but not nonattending doctor; majority reject use as evidence per se).

124. As a technical matter we are not faced with a question of the use of patient statements themselves as evidence. Where the statements may be used as evidence per se, the basis use is much enhanced; the problem arises on the appellate level of determining exactly what use was made. And, as has been remarked, confusion of the two uses has been common. It should be noted that the trier may well tend to accord more weight to a statement by a patient repeated by a doctor than a mere repetition by the patient as witness. See United States v. Nickle, 60 F.2d 372 (8th Cir. 1932).

125. *Federal cases.* Meaney v. United States, 112 F.2d 538 (2d Cir. 1940); Salminen v. Ross, 185 Fed. 977 (1911), *aff'd*, 191 Fed. 504 (1st Cir. 1911). *Alabama.* Lowery v. Jones, 219 Ala. 201, 121 So. 704 (1929) (diagnoses only); Eckles & Brown v. Bates, 26 Ala. 655 (1855). *California.* People v. Brown, 49 Cal. 2d 577, 320 P.2d 5 (1958); People v. Odmann, 160 Cal. App. 2d 693, 325 P.2d 495 (Dist. Ct. App. 1958); Willoughby v. Zylstra, 5 Cal. App. 2d 297, 42 P.2d 685 (Dist. Ct. App. 1935). *Indiana.* Durham Mfg. Co. v. Hutchins, 115 Ind. App. 479, 58 N.E.2d 444 (1945). *Louisiana.* Manuel v. Metropolitan Life Ins. Co., 139 So. 548 (La. App. 1932). *Maine.* Johnson v. Bangor Ry. & Elec. Co., 125 Me. 88, 131 Atl. 1 (1925). *Massachusetts.* Cronin v. Fitchburg & L. St. Ry., 181 Mass. 202, 63 N.E. 335 (1902); *but see* Commonwealth v. Sinclair, 195 Mass. 100, 80 N.E. 799 (1907). *Missouri.* De Courcy v. Prendergast Constr. Co., 140 Mo. App. 169, 120 S.W. 632 (1909). *New Jersey.* State v. Lucas, 30 N.J. 37, 152 A.2d 50 (1959); Seitz v. Seitz, 1 N.J. Super. 234, 64 A.2d 87 (1949). *Oklahoma.* Eagle-Picher Lead Co. v. Black, 164 Okla. 67, 22 P.2d 907 (1933). *Texas.* Pullman Palace-Car Co. v. Smith, 79 Tex. 468, 14 S.W. 993 (1890). *Vermont.* Wilkins v. Brock, 81 Vt. 332, 70 Atl. 572 (1908). *Washington.* Estes v. Babcock, 119 Wash. 270, 205 Pac. 12 (1922). *West Virginia.* Curfman v. Monongahela West Penn Pub. Ser. Co., 113 W. Va. 85, 166 S.E. 848 (1932). *Wyoming.* Acme Cement Plast Co. v. Westman, 20 Wyo. 143, 122 Pac. 89 (1912). See also cases cited at note 151 *infra*.

drawn differently in different jurisdictions, depending upon the terminology used and the particular aims of the judges.[126]

The line has been drawn most frequently in the area of statements and histories given to the doctor.[127] When the patient consults a doctor for treatment, especially when he does so immediately after the need for attention arises, the courts feel that he consults in order to recover from his disease or injury and therefore has every reason to tell the truth.[128] But as

126. The "attending doctor" is perhaps the best and broadest term. It includes the concept of the general practitioner, the family doctor and the treating physician, although in fact he need not be all of these in order to qualify to handle patient statements. That is: (a) He need not treat in some states, examination being sufficient, as long as he is the family or attending doctor. Austin Road Co. v. Thompson, 275 S.W.2d 521 (Tex. Civ. App. 1955); Quirk v. Schramm, 333 Ill. App. 293, 77 N.E.2d 417 (1948); Gluch Lumber Co. v. Fields, 193 Tenn. 365, 246 S.W.2d 47 (1952); United Employers Cas. Co. v. Daniels, 142 S.W.2d 607 (Tex. Civ. App. 1940); Ray, *supra* note 119. (b) He need not be a general practitioner since many treating doctors are specialists. (c) He need not be the family doctor in some states which allow a consultant who in fact treats, or a member of a hospital staff not in a professional relationship with the patient. Santiemmo v. Days Transfer Inc., 9 Ill. App. 2d 487, 133 N.E.2d 539 (1956); Epstein v. National Cas. Co., 1 N.J. 409, 64 A.2d 67 (1949); Jensen v. Elgin, J. & E. Ry., 31 Ill. App. 2d 198, 175 N.E.2d 564 (1961); Mangione v. Snead, 173 Md. 33, 195 Atl. 329 (1937); Chicago Ry. v. Kramer, 234 Fed. 245 (7th Cir. 1916); Marshall v. Papineau, 132 So. 2d 786 (Fla. App. 1961).

As for the nonattending doctor, he is often referred to as the specialist (which he need not be), the consultant (which he need not be), or the qualifying or testifying doctor who examines so as to qualify for testimony. He can be distinguished from the expert who speaks completely hypothetically since the latter has not examined the patient and has no patient statements upon which to rely in the usual case. The nonattending doctor who was originally visited by the patient for testimony purposes but who subsequently treats the patient is still not considered as an attending doctor by a few courts which stress the original motive for visit. See Nashville, C. & St. L. Ry. v. York, 127 F.2d 606 (6th Cir. 1942); *accord*, Chicago & N.W. Ry. v. Garwood, 167 F.2d 848 (8th Cir. 1948); cases cited note 137 *infra; contra*, Santiemo v. Days Transfer Inc., *supra;* Chicago Ry. v. Kramer, *supra;* Spalding v. Dep't of Labor Indus., 29 Wash. 2d 115, 186 P.2d 76 (1947); Kath v. Wisconsin Cent. Ry., 121 Wis. 503, 99 N.W. 217 (1904).

127. See generally citations at note 123 *supra;* McCormick, *Direct Examination of Medical Experts for Death and Bodily Injuries*, 12 LA. L. REV. 264 (1952); Note, 1960 W. VA. L. REV. 274.

128. Among the recent and leading cases drawing this distinction are Petersen v. Dep't of Labor & Indus., 36 Wash. 2d 266, 217 P.2d 607 (1950); Penland v. Bird Coal Co., 246 N.C. 26, 97 S.E.2d 432 (1957); Sutherland v. Kroger Co., 144 W. Va. 673, 110 S.E.2d 716 (1959); Johnson v. Toscano, 114 Conn. 582, 136 A.2d 341 (1957); Henderson v. Union Pac. R.R., 189 Ore. 145, 219 P.2d 170 (1950); McPhail v. State, 56 So. 2d 72 (Miss. 1952); Charron's Case, 331 Mass. 519, 120 N.E.2d 754 (1954); Bowman v. Illinois C.R.R., 11 Ill. 2d 186, 142 N.E.2d 104 (1957); Boston & A.R.R. v. O'Reilly, 158 U.S. 334 (1895); McNaught v. New York Life Ins. Co., 145 Neb. 694, 18 N.W.2d 56 (1945).

The Pennsylvania line of anthority inquired whether the statement given the doctor enabled him to treat and prescribe and whether the statement is "pathologically germane," a logical extension of the main idea and a test similar to that used for statements as to cause (see note 158 *infra*): Ferne v. Chadderton, 375 Pa. 302, 100 A.2d 854 (1953); Eby v. Travelers' Ins. Co., 258 Pa. 525, 102 Atl. 209 (1917); Baltimore Transit Co. v. Truitt, 223 Md. 440, 164 A.2d 882 (1961).

These cases generally recognize that they are proceeding by way of a special excep-

to the nonattending doctor it is presumed that the patient will readily make self-serving statements, especially as the time of trial draws near.[129] To this reasoning, however, there are some limits: (1) there are certain guarantees of genuineness even in the case of the doctor who only examines for trial since he is trained to detect malingering and feigning;[130] (2) the examining doctor often does some treating or at least prescribes a course for the attending doctor to follow;[131] (3) the typical patient does not distinguish between doctors and has an equal motive in every situation—to get well;[132] (4) if the temptation to lie be stressed, there is a temptation to lie to the attending doctor, the motive to falsify originating with the injury, not the suit;[133] (5) it seems unreasonable to start with the presumption that the majority of persons will exaggerate or create claims;[134] (6)

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tion made to hearsay when used for basis only. See Devore v. Schaffer, 245 Iowa 1017, 65 N.W.2d 553 (1954); Yellow Cab Co. v. Hicks, 224 Md. 563, 168 A.2d 501 (1961); Eby v. Travelers' Ins. Co., *supra;* cases cited at note 345 *infra.*

It should be noted that in this discussion it is generally assumed that the doctor under examination is using statements made to him. What if, however, counsel sought to have a consulting doctor rely on statements made to a treating doctor (who could properly rely upon them)? The statements, if presented in a hypothetical fashion, could probably be relied upon by the nonattending doctor, see pp. 522-26 *infra;* so too if the statements were part of a hospital record, see pp. 512-14 *infra.* But even if the statements had come to the doctor's attention by some means other than by a means involving admission into proof, the writer believes the doctor could rely upon them, since the patient statements have exactly the same guarantees no matter who makes use of them. Doubtlessly many cases have involved this arrangement without comment. See, *e.g.,* Dorsey v. Muilenburg, 345 S.W.2d 134 (Mo. 1961).

129. Recent and leading cases include Chicago & N.W. Ry. v. Garwood, *supra* note 126; Parker v. State, 189 Md. 244, 55 A.2d 784 (1947); Nashville, C. & St. L. Ry. v. York, *supra* note 126; Layton v. Cregan & Mallory Co., 269 Mich. 574, 257 N.W. 888 (1934); Reid v. Yellow Cab Co., 131 Ore. 27, 279 Pac. 635 (1929).

130. As to the doctor's training to detect malingering, see (in addition to the general citations at notes 93, 120 *supra*) Campenale v. Metropolitan Life Ins. Co., 290 Mass. 149, 194 N.E. 831 (1935); Edwards v. Druien, 235 Ky. 835, 32 S.W.2d 411 (1930); Stackpole v. Northern Pac. Ry., 121 Fed. 389 (C.C.D. Ore. 1903).

131. See the pertinent cases, *supra* note 126. Indeed it may be necessary for a doctor to do some treating in order to qualify at all. See note 136 *infra.*

132. In State v. Ward, 10 Utah 2d 34, 347 P.2d 865, 868 (1959), it was remarked: "It is hardly to be expected that a patient would go to a doctor and stand mute, defying him to find out what was wrong." As part of a report on the New York impartial expert experiment, Dr. Irving S. Wright, medical consultant to the project, stated on the basis of question asked of doctors who had served as experts that "the plaintiffs were in general believed to have given accurate histories, but in some instances they exaggerated or colored the history somewhat in their favor. This is, of course, a natural tendency." IMPARTIAL MEDICAL TESTIMONY 73 (1956). See also note 146 *infra.*

133. An example of this tendency is found in Texas Employers Ins. Ass'n v. Morgan, 187 S.W.2d 603 (Tex. Civ. App. 1945); Cuneo Press Co. v. Industrial Comm'n, 341 Ill. 569, 173 N.E. 470 (1930).

134. MCCORMICK, EVIDENCE 33 (1954). In some instances there are clearly self-serving motives for exaggeration and the existence of these motives can well serve as a flag to the trial judge. See, *e.g.,* United States v. Balance, 59 F.2d 1040 (D.C. Cir. 1932); Prevenden v. Metropolitan Life Ins. Co., 200 Minn. 523, 274 N.W. 685 (1937); Texas Employers Ins. Ass'n v. Wallace, 70 S.W.2d 832 (Tex. Civ. App. 1934).

the rule favoring the attending doctor favors a man who is often only a general practitioner, and prevents the attorney from fully utilizing the examining doctor, often a specialist, who may be able to give better medical testimony;[135] and (7) the rule may well lead to "white lying" by non-attending doctors.[136]

Instead of inquiring directly as to what type of doctor the statements were made, a few courts have indirectly approached the line-drawing problem by inquiring into the *time* when the statement was made or *motive* for making it.[137] The result in these cases has not been significantly different, however, from a type-of-doctor approach.

Cases in at least ten jurisdictions have permitted a nonattending doctor to rely on patient statements even if *post litem motam*.[138] This result is reached by employment of a special exception for nonattending doctors and not a general exception for all medical hearsay. When the group making general exceptions[139] is added to these cases it may be said that

135. See note 364 *infra*.

136. Ray, *supra* note 119, has an excellent exposition of this point, indicating that, in order to comply with the attending-doctor-only rule, examining doctors are being forced to prescribe or treat in some fashion, to lie as to what they did, or to talk hypothetically, a poor alternative; and that the rule as well forces courts to mischaracterize testimony or to think up and apply narrow exceptions.

137. *Allowing*: Yellow Cab Co. v. Hicks, *supra* note 128 (consulting doctor asked to examine by attorney, but to report to attending doctor, which he did; also corroborated); Jensen v. Elgin, J. & E. Ry., 31 Ill. App. 2d 198, 175 N.E.2d 564 (1961) (although doctor was recommended by plaintiff's attorney, he can use statements since he was also recommended by family doctor; he treated as well as consulted since he gave pills; he was well-qualified; there was corroborative material); Thompson v. Nee, 12 Wis. 2d 326, 107 N.W.2d 150 (1961). *Not allowing*: Nashville, C. & St. L. Ry. v. York, *supra* note 126; Cuneo Press Co. v. Industrial Comm'n, *supra* note 133 (treating doctor could not testify since he was first consulted at a time closer to trial than to injury; testimony could be given only if *ante litem motam*). See also 6 WIGMORE § 1721.

138. *Federal*. Taylor v. Monongahela Ry., 155 F. Supp. 601 (W.D. Pa. 1957); Campbell v. Pittsburgh & W. Va. R.R., 122 F. Supp. 749 (W.D. Pa. 1954); Putney v. United States, 4 F. Supp. 376 (D. Colo. 1933); *cf.* Lycon v. Walker, 279 F.2d 478 (8th Cir. 1960). *Iowa*. State v. Beckwith, 243 Iowa 841, 53 N.W.2d 867 (1952); State v. Blydenburg, 135 Iowa 264, 112 N.W. 634 (1907); *but see* Devore v. Schaffer, *supra* note 128. *Kentucky*. Field Packing Co. v. Denham, 342 S.W.2d 524 (Ky. 1961); Mary Helen Coal Corp. v. Bigelow, 265 S.W.2d 69 (Ky. 1954) (only to extent relied upon; cannot be related fully); Edwards v. Druien, *supra* note 130 (on facts easy for doctor to detect feigning). *Massachusetts*. Barber v. Merriam, 93 Mass. (11 Allen) 322 (1865); see cases cited, *supra* note 125. *Nebraska*. Lyons v. State, 156 Neb. 550, 57 N.W.2d 82 (1953). *New Mexico*. Seal v. Blackburn Tank Truck Serv., 64 N.M. 282, 327 P.2d 797 (1958); Waldroop v. Driver-Miller Plumbing & Heating Corp., 61 N.M. 412, 301 P.2d (1956). *Ohio*. Di Marzo v. Columbus Transit Co., 100 Ohio App. 521, 137 N.E.2d 766 (1957) (some prior cases are *contra*). *Oklahoma*. A & A Checker Cab Operating Co. v. Fritzshall, 264 P.2d 322 (Okla. 1953); Danner v. Chandler, 205 Okla. 185, 286 P.2d 503 (1951). *Oregon*. *Cf.* Reid v. Yellow Cab Co., *supra* note 129 (Rossman, J., concurring). *Tennessee*. *Cf.* Mutual Life Ins. Co. v. McDonald, 25 Tenn. App. 50, 150 S.W.2d 715 (M.S. 1942). *Washington*. Kraettli v. North Coast Transp. Co., 166 Wash. 186, 6 P.2d 609 (1932); Poropat v. Olympic Peninsula Motor Coach Co., 163 Wash. 78, 299 Pac. 979 (1931).

139. See note 125 *supra*.

perhaps one-half of all jurisdictions would allow all types of doctors to rely on some types of patient statements. Some states, of course, allow the non-treating doctor to rely on present but not past history (an example of misguided balancing of equities)[140] or have imposed other restrictions.[141] In a recent, extremely well-reasoned case, *Waldroop v. Driver-Miller Plumbing & Heating Corp.*,[142] Judge Kiker remarked:

> In every diagnosis of a physician, the opinion expressed by him is necessarily founded upon both objective and subjective symptoms. In order to express an intelligent opinion he must know as much as he can ascertain of the physical history of the patient, whether the purpose of his examination is to treat the patient or to express an opinion in court as to his condition and its causes.

Under such a rule, the court in the rare instances where there is a substantial danger of self-serving statements would certainly have it within its discretion to refuse the use of a statement.

Special exceptions, otherwise not permitted, have been made to allow the doctor to use patient statements where, because of the specialty of the doctor, the statements are particularly necessary to his diagnosis and treatment. The best recognized exception is that of the psychiatrist, whose standard therapeutic approach is predicated upon a full understanding of the patient's life—his so-called "longitudinal history."[143] In other cases, necessity has been combined with inability to fake statements as a justification for the doctor's reliance,[144] a typical example being the responses of a patient to an ophthalmologist while his eyes are being tested. Exceptions have been made also for the defendant's doctor who examines the plaintiff pretrial, often under compulsory process, where there is of course little danger of self-serving statements being relied upon by the doctor.[145] In a few cases special allowances have also been given to the

140. See discussion of past and present statements, especially the Missouri view, at note 149 *infra*. See also Ray, *supra* note 119.

141. For example, they can be used to find the area of the body injured but no more, Texas Employers' Ins. Ass'n v. McMullin, 279 S.W.2d 699 (Tex. Civ. App. 1955); limits in Kentucky cases, *supra* note 138.

142. 61 N.M. 412, 301 P.2d 521, 524 (1956).

143. Kaufman v. Kaufman, 164 F.2d 519 (D.C. Cir. 1947); United States v. Roberts, 62 F.2d 594 (10th Cir. 1932); State v. Lucas, 30 N.J. 37, 152 A.2d 50 (1959); *cf.* Peareson v. McNabb, 190 S.W.2d 402 (Tex. Civ. App. 1945); *but see* Kitselman v. Rautzahan, 68 Nev. 342, 232 P.2d 1008 (1951). See generally DAVIDSON, FORENSIC PSYCHIATRY 248 (1952); Guttmacher & Weihofen, *The Psychiatrist on the Witness Stand*, 32 B.U.L. REV. 287, 293 (1952).

144. Fred Howland, Inc. v. Morris, 143 Fla. 189, 196 So. 472 (1940) (internal disorders); Gaydos v. Peterson, 300 Ill. App. 219, 20 N.E.2d 837 (1939) (ophthalmologist); Hinds v. Johnson, 55 Wash. 2d 325, 347 P.2d 828 (1959) (opthalmologist).

145. Kabai v. Majestic Collieries Co., 293 Ky. 783, 170 S.W.2d 357 (1943) (considering statement as admission against interest). *Contra*, Chavaries v. National Life & Acc. Ins. Co., 110 S.W.2d 790 (Mo. App. 1937). Liberality has also been shown for doctors in workmen's compensation hearings, either by statute or judicial gloss. 2 LARSON, WORKMEN'S COMPENSATION § 79 (1952).

court-appointed impartial expert,[146] due in part to his often late entrance into the case.

*(b) Type of Statement.*—In other cases the decisions have turned upon the subject matter of the statement—whether it concerns a present symptom, a past symptom, or a statement relating to the cause of the injury.[147]

As to statements relating to present symptoms, most if not all cases hold them to be a proper basis for testimony.[148] As to statements of matters transpiring before the visit to the doctor,—prior symptoms in the present illness or injury or previous histories—almost all courts except Missouri will allow the doctor to rely on them[149] if, of course, he is of the type which can utilize any class of patient statements at all. Cases have involved both attending[150] and nonattending doctors.[151] The rationale of the few which

146. Sherwood v. Thomas, 124 Cal. App. 450, 12 P.2d 676 (Dist. Ct. App. 1932); People v. Furlong, 187 N.Y. 198, 79 N.E. 978 (1907). *Contra,* Dehaven v. Danville Gaslight Co., 150 Ky. 241, 150 S.W. 322 (1912). Apparently the doctors who participated in the New York impartial witiness plan were accorded no more freedom than partisan witnesses. Wright, *op. cit. supra* note 132, at 76, declared, "If the object of this type of plan is to ensure justice, then all facts and materials which the expert panel physician can obtain should be permitted in his testimony if he feels it will aid the cause of justice and present the entire picture. Every physician knows that history is probably the most important single aspect of diagnosis. To insist that the testimony of the expert be confined to physical findings results in an absurdity since the expert may not examine the patient for several years after the accident at which time no findings may be present."

147. It should be noted that many courts will use "history" as a term to cover all that a patient tells the doctor including any present symptomology.

148. See the cases collected Annots., 51 A.L.R.2d 1051, 1078 (1957), 65 A.L.R. 1217, 1231 (1930), 64 A.L.R. 557 (1929), 130 A.L.R. 977 (1941), 80 A.L.R. 1527, 1529 (1932), 67 A.L.R. 10, 22 (1930). See generally 3 WIGMORE § 688; 6 *id.* §§ 1718, 1745; MCCORMICK, EVIDENCE 561-66 (1954). It is possible that a few courts which for purposes of direct evidence make a distinction between statements that are involuntary, animal-like exclamations and mere simple nondramatic narratives (admitting only the former) would carry this distinction over into basis law. See Northern Pac. R.R. v. Urlin, 158 U.S. 271 (1895). *But see* Meaney v. United States, 112 F.2d 538 (2d Cir. 1940) (refusing to draw such a distinction).

149. *Allowing past*: *E.g.*, Martin v. United States, 284 F.2d 217 (D.C. Cir. 1960); Atlantic Ins. Co. v. Boyette, 342 S.W.2d 379 (Tex. Civ. App. 1961); cases in Annots., *supra* note 148. See 6 WIGMORE § 1722(b). *Not allowing past*: Hartford Acc. & Indem. Co. v. Baugh, 87 F.2d 240 (5th Cir. 1936) ("past" as compared to "present" symptoms determined by "remoteness"); Corbett v. Terminal R.R., 336 Mo. 972, 82 S.W.2d 97 (1935); Berry v. Kansas City Pub. Serv. Co., 343 Mo. 474, 121 S.W.2d 825 (1938); *accord,* Cain v. Steely, 173 Kan. 866, 252 P.2d 909 (1953); People v. Foglesong, 116 Mich. 556, 74 N.W. 730 (1898) (probably not the law today).

150. Cases in Annots., *supra* note 148; see Guidry v. Michigan Mut. Liab. Co., 130 So. 2d 513 (La. App. 1961) (recognizing that reliance by attending doctor depends upon truthfulness of case history given and belief of what patient says).

151. People v. Brown, *supra* note 125; Campbell v. Pittsburgh & W. Va. R.R., *supra* note 138; Taylor v. Monongahela Ry., *supra* note 138; Lathem v. Hartford Acc. & Indem. Co., 60 Ga. App. 523, 3 S.E.2d 916 (1939); Danner v. Chandler, *supra* note 138; Moore v. Summers Drug Co., 206 N.C. 711, 175 S.E. 96 (1934). It is obvious that once a nonattending doctor is allowed to rely on past history the same result occurs as if there were no rules at all and the doctor is allowed to rely on any statements which he chooses; that line of cases was considered at notes 125 *supra.*

deny past history seems to be that they are more self-serving and are not covered by the guarantee to recover.[152] This assumption seems rather inaccurate in that past as well as present history, the layman knows, aids in diagnosis.[153] As was stated in *People v. Brown*:[154]

> It cannot be doubted that a physician's diagnoses as to an injury will usually be based . . . in part upon the history given by the patient. 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 as well as facts learned by immediate personal observation. Therefore, declarations to a position [*sic*] concerning physicial 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 . . . [This is not] an exception to the hearsay rule . . . but to enable the expert to explain and the jury to appraise the basis of his opinion.

In permitting past history statements, a case has occasionally recognized a special hearsay exception, based upon trustworthiness and necessity;[155] the approach in *Brown*,[156] however, has been more commonly, though tacitly, relied upon. In general, it is an unnatural result to deprive the doctor of the case history that he so routinely takes and relies upon.[157]

Another subject matter of patient statements concerns the alleged cause of the injury, often including details directly relating to legal liability. The majority of courts would exclude such statements as basis material, either because of the general rules already discussed or because of a direct policy against bringing legal liability statements into court, even if for basis purposes.[158] Certain cases, however, have allowed reliance by the doctor

152. See cases cited at note 149 *supra* (not allowing).

153. A harder problem is presented when what the patient tells the doctor is what another doctor previously told him about his physical or mental condition, creating a type of second-level hearsay. See Nashville, C. & St. L. Ry. v. York, *supra* note 129 (not allowing); Meaney v. United States, *supra* note 148 (using without comment).

154. 49 Cal. 2d 577, 320 P.2d 5, 10 (1958).

155. Kasiski v. International Paper Co., 58 N.J. Super. 353, 156 A.2d 273 (1959) presents an excellent and intelligent discussion of the problem; see also 6 WIGMORE § 1722 (c). *Cf.* Campbell v. Pittsburgh & W. Va. R.R., *supra* note 138; State Realty Co. v. Ligon, 218 Ala. 541, 119 So. 672 (1919).

156. Note 154 *supra*. See also State v. Beckwith, *supra* note 138.

157. In Atchison, T. & S.F. Ry. v. Preston, 257 F.2d 933 (10th Cir. 1958) a doctor said, in rendering an opinion, that he was bound to rely on case history; and in Wolfinger v. Frey, 223 Md. 184, 162 A.2d 745 (1960), a doctor said he could not form an opinion without having a case history. Dr. Wright in his study, *op. cit. supra* note 132, at 53, reported that "in many cases the history is absolutely essential to the diagnosis or a sound analysis of the findings. In some instances a diagnosis cannot be made without the aid of a history."

158. *E.g.*, Commonwealth v. Dawn, 302 Mass. 255, 19 N.E.2d 315 (1939); Boulanger v. McQuestin, 79 N.H. 175, 106 Atl. 492 (1919); Huffman v. Terminal R.R., 281 S.W.2d 863 (Mo. 1955); Natlalizia v. Atlantic Tubing & Rubber Co., 81 R.I. 515, 105 A.2d 190 (1954) (only when used as diagnosis aid and not for cause of symptoms —a fine line!); Pope v. St. Louis Pub. Serv. Co., 341 S.W.2d 123 (Mo. 1960); Terry Dairy Prods. Co. v. Cash, 224 Ark. 576, 275 S.W.2d 12 (1955) (administrative proceeding). See the many cases collected in Annot., 130 A.L.R. 977 (1941).

upon these types of statements where they have some medical usefulness and are not unduly prejudicial, or where though related to cause they did not go into details of legal liability.[159] In several workmen's compensation cases, the courts have indicated that doctors may use causal statements in administrative proceedings which would have been prohibited in regular trials.[160] Again, this is probably not an area for flatly denying the doctor his use. When the physician states that the statements are medically germane and have been useful to him in reaching his final diagnosis, or that he has relied upon the information in treating, certain guarantees are presented that should in most cases induce a court to permit reliance.[161]

*(c) Other Factors.*—A few other factors have been mentioned in appellate decisions as affecting favorably the use of patient statements.

(1) It has been held in several cases that although the patient statement in the particular case was improperly used the testimony will not be struck because there has been another proper and corroborating basis for the doctor to use,[162] or there was in the case other, sufficient testimony on the same matter.[163]

159. People v. Brown, *supra* note 125 (that doctor-defendant performed abortion upon her); State v. King, 360 P.2d 757 (Wash. 1961) (prosecutrix about her rape); Advance Loan Serv. v. Mandik, 306 S.W.2d 754 (Tex. Civ. App. 1957) (doctor told of methods used by collection agency to harass patient); Unsfram v. Burkhart, 247 S.W.2d 288 (Tex. Civ. App. 1952) (auto accident trauma); Losleben v. California State Life Ins. Co., 119 Cal. App. 556, 6 P.2d 1012 (Dist. Ct. App. 1932); Edwards v. E. B. Murray & Co., 305 S.W.2d 702 (Mo. App. 1957) (only if facts of injury not in dispute); Commonwealth v. Colangelo, 256 Mass. 165, 152 N.E. 241 (1926); State Realty Co. v. Ligon, *supra* note 155. Some cases have admitted statements as to cause under a hearsay exception for spontaneous ejaculations: Almquist v. Shenandoah Nurseries, Inc., 218 Iowa 724, 254 N.W. 35 (1934); *accord,* Baker v. Industrial Comm'n, 44 Ohio App. 539, 186 N.E. 10 (1933). *Contra,* Dugan v. Industrial Comm'n, 135 Ohio St. 652, 22 N.E.2d 132 (1939) (exclamations made too long after time of injury). On occasion, statements as to cause have been used as bases when they have been contained in a hospital record itself admitted into evidence. See McCORMICK, EVIDENCE 290 (1954). See further discussion at pp. 512-14 *infra.*

160. Lathem v. Hartford Acc. & Indem. Co., *supra* note 151; Jones v. Goodyear Tire & Rubber Co., 59 Ohio App. 371, 18 N.E.2d 511 (1938); Hammond v. Industrial Comm'n, 84 Utah 67, 34 P.2d 687 (1934) (only if necessary for treatment). See also 2 LARSON, *op. cit. supra* note 145, § 7925.

161. See 3 WIGMORE § 688 (permissible if doctor utilizes it to form a new opinion, adding corroborative matter; in all, rather cautious).

162. Recent cases include Atchison, T. & S.F. Ry. v. Preston, *supra* note 157; Terry Dairy Prods. Co. v. Cash, 224 Ark. 576, 275 S.W.2d 12 (1955); Bogart v. Board of Medical Examiners, 105 Cal. App. 2d 250, 233 P.2d 100 (Dist. Ct. App. 1951); Webber v. Wofford-Brindley Lumber Co., 113 So. 2d 23 (La. App. 1959); Kresoya v. Dep't of Labor & Indus., 40 Wash. 2d 40, 240 P.2d 257 (1952); Commonwealth v. Harrison, 173 N.E.2d 87 (Mass. 1961); Paparazzo v. Perkel, 16 N.J. Super. 128, 84 A.2d 11 (Super. Ct. 1951); North Am. Acc. Ins. Co. v. Burkett, 281 P.2d 434 (Okla. 1955); Rasmussen v. Metropolitan Cas. Ins. Co., 264 Wis. 432, 59 N.W.2d 457 (1953).

163. *E.g.,* Pagano v. Magic Chef, Inc., 181 F. Supp. 146 (E.D. Pa. 1960); Krzywosz v. Crummett, 286 Mich. 649, 282 N.W. 853 (1938); Rodefeld v. St. Louis Pub. Serv. Co., 275 S.W.2d 256 (Mo. 1955); Gulch Lumber Co. v. Fields, 193 Tenn. 365, 246

(2) If the doctor has been exposed to inadmissible patient statements but testifies that he is basing his conclusions on objective signs and symptoms, his testimony has also been saved,[164] making for rather improbable mental gymnastics.

(3) Casting the patient's statements into the hypothetical form of question has also been said to open the way for its use.[165]

(4) In a few cases otherwise improper reliance has been permitted if there is a full recital of the statements,[166] or conversely, none at all.[167]

These same "mitigating" factors have application to all of the bases in this paper, it may be noted.

The most frequent application of the physician-patient privilege in the basis area has been for patient statements, of course. Where the privilege exists, it has been applied only when the physician-patient relationship (originating with as consultation for treatment or examination leading to contemplated treatment) has been established.[168] Special problems have also arisen when statements were made involuntarily,[169] to a doctor employed by one other than the patient,[170] or in the presence of a nurse or

S.W.2d 47 (1952); Texas Employers Ins. Ass'n v. Hale, 242 S.W.2d 796 (Tex. Civ. App. 1951).

164. Criehton v. United States, 92 F.2d 224 (D.C. Cir. 1937), *cert. denied*, 302 U.S. 702 (1937); Deckert v. Chicago & E. Ill. R.R., 4 Ill. App. 2d 483, 124 N.E.2d 372 (1955); Feldotto v. St. Louis Pub. Serv. Co., 285 S.W.2d 30 (Mo. App. 1955); Texas Employers' Ins. Ass'n v. Johnson, 323 S.W.2d 345 (Tex. Civ. App. 1959); *cf.* Skeels v. People, 358 P.2d (Colo. 1961). In State v. Ward, *supra* note 132, and in Tracers & General Ins. Co. v. Millikin, 110 S.W.2d 108 (Tex. Civ. App. 1937), doctors saved the day by saying on re-direct that they could rest all of their prior opinions, based previously upon patient statements, upon objective symptoms. Or the doctor may state that he did not rely because he reached a conclusion rejecting what the patient said. See Angel v. Rand Express Lines, Inc., 66 N.J. Super. 77, 168 A.2d 423 (Super. Ct. 1961).

165. Lee v. Minneapolis St. Ry., 230 Minn. 315, 41 N.W.2d 433 (1950). But see the discussion at pp. 522-26 *infra* (inefficiency of this alternative). See also the dissent in Devore v. Schaffer, *supra* note 128.

166. Peters v. Mutual Life Ins. Co., 26 F. Supp. 50 (M.D. Pa. 1939), *aff'd*, 107 F.2d 9 (3d Cir. 1939), *cert. denied*, 309 U.S. 663 (1940); and see the more general discussion on recital at pp. 475-78 *supra*.

167. *Cf.* Devore v. Schaffer, *supra* note 128; cases *supra* note 25.

168. See generally MCCORMICK, EVIDENCE 212 (1954). Thus, where the statement is about the cause of the accident or otherwise deemed unrelated to treatment, there will be no privilege. Myers v. State, 192 Ind. 592, 137 N.E. 547 (1922). Statements made to a specialist-consultant, seen at the request of the family doctor, have been held privileged, Leonczak v. Minneapolis, St. P. & S.S.M. Ry., 161 Minn. 304, 201 N.W. 551 (1924); but those made to a consultant procured merely to testify have been held nonprivileged, Fisher v. Small, 166 A.2d 744 (D.C. Munic. Ct. App. 1960); City & County of San Francisco v. Superior Court, 37 Cal. 2d 227, 231 P.2d 26 (1951).

169. Involuntary treatment and examination of an unconscious person has been held privileged, Smart v. Kansas City, 208 Mo. 162, 105 S.W. 709 (1907), whereas that made by an opposing party under court order has been freed of the privilege, Simecek v. State, 243 Wis. 439, 10 N.W.2d 161 (1943).

170. Malone v. Industrial Comm'n, 140 Ohio St. 292, 43 N.E.2d 266 (1942) (plant physician, statement made to him privileged).

technician.[171] Just as the hearsay rule is side-stepped by regarding statements as bases only, so too has it been held possible to similarly avoid the privilege.[172]

In conclusion, notwithstanding the diversity of rules which exists, it is hoped that it has been demonstrated that rules and views which tend to deny to the doctor the use of patient statements are out of step with reality and a divergence from sound medical practice.[173] What the patient, a layman, told his doctor is particularly useful to the jury. Indeed, in the malpractice area the law has required the doctor or his assistants to take a history and rely upon it.[174] If the courts were in fact to exclude the statements which they call improper, there would be virtually no medical evidence heard in court.[175]

### 2. *From Relatives or Other Lay Observers*

Occasionally the doctor feels compelled by the circumstances to gather information from laymen other than the patient—from his relatives or friends, and even from strangers who have pertinently observed the patient. This inquiry is necessitated when relevant information is needed either (a) about the patient's actions and conditions but cannot be obtained directly because he was asleep, unconscious or the like, or (b) about the patient's case history but cannot be obtained because he is incapacitated due to physical injury[176] or impaired mental status,[177] is a child, or is now dead.

As to relatives, many of the cases have allowed a doctor to rely upon what they have told him, especially when elements of necessity and trustworthiness are present.[178] In many cases, however, the courts have

171. Generally there is no waiver, at least for the primary party to whom made. See Culver v. Union Pac. Ry., 112 Neb. 441, 199 N.W. 794 (1924).

172. State v. Lucas, 30 N.J. 37, 152 A.2d 50 (1959).

173. See State Realty Co. v. Ligon, *supra* note 155; 3 WIGMORE § 688; 6 *id.* § 1720; Ray, *Testimony of Physician as to Plaintiff's Injuries*, 26 TUL. L. REV. 60 (1951); METTLER, THE MEDICAL SOURCEBOOK 94 n.66 (1960). But see, expressing caution for reliance upon subjective symptoms to a substantial degree, Cohen, *Doctors and Lawyers in Court*, 16 CONN. S. MED. J. 741 (1952); Elliott & Spellman, *Medical Testimony in Personal Injury Cases*, 2 LAW & CONTEMPT. PROB. 466 (1935).

174. Sanzari v. Rosenfeld, 34 N.J. 128, 167 A.2d 625 (1961); Yorsten v. Pennell, 397 Pa. 28, 153 A.2d 255 (1959).

175. Thus, in Traders & Gen. Ins. Co. v. Burns, 118 S.W.2d 391 (Tex. Civ. App. 1938), a doctor testified that without using patient statements he could have only made a guess as to the nature of patient's injuries; with them he could be fairly conclusive. See also the citations at note 157 *supra*.

176. The case for use is especially strong when the harm that the defendant has done is the very cause of the plaintiff's present inability to communicate.

177. The normal and routine procedure in psychiatry may well involve consultation with relatives even when the patient can communicate; such consultation has for its purpose the evaluating of what the patient has said and the obtaining of further material on family interaction as a step toward diagnosis. See generally the citations on psychiatric techniques at notes 90, 143 *supra*.

178. Yellow Cab Co. v. Henderson, 183 Md. 546, 39 A.2d 546 (1944) (about child); *In re* Mundy, 97 N.H. 239, 85 A.2d 371 (1952) (father—impaired mental status);

said that statements by relatives are not proper, being hearsay and not subject to the jury's own evaluation of trustworthiness.[179]

As to friends and strangers, the courts have been more cautious since the check on the declarant and the need to tell the truth are assumed to decrease; thus many cases have refused reliance on these statements.[180] In other circumstances, however, it has been accepted.[181] A fair example of statements allowed is where strangers in a crowd tell a doctor about what had happened to an injured person prior to the doctor's arrival on the scene of the accident.

It would seem that no rule can be laid down to cover all of these cases, but that each must be judged by (a) the need of the doctor to have this information[182] and (b) the reliability of the source, allowing for the somewhat less accurate observational powers of untrained persons.[183] While Wigmore appears to have been rather cautious about this type of information, it would seem that reliance in many cases is proper.[184]

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National Security Life & Cas. Co. v. Benham, 233 S.W.2d 334 (Tex. Civ. App. 1950) (by parents—dead); *In re* Collins' Estate, 150 Cal. App. 2d 702, 310 P.2d 663 (Dist. Ct. App. 1957) (by family—impaired mental status); *accord*, People v. Powell, 202 P.2d 837 (Cal. Dist. Ct. App. 1949), *aff'd*, 34 Cal. 2d 196, 208 P.2d 974 (1949) (by husband); Riley v. Luedloff, 253 Minn. 447, 92 N.W.2d 806 (1958); Commonwealth v. Harrison, *supra* note 162. A few cases have allowed only the attending doctor to rely. Altieri v. Public Serv. Ry., 101 N.J.L. 241, 128 Atl. 547 (1925) (by parents); Welter v. Bowman Dairy Co., 318 Ill. App. 305, 47 N.E.2d 739 (1943) (mother—formula given infant); Switzer v. Baker, 178 Iowa 1063, 160 N.W. 372 (1916).

179. People v. Capoldi, 10 Ill. 2d 261, 139 N.E.2d 776 (1957) (mother—defendant's sexual drives); State v. Gevrez, 61 Ariz. 296, 148 P.2d 829 (1944); People v. Keough, 276 N.Y. 141, 11 N.E.2d 570 (1937) (mother and sister—lunacy hearing); Woodman of World Life Ins. Soc'y v. Parish, 290 Ky. 141, 160 S.W.2d 629 (1942) (cousin—behavior of insured before he drank and died; harmless error on facts); Security Beneficiary Ass'n v. Small, 34 Ariz. 458, 272 Pac. 647 (1928) (wife—decedent had flu); State v. Hadley, 65 Utah 109, 234 Pac. 940 (1925) (mother—daughter was menstruating); *cf.* Frazier v. Geneva, 203 Ill. App. 566 (1916).

180. People v. Keough, *supra* note 179; Ingles v. People, 90 Colo. 51, 6 P.2d 455 (1931) (friends of mental patient—to staff of hospital); Behles v. Chicago Transit Authority, 346 Ill. App. 220, 104 N.E.2d 635 (1952) (third party, given in hospital record when patient admitted; set on "best evidence" notion); Shuffield v. Taylor, 125 Tex. 601, 83 S.W.2d 955 (1935) (person who brought patient to doctor—that patient had difficulty talking and hearing); Spence v. National Life & Acc. Ins. Co., 59 S.W.2d 212 (Tex. Civ. App. 1933) (third party—patient had cancer).

181. Thompson v. Bankers Mut. Cas. Ins. Co., 128 Minn. 474, 151 N.W. 180 (1915) (as in example); Lemmon v. Denver & R.G.W.R.R., 9 Utah 2d 195, 341 P.2d 215 (1959) (switchman—to doctor); *In re* Mundy, *supra* note 178 (community knowledge); Pete v. Lampi, 150 Minn. 423, 185 N.W. 653 (1921); Fuller v. State, 213 Ind. 144, 10 N.E.2d 594 (1937) (jailer's account). Note the relation of this basis to that of legal information relied upon (pp. 514-16 *infra*).

182. In National Security Life & Cas. Co. v. Benham, *supra* note 178, a doctor testified that he would have diagnosed the death of a baby as respiratory congestion as well as suffocation if he had not heard statements by its parents which led him to conclusively diagnose death by accident alone, due to suffocation.

183. 3 WIGMORE § 688, at 7.

184. See Ray, *supra* note 117, at 65; Arnold, *Medical Evidence in Wisconsin*, 39 MARQ. L. REV. 239, 297 (1956).

*3. From Doctors, Nurses and Technicians*

Another common source of information for the physician about his case is from other doctors and the host of personnel connected with the medical profession—most commonly nurses and laboratory technicians.[185] A doctor today simply does not have the time and, in a growing number of cases, the skill to gather all of the information used in treatment of his patients. His reliance upon others who are also scientifically trained is a medical fact of life. Therefore, it is not uncommon to find a doctor on the stand seeking to rely upon what he has been told about the treatment an emergency case received at a hospital, the observations made and medications given to the patient admitted to a hospital for surgery or other therapy, or a report from a consulting physician.

But the cases have not always deferred to this common practice. The weight of the cases appears to deny the use of information gained from medical personnel.[186] Cases have involved statements by fellow doctors, including attending doctors,[187] consulting doctors,[188] medical examiners,[189] hospital superintendents,[190] and others;[191] statements by nurses;[192] statements by staffs at mental hospitals;[193] and statements embodied in hospital records and in certificates of various sorts.[194] Reasons variously given for

185. See Stack v. Prudential Ins. Co., 173 S.C. 81, 174 S.E. 911 (1934) (doctor so testified, but court was not persuaded). See METTLER, *op. cit. supra* note 173, at 96, 825; Caughey, *Auxiliary Personnel in Medical Practice*, 48 AM. J. PUB. H. 1049 (1958).

186. See generally MCCORMICK, EVIDENCE § 15, at 32-33 (1954); 3 WIGMORE § 688; Ray, *supra* note 117; Annot., 175 A.L.R. 274 (1948).

187. Brouillette v. Weymouth Shoe Co., 157 Me. 143, 170 A.2d 412 (1961); Heald v. Thing, 45 Me. 392 (1858); Beattie v. J. L. Hudson Co., 180 Mich. 111, 146 N.W. 650 (1914); Miller v. St. Paul C.R.R., 62 Minn. 216, 64 N.W. 554 (1895); Roberts v. Pitt Publishing Co., 330 Pa. 44, 198 Atl. 688 (1938).

188. Louisville, N.A. & C. Ry. v. Shires, 108 Ill. 617 (1884); Lefebvre v. Western Coal & Mining Co., 131 Kan. 1, 289 Pac. 456 (1930); Tevis v. Proctor & Gamble Distrib. Co., 21 Tenn. App. 494, 113 S.W.2d 64 (E.S. 1937).

189. Fiander's Case, 293 Mass. 157, 199 N.E. 309 (1936); Katora v. New Jersey Zinc Co., 116 Pa. Super. 257, 176 Atl. 762 (1935).

190. Southern Nat'l Ins. Co. v. Heggie, 206 Ark. 196, 174 S.W.2d 931 (1943).

191. Nashville, C. & St. L. Ry. v. York, 127 F.2d 606 (6th Cir. 1942); Briggs v. Chicago, G.W. Ry., 248 Minn. 418, 80 N.W.2d 625 (1957); State v. Morgan, 3 N.J. Misc. 119, 127 Atl. 337 (Sup. Ct. 1925); Birtwistle v. Public Serv. Ry., 94 N.J.L. 407, 112 Atl. 193 (Ct. Err. & App. 1920); Holt v. Hartschuk, 96 Ohio App. 491, 122 N.E.2d 653 (1953); Reserve Life Ins. Co. v. Everett, 275 S.W.2d 713 (Tex. Civ. App. 1955); Texas Employers Ins. Ass'n v. Wilkerson, 199 S.W.2d 288 (Tex. Civ. App. 1946). The Alabama experience has been fascinating. After taking the stand that this basis of reliance was improper, Hussey v. State, 87 Ala. 121, 6 So. 420 (1889), Alabama adopted a liberal view of use in Grammer v. State, 239 Ala. 663, 196 So. 268 (1940); but *Grammer* was prospectively overruled in Prince v. Lowe, 263 Ala. 410, 82 So. 2d 606 (1955), and finished off in Clark v. Hudson, 265 Ala. 630, 93 So. 2d 138 (1956).

192. Stack v. Prudential Ins. Co., *supra* note 185; Holt v. Hartschuk, *supra* note 191; Heald v. Thing, *supra* note 187.

193. People v. Black, 367 Ill. 209, 10 N.E.2d 801 (1937); Ingles v. People, *supra* note 180; State v. Frotten, 114 Vt. 410, 46 A.2d 921 (1946).

194. See the discussion of hospital and other medical records at pp. 512-14 *infra*.

exclusion have been: (1) the statements are hearsay;[195] (2) in order to make use of the statements the medical witness must decide the issue of competency of the primary declarant, thereby invading the province of the trier;[196] (3) the matter should have been rendered hypothetically;[197] (4) the matter should have been in evidence, or the best evidence rule;[198] (5) personal observation was necessary and reliance alone upon the statements of other medical personnel would not suffice medically;[199] and (6) the rule against opinions upon opinions.[200]

The trend toward medical reality, which Dean Wigmore felt existed in 1940,[201] has been increasing recently many good recent cases have allowed a doctor to rely on the statements of other medically trained persons.[202] There is no better example than *In re Mundy*.[203] In that case a psychiatrist based his opinion upon the report of a board of psychiatrists who had in turn based their opinions upon probation and police reports and correspondence with others. Justice Blandin recognized that the testimony was

195. Stack v. Prudential Ins. Co., *supra* note 185.

196. People v. Black, *supra* note 193; Briggs v. Chicago G.W. Ry., *supra* note 191; Heald v. Thing, *supra* note 187.

197. Briggs v. Chicago G.W. Ry., *supra* note 191.

198. Holt v. Hartschuk, *supra* note 191 (court rather unnecessarily required that the doctor third-party appear to identify his statements, followed by their admission into evidence!); Tevis v. Proctor & Gamble Distrib. Co., *supra* note 188.

199. Stack v. Prudential Ins. Co., *supra* note 185.

200. Ipsen v. Ruess, 239 Iowa 1376, 35 N.W.2d 82 (1948); Tevis v. Proctor & Gamble Distrib. Co., *supra* note 188; Katora v. New Jersey Zinc Co., *supra* note 189; Lefebvre v. Western Coal & Mining Co., *supra* note 188; *accord*, People v. Lewis, 186 Cal. App. 2d 585, 9 Cal. Rep. 263 (1960).

201. 3 WIGMORE § 688, at 8 (citing State Realty Co. v. Ligon, 218 Ala. 541, 119 So. 672 (1929) (nurse's statistics)); Graves v. Katzen, 112 W. Va. 467, 164 S.E. 796 (1932) (hospital records).

202. *In re* Mundy, 97 N.H. 239, 85 A.2d 371 (1952); Alexander v. Covel Mfg. Co., 336 Mich. 140, 57 N.W.2d 324 (1953) (reports and conferences of another doctor; first rate decision); John F. Buckner & Sons v. Allen, 289 S.W.2d 387 (Tex. Civ. App. 1956); Watts v. State, 223 Md. 268, 164 A.2d 334 (1960) (psychologist's report; first rate decision); Nail v. State, 328 S.W.2d 836 (Ark. 1959) (composite of 14 staff doctors at state hospital); People v. Lewis, *supra* note 200; Kelley v. Bailey, 11 Cal. Rep. 448 (1961); Pollard v. United States, 282 F.2d 450 (6th Cir. 1960); Purks v. State, 226 Md. 43, 171 A.2d 726 (1961) (in a defeective delinquent hearing, psychiatrist relied on results of staff conference in mental hospital, including impressions and conclusions of members; basis allowed both on general grounds, following *In re* Mundy, *supra*, and on statutory language requiring that doctor base report made to court upon all available data); Guidry v. Michigan Mut. Liab. Co., 130 So. 2d 513 (La. App. 1961) (doctor); State v. Linders, 224 S.W.2d 386 (Mo. 1949) (hospital records); Zelayeta v. Pacific Greyhound Lines, 104 Cal. App. 2d 716, 232 P.2d 572 (Dist. Ct. App. 1951) (orderly's observations); *In re* Sales' Estate, 108 Mont. 202, 89 P.2d 1043 (1939).

Among other earlier cases see Metropolitan Life Ins. Co. v. Osborne, 286 Ky. 301, 150 S.W.2d 479 (1941) (doctor); Taylor v. Atlantic C.L.R.R., 232 Ala. 378, 168 So. 181 (1936); Grammer v. State, *supra* note 191; Southern Kan. Ry. v. Michaels, 57 Kan. 474, 46 Pac. 938 (1896) (doctor); see also Holt v. Hartschuk, *supra* note 191 (dissent by Younger, J.).

203. Note 202 *supra*.

posited on hearsay but upheld its use on the grounds of need and reliability.[204] A few cases have permitted only the attending doctor to rely on the statements of others.[205] In many other cases reliance by doctors has been permitted on the facts of the case, especially where there was available corroborative evidence, either from the same doctor or other witnesses.[206] Opinions based upon opinions have also been allowed, notwithstanding the supposed rule.[207] Furthermore, there no doubt are many cases in which such material is used without comment or objection;[208] and such must be the practice.

The *Mundy* case and a few others raise an additional problem—the doctor's use of a basis of "we agreed" or "it was the consensus of the opinion that" and the like.[209] The majority of cases would exclude this, either on the general grounds discussed above or on an additional rationale that the expert must give his own new opinion and not merely assert his agree-

204. The decision is set upon much broader grounds than a special result dictated by the sexual psychopath statute which it upholds. Compare the liberality of this case and those involving psychiatrists in notes 202 and 211 with those in note 193. Agreeing that it is hearsay but that an exception should be made is Karageozian v. Bost, 134 Cal. App. 2d 874, 294 P.2d 778 (Dist. Ct. App. 1956).

205. Al McCullough Transfer Co. v. Pizzulo, 52 Ohio App. 470, 5 N.E.2d 796 (1936); Metropolitan Life Ins. Co. v. Osborne, *supra* note 202; Marshall v. Sellers, 188 Md. 508, 53 A.2d 5, 9 (1947) ("where the information as to symptoms has been received from an attending physician or nurse having personal observation and a direct interest in learning and describing accurately, there is ample justification for admitting the testimony based in part thereon"); *cf. In re* Sales' Estate, *supra* note 202.

206. Frampton v. Hartzell, 179 Cal. App. 2d 771, 4 Cal. Rep. 427 (1960); Karageozian v. Bost, *supra* note 204; Commonwealth v. Harrison, *supra* note 162; Sturgeon v. Clark, 69 N.M. 32, 364 P.2d 757 (1961) (what other doctor charged for operation); Hope v. Arrowhead & Puritas Waters, Inc., 174 Cal. App. 2d 222, 344 P.2d 428 (1959); Brouillette v. Weymouth Shoe Co., 157 Me. 143, 170 A.2d 412 (1961); *In re* Estate of Forsythe, 221 Minn. 303, 22 N.W.2d 19 (1946); Slider v. Brown Shoe Co., 308 S.W.2d 306 (Mo. App. 1957); Conradson v. Vinkemeier, 235 Minn. 537, 51 N.W.2d 651 (1952) (nurse's statements); Spalding v. Department of Labor & Indus., 29 Wasb. 2d 115, 186 P.2d 76 (1947); Paparazzo v. Perkel, 16 N.J. Super. 128, 84 A.2d 11 (1951); Caskie v. Coca-Cola Bottling Co., 373 Pa. 614, 96 A.2d 901 (1953); Yellow Cab Co. v. Henderson, *supra* note 178; Southern Kan. Ry. v. Michaels, *supra* note 202.

207. *In re* Mnndy, *supra* note 202; Purks v. State, *supra* note 202; Holstein v. Quality Excelsior Coal Co., 230 Ark. 758, 324 S.W.2d 529 (1959); *accord,* Watts v. State, *supra* note 202. As Tyree, *The Opinion Rule,* 10 RUTGERS L. REV. 601, 611 (1955), points out, it could be said that a prior opinion relied upon is a "fact," in the sense that the expert's holding the opinion is a factual matter.

208. See, *e.g.,* Dunn v. State, 174 A.2d 185 (Md. 1961); Travelers Ins. Co. v. Childs, 272 F.2d 855 (2d Cir. 1959); Jennings v. United States, 178 F. Supp. 516 (D. Md. 1959) (psychologist); United States v. Hopkins, 169 F. Supp. 187 (D. Md. 1958); Burch v. Reading Co., 140 F. Supp. 136 (E.D. Pa. 1956), *aff'd,* 240 F.2d 574 (3d Cir. 1957), *cert. denied,* 353 U.S. 965 (1957); Derrick v. St. Paul C. Ry., 252 Minn. 102, 89 N.W.2d 629 (1958); Keller v. Wonn, 140 W. Va. 860, 87 S.E.2d 453 (1955).

209. *In re* Mundy, *supra* note 202. Falknor, *Indirect Hearsay,* 31 TUL. L. REV. 3 (1956), has characterized this as indirect hearsay, with the implication that it should not be allowed. See MCCORMICK, EVIDENCE 468 (1954).

ment.[210] However, in many cases it is the same as relying upon another's statement but also adding the extra bit of information of agreement.[211]

The writers generally have had little doubt about the basis under consideration here, agreeing that the medical need for the communicated information and the assumed reliability of medical personnel generally justifies the slight danger of erroneous information falling on the ears of the trier.[212] After all, the very notion of an expert assumes a person competent to judge the reliability of the information he receives.[213] In fact, in another area of the law a duty is laid upon the doctor to refer his patient to a specialist when necessary.[214] If that be so, the doctor ought to be able to rely upon what he is told by the consultant.

*4. From the Results of Tests Performed or Interpreted by Others*

Just as the doctor turns for aid to the observations of other doctors and medical personnel, the doctor of today must also of necessity turn to others to conduct, record the results of, and make interpretations of such diverse medical tests and experiments as X-rays, blood tests, EEGs, myelograms, biopsies, and even autopsies. Analytically there are two stages to the testing process: (a) making the test which often results in a plate, graph or the like,[215] and (b) interpreting the test.[216]

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210. Frampton v. Hartzell, *supra* note 206 (but harmless error as corroborated); Prinee v. Lowe, *supra* note 191; Lindsay v. Baltimore & O.R.R., 98 Ohio App. 63, 128 N.E.2d 242 (1954); Ponca v. Crawford, 18 Neb. 551, 26 N.W. 365 (1886).

211. See, in addition to the *Mundy* case, Watts v. State, *supra* note 202; Purks v. State, *supra* note 202; Commonwealth v. Harrison, *supra* note 162; United States v. Hopkins, *supra* note 208; Hazel v. State, 226 Md. 254, 173 A.2d 187 (1961); *accord*, People v. Cravens, 13 Cal. Rep. 510 (1961); Dunn v. State, *supra* note 208; Nail v. State, *supra* note 202. It is no coincidence that most of these cases involve a psychiatrist, since group discussion, properly practiced in every branch of medicine, is heavily relied upon in psychiatry, notably in the public practice in state mental hospitals. Sending one man to court to report for the staff is also a good solution to the frequent criticism of the time doctors have to spend in court. See especially Nail v. State, *supra*. What we really have to fear is the "me-too" opinion, no more likely in psychiatry than elsewhere.

212. 3 WIGMORE § 66; MCCORMICK, EVIDENCE 32-33 (1954); Longan, *Preparation of Medical Testimony*, 17 MONT. L. REV. 121, 135 (1956); Gray, *The Requisites and Importance of Sound Medical Examinations in Medico-Legal Cases*, 18 ROCKY MT. L. REV. 279 (1946); Ray, *Restrictions on Doctors' Testimony in Personal Injury Cases*, 14 SW. L.J. 132 (1960); Tyree, *supra* note 207, at 611 (ban is wholly unscientific and deprives court of much needed expertise).

213. This concept is further discussed at pp. 530-31 *infra*. *Cf.* Santiemo v. Days Transfer Inc., 9 Ill. App. 2d 487, 133 N.E.2d 539 (1956) (recognizing the need for the consulting doctor and the family doctor to confer); Marshall v. Sellers, *supra* note 205.

214. Simone v. Sabo, 37 Cal. App. 2d 253, 231 P.2d 19 (Sup. Ct. 1951); McCoid, *The Care Required of Medical Practitioners*, 12 VAND. L. REV. 549, 597 (1959). And reliance on the consultant's recommendations may even serve as a defense to malpractice. See Maercklein v. Smith, 129 Colo. 72, 266 P.2d 1095 (1954); Marchese v. Monaco, 52 N.J. Super. 474, 145 A.2d 809 (Super. Ct. 1958).

215. Boardman, *Laboratory Tests*, in THE PHYSICIAN AND HIS PRACTICE 139 (Garland ed. 1954); METTLER, THE MEDICAL SOURCEBOOK 824 (1960); Note, *The Desirability of State Licensing of Medical Technologists*, 44 MINN. L. REV. 1125 (1960).

It follows that a doctor in giving his diagnostic opinion in court must rely upon the results of tests which he has not made, but which are, nevertheless, often his surest proof of the existence or nonexistence of the disputed condition of the body. Many cases, most of them of an old vintage, have denied to the doctor reliance upon such tests; such a result has been grounded, as might be guessed, either on hearsay, or on the rule of opinions upon opinions.[217] These encrusted cases have covered X-rays,[218] Wasserman tests,[219] blood tests,[220] chemists' analyses,[221] and autopsies.[222]

There is, however, a strong minority of well-reasoned, scientifically accurate cases allowing a doctor to base his opinion upon the medical work of another doctor or technician.[223] In the leading case of *Sundquist v.*

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216. If the doctor both makes the test and reads the results, his basis is of course one of personal knowledge (this is considered at p. 491 *supra*). If a technician under his control makes it and the doctor interprets it, certainly most courts also consider this a matter of personal knowledge, especially if the doctor testifies as to the reliability of both the test and the technician. See Federal Underwriters Excb. v. Rigsby, 130 S.W.2d 1105 (Tex. Civ. App. 1939) (X-ray); Melford v. Gaus & Brown Constr. Co., 17 Ill. App. 2d 497, 151 N.E.2d 128 (1958) (EEGs); Willis v. Buchanan County Quaries Co., 218 Mo. App. 698, 268 S.W. 102 (1924) (urinalysis); Engler v. Woodman, 54 Wasb. 2d 360, 340 P.2d 563 (1959). *But see* Depfer v. Walker, 123 Fla. 862, *aff'd on rehearing*, 125 Fla. 189, 169 So. 660 (1935) (in which it was apparently held that the doctor must actually make the test, supervision being insufficient); Lake Shore Power Co. v. Meyer, 51 Ohio App. 534, 1 N.E.2d 1021 (1935) (being in the room was apparently insufficient). In faot, the majority of cases would probably not even raise an issue or objection where the doctor testifying does only the evaluation, which is obviously the place where medical skill is most important. See, *e.g.*, Snyder v. Jensen, 281 S.W.2d 802 (Mo. 1955) (EEG); cases cited at notes 223-29 *infra*.

217. See, *e.g.*, Baltimore & O.R.R. v. Zapf, 192 Md. 403, 64 A.2d 139 (1949) (hearsay).

218. Brouillette v. Weymouth Shoe Co., *supra* note 187; Holt v. Hartschuk, *supra* note 191; Baumhocr v. McLaughlin, 205 S.W.2d 274 (Mo. App. 1947); Equitable Life Assur. Soc'y v. Kazee, 257 Ky. 803, 79 S.W.2d 208 (1934); Kooyumjian v. Stevens, 10 Ill. App. 2d 378, 135 N.E.2d 146 (1956); Baltimore & O.R.R. v. Zapf, *supra* note 217; Gastiger v. Horowitz, 220 App. Div. 284, 221 N.Y.S. 481 (1927); Republic Underwriters v. Lewis, 106 S.W.2d 1113 (Tex. Civ. App. 1937); Southwestern Cotton Oil Co. v. State Indus. Comm'n, 167 Okla. 294, 29 P.2d 122 (1934).

219. Sovereign Camp v. McDaniel, 251 Ky. 212, 64 S.W.2d 581 (1933); Equitable Life Assur. Soc'y v. Kazee, *supra* note 218.

220. Depfer v. Walker, *supra* note 216 (result reached even though statute made results admissible as evidence).

221. General Aco. Life & Fire Assur. Corp. v. Richardson, 157 Ky. 503, 163 S.W. 482 (1914); United States Health & Acc. Ins. Co. v. Jolly, 118 S.W. 281 (Ky. 1909) (twin pus cases).

222. Bullock v. N.Y. Life Ins. Co., 182 Minn. 192, 233 N.W. 858 (1930); State v. David, 222 N.C. 242, 22 S.E.2d 633 (1942).

223. Sundquist v. Madison Ry., 197 Wis. 83, 221 N.W. 392 (1928); State Realty Co. v. Ligon, 218 Ala. 541, 119 So. 672 (1929); State v. Alexander, 7 N.J. 585, 83 A.2d 441 (1951) (lab report from technician to medical examiner); Taylor v. Monongahela Ry., 155 F. Supp. 601 (W.D. Pa. 1957) (lab tests); Wilson v. State, 243 Ala. 1, 8 So. 2d 422 (1942) (blood test for syphilis and toxicologist's report); *accord*, Kelley v. Bailey, 11 Cal. Rep. 448 (1961) (X-rays sent by consulting doctor); People v. Lewis, 9 Cal. Rep. 263 (1960); Watts v. State, *supra* note 202; (psychologist's tests); Christiansen v. Hollings, 44 Cal. App. 2d 332, 112 P.2d 723 (Dist. Ct. App.

*Madison Ry.*,[224] a doctor relied in testifying upon a report made by a hospital technician; Justice Stevens declared:

> 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 is essential the court should possess in order that it may do justice between these parties litigant.[225]

In other cases special circumstances have justified the use of reliance upon tests.[226] The familiar distinctions between the attending and the non-attending doctor has also been used as a line.[227] Many of the test results which doctors have been allowed to rely upon, through called "facts," have been more or less clearly opinion, and yet passed without comment.[228] And, as mentioned above, it is clear that reliance on tests is the regular practice today in the courts, many cases allowing the practice without comment or objection.[229]

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1941); White v. Zutell, 263 F.2d 613 (2d Cir. 1959); Holstein v. Quality Excelsior Coal Co., 230 Ark. 758, 324 S.W.2d 529 (1959) (autopsy report); Holt v. Hartschuk *supra* note 191 (dissenting opinion).

224. Note 223 *supra*.

225. 221 N.W. at 393.

226. Caskie v. Coca-Cola Bottling Co., *supra* note 206 (maker testified); Miller v. McCoy Truck Lines, 243 Iowa 483, 52 N.W.2d 62 (1952) (corroborated by personal knowledge); Paparazzo v. Perkel, *supra* note 206 (same); People v. Powell, *supra* note 178 (just one factor); Smith v. Morning News, Inc., 99 Ga. App. 547, 109 S.E.2d 639 (1959) (examined patient immediately after reading test result); Boardman Co. v. Eddy, 363 P.2d 821 (Okla. 1961); Schwinegruber v. St. Louis Pub. Serv. Co., 241 S.W.2d 782 (Mo. App. 1951) (doctor read but did not rely, obviously a saving falsehood; compare with Baumhoer v. McLaughlin, *supra* note 218, equally metaphysical); Hope v. Arrowhead & Puritas Waters, Inc., 174 Cal. App. 2d 222, 344 P.2d 428 (Dist. Ct. App. 1959) (where relied upon on direct can be used during cross); Hearn v. Waterloo, 185 Iowa 995, 169 N.W. 392 (1918) (corroborated). The Minnesota experience is not unusual. After announcing in Miller v. St. Paul Ry., 62 Minn. 216, 64 N.W. 554 (1895), that reliance was improper since the test results were hearsay, the court has consistently allowed reliance upon many types of secondhand information by the employment of various subterfuges including the discovery of independently competent evidence in the record. See Riley v. Lucdloff, 253 Minn. 447, 92 N.W.2d 806 (1958); *In re* Estate of Forsythe, *supra* note 206; Conradson v. Vinkmeier, *supra* note 206; Pete v. Lampi, *supra* note 181; Thompson v. Bankers Mut. Cas. Ins. Co., *supra* note 181.

227. *E.g.*, Cleveland Ry. v. Merk, 124 Ohio St. 596, 180 N.E. 51 (1932) (X-rays).

228. *E.g.*, Holstein v. Quality Excelsior Coal Co., *supra* note 223 (calling autopsy report including conclusions "fact"); *accord*, Watts v. State, *supra* note 202; Holt v. Hartschuk, *supra* note 191 (dissenting opinion). See also note 207 *supra*.

229. *E.g.*, Wolfinger v. Frey, 223 Md. 184, 162 A.2d 745 (1960) (lab tests); *In re* Thompson's Petition, 191 F. Supp. 545 (D.N.J. 1961) (autopsy report); Virgin Islands v. Smith, 278 F.2d 169 (3d Cir. 1960) (EEG); Hershon's Case, 169 N.E.2d 865 (Mass. 1960) (EKG); Williams v. Daniels, 344 S.W.2d 555 (Tenn. App. W.S. 1961) (radiologist's report); Paxton v. Misiuk, 34 N.J. 453, 170 A.2d 16 (1961) (X-rays); Varin v. Lymansville Co., 87 R.I. 463, 143 A.2d 138 (1958) (roentgenologist's

Occasionally there will be encountered the judicial statement that the test results were "not in evidence," with the result that the doctor cannot base his testimony upon them. Such an equivocal statement has been used to cover a multitude of situations. In some cases, for example, it has reference to the situation where the statements are hearsay, could not be relied upon and could never be in evidence.[230] In others, however, what is meant is that the doctor, relying on the results of a certain test, did not produce the *tangible* results of the test—graphs, plates or the like—which, it is implied, form a necessary predicate to his testimony.[231] This rule has been justified as a "best evidence" requirement,[232] and also on the grounds that the need exists for checking what the expert has said, production being required for the use of the court and for the experts of the opponent, as well as for cross-examination of the proponent's expert.[233] However, it may be pointed out that in many situations it is difficult for the doctor to produce the actual results[234] and the rationale of the rule may be outdated in a day of routine pre-trial examination of persons and discovery of documents.[235] Thus it seems that the better policy would be not to require the results as a predicate, except under unusual circumstances and then only when they are readily producible.[236]

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myelogram report); Birmingham Elec. Co. v. Farmer, 251 Ala. 148, 36 So. 2d 343 (1948) (pyelograph); Spivey v. Aetna Cas. & Sur. Co., 127 So. 2d 297 (La. App. 1961); Schmitt v. Pierce, 344 S.W.2d 120 (Mo. 1961) (slides of spinal cord tissue).

230. *E.g.*, see cases at notes 217-22 *infra*, refusing reliance upon test results of others. For a general discussion of this judicial requirement, see Maguire & Hahesy, *Requisite Proof of Basis for Expert Opinion*, 5 VAND. L. REV. 432, 442 (1952) [hereinafter cited as Maguire]. Note especially Missouri Pac. R.R. v. Willingham, 348 S.W.2d 764 (Tex. Civ. App. 1961).

231. Drake v. Walls, 348 S.W.2d 62 (Tex. Civ. App. 1961); Simon v. Hendricks, 330 P.2d 186 (Okla. 1958); Marion v. B. G. Coon Coust. Co., 216 N.Y. 178, 110 N.E. 444 (1915); Federal Underwriters v. Rigsby, 130 S.W.2d 1105 (Tex. Civ. App. 1939); McMillian v. State, 92 Tex. Crim. 474, 244 S.W. 512 (1922); Jolman v. Alberts, 192 Mich. 25, 158 N.W. 170 (1916); Gay v. United States, 118 F.2d 160 (7th Cir. 1941). *Contra*, cases cited at note 236 *infra*. Note that this issue of testifying without the underlying material relied upon can arise not only in this area of tests made by others, but also where the witness himself has made the test and he speaks from personal knowledge. See p. 491 *supra*. It may also arise in the next basis considered, hospital records.

232. Drake v. Walls, *supra* note 231; Mobile City Lines, Inc. v. Proctor, 130 So. 2d 388 (Ala. 1961).

233. Patrick & Tillman v. Matkin, 154 Okla. 232, 7 P.2d 414 (1932).

234. See Holt v. Hartschuk, *supra* note 191 (dissenting opinion). Also, many tests have no final, demonstrative form, *e.g.*, urinalysis, blood pressures, fluoroscopic examinations. It should be noted, however, that on the whole those tests having a concrete form which can be brought into court, *e.g.*, X-rays, EEGs, are the hardest to interpret and raise differences among specialists as to what they show. This adds some weight to the view under discussion.

235. See excellent critique of this requirement in CURRAN, LAW AND MEDICINE 467 (1960). *But see* Maguire 442.

236. This was the rule in Cleveland Ry. v. Merk, *supra* note 227 (but only the attending doctor), as well in a great number of cases in which no issue was raised in the first place. And see the extraordinary case of Missouri Pac. R.R. v. .Willingham,

Wigmore pointed out that the real question in this area is the scientific reliability and accuracy of the testing device selected by the doctor, and not the reliability of the maker, on whom after all the doctor presumably relied by selecting him to make the test.[237] Perhaps it is significant that in one recent case the court, while remanding on other grounds, took the opportunity to advise the doctors to consult various tests made by others before they testified again in order to aid the trier.[238]

*5. From Hospital Records and Other Medical Forms*

When a medical witness seeks to rely upon what he has read in hospital records or other medical forms (such as death certificates), courts have taken various approaches on the question of propriety. In a sizable number of cases the material in the record relied upon has been evaluated without concern for its being in a record.[239] Other courts have tended to inquire into the record itself. If the form is itself in evidence, reliance on any part of its contents has routinely been sanctioned.[240] General admission has not always been the key to use, however, since a few courts have nevertheless attacked the particular use of the particular bit of the record relied upon.[241] On the other hand, information which, had it not been encased in

*supra* note 230, where the treating doctor relied upon X-ray and EEG reports submitted by consultants but did not put his reports in evidence; the defense's medical experts had introduced their own X-ray and EEG reports; *held,* proper for doctor to testify since the tests relied on were in evidence!

237. 2 WIGMORE § 665a; WIGMORE, THE SCIENCE OF JUDICIAL PROOF 450 (1938). Or the perceived hurdle may be one of identification of the results rather than validity. See Snyder v. Jensen, *supra* note 216. Judicial hesitation may also arise from its concern for the use of a test which is new to science as well as law. See the discussion at pp. 487-88 *supra.*

238. Meyer v. Woolf, 4 App. Div. 2d 753, 164 N.Y.S.2d 572 (1957); see also Mageau v. Great Northern Ry., 106 Minn. 375, 119 N.W. 200 (1908) (without autopsy, doctor's basis inadequate). As ably stated in Moran v. Pittsburgh-Des Moines Steel Co., 86 F. Supp. 255 (W.D. Pa. 1949), *approved but rev'd on other grounds,* 183 F.2d 467 (3d Cir. 1950), men in the scientific fields cannot perform personally all the required investigations and research but must work with data and information complied by others. This same view is persuasively argued by METTLER, *op. cit. supra* note 215, at 825. *But see* RICHARDSON, MODERN SCIENTIFIC EVIDENCE 421 (1961).

239. The determination of propriety was made on the underlying material relied upon, which material has been considered above.

240. See, *e.g.,* Dorsey v. Muilenberg, 345 S.W.2d 134 (Mo. 1961); Parrott v. Kisco Boiler & Eng'r Co., 332 S.W.2d 41 (Mo. App. 1960); Smith v. American Mail Lines, Ltd., 363 P.2d 133 (Wash. 1961). On admission of records, see McCormick, *The Use of Hospital Records as Evidence,* 26 TUL. L. REV. 371 (1952); 6 WIGMORE § 1707.

241. Note, for example, the situation in which the patient's statements in the records refer to the cause for his injuries. See MCCORMICK, EVIDENCE 611 (1954); Melton v. St. Louis Pub. Serv. Co., 363 Mo. 474, 251 S.W.2d 663 (1952); or where the matter relied upon is an opinion, as in New York Life Ins. Co. v. Taylor, 147 F.2d 297 (D.C. Cir. 1945) (Justice Arnold drew a line between simple diagnoses and complicated evaluations where doctors could differ); Stremming Veneer Co. v. Jacksonville Blow Pipe Co., 263 Ala. 491, 83 So. 2d 224 (1955); or where the physician-patient privilege is deemed to attach to some particular statements, see Weis v. Weis, 147 Ohio St. 416, 72 N.E.2d 245 (1947).

a record itself admitted, would not have been deemed proper basis material, has been allowed because of the general admission.[242] Of course, many records are unobtainable, or, for various technical reasons, inadmissible.[243]

Where the record has not been admitted into evidence but use of it is merely sought as the *basis* of testimony, some courts, akin in philosophy to those which have refused reliance upon other types of secondhand information, have declared the use of hospital records[244] and other forms[245] improper. They have tended to say either that the record is hearsay[246] or that it simply was "not in evidence."[247] However, a substantial number of courts, most of them by recent decision, allow physicians to rely upon such records,[248] recognizing such reliance as established medical practice.

242. See, *e.g.*, Wolfinger v. Frey, *supra* note 229; McReynolds v. Howland, 218 Ore. 566, 346 P.2d 127 (1959) (diagnosis of herniated disc); Lewis v. Woodland, 101 Ohio App. 442, 140 N.E.2d 322 (1955) (doctor could rely on opinion in record but not if it were told to him directly); *cf.* Watts v. State, *supra* note 202 (though psychiatrist could not perhaps rely on opinions of psychologist, if latter's report was in a record, which had some factual nature of its own, basis was proper); Dunn v. State, 174 A.2d 185 (Md. 1961) (opinions in record as to defendant; persons who made entries were themselves qualified).

243. The point is that any rule conditioning reliance on parts of a record upon its prior admission will tend to bar from consideration much valuable material. See the discussion *infra;* Holt v. Hartshuck, *supra* note 191 (dissenting opinion); see also Gaines v. Acme Indus. Life Ins. Soc'y, 155 So. 276 (La. App. 1934) (after discovering records were wrongly admitted, court struck entire testimony of doctor who had based opinions partly on records).

244. Hayes v. Equitable Life Assur. Soc'y, 150 S.W.2d 1113 (Mo. App. 1941); Foy v. Metropolitan Life Ins. Co., 220 Iowa 628, 263 N.W. 14 (1935); Cousineau v. Indus. Comm'n, 99 N.E.2d 323 (Ohio App. 1949); Estes v. Goodyear Tire & Rubber Co., 99 N.E.2d 619 (Ohio C.P. 1951) (even if presented hypothetically); Stack v. Prudential Ins. Co., 173 S.C. 81, 174 S.E. 911 (1934); Harden v. Fehrenkopf & Reufle, 299 App. Div. 1, 240 N.Y. Supp. 645 (1930); Rajkovich v. Oliver Iron Mining Co., 292 Mich. 162, 290 N.W. 365 (1940); *cf.* Manley v. Manley, 193 Pa. Super. 252, 164 A.2d 113 (1960).

245. People v. Williams, 174 Cal. App. 2d 364, 345 P.2d 47 (Dist. Ct. App. 1959) (coroner's report); Briggs v. Chicago G.W. Ry., 248 Minn. 418, 80 N.W.2d 625 (1957) (prescription); Katora v. New Jersey Zinc Co., 116 Pa. Super. 257, 176 Atl. 762 (1935) (coroner's certificate).

246. State v. Layton, 125 N.J.L. 120, 14 A.2d 771 (Sup. Ct. 1940), *aff'd*, 127 N.J.L. 227, 21 A.2d 732 (Ct. Err. & App. 1941); *accord, In re* Scanlan's Estate, 246 Iowa 52, 67 N.W.2d 5 (1954) (opinion on opinion rule).

247. See the *Hayes, Foy* and *Cousineau* cases, *supra* note 244. Such a reason begs the question, of course.

248. State v. Linders, 224 S.W.2d 386 (Mo. 1949); Gillett v. Gillett, 168 Cal. App. 2d 102, 335 P.2d 736 (Dist. Ct. App. 1959); Sharp v. Redco Corp., 355 P.2d 856 (Okla. 1960); Twombley v. Fuller Brush Co., 221 Md. 476, 158 A.2d 110 (1960) (opinion record); Watts v. State, *supra* note 202 (opinions); People v. Williams, 187 Cal. App. 2d 355, 9 Cal. Rep. 722 (1960); Travelers Ins. Co. v. Childs, 272 F.2d 855 (2d Cir. 1959) (opinions); cases cited at note 242 *supra; cf.* United States v. Matory, 71 F.2d 798 (7th Cir. 1934); Commonwealth v. Harrison, 173 N.E.2d 87 (Mass. 1961) (mental hospital records; allowed since witness was superintendent, defense doctor also relied, records were available to make a check of them, and not clear doctor relied on them anyway).

The attending doctor distinction has also been employed;[249] in many other cases reliance on records has gone unquestioned by opponent or court.[250]

Most courts have agreed that if the doctor is only (as they characterize it) "interpreting" the record and not using it to form an opinion of his own, he may always state what he reads.[251] In summary, it appears that much secondhand medical information—drug sheets, diet notes, pulse and temperature charts and the like—is being relied upon in the course of medical testimony and is being sanctioned either through general admission of the document or through established propriety of the subsidiary information relied upon. Such a salutary practice should be continued by whichever device seems more appropriate to the situation.

*6. From Legal Sources*

After the doctor has been asked to testify but while the case is in pre-trial stages, he frequently gathers additional medical information from what may well be labelled "legal sources."

(*a*) *From Conferences and Correspondence With the Attorney Who Plans To Call Him.*—Many writers advocate a full exchange of information when the attorney and the expert get together before the trial so that each can do his job better.[252] Such an exchange is likely to produce additional information of a medical nature for the doctor, but if subsequently the doctor were to testify that he was relying on some particular facts of which he was first informed by his attorney (and assuming that the material is not otherwise in evidence), one would expect that objections to the propriety of the basis would be made, and so the few decided cases have held.[253] Perhaps all that can be said about these cases is that the doctor has fallen into a trap for the uninitiated, since such information is daily used and merely not acknowledged or noticed in the courtroom.

(*b*) *From Legal Documents.*—Another source of information is the various legal documents involved in litigation, including pleadings and prior testimony in the same case, records and transcripts of prior hearings, and answers to interrogatories and depositions. Without establishing any general principles the courts have tended to permit such material as the

249. Atchison, T. & S.F.Ry., 257 F.2d 933 (10th Cir. 1958).

250. *E.g.*, Overholser v. Russell, 283 F.2d 195 (D.C. Cir. 1960); Keller v. Wonn, *supra* note 208; Derrick v. St. Paul C. Ry., 252 Minn. 102, 89 N.W.2d 629 (1958).

251. Briggs v. Chicago G.W. Ry., *supra* note 245; *In re* Scanlan's Estate, *supra* note 246; Gillett v. Gillett, *supra* note 248. The distinction is quite thin of course and can serve as a subterfuge, as in the first two cases cited, to allow reliance where the usual rule is to refuse it.

252. See *e.g.*, Longan, *supra* note 212; Arnold, *Medical Evidence in Wisconsin*, 39 MARQ. L. REV. 289 (1956); Pierce, *Preparation and Presentation of Medical Testimony*, 48 OKLA. S. MED. J. 269 (1955); Davidson, FORENSIC PSYCHIATRY 255 (1952).

253. Bickel v. Louisville Trust Co., 303 Ky. 356, 197 S.W.2d 444 (1946) (letters and conversation); State v. Gevrez, 61 Ariz. 296, 148 P.2d 829 (1944) (files of district attoruey).

basis for medical testimony,[254] although there are a few cases of exclusion upon the particular facts.[255]

(c) *From Miscellaneous Sources.*—Other sources involved in cases or mentioned by writers include: information from insurance companies and adjusters,[256] confessions of defendants,[257] conversation with witnesses,[258] conversation with jailors,[259] legal documents executed by an actor whose capacity is in question,[260] and even the plays and poems written by a witness.[261]

### *D. Information Received at Trial*

The last major class of information that the doctor has available to knit into his conclusions is that received during trial. While it is not a primary medical source of information the material is, on analysis, quite similar to that which has already been considered, with only the means of the doctor's becoming aware of it differing. Thus, overhearing prior testimony by another doctor is similar to having talked with the doctor earlier; the hypothetical question merely supplies the witness with information that he might have gathered for himself earlier. Since, however, courts have tended to apply special rules to these bases, sometimes in conflict with their handling of the underlying material, this last class of bases takes some individual attention.

#### *1. From Observation and Demonstration in the Courtroom*

Sources of information in medical trials that have been increasingly utilized are those facts which come to the doctor's attention other than

254. *In re* Collins' Estate, 150 Cal. App. 2d 702, 310 P.2d 663 (1957) (transcript); Jennings v. United States, 178 F. Supp. 516 (D. Md. 1959) (transcript contained report of doctor); *In re* Thompson's Petition, 191 F. Supp. 545 (D.N.J. 1961) (autopsy report); Tighe v. Atchison, T. & S.F. Ry., 129 Mo. App. 498, 107 S.W. 1034 (1908) (deposition; proper only if answer hypothetically); *cf.* Galloway v. United States, 319 U.S. 372 (1943) (deposition); Commonwealth v. Harrison, *supra* note 248 (daughter's statements already in evidence). Prior testimony in the case as basis is discussed at pp. 517-22 *infra.*

255. Pecos & N.T. Ry. v. Coffman, 160 S.W. 145 (Tex. Civ. App. 1913) (deposition); Williams v. State, 37 Tex. Crim. 348, 39 S.W. 687 (1897) (what he had read of earlier part of trial in Dallas newspaper); People v. Keough, 276 N.Y. 141, 11 N.E.2d 570 (1937) (lunacy commission results); Prewitt v. State, 106 Miss. 82, 63 So. 330 (1913) (evidence doctor heard from prior trial which jury had not heard).

256. Alkire v. Myers Lumber Co., 57 Wash. 300, 106 Pac. 915 (1910) (doctor talked with officers to discover whether plaintiff insurable; not allowed); see Arnold, *supra* note 252.

257. State v. Gevrez, *supra* note 253 (not allowed); Griffith v. Rhay, 282 F.2d 711 (9th Cir. 1960) (used).

258. Louisville, N.A. & C. Ry. v. Shires, 108 Ill. 617 (1884) (not allowed).

259. Fuller v. State, 213 Ind. 144, 10 N.E.2d 594 (1937) (allowed); see also cases at pp. 503-04 *supra* (reliance on nonrelative statements).

260. Burch v. Reading Co., *supra* note 208; *accord,* Jiminez v. O'Brien, 117 Utah 82, 213 P.2d 337 (1949) (doctors should have consulted this data).

261. United States v. Hiss, 88 F. Supp. 559 (S.D.N.Y. 1950).

verbally while he is in the courtroom. Three classes can be distinguished:

(*a*) *Courtroom Observation of Witnesses or Parties.*—When, as in the now famous *United States v. Hiss* situation,[262] the psychiatrist is asked to observe the behavior and speech of a witness and then to interpret it as it relates to the witness' capacity to testify and tell the truth, the doctor will be basing his opinion in part upon what he sees.[263] While the use of such a method is open to attack as psychiatrically crude in comparison with private examination,[264] it would seem that there is no fundamental objection to its use for basis material, especially when there has been no other opportunity to make needed observations.

(*b*) *Real Evidence.*—At the trial the attorney may show his expert an object—real evidence (*e.g.*, the cord used to strangle a person or part of a body in a bottle)—and ask his opinion on some medical issue, based in part upon the exhibit he is examining. No legal criticisms of the use of the exhibitions for this purpose have been raised,[265] probably because it is already itself evidence.

(*c*) *Demonstrative Evidence.*—The medical demonstrative evidence in a trial may become the basis for an opinion,[266] as, for example, a demonstration with the patient's body;[267] illustrating normal or abnormal conditions with a chart or skeleton;[268] viewing movies as evidence of malingering or the like,[269] or estimating the value of a surgical instrument.[270]

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262. *Ibid.*

263. United States v. Hiss, *supra* note 261 (allowing); State v. Linders, 224 S.W.2d 386 (Mo. 1949) (used); People v. Marsh, 170 Cal. App. 2d 284, 338 P.2d 495 (Dist. Ct. App. 1959) (one psychiatrist set to observe another in order to make a judgment as to the second's ability to hypnotize); *cf.* State v. Riley, 147 Ore. 89, 30 P.2d 1041 (1934). *Contra,* State v. Driver, 88 W. Va. 479, 107 S.E. 189 (1921). See generally WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 278 (1954); Pederson, *The Opinion-Evidence Rule in Oregon as It Relates to Cases Involving Medical Matters and Insanity,* 33 ORE. L. REV. 243, 271 (1954) (recognizing such observations as personal knowledge).

264. See DAVIDSON, *op. cit. supra* note 252, at 267.

265. McPherson v. State, 271 Ala. 533, 125 So. 2d 709 (1960) (bullet); *In re* Thompson's petition, *supra* note 254 (syringe); Lund v. Olson, 182 Minn. 204, 234 N.W. 310 (1931) (brain and bone); State v. Boozer, 80 Ariz. 8, 291 P.2d 786 (1955) (fetus and placenta).

266. See Ladd, *Demonstrative Evidence and Expert Opinion,* 1956 WASH. U.L.Q. 1; *cf.* MCCORMICK, EVIDENCE 384-91 (1954).

267. Happy v. Walz, 244 S.W.2d 380 (Mo. App. 1951); Friedler v. Hekeler, 96 Conn. 29, 112 Atl. 651 (1921); Willoughby v. Zylstra, 5 Cal. App. 2d 297, 42 P.2d 685 (Dist. Ct. App. 1935); Osborne v. City of Detroit, 32 Fed. Cas. 36 (1886), *rev'd on other grounds,* 135 U.S. 492 (1886) (leading case).

268. Slow Development Co. v. Coulter, 88 Ariz. 122, 353 P.2d 890 (1960) (drawing); Berry v. Harmon, 329 S.W.2d 784 (Mo. 1959) (picture of pelvis); First Fed. Sav. & Loan Ass'n v. Wylie, 46 So. 2d 396 (Fla. 1950); Smith v. Ohio Oil Co., 10 Ill. App. 2d 67, 134 N.E.2d 526 (1956) (skeleton); Cavallaro v. Welch, 138 Conn. 331, 84 A.2d 279 (1951) (chart).

269. Cutting v. John A. Cowper Co., 7 App. Div. 2d 348, 183 N.Y.S.2d 171 (1959).

270. Sheppard v. Firth, 215 Ore. 268, 334 P.2d 190 (1959); State v. Furley, 245 N.C. 219, 95 S.E.2d 448 (1956).

### 2. *From Testimony of Prior Witnesses*

It is the practice in some jurisdictions to allow the medical witness to sit in on a trial and hear some or all of the testimony which precedes his. Then when he is called, as a basis for his testimony, he is asked to rely on what he has overheard. Such a practice is similar, of course, to that of the hypothetical presumption[271] except that in the latter case the basis is fully stated whereas here it is generally not stated.[272]

Probably the majority of states permit the use of prior testimony as a basis, at least under some circumstances.[273] It is sometimes said that the hypothetical form is to be preferred but that this practice is permissible.[274] One of the few cases to present a considered defense for this basis, an early Vermont case,[275] stated:

> Where an expert hears or reads the evidence, there is no reason why he may not form as correct a judgment based upon such evidence, assuming it to be true, as if the same evidence was submitted to him in the form of hypothetical questions; and it would seem to be an idle and useless ceremony to require evidence with which he is already familiar to be repeated to him in that form.

Certain conditions have been placed upon the use of this type of basis; taken together, these limitations make it apparent that many courts, though technically permitting the practice, are giving it only grudging acceptance. Thus it has frequently been stated that a doctor may not rely on prior

271. The hypothetical form is compared in the next section. In some cases the term "hypothetical form" is used to cover both practices, blurring the essential differences. See, *e.g.*, Mt. Royal Cab Co. v. Dolan, 168 Md. 633, 179 Atl. 54 (1935); Ingles v. People, 90 Colo. 51, 6 P.2d 455 (1931).

272. It should be noted that if the doctor reads or is read the prior testimony the same rules are applied generally as if he had overheard the statements. Baltimore v. State, 132 Md. 113, 103 Atl. 426 (1918); Kelly v. Watson Coal Co., 272 Pa. 39, 115 Atl. 885 (1922). And the same result if he hears part and reads the rest, as in Reynolds v. John Hancock Life Ins. Co., 117 Vt. 541, 97 A.2d 121 (1953); Smart v. Kansas City, 208 Mo. 162, 105 S.W. 709 (1907). *Contra*, Williams v. State, *supra* note 255 (what was read in newspaper).

273. Annot., 82 A.L.R. 1460 (1933) indicates that 23 states at that time permitted this basis and 12 forbade it. McCormick, *Direct Examination of Medical Experts in Action for Death and Bodily Injuries*, 12 LA. L. REV. 264, 270 (1952) indicates that it is in common use in five states: Maryland, Missouri, Minnesota, Pennsylvania, Wisconsin. Among leading or recent cases are *In re* Collins' Estate, *supra* note 254; Twombley v. Fuller Brush Co., *supra* note 248; cases cited at notes 274-78 *infra*. This practice would seem to be allowed in England. See M'Naghten's Case, 10 C. & F. 200, 8 Eng. Rep. 718 (1843). *But see* Regina v. Francis, 4 Cos. C.C. 57 (1849). Occasionally the rule is expressed as one of discretion, Watson v. State, 273 S.W.2d 879 (Tex. Civ. App. 1954); *In re* Barnes' Will, 41 Del. 206, 18 A.2d 433 (1941); Slade v. Harris, 105 Conn. 436, 135 Atl. 570 (1927); King v. Belmore, 248 Mass. 108, 142 N.E. 911 (1924). See generally MCCORMICK, EVIDENCE 30-32 (1954); 2 WIGMORE §§ 681-82; 2 WHARTON, CRIMINAL EVIDENCE § 521 (12th ed. 1955).

274. Hohenstein v. Dodds, 215 Minn. 348, 10 N.W.2d 236 (1943); Quimby v. Greenhawk, 166 Md. 335, 171 Atl. 59 (1934); Robinson v. Puritan Store, 48 R.I. 131, 136 Atl. 243 (1927); Rafferty v. Nawn, 182 Mass. 503, 65 N.E. 830 (1903).

275. Gilman v. Strafford, 50 Vt. 723, 727 (1887). See also RAY, MEDICAL JURISPRUDENCE OF INSANITY 632 (5th ed. 1871).

testimony where (a) the evidence is conflicting (on one side or between the sides);[276] (b) the evidence is voluminous, complex, or detailed;[277] (c) the evidence is doubtful, speculative or confusing.[278] Rules such as these, when applied in the right case, are valuable;[279] the danger lies in their over application.

It has also frequently been stated that it must be made apparent by the doctor that he has had the opportunity to hear the testimony.[280] It has also been required, or at least suggested, especially in the earlier cases, that the doctor's reasons or indeed the whole basis be stated.[281] If this in fact were required obviously much of the benefit of this procedure would be lost; and it is probably not required today.[282] It is also a requirement and practice in many states that the doctor assume the truth of what he has heard before he gives his opinion[283]—an unobjectionable but quite superfluous requirement.[284]

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276. O'Brien v. Wallace, 137 Colo. 253, 324 P.2d 1028 (1958) (leading case); Commonwealth v. Harrison, *supra* note 248; Quimby v. Greenhawk, *supra* note 274; Hohenstein v. Dodds, *supra* note 274. The rationale apparently is that the jury is being usurped or invaded in its fact-weighing task, Wissinger v. Valley Smokeless Coal Co., 271 Pa. 566, 115 Atl. 880 (1922); Connor v. O'Donnell, 230 Mass. 39, 119 N.E. 446 (1918); see note 297 *infra*.

277. Twombley v. Fuller Brush Co., *supra* note 248; McCarthy v. Boston Duck Co., 165 Mass. 165, 42 N.E. 568 (1896); Cornell v. State, 104 Wis. 527, 80 N.W. 745 (1899).

278. Dexter v. Hall, 82 U.S. (15 Wall.) 9 (1872); Scheller v. Schindel, 153 Md. 547, 138 Atl. 415 (1927); M'Naghten's Case, *supra* note 273.

279. A moderate approach was taken in Cornell v. State, *supra* note 277, at 748: "It is to he noted, however, that the volume and degree of complication of testimony which may render the one form or other of question proper must rest largely in the sound discretion of the trial judge. The intelligence of the expert witness, the consecutiveness and clearness with which testimony goes in, the interruptions, or diversions of attention to other subjects, and all material considerations, may well vary in different cases, and cannot so well be known to this court." Note that these same limits have also been used as rationalizations against the use of prior testimony in total (see p. 520 *infra*).

280. Thompson v. Standard Wholesale Phosphate & Acid Works, 178 Md. 305, 13 A.2d 328 (1940); Kirschbaum v. Lowrey, 174 Minn. 107, 218 N.W. 461 (1928); Prewitt v. State, 106 Miss. 82, 63 So. 330 (1913); Latourette v. Miller, 67 Ore. 141, 135 Pac. 327 (1913). But any lapse can generally be corrected if the doctor reads or is read what he missed, *supra* note 272; and it may not matter if what was missed was minor, as was the case in Williams v. Dawidowicz, 209 Md. 77, 120 A.2d 399 (1956). *But see* Pennsylvania R.R. v. Lord, 159 Md. 518, 151 Atl. 400 (1930) (doctor missed two minutes of testimony and whole opinion struck).

281. See, *e.g.*, Lemley v. Doak Gas Engine Co., 40 Cal. App. 146, 180 Pac. 671 (Dist. Ct. App. 1919); Williams v. State, *supra* note 255.

282. Where the prior testimony as a whole, however, is conflicting, voluminous, or the like, a right result would require the doctor to state specifically which prior statements of witnesses he is relying upon. See Commonwealth v. Russ, 232 Mass. 58, 122 N.E. 176 (1919).

283. *E.g.*, O'Brien v. Wallace, *supra* note 276; Owings v. Dayhoff, 159 Md. 403, 151 Atl. 240 (1930); Burdick v. Mann, 60 N.D. 710, 236 N.W. 340 (1931).

284. MCCORMICK, EVIDENCE 30-31 (1954), advances the position that it makes a significant difference whether the doctor is asked to assume the truth of what he has

A negative determination by a court may be based not only upon these general policies but also upon examination of the part of the prior testimony in fact relied upon.[285] Of course, as a general rule, where the matter has been in fact successfully relied upon by the first witness, the second doctor should be able to rely on it as the first did, even though it is by now third-hand. Where, however, the prior expert testimony is characterized as "opinion" or "conclusion," it has been held that a doctor may not rely upon it;[286] this rule has led to much litigation and to the exclusion of much valuable information. And the handful of cases which allow a doctor to rely only upon lay testimony and not upon prior expert testimony[287] is probably based upon this same supposed rule against opinions. The leading case, *State v. David*,[288] furnishes the best illustration one could hope for of the unfairness and impracticality of the rule. A toxicologist based his opinion of the cause of death upon an opinion uttered by a pathologist who performed an autopsy. On appeal this was found objectionable and his opinion struck.[289] Such a decision would come somewhat as a surprise to the medical profession. Fortunately there are a few cases refusing to bar

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heard, since in the instance when what he has heard is *opinion* testimony (which is discussed in next paragraph) and he does not merely "take into account" the opinion but "assumes the truth" of it, he will be rendering "an academic echo." The writer believes that doctors, when they testify upon any type of basis whatever, routinely assume that it is true; otherwise why rely upon it? This was stated in Patry v. Chicago St. P.M. & O. Ry., 82 Wis. 408, 52 N.W. 312 (1892), and by Holmes in the language of *Finnegan* set out at pp. 482-84 *supra*. See also Flannagan v. State, 106 Ga. 109, 32 S.E. 80 (1898); Commonwealth v. Russ, *supra* note 282. If Professor McCormick would have no criticism where the doctor privately relies upon what a colleague or technician has told him (whether acknowledged to the trier or not), how could the prior testimony source of information be anything but better? The jury is as free to accept or reject the ultimate opinion rendered here as elsewhere, and is, if anything, more misled by the first situation than by the present one.

285. The discussion of hospital records as a basis (at pp. 512-14 *supra*) raised parallel problems of taking apart the basis to examine what might be called sub-bases, as does the hypothetical issue, which is considered next.

286. *In re* Barber's Estate, 63 Conn. 393, 27 Atl. 973 (1893); State v. David, 222 N.C. 242, 22 S.E.2d 633 (1942); Zelenka v. Industrial Comm'n, 165 Ohio St. 587, 138 N.E.2d 667 (1956); O'Brien v. Wallace, *supra* note 276; Mt. Royal Cab Co. v. Dolan, *supra* note 271; Vallee v. Spaulding Fibre Co., 89 N.H. 285, 197 Atl. 697 (1938); Jewett v. Boston Elevated Ry., 219 Mass. 528, 107 N.E. 433 (1914).

287. State v. King, 158 S.C. 251, 155 S.E. 409 (1930); Pecos & N.T. Ry. v. Coffman, 160 S.W. 145 (Tex. Civ. App. 1913); *cf.* Globe Indem. Co. v. Reinhart, 152 Md. 439, 137 Atl. 43 (1927); People v. Bowen, 165 Mich. 231, 130 N.W. 706 (1911); Manufacturers' Acc. Indem. Co. v. Dorgan, 58 Fed. 945 (6th Cir. 1893).

288. Note 286 *supra*.

289. To compound its reactionary approach, the North Carolina court further reasoned in the alternative that the statement by the pathologist (no apparent conditions other than carbon monoxide poisoning to which death might be attributed) could be considered as "fact" and still the toxicologist could not use it as basis for his opinion since either (a) the fact was "not in evidence," or (b) the fact was not hypothetically presented to the toxicologist by counsel! As to point(a), see p. 511 *supra*.

reliance on prior conclusions,[290] if only by calling "opinion" "fact."[291] McCormick's fear that this practice allows an "academic echo" does not seem to be a realistic concern.[292]

A minority of the jurisdictions wholly prohibit the use of prior testimony as a basis for new expert testimony.[293] The numerous objections to such a practice, which have tended to constitute its rationale, run as follows: (a) it is unlikely that the doctor can recollect all that he has heard;[294] (b) the jury does not know what the expert is relying upon;[295] (c) there is a possibility that the doctor is relying on other bases which are not in evidence;[296] (d) in almost every case the doctor is in the position of the jury and therefore usurping its role, since he is passing on issues of credibility and disputed fact which his expertness does not qualify him to handle;[297] and (e) there is an easy alternative in the hypothetical question.[298]

To these arguments, however, these answers can be offered: (a) this is a fact question; the doctor may well have understood the essentials of the prior testimony;[299] after all, the jury is being asked to perform the same

290. Miller v. American Car & Foundry Co., 145 S.W.2d 472 (Mo. App. 1940); Prudential Ins. Co. v. Brookman, 167 Md. 616, 175 Atl. 838 (1934); Callahan v. Feldman, 90 Colo. 540, 11 P.2d 217 (1932); *accord,* Commonwealth v. Russ, *supra* note 282; Nardinger v. Ladies of Maccabees, 138 Minn. 16, 163 N.W. 785 (1917) (doctor heard opinions but was vainly asked to exclude them in giving his opinion); Arkansas Baking Co. v. Wyman, 185 Ark. 310, 47 S.W.2d 45 (1932) (since first doctor was family doctor, not really a case of basing on prior *expert* testimony).

291. Schwinegruber v. St. Louis Pub. Serv. Co., 241 S.W.2d 782 (Mo. App. 1951); Louisville Ry. v. Oppenheimer, 31 Ky. L. Rep. 1141, 104 S.W. 720 (1907); Howland v. Oakland Consol. St. Ry., 110 Cal. 513, 42 Pac. 983 (1895).

292. See note 284 *supra* and accompanying text.

293. See cases collected in Annot., 82 A.L.R. 1460, 1472 (1933); see citations at note 273 *supra*; cases cited at notes 294-98 *infra.*

294. Ingwersen v. Carr & Brannon, 180 Iowa 988, 164 N.W. 217 (1917); Hagadorn v. Connecticut Mut. Life Ins. Co., 22 Hun 249 (N.Y. 1880).

295. Shoemaker v. Elmer, 70 N.J.L. 710, 58 Atl. 940, 941 (Ct. Err. & App. 1904) ("The question permitted the witness to choose which part of the defendant's evidence he would adopt and which reject in reaching his conclusion. . . . A question should not be so framed as to permit the witness to roam through the evidence for himself, and gather the facts as he may consider them to be proved, and then state his conclusion concerning them"); Tighe v. Atchison, T. & S.F. Ry., 129 Mo. App. 498, 107 S.W. 1034 (1908); Bennett v. State, 57 Wis. 69, 14 N.W. 912 (1883).

296. Young v. Travelers' Ins. Co., 68 F.2d 83 (10th Cir. 1933).

297. People v. Le Doux, 155 Cal. 535, 102 Pac. 517, 525 (1909) ("The vice still remains, if it be said that the evidence is unconflicting, since it is for the jurors alone to say what weight shall be given to this, or that, or the other evidence tending to establish a given fact"); Commonwealth v. Rogers, 48 Mass. (7 Met.) 500 (1844); Ferrer's Case, 19 How. St. Tr. 885 (1760).

298. State v. David, *supra* note 286.

299. Note that many of the cases allowing overheard testimony as a basis impose the condition that it not be too complex, a better solution than absolute denial. See note 277 *supra.* See also Foster v. Dickerson, 64 Vt. 233, 24 Atl. 253 (1892) (witness can be presumed to remember the testimony); State v. Spangler, 92 Wash. 636, 159 Pac. 810 (1916).

task; (b) the jury should know since it has heard the prior testimony; further, in most instances the doctor does not detail his basis, whatever it is, so that the jury is no more uninformed than usual;[300] (c) this is equally possible under any basis, and also this is the exact reason for cross-examination; and is in every case a question of reliance upon the expert himself;[301] (d) the expert simply does not pass on credibility, since the jury ultimately must reject or accept his testimony;[302] further, this ultimate issue rule is undergoing much needed amputation;[303] and (e) the hypothetical approach, both because of its cumbersome, dangerous nature, and because much the same material has been refused incorporation in the presumption, is a wholly unsatisfactory alternative.[304]

The discussion so far has been under the assumption that the doctor heard the whole of the preceding evidence. In many instances, however, he specifically is called to listen to only one or several prior witnesses and builds his testimony upon that circumscribed amount of testimony,[305] be it the plaintiff-patient preceding his doctor to the stand or the family doctor preceding the specialist. Most of the courts which allow reliance on prior testimony at all will allow use of portions of all that has preceded, and indeed may favor it, both when the prior witness has been the plaintiff-patient[306] and a doctor.[307] And a few courts which generally do not allow the practice have made an exception for this special situation.[308] Such back-to-back testimony of patient-doctor or doctor-expert is well-established trial

300. 2 WIGMORE § 681. Of course, the doctor can state his basis and undo the objection. See notes 281-82 *supra*.

301. This point is discussed at length at pp. 530-31 *infra*. See Commonwealth v. Harrison, *supra* note 248 (doctor stated that he did not rely on any undisclosed facts).

302. Getchell v. Hill, 21 Minn. 464 (1875).

303. See Kinney, *A Re-Examination of the Ultimate Issue Rule*, 22 U. CINC. L. REV. 161 (1953); Norvell, *Invasion of the Province of the Jury*, 31 TEXAS L. REV. 731 (1953); MCCORMICK, EVIDENCE 24-28 (1954).

304. See the discussion in next section. See also *In re* Collins' Estate, *supra* note 254; RAY, *op. cit. supra* note 275, at 635.

305. Dean Wigmore had characteristically broken down this area into five types of queries which could be asked of the expert (an analysis which did not prove useful for present purposes, however): (1) upon all that you have heard; (2) upon what you have heard; (3) upon the testimony for the plaintiff (or the defendant); (4) upon the testimony of several specified speakers; (5) upon the testimony of one prior testificant. 2 WIGMORE § 682.

306. Wojcicchowski v. Coryell, 217 S.W. 638 (Mo. App. 1920); Watkins v. Brunswick Restaurant, 123 Neb. 212, 242 N.W. 439 (1932); McKeon v. Chicago, M. & St. P. Ry., 94 Wis. 477, 69 N.W. 175 (1896).

307. Howland v. Oakland Consol. St. Ry., *supra* note 291; State v. Watson, 81 Iowa 380, 46 N.W. 868 (1890); Damm v. State, 128 Md. 655, 97 Atl. 645 (1916); *accord*, Nardinger v. Ladies of Maccabees, *supra* note 290 (if no part is opinion); McMinis v. Philadelphia Rapid Transit, 288 Pa. 377, 135 Atl. 722 (1927) (where doctor missed part and had part to go on). *Contra*, Leache v. State, 22 Tex. App. 279, 3 S.W. 539 (1886).

308. Yardley v. Cuthbertson, 108 Pa. 395, 1 Atl. 765 (1885); *accord*, State v. Spangler, 92 Wash. 636, 159 Pac. 810 (1916). *Contra*, Cunniff v. Cunniff, 255 Ill. 407, 99 N.E. 654 (1912).

practice today and ought to be encouraged through allowance of this device.

While it is of course true that not all doctors will have the time or temper to sit in court for several hours or days, it would seem that when the doctor and the attorney want to use this basis means, and when the testimony is neither unduly conflicting or confusing, no judicial limits on this type of basis should be flatly placed. Remarked the first and perhaps the most eloquent protagonist of this practice, Dr. Isaac Ray: "It is immaterial . . . whether [the basis] is to be received directly from the witness, or, at secondhand, by a tedious process of circumlocution."[309]

### 3. *From Hypothetical Assumptions*

One of the best-known and most frequently used of the bases of medical testimony, as well as one often a cause of appellate litigation, is the hypothetical assumption, put in the form of a hypothetical question.[310] The basis forms the premise, offered by the attorney, and the opinion is the response of the expert. The premise material, it will be seen, is only a compilation of the type of material in the bases already discussed, except that in this case the doctor has presumably not come into the material in his own right by means of his observational or analytical skill. The use of the hypothetical question is, of course, accepted in every jurisdiction as a basis,[311] assuming that the doctor has qualified himself as that type of skilled expert who can handle such information.[312] When the doctor must or may speak hypothetically has already been considered.[313]

Most of the rules on the use of hypothetical questions, including those relating to the assumption of unproven evidence or the omission of proven evidence, are well known and need not be repeated in a discussion of medical testimony problems.[314] However, a few of the rules have peculiar and often detrimental import for expert medical testimony.

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309. RAY, *op. cit. supra* note 275, at 635. More on the amazing Dr. Ray (1807-1881) may be found in Overholser, *Isaac Ray, Pioneer in Criminology*, 45 J. CRIM. L., C. & P.S. 249 (1954); Stearns, *Isaac Ray, Psychiatrist and Pioneer in Forensic Psychiatry*, 101 AM. J. PSY. 573 (1945).

Note that UNIFORM RULE OF EVIDENCE 56(2)(a) allows expert testimony to be based upon data "made known to the witness at the hearing," implying the use of this basis. See Tyree, *The Opinion Rule*, 10 RUTGERS L. REV. 601, 610 (1955).

310. See generally Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 425 (1952); MCCORMICK, EVIDENCE 29-34 (1954); 2 WIGMORE §§ 672-86; DAVIDSON, FORENSIC PSYCHIATRY 272 (1952).

311. See citations at note 310 *supra*. Many cases are collected in Annot., 66 A.L.R.2d 1082, 1104 (1959).

312. Marsball v. Sellers, 188 Md. 508, 53 A.2d 5 (1947); Donaldson v. Maffucci, 397 Pa. 548, 156 A.2d 835 (1959); Lewis v. American Security & Trust Co., 289 Fed. 916 (D.C. Cir. 1923). See the discussion of types of doctors at note 126 *supra;* see also note 323 *infra*.

313. See pp. 490-91 *supra*.

314. See citations at note 310 *supra*.

Perhaps the knottiest problem has been that of medical information contained in the premise which is for one reason or another challenged as "improper" or "incompetent" for the basis of the opinion. If the standard rule is that all facts in the hypothetical must be proven (at some stage),[315] then no medical material could be in the premise which is not in evidence or fairly inferable from it. Such a rule potentially works a right result where the attorney feeds to the doctor facts that the doctor himself does not know, which are misleading or in doubt and which are not medical. The same rule requiring "competent evidence," however, is out of step with the cases already considered in that it requires a higher standard of proof for basis material here than when the same matter is directly used as a basis, *e.g.*, the use of patient's statements in a hypothetical against an attending doctor's own use. This has in fact been the result in many cases,[316] even though in some of these the doctor personally knew the facts and probably could have used them as a basis on his own.[317] It is arguable that, if anything, a less strict evidentiary standard is needed here where the basis is explicitly hypothetical; some defense might be made, on the other hand, on the peculiar nature of the hypothetical question where generally only those who are specialists and without personal knowledge may testify.[318]

Conversely, of course, where the doctor is not allowed to use the basis on his own he may be with some logic excluded from having it presented to him hypothetically.[319] And of course if the material is readily admissible and the attorney has merely failed to prove it, a right result is also reached in exclusion.[320] Note too that if the evidence is proven or otherwise put into evidence by the end of the case the opinion is often saved.[321] In any case,

315. See citations *supra* note 310.

316. Mangione v. Snead, 173 Md. 33, 195 Atl. 329 (1937) (mother statements, hospital records); Estes v. Goodyear Tire & Rubber Co., 99 N.E.2d 619 (Ohio C.P. 1951) (doctor's report in hospital records); Oesterle v. Kroger Grocery & Baking Co., 346 Mo. 321, 141 S.W.2d 780 (1940) (patient statements); Wise v. State Industrial Acc. Comm'n, 148 Ore. 461, 35 P.2d 242 (1934) (doctor); Texas Employers' Ins. Ass'n v. Morgan, 187 S.W.2d 603 (Tex. Civ. App. 1945) (patient statements); Standard Acc. Ins. Co. v. Terrell, 180 F.2d 1 (5th Cir. 1950) (patient statements); McCORMICK, EVIDENCE 30 (1954) (apparently favored).

317. As was apparently the case in Standard Acc. Ins. Co. v. Terrell, *supra* note 316. Of course, what is "use" in a hypothetical question? Some courts might allow a paraphrase where they would not allow actual verbatim repetition, treating the latter only as the real danger, sneaking in the basis as evidence per se. See note 322 *infra.*

318. Related issues have arisen when the hypothetical device is used on cross-examination primarily to impeach the medical witness. Courts have split here as to whether the premise, for these special purposes, can contain or assume facts not in evidence or inferable from it, some jurisdictions allowing more speculative freedom than they would on direct. See Annot., 71 A.L.R.2d 6 (1960).

319. As was stated in Johnson v. Toscano, 144 Conn. 582, 136 A.2d 341 (1957). Yet even here it is arguable that the use of the material in the hypothetical might be proper (though it might not have otherwise been proper) because of the very hypothetical means of rendition. See cases cited at note 322 *infra.*

320. As was also the case in State v. Shiren, 9 N.J. 445, 88 A.2d 601 (1952).

321. See State v. Acri, 83 N.E.2d 415 (Ohio App. 1948); Mechanics Universal Joint

instances of sensible action exist in which a doctor has been allowed to rely on medical material not proven, on the proper analogy of other bases.[322]

Distinguish the situation in which what the doctor relies upon is not in the hypothetical but has merely been added by him *sub silento*. When such an addition is later detected on cross-examination, the courts here have almost unanimously condemned it,[323] sometimes declaring that the basis should be recited, probably as a reason.[324] However, even here, if the basis is a proper one and there is no rule of recital in the jurisdiction (as there should not be), the result in allowing reliance is no different than if the doctor merely renders an opinion without hypothetical presentation and so ought to be allowed.[325]

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Div., Borg-Warner Corp. v. Industrial Comm'n, 21 Ill. App. 2d 535, 173 N.E.2d 479 (1961); Birmingham Elec. Co. v. Farmer, 251 Ala. 148, 36 So. 2d 343 (1948); Texas State Highway Dep't, v. Fillmon, 242 S.W.2d 172 (Tex. 1951); Coca-Cola Bottling Co. v. Krueger, 239 S.W.2d 669 (Tex. Civ. App. 1951); National Life & Acc. Ins. Co. v. Leverett, 215 S.W.2d 939 (Tex. Civ. App. 1948).

322. Wolfinger v. Frey, 223 Md. 184, 162 A.2d 745 (1960) (patient history); Park v. State, 82 Ga. App. 556, 61 S.E.2d 689 (1950); Jack Cooper Transp. Co. v. Griffin, 356 P.2d 748 (Okla. 1959) (expert may establish facts assumed in question by scientific knowledge or personal observation); Piotrowski v. Corey Hosp., 172 Ohio St. 61, 173 N.E.2d 355 (1961) (hospital record not in evidence and statement about plaintiff by husband); Davis v. Seller, 329 Mass. 385, 108 N.E.2d 656 (1952) (data from personal examination of incompetent persons); United States v. Marymount, ACM 16273, AFCJA 23/4 (1960) (Dr. Camps asked question based on "experience" not enumerated); *accord*, Hemker v. Drobney, 112 N.W.2d 672 (Iowa 1962).

To this whole argument, cast in black and white, there is a gray compromise. Might not some of the courts referring to "proven evidence or inferences" include in the latter a rather broad class of material which is not wholly *out-of-step* or *out-of-the-scope* of the party's case? That is, though no evidence has been rendered which, for example, specifically says *P* was struck in the stomach, the striking can be put into the premise as long as it does not overtly clash with the possibilities in the case. The doctor might be drawing this inference from his generalized experience or from other information he has about the case. See Sneed v. Goldsmith, 343 S.W.2d 345 (Mo. App. 1961); McCarty v. Kendall Co., 238 S.C. 493, 120 S.E.2d 860 (1961); Stanley Co. v. Hercules Powder Co., 29 N.J. Super. 545, 103 A.2d 33 (1954) (rational inferences or facts jury would have a right to find).

323. Hulsizer v. Johnson-Brennan Constr. Co., 339 S.W.2d 116 (Ark. 1960); Lipscomb v. Groves, 187 F.2d 40 (3d Cir. 1950); Henderson v. Union Pac. R.R., 189 Ore. 145, 219 P.2d 170 (1950); Watson v. State, 273 S.W.2d 879 (Tex. Civ. App. 1954); Fidelity Union Cas. Co. v. Dapperman, 47 S.W.2d 408 (Tex. Civ. App. 1932). A proper case was Black v. Mahoney Troast Constr. Co., 65 N.J. Super. 397, 168 A.2d 62 (Super. Ct. 1961), where cross-examination brought out that the doctor based his opinion on an erroneous conception of the legal operation of the compensation laws.

324. Henderson v. Union Pac. R.R., *supra* note 323.

325. Dorsey v. Muilenburg, 345 S.W.2d 134 (Mo. 1961) (material in hospital record—existence of cuts); Lee v. Minneapolis St. Ry., 230 Minn. 315, 41 N.W.2d 433 (1950) (patient history); Kiewert v. Balaban & Katz Corp., 251 Ill. App. 342 (1929) (patient statement); Sneed v. Goldsmith, *supra* note 322 (as long as unstated); Hulsizer v. Johnson-Brennan Constr. Co., *supra* note 323 (dissenting opinion). See cases at note 325 *supra*, indicating that hypothetical and personal knowledge can be mixed and that the personal part probably need not be restated. In the leading case of De Donato v. Wells, 328 Mo. 448, 41 S.W.2d 184 (1931), the court, in replying to a request that a doctor be asked to eliminate all from his mind but that which was in the

The judicial rule requiring "competent" evidence has had another application in the case of the opinion on an opinion prohibition. Many of the cases seem to agree that no opinion can be placed in the hypothetical predicate, even if the opinion has been previously expressed in evidence.[326] An attempt at rationalizing such a rule was made in *Quimby v. Greenhawk*:[327] "To do so would destroy the premises of fact upon which an expert . . . is permitted to give in evidence his own inference and opinion." In a bevy of cases, however, opinions have been allowed to form part of the premise of a hypothetical question,[328] mainly by such devious routes as (a) characterizing the opinion as fact, even though it clearly is not;[329] (b) accepting it if the opinion rendered was by a family or treating doctor, who presumably is not an expert;[330] or (c) logically, determining that the answer was in the negative.[331]

As to the physician-patient privilege, it has been held inapplicable here when the doctor speaks hypothetically, even though he may be the family doctor and have some privately learned information.[332]

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premise said: "Certainly the witness should be left free in the exercise of all his faculties in so doing [relating injury to accident], and should not be told to exclude matters which may be important." 41 S.W.2d at 187. And note also that the doctor can add to the premise his experience and training, matters here considered as bases; see Commonwealth v. Harrison, *supra* note 248; discussion at note 322 *supra*.

326. This is so even if the doctor could have relied upon the opinion were he not talking hypothetically and the more so where the opinion is given him for the first time upon the stand. Wise v. State Industrial Acc. Comm'n, *supra* note 316; Quimby v. Greenhawk, *supra* note 274; Fiander's Case, 293 Mass. 157, 199 N.E. 309 (1936); Laughlin v. Christensen, 1 F.2d 215 (8th Cir. 1924); Briggs v. Chicago G.W. Ry., 248 Minn. 418, 80 N.W.2d 625 (1957) (no prejudicial error on facts, however); Hays v. Hogan, 273 Mo. 1, 200 S.W. 286 (1917); Coughlin v. Cuddy, 128 Md. 76, 96 Atl. 869 (1916); Parrish v. State, 139 Ala. 16, 36 So. 1012 (1904).

327. Note 326 *supra*. Equally well-reasoned was the statement in Estes v. Goodyear Tire & Rubber Co., *supra* note 316, at 622: "When the hypothetical question which should contain the claimed proven facts gets into the realm of what some other expert's opinion is, you are on dangerous ground, especially where the first expert is not called to testify, but writes his opinion in a hospital record, and you don't know on what it is based."

328. Besides the cases in the following three notes, see Globe Indem. Co. v. Reinhart, *supra* note 287 (could use opinion only hypothetically and as a matter of general science but not as ordinary basis). The leading case, though involving a nonmedical expert, is Stanley Co. v. Hercules Powder Co., *supra* note 322 ("inferred data presented by expert testimony may equally well become a part of the basis for a hypothetical question"). *But see* DAVIDSON, FORENSIC PSYCHIATRY 279 (1952) ("pyramid hypothesis").

329. *In re* Scanlan's Estate, 246 Iowa 52, 67 N.W.2d 5 (1954) ("diagnosis"); Christiansen v. Hollings, 44 Cal. App. 2d 332, 112 P.2d 723 (Dist. Ct. App. 1941) (same); Park v. State, *supra* note 322 ("very apparent brain damage"); Hunder v. Rindlaub, 61 N.D. 389, 237 N.W. 915 (1931).

330. Park v. State, *supra* note 322; Missouri State Life Ins. Co. v. Fodrea, 185 Ark. 155, 46 S.W.2d 638 (1932).

331. Ivanesovich v. North Am. Life & Cas. Co., 145 Minn. 175, 176 N.W. 502 (1920).

332. Maetzold v. Walgreen Co., 249 Minn. 572, 83 N.W.2d 233 (1957).

There has been, of course, a lively debate among lawyers on the merits of the hypothetical question, and even in the medical profession there has been side-taking.[333] The model codes have generally done away with the requirement of speaking hypothetically.[334] Nevertheless, the hypothetical question will probably be with us for some time to come and it seems that, in the shorter run at least, we should take care to use it properly, and in the case of medical testimony to put it to whatever use it has without unduly restrictive rules about medical material in the premise.

## IV. IMPROVEMENT OF THE RULES AND PRACTICES RELATING TO THE BASIS OF MEDICAL TESTIMONY

The previous sections have been not only a factual examination of the types of bases which doctors utilize but also a consideration of the legal rules and practices which apply to them. The writer has endeavored to illuminate those areas in which the rules of evidence are being applied improperly and inappropriately to medical expert testimony. Taken as a whole these various rules work as a demand for *technically competent evidence* as basis material. In the remaining section an argument against such a strict requirement is presented, along with subsidiary critieisms of the judicial handling of the basis of medical testimony,[335] to the end that more accurate and complete testimony may be rendered by wituesses more at home in the courtroom.[336]

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333. See DAVIDSON, *op. cit. supra* note 228, at 281. *Contra,* OVERHOLSER, THE PSYCHIATRIST AND THE LAW 129 (1953); WHITE, INSANITY AND THE CRIMINAL LAW 56 (1932); RAY, *op. cit. supra* note 275, at 625, 639.

334. MODEL EXPERT TESTIMONY ACT § 9, *supra* note 18; UNIFORM RULE OF EVIDENCE 58. It is no longer required in Michigan, Honigman, *The Hypothetical Question Meets Its Answer,* 36 MICH. S.B.J. 12 (1957); or in Vermont, VT. STAT. ANN. tit. 12, § 1643 (1956), interpretcd in Tinney v. Crosby, 112 Vt. 95, 22 A.2d 145 (1941). In all of these revisions, cross-examination is substituted as a control on basis.

335. Certain rules or practices which interfere undesirably with free medical testimony have already been discussed: (1) the rule requiring recital of bases in all cases, *supra* pp. 475-78; (2) rules distinguishing between attending doctors and those who examine only to testify, *supra* note 126; (3) rules distinguishing between objective and subjective symptoms, *supra* note 93; (4) the practice of the court in isolating on appeal individual bases without regard to the whole of the testimony and similar practices of requiring doctors to segregate improper bases in their minds so as not to contaminate the proper ones, *supra* pp. 475-78, *supra* note 164, *infra* note 336.

336. Relatively little attention has been paid in this paper to the weight to be accordcd to opinions set upon certain bases, the issue of admissibility aside. This is largely because of the relatively slight attention given by the courts to the problem. The question has arisen at the trial level, of course, upon motions for directed verdict, summary judgment or the like; and it has arisen as an appellate issue when the court seeks to determine whether there was sufficient evidence to uphold a verdict. It is justifiable in some instances to examine the bases of an opinion, since it is a well-acknowledged rule that the opinion will fail if the bases fail. Such an opinion, ungrounded in fact, is often characterized as "conjectural" or "speculative"—terms of weight. See, among the almost daily holdings, Marshall v. Sellers, 188 Md. 508, 53 A.2d 5, 10 (1947) ("the facts upon which the expert bases his opinion must permit reasonably

### A. *False Requirement of Technically Competent Evidence*

Many cases have called in a specific manner for a doctor's basis to be solely "proven facts," "in evidence," or the like,[337] and many more of the cases considered above have had that effect. This is largely the result of the application of the hearsay rule, with the rule against opinions upon opinions working its own type of detriment. It therefore seems reasonable to examine briefly the operation of these rules.

#### 1. *Hearsay Rule*

Even a hurried survey of the various bases indicates that hearsay in one form or another pervades all of medical testimony, just as it pervades the whole medical routine and practice. And, by the very exclusion of material deemed hearsay, often as the result of rather legalistic, technical reasoning, much that is of value to the doctor in his practice and to the court in the determination of the medical facts of the case is lost. Still, without doing violence to the rule against hearsay, it does seem possible that some improvement can be made.

The most comprehensive approach to this problem would be, of course, to take the position that material used for basis purposes and not given as evidence itself should not be subject to the operation of the hearsay rule,

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accurate conclusions, as distinguished from mere guess or conjecture"); Kelley v. Bailey, 11 Cal. Rep. 448 (1961) (setting out proper California instructions on the matter); Amburgey v. United States, 189 F. Supp. 689 (D.D.C. 1960) (excellent discussion by Youngdahl, J.); Kimmie v. Terminal R.R., 334 Mo. 596, 66 S.W.2d 561 (1933) (opinion is substantial evidence if it has support; support is reasons and bases of probative force); Great Am. Indem. Co. v. Roussell, 103 N.H. 125, 166 A.2d 866 (1960); *In re* Springer's Estate, 110 N.W.2d 380 (Iowa 1961); Zappa v. Charles Mfg. Co., 109 N.W.2d 420 (Minn. 1961); Baltimore Transit Co. v. Truitt, 223 Md. 440, 164 A.2d 882 (1960). See McCormick, *Direct Examination of Medical Experts in Actions for Death and Bodily Injuries*, 12 LA. L. REV. 264, 274-75 (1952); Annot., 79 A.L.R.2d 890 (1961) (weight due hearsay).

Where, however, the bases are proper but it is the opinion which the court dislikes or the opinion is on a subject distasteful for some reason, such as matters psychiatric, the bases have also been attacked. See, *e.g.*, Etieune v. Algernon Blair, Inc., 100 So. 2d 533 (La. App. 1958) (psychiatric opinion); Jiminez v. O'Brien, 117 Utah 82, 213 P.2d 337 (1949) (psychiatric opinion); West v. National Bank, 219 Md. 258, 147 A.2d 859 (1959) (psychiatric opinion). Another example is where the court has its donbt as to the underlying scientific principles. See pp. 487-88 *supra*. Such kicking of the dog makes bad law, both for the surprised proponent of the evidence and for the would-be commentator-rationalizer of the law.

337. No better discussion (and condemnation) exists than in Tyree, *The Opinion Rule*, 10 RUTGERS L. REV. 601, 612-14 (1955). He implies that courts have been confusing the proper rule that no decision should be based on testimony not in evidence with this unwise rule that medical testimony in evidence must be based itself on data in evidence. For examples of restrictive rulings, besides those cases already discussed under special rules in hypothetical premises (*supra* pp. 522-26) and tests relied upon (*supra* p. 511), see Brouillette v. Weymouth Shoe Co., 157 Me. 143, 170 A.2d 412 (1961); Commonwealth v. Harrison, 173 N.E.2d 87 (Mass. 1961) (two cases which were born 50 years too late). Note that Tyree feels that such a narrow rule could be the result of the snpposed "reform" in UNIFORM RULE OF EVIDENCE 56.

applying that rule only to matters asserted for their truth and not those used by a doctor only explanatorily.[338] There is here no significant reliance on an out-of-court declarant or strong need to cross-examine such person. Several courts have taken this position,[339] in which they have been joined by very learned commentators.[340] Many courts, however, have rejected such a comprehensive approach, even if they do eventually allow the basis by making an exception to the hearsay rule. There is a creditable school of thought to defend this approach: even if the secondhand material is not asserted for the truth of the matter it bears upon, still if it contains all or most all of the faults upon which the objections of the rule are based—lack of test of sincerity, reliance on the perception of another—it should be treated similarly.[341] Since, as will be shown, an exception should regularly be made for medical hearsay, the result is the same as if it were not deemed offensive in the first place and this technical issue obviated.

If some material must be potentially hearsay, at least some matter is rather clearly not under the rule as, for example, the bases that relate to the qualifications or the background of the witness.[342] Other material can simply be placed under one of the recognized hearsay exceptions and permitted.[343] The most commonly used exception in the medical area is

338. As to the rule and its reasons, see 6 WIGMORE § 1720; MCCORMICK, EVIDENCE ch. 25 (1954); Donnelly, *The Hearsay Rule and Its Exceptions,* 40 MINN. L. REV. 455 (1956); Maguire, *The Hearsay System: Around and Through the Thicket,* 14 VAND. L. REV. 741 (1961).

339. Besides the great wealth of cases which allow patient statements as a basis, analyzed at note 125 *supra,* see also cases at note 61 *supra.* As Justice Rossman cogently remarked in a land valuation case, State v. Parker, 357 P.2d 548, 556 (Ore. 1960): "However, if an expert states the ground upon which his opinion is based, his explanation is not proof of the facts which he says he took into consideration. . . . It is an illustration of the kind of evidence which can serve multiple purposes and is admitted for a single, limited purpose only."

340. 6 WIGMORE § 1720 ("Here, of course, the patient's statement has no hearsay quality; without regard to its correctness or incorrectness, it enters merely as an observed fact forming part of the physician's data"); MCCORMICK, EVIDENCE 466, 561-66 (1954); Ray, *Testimony of Physician as to Plaintiff's Injuries,* 26 TUL. L. REV. 60 (1951).

341. This argument was best expressed and correctly applied by Judge Wyzanski in a recent nonmedical case, American Luggage Works, Inc. v. United States Trunk Co., 158 F. Supp. 50 (D. Mass. 1957).

342. Maguire & Hahesy, *Requisite Proof of Basis for Expert Opinion,* 5 VAND. L. REV. 432, 433 (1952) [hereinafter cited as Maguire]; MORGAN, BASIC PROBLEMS OF EVIDENCE 198 (1954); see also Laird v. Boston & M.R.R., 80 N.H. 377, 117 Atl. 591 (1922).

343. Exceptions already considered include hospital records, *supra* note 240, and learned treatises, *supra* note 71. A fascinating question is then raised: if the material is allowed into evidence under a hearsay exception, does it follow inevitably that the doctor can use it as the basis of his testimony, admittedly a "lower powered" use? The examination of hospital records has indicated that an affirmative answer cannot be given unequivocally. See note 241 *supra.* See also Tyree, *The Opinion Rule,* 10 RUTGERS L. REV. 601, 612-14 (1955). Many cases have, of course, reasoned that if the material was in evidence it was proper as a basis. *E.g.,* Holstein v. Quality Excelsior Coal Co., 230 Ark. 758, 324 S.W.2d 529 (1959).

probably that which allows in that loose class of statements, observation of body movements, animal-like noises and the like, variously referred to as an exception for statements as to bodily condition, statements made to treating doctors, statements as to mental state, excited utterances, spontaneous declarations and res gestae.[344]

Nevertheless, much that is technically hearsay is being admitted as basis statement today, not on any established exception to the rule, but by virtue of some sort of *ad hoc* exception for medical testimony, the right of the doctor to use technically incompetent evidence. The existence of such an exception has been recognized in a few cases, often in very clear and promising language,[345] and is implicit in the results of others. Such an *ad hoc* rule has also been identified or proposed by many of the writers, foremost among them being Professor Maguire,[346] and is the probable result of the model codes.[347] The reasons for the exception are those supposedly lying at the heart of every exception to the rule—need and trustworthiness. Some little consideration must be given to demonstration of the existence of these twin justifications, since they form as well the basis of a suggestion for affecting the over-all attitude toward medical testimony.

(*a*) *Need.*—If the physician is not allowed fully to describe his factual underpinning and reasoning, the lay trier is in danger of not fully understanding what he has to say and is in a worse position to judge the witness's credibility where opinions differ.[348] Nor can the doctor feel that he has

344. Discussed under patient statements as a basis at note 148 *supra.*

345. Kasiski v. International Paper Co., 58 N.J. Super. 353, 156 A.2d 273, 276 (Super. Co. 1959) (patient statements—"Testimony such as this is admittedly hearsay. If, however, the proffered proof satisfies the tests of trustworthiness and necessity, it may be admitted into evidence under the so-called exceptions to the hearsay rule, either as part of the *res gestae* . . . or as information given a treating physician by this patient which is relevant to the physician's diagnosis or treatment . . ."); Laird v. Boston & M.R.R., *supra* note 342; *In re* Mundy, 97 N.H. 239, 85 A.2d 371 (1952); State Realty Co. v. Ligon, *supra* note 358; Sundquist v. Madison Ry., 197 Wis. 83, 221 N.W. 392 (1928); Paparazzo v. Perkel, 16 N.J. Super. 128, 84 A.2d 11 (Super. Ct. 1951); Seitz v. Seitz, *supra* note 125; cases cited at note 128 *supra.*

The courts have gone as far if not farther on the same rationale in regard to non-medical experts, such as (a) those who evaluate property, *e.g.*, Kuklinska v. Maplewood Homes, Inc., 336 Mass. 489, 146 N.E.2d 523 (1957); Young v. Bates Valve Bag Corp., 52 Cal. App. 2d 86, 125 P.2d 840 (Dist. Ct. App. 1942) (both cases are based on Finnegan v. Fall River Gas Works Co., *supra* note 50); State v. Parker, *supra* note 339; (b) anti-trust case witnesses, *e.g.*, United States v. Aluminum Co. of America 35 F. Supp. 820 (S.D.N.Y. 1940); United States v. Du Pont, 177 F. Supp. 1 (N.D. Ill. 1959); (c) poll and survey makers, American Luggage Works, Inc. v. United States Trunk Co., *supra* note 341.

346. Maguire 446. See also WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 278 (1954); Tyree, *The Opinion Rule*, 10 RUTGERS L. REV. 601 (1955); 3 WIGMORE § 688; citations at notes 138-39 *supra.*

347. See UNIFORM RULE OF EVIDENCE 63, patterned on MODEL CODE OF EVIDENCE § 503. *But see* note 337 *supra.*

348. See the discussion at pp. 474-75 *supra.*

done the job which his profession requires of him.[349] Alternatives sometimes proposed, including omission of the basis recital,[350] getting into evidence the material that the doctor will later rely on,[351] or finding corroborative evidence in each case,[352] are not realistic.

(*b*) *Trustworthiness.*—Trustworthiness arises, first, from the very employment of the material by the physician, since his use indicates that he has considered the information, found it valid and has therapeutically relied on it. It arises, second, from the qualification of the doctor himself—his ability to handle and evaluate correctly the material. The doctor could not have testified unless the judge as an initial question determined that he was competent.[353] And doctors, as a group, are trained to handle this sort of material—to sift it and test it objectively—both in medical education and in practicing internship and residencies. Dean Wigmore defined trustworthiness as surrounded by circumstances indicating the utterance was sincerely and accurately stated and that no plan of falsification could be found.[354] For the great majority of the secondhand information the doctor receives, whether from doctor, nurse, or ailing patient, this is demonstrably so.

In addition to these fundamental criteria for allowing hearsay testimony, other more specific ones have been suggested. Professor Maguire has advanced the following factors,[355] which also corroborate the above: (a) the material is easier to use the farther it lies from the ultimate issue—considerable distance being common in the medical area; (b) extra allowance should be made where the material is especially reliable, being based on charts, tables, and the like;[356] (c) corroboration by nonhearsay wherever possible enhances validity.[357]

Nowhere has the notion of permitting the doctor to rely on what his own practices dictate been better expressed, whether the admission is based

349. RAY, MEDICAL JURISPRUDENCE OF INSANITY 629 (5th ed. 1871), sagely remarked that it was never intended that scientific opinions be set on partial bases because of legal requirements.

350. The inadvisability of hiding the basis is discussed at p. 478 *supra.* Maguire 434, refers to this caustically as an ostrich-like solution.

351. Presumably if the simple solution to the problem was to submit the material into evidence few of the cases already considered would have arisen. See the discussion at pp. 511, 512-14, on the difficulties of getting the basis material into evidence.

352. That this works sometimes, see note 357 *infra;* the trouble is that it does not work all the time.

353. Competency to testify has been discussed at note 2 *supra* and pp. 478-81. There would be even less complaint against hearsay bases probably if a higher standard of qualification were adopted. As to such higher standards, see note 364 *infra.*

354. 5 WIGMORE § 1422.

355. Maguire 435-36.

356. See the examples given at notes 54-55, 82-83, 106-10 *supra.*

357. Examples already considered where corroboration did save the day include notes 162-63, 206, 226 *supra.* See also pp. 501-03 *supra,* where, in connection with patient statements, other means of enhancing hearsay testimony or "mitigating" its supposed dangerous effect are also listed.

on a special *ad hoc* exception or just on general equity, than in *State Realty Co. v. Ligon*:[358]

> The law recognizes that, in 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, such as X-ray examination and blood tests. 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 of the necessities of medical science, because the patient's statements are presumed to be made to aid a correct diagnosis and cure, and the professional reports of physicians and nurses with the same end in view.

### *2. Opinion Rule*

Another region of treacherous shoals for medical testimony has been the rule forbidding opinions set upon opinions.[359] Since this rule is quite akin to the hearsay rule, much that has been said above is here applicable. The rule has been generally criticized,[360] is nearly impossible of application,[361] and unpardonable when it is applied to prevent a doctor from relying upon the opinion of a fellow medical person. Again the notions of need and trustworthiness prevail over any ancient notions of opinions of experts, and not a few modern courts have permitted opinions based upon opinions.[362]

## *B. Better Overall Approach—Expert Validation*

Any suggested change in the rules or in the rationalizations must meet certain prerequisites based upon presently existing courtroom needs, including:

(1) the need on the part of the trier of the fact to have as much medical evidence as possible in order to make the determination;[363]

358. 218 Ala. 541, 119 So. 672, 674 (1929).

359. Cases applying the rule are cited at notes 200, 210, 217, 241, 286, 326 *supra*. In addition see Annot., 98 A.L.R. 1109 (1935).

360. Wigmore cogently remarked that there is no mysteriously logical fatality in this form, 2 WIGMORE § 682; 7 *id.* § 1918. Tyree, *The Opinion Rule*, 10 RUTGERS L. REV. 601 (1955), also strongly castigated the rule.

361. This impossibility arises from the difficulty in distinguishing fact from opinion. Many cases have been cited which baldly characterized opinion as fact in order to evade the rule. See notes 207, 228, 291, 329 *supra*. See also, recognizing the impossibility of its task, *In re* Scanlan's Estate, 246 Iowa 52, 67 N.W.2d 5 (1954); State v. Pike, 49 N.H. 399 (1869). Note also MCCORMICK, EVIDENCE 22 (1954); Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 428 (1952).

362. See notes 207, 211, 228, 242, 248, 290, 328-31 *supra*. See also Hornberger v. St. Louis Pub. Serv. Co., 353 S.W.2d 635 (Mo. 1962).

363. See Dession, *Deviation and Community Sanction*, in PSYCHIATRY AND THE LAW

(2) the need for better medical testimony, better in terms of doctors who are more qualified to testify;[364]

(3) the need to recognize that the legal system is wed to the physician, because there simply are no other sources of information on the great number of issues which daily arise on injury, disease, disability, insanity, death and the like.

The simplest and most satisfactory solution to the various problems presented in this article, it is believed, lies in a policy of according to the physician free reliance upon medical material which he believes to be germane to the opinion which he is asked to offer. As has been repeatedly pointed out, the expert is competent to ascertain the reliability of statements and reports of others and to use only what is relevant and trustworthy. The concept, simply put, is that *the doctor validates what he uses.* He follows a process scientifically ingrained: he analyzes what he hears, casts out what seems inaccurate, pulls together the rest and reaches an opinion and course of action. Indeed, this approach has already been proposed for the solution of the problem of the overapplication of the hearsay rule, and can now be put forward more broadly.[365]

This same notion of expert validation has been the perception and teaching of the leading cases considered in this article,[366] the most notable of

1 (Hoch & Zubin, eds. 1955); Baran, *Impartial Medical Testimony—A New Medical Horizon,* 32 TEMP. L.Q. 193, 201 (1959); Atlantic Ins. Co. v. Boyette, 342 S.W.2d 379 (Tex. Civ. App. 1961); Freedman, Guttmacher & Overholser, *Mental Disease or Defect Excluding Responsibility,* 1961 WASH. U.L.Q. 250.

364. Undoubtedly rejecting information of second nature to doctors has been one of the major factors in deterring many highly skilled practitioners from taking medico-legal cases. See the chafing of Dr. Irving S. Wright, *supra* note 132; Dr. Fred A. Mettler, *infra* note 365; Drs. Freedman, Guttmacher, and Overholser, *supra* note 364. See also Ray, *Medical Proof of Symptoms in Personal Injury Cases,* 3 J. PUB. LAW 605-12 (1954). On higher standards for qualification to testify, see CURRAN, LAW AND MEDICINE 394 (1960); Wolff, *Expert Testimony From the Viewpoint of Industrial Medicine,* 1 MD. S. MED. J. 195, 197 (1952) (suggesting that the definition of an expert be one of unchallenged integrity whose competency is known to his colleagues).

365. Ray, *Medical Proof of Symptoms in Personal Injury Cases,* 3 J. PUB. LAW 605 (1954), speaks of expert evidence as one of the most reliable sources for the discovery of truth. METTLER, THE MEDICAL SOURCEBOOK at xxix-xxxii (1960), presents strong if not overbearing arguments in favor of placing the freedom of discretion in the doctor; in his mind there is no question but that law must defer to scientific facts and practices. The dean of evidence points out that the doctor-expert is endowed with the professional experience to evaluate the medical hearsay as to accuracy and plausibility. 2 WIGMORE §§ 665(b), 668 n.2. See also HUGHES, MASSACHUSETTS EVIDENCE 410-15 (1955).

366. Finnegan v. Fall River Gas Works, 159 Mass. 311, 34 N.E. 523 (1893); Alexander v. Covel Mfg. Co., 336 Mich. 140, 57 N.W.2d 324, 327 (1953); ("no person is born with a knowledge of medicine and a doctor's conclusions must of necessity in many instances be based upon information acquired from sources outside himself"); White v. Zutell, 263 F.2d 613 (2d Cir. 1959) (referring to the inherent guarantees in the physician's medical examination); Taylor v. Monongahela Ry., 155 F. Supp. 601 (W.D. Pa. 1957) (concern should be for what doctors do in their own practice); State Realty Co. v. Ligon, *supra* note 358; *In re* Mundy, 97 N.H. 239, 85 A.2d 371 (1952);

which is *Finnegan* (*per* Justice Holmes). In areas of expert testimony other than medical, more freedom has been accorded the witness.[367] It is not believed that this solution is "will-of-the-wispish, highly attractive and exasperatingly indefinite."[368] It is not so much a rule as an attitude. The contrary philosophy, that we must have checks and controls on medical testimony lest it run into unknown regions of space where mere laymen are unable to follow, cannot be the correct place to begin. Such a view would cast out more valuable scientific evidence than erring evidence offered by the incompetent or the bought.

This is not to say that the stand should be open carté blanche to the physician. Certain restraints or limits ought, of course, to be maintained; these could include: (1) that the doctor be well qualified to testify;[369] (2) that discretion be vested in the judge to prevent the occasional reliance on bases highly unreliable,[370] or to prevent the presentation as basis of what is actually intended to be evidence;[371] (3) that the jury be instructed that the opinion may be rejected if the bases fail and that bases may fail if the material in their (the jurors') lay estimate is untrue or unsubstantial;[372] (4) that where the material is secondhand, trustworthiness and necessity be established;[373] (5) that it be required wherever possible that corroborative testimony be offered or the material put into evidence directly;[374] (6) that recital of the bases and reasons be required, in the court's discretion, where it would be of aid to the trier or to opposing counsel;[375] (7) that full cross-examination and rebuttal be permitted of the expert.[376]

People v. Brown, *supra* note 125; Illinois Steel Co. v. Fuller, 216 Ind. 180, 23 N.E.2d 259 (1939).

367. See the discussion at note 345 *supra*.

368. As was stated by Maguire 438-41. This attitude is partly based on certain readings of the cases which are discussed at note 51 *supra*. The artillery for the rebuttal lies in notes 364-66 *supra*.

369. Discussed at notes 354, 364 *supra*.

370. See the discussion at pp. 503-04 and note 51 *supra;* the rule of discretion is adopted in UNIFORM RULE OF EVIDENCE 52. In many cases considered here the courts have been affirming the trial judge's discretion although the holding is put in terms of a substantive rule.

371. Pointed out by the court in Boulanger v. McQuestin and Lewis, 79 N.H. 175, 106 Atl. 492 (1919). See the extended discussion and citations at note 51 *supra;* see also note 67 *supra*.

372. See the cases discussed at note 336 *supra*. It is worth repeating here that the real rule is not that expert testimony cannot be based on data not in evidence but that decisions cannot be based on testimony not offered or not probative.

373. Cases so requiring include State v. Lucas, 30 N.J. 37, 152 A.2d 50 (1959); Kasiski v. International Paper Co., *supra* note 345.

374. This is the "reassuring guardrail" of Maguire 441, 448. See note 357 *supra* for complete discussion; see also notes 355-56 *supra*.

375. See the discussion at pp. 475-78 *supra*.

376. The right of cross-examination is so zealously guarded today that in its absence the testimony offered on direct is routinely struck. See MCCORMICK, EVIDENCE 40-42 (1954). Of course bases used in cross-examination are rarely subject to challenge as improper since they are generally being elicited for direct or collateral attack purposes. See note 318 *supra*.

As was so forcefully stated in *Sundquist v. Madison Ry.*:[377]

> 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.

377. 197 Wis. 83, 221 N.W. 392, 393 (1928).