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Witness with no memory may be deemed 'unavailable'

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Moving forward, a witness in a civil case may be deemed "unavailable" if he or she testifies credibly to a lack of memory about a subject matter, the Supreme Judicial Court decided July 11.

The adoption of what had been a proposed rule of evidence will in turn open the door to such witnesses' prior statements becoming admissible under hearsay exceptions premised on witness unavailability.

In Hedberg, et al. v. Wakamatsu, plaintiffs Leslie and Peter Hedberg are suing a surgeon who oversaw a 2012 vaginal hysterectomy in which Leslie suffered a permanent injury. They sought to use a conversation the day after her surgery between Leslie and a then-third-year medical student who assisted with the procedure.

In that conversation, the student acknowledged that the medical team had a hard time positioning her leg during the operation, and that he may have leaned against her leg, according to Leslie. Leslie said that the student both apologized and told her he would pray for her.

At a 2017 deposition, the medical student said that he had little memory of the surgery or Leslie's care afterward. He specifically said he could not recall any discussion regarding the positioning of Leslie's leg or whether he had leaned on it during surgery.

Before trial, the defendant doctor filed a motion in limine seeking to exclude Leslie's testimony regarding the student's statements. The trial judge excluded the student's statements as inadmissible hearsay and denied the plaintiffs' motion for reconsideration.

On appeal, the plaintiffs argued that the student's statements should have entered evidence through Leslie's testimony either as an exemption to the rule against hearsay made by an opponent party's agent under Mass. G. Evid. 801(d)(2)(D) or as statements against interest by an unavailable declarant under Mass. G. Evid. 804(b)(3).

On the latter basis, the SJC agreed, obviating the need to assess the "agent" theory.

"We now adopt as a matter of common law, in civil cases, Proposed Mass. R. Evid. 804(a)(3), which will allow a declarant to be deemed unavailable if he or she testifies to a lack of memory about the subject matter in question," Justice David A. Lowy wrote for the court.

Had a lack of memory previously been adopted as a means of establishing unavailability, the trial judge would have abused her discretion by excluding the statements, the court concluded. Thus, a new trial was warranted.

The court noted that a witness testifying to not remembering the subject matter is among the five bases for finding a declarant "unavailable" under the Federal Rules of Evidence.

The SJC noted it had never previously indicated why lack of memory should not also establish unavailability in state court. As a result, the court saw no reason why it should not follow the lead of a majority of other states that recognize a declarant's lack of memory as a means to establish unavailability.

The court went on to determine that the student's remarks constituted statements against interest, given that he had a "burgeoning career and an unshaped reputation in the medical profession."

That he allegedly admitted to mistakenly leaning on a patient's leg during surgery "is against his pecuniary interest, as it reflects negatively on his ability and judgment as a physician," the court said.

The 12-page decision is Hedberg, et al. v. Wakamatsu, Lawyers Weekly No. 10-115-19. The full text of the ruling can be found here.

---- Index References ----

News Subject: (Government Litigation (1GO18); Judicial Cases & Rulings (1JU36); Legal (1LE33); Liability (1LI55))

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