NewsRoom

7/18/19 Mass. Law. Wkly. (Pg. Unavail. Online)
2019 WLNR 22618413

Massachusetts Lawyers Weekly

July 18, 2019

Section: News

Forgetful witness can be unavailable,' SJC says

Kris Olson

A response of "I don't remember" feigned or otherwise will be less useful to witnesses in light of a recent Supreme Judicial Court decision, attorneys say.

In Hedberg, et al. v. Wakamatsu, the SJC ruled that a witness in a civil case may be deemed "unavailable" if he or she testifies to a lack of memory about a subject matter.

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

In Hedberg, one of the plaintiffs said that the day after her surgery a medical student revealed details about what may have caused the permanent injuries she suffered. But in a deposition years later, the medical student testified that he could not recall the conversation.

Applying the rule that it was adopting, the SJC determined that the medical student's testimony was "unavailable" and that the plaintiff's account of his comments was admissible hearsay as statements against interest.

Thirty-seven years ago, the SJC eschewed codifying proposed rules of evidence wholesale, instead opting to adopt new rules piecemeal as a matter of common law. Proposed Mass. R. Evid. 804(a)(3) is just the latest to be adopted in that manner.

The court noted that the rule tracks with the approach of "an overwhelming majority" of other states, as well as the Federal Rules of Evidence.

The court made clear that the new evidentiary rule applies only in civil cases, given the Sixth Amendment Confrontation Clause issues implicated in the criminal context.

If the trial judge had the benefit of its decision, she would have abused her discretion by excluding the medical student's statements, the SJC determined. As a result, the court vacated the jury's defense verdict and remanded the case to the Superior Court for a new trial.

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.

Longstanding amnesia issue

Boston attorney Patrick T. Jones, who is representing the plaintiffs with colleague Richard W. Paterniti, said the decision addresses "in a pretty direct way the broad problem of witness forgetfulness or amnesia."

The issue has been a problem across civil litigation for a long time, and the SJC's decision is a good development in the law of evidence, he said. Other attorneys echoed that sentiment.

One of the defendant's attorneys, Brian H. Sullivan of Boston, said he remains convinced that his client acted within the standard of care and provided appropriate treatment to the plaintiff.

He added that he does not believe the admission of the medical student's alleged statements, considered in the context of the evidence as a whole, would have altered the jury's verdict.

Sullivan declined to comment on the broader issues implicated by the SJC's decision, citing the ongoing nature of the proceedings.

[divider]

The decision "opens the door to probative evidence that has been excluded in Massachusetts, even though for many years it has been freely admitted in numerous other states."

Thomas J. Carey Jr., Hingham

[divider]

Boston College Law School professor Mark S. Brodin, who collaborated with Hingham attorney Thomas J. Carey Jr. and a BC Law student, Nicholas I. Merrill, on an amicus brief, said the case was the perfect vehicle to bring about an important change to the state's rules of evidence.

The decision "opens the door to probative evidence that has been excluded in Massachusetts, even though for many years it has been freely admitted in numerous other states," Carey said.

Salem attorney Thomas R. Murphy, president of the Massachusetts Academy of Trial Attorneys and co-author of its amicus brief in Hedberg, said the decision may "level the playing field" in personal injury cases. While "the rule is there for everybody," plaintiffs start off "two steps behind the starting line" in such cases, he said.

Given how directly the student's statements addressed a central issue in the case, the exclusion of those statements made it hard to put complete faith in the jury's verdict in Hedberg, Brodin said.

"We're certainly happy that [the plaintiff] gets another shot with a fuller picture of the story being presented to the fact-finder," he said.

For Brodin and others, the SJC's decision also called to mind the tortured path that had led to this point.

In 1982, after the state's bar associations had studied the issue at length and then endorsed codifying the proposed rules of evidence, the SJC chose another path. In a short memorandum, the court set the course that the state has been on since: piecemeal adoption of the rules as a matter of common law prompted by arguments made in the context of individual cases.

Carey noted that a majority of the court had seemingly been swayed by the testimony of 2nd U.S. Circuit Court of Appeals Judge Henry J. Friendly as Congress was weighing a similar codification effort on the federal level.

Carey said he was not sure the degree to which younger lawyers, in particular, appreciate that the Guide to Evidence is not substantive law or the result of a codification process.

"The lesson to lawyers is to follow up on [the SJC's] suggestion" in 1982 and propose the adoption of a particular rule when circumstances warrant, Brodin said.

Boston attorney Daniel I. Small agreed that the SJC's decision "does send a message that lawyers can and should be on the lookout for other gaps in the common law."

[box type="shadow" align="alignright" width="350px"]The next battle

In deciding to expand the definition of "unavailable" testimony, the Supreme Judicial Court bypassed an alternate argument made by the plaintiffs in Hedberg, et al. v. Wakamatsu: that the statements of the medical student should have been admitted under a hearsay exception for statements made by an opposing party's agent under Mass. G. Evid. 801(d)(2)(D).

That argument drew sharp opposition in an amicus brief filed by the Massachusetts Defense Lawyers Association.

"Fear of liability for a medical student's statement of admission, where the supervising physician did not know the statement was made, would have the chilling effect of dissuading physicians from agreeing to supervise medical students," the MDLA warned in a brief authored by Woburn attorneys Chad P. Brouillard and Emily A. Chadbourne.

The MDLA cautioned that the court "should be deferential to the educational and training needs of future physicians."

"In this case, and as the Defendant-Appellee argued, if medical students were found to be agents of their attending physician, it would drastically alter the landscape of medical training in the Commonwealth," the MDLA argued.

Plaintiffs' attorney Elizabeth N. Mulvey was skeptical of that argument.

While allowing that such a finding is "fact-specific in any given case," she said the relationship between a medical student and a supervising physician is presumptively one of agency.

"With supervision comes agency," she said.

But the court left the resolution of that debate for another day and another case.[/box]

"But at the same time, it evinces the need for a code of evidence," Small argued. "The law of evidence is too important to be doing it ad hoc like this."

Bedside apology

Davis "Mac" Stephen, then a third-year student at Harvard Medical School, was on his first rotation at Massachusetts General Hospital on May 16, 2012, when plaintiff Leslie Hedberg was admitted to undergo surgery. The procedure included a vaginal hysterectomy by defendant Dr. May Wakamatsu, one of the first such procedures on which Stephen had assisted.

Following the surgery, Hedberg complained of pain, numbness and tingling in her left leg and foot. The symptoms were eventually traced to a permanent injury to her sciatic nerve.

In an affidavit and at trial, Hedberg testified that Stephen had come to check on her the day after her surgery. In response to her complaints of leg pain, Hedberg said Stephen told her, "I am awfully sorry. We had a hard time positioning that leg."

He also reported that he may have been leaning against her leg while holding retractors. Hedberg said that, in addition to apologizing, Stephen said he would pray for her.

In a 2017 deposition, Stephen testified that he remembered nothing about the surgery or the events thereafter, other than having a vague recollection that he had discussed whether Hedberg needed a neurology consultation with the resident who participated in the surgery. Specifically, he said that he could not recall having a conversation with Hedberg like the one she described.

Before trial, Wakamatsu filed a motion in limine seeking to exclude Hedberg's testimony regarding Stephen's statements. Superior Court Judge Heidi E. Brieger excluded Stephen's statements as inadmissible hearsay and denied a motion for reconsideration from Hedberg and her co-plaintiff husband, Peter.

After the jury's verdict, the Hedbergs petitioned the Appeals Court for further review, and the SJC transferred the case on its own motion.

Ignominious start

Once the court decided to adopt the new evidentiary rule, the final step in applying it to the Hedberg case was to assess whether Stephen's comments were, in fact, statements against interest.

In 1977, the SJC in Commonwealth v. Carr had adopted Rule 804(b)(3) of the Federal Rules of Evidence, which explains that the standard for the hearsay exception to apply is "that a reasonable [person] in his position would not have made the statement unless he believed it to be true."

That includes statements against one's financial interest, the court noted.

Here, that standard easily had been met, the SJC concluded.

"In this instance, Stephen was a third-year medical student with a burgeoning career and an unshaped reputation in the medical profession," Justice David A. Lowy wrote for the court. "His admission to having mistakenly leaned on a patient's leg during a surgery in such a manner that may have left her with a permanent injury is against his pecuniary interest, as it reflects negatively on his ability and judgment as a physician."

As for whether the improperly excluded evidence warranted a new trial, the court said it had no confidence that the exclusion had not made a material difference in the outcome.

"The statements in question go directly to the cause of Leslie's injuries, and could be relevant to a question of the defendant's duty of care, and we cannot confidently determine what impact it may have had on the jury's ultimate verdict," Lowy wrote.

Hedberg, et al. v. Wakamatsu

THE ISSUE: When a witness testifies to a lack of memory about a particular subject matter, is that witness "unavailable," such that prior statements of that witness will be deemed admissible evidence, provided they otherwise qualify for a hearsay exception?

DECISION: Yes (Supreme Judicial Court)

LAWYERS: Patrick T. Jones and Richard W. Paterniti, of Jones Kelleher, Boston (plaintiffs)

Brian H. Sullivan and Rebecca A. Cobbs, of Sloane & Walsh, Boston (defense)

---- Index References ----

Company: MASSACHUSETTS GENERAL HOSPITAL (THE)

News Subject: (Government Litigation (1GO18); Judicial Cases & Rulings (1JU36); Legal (1LE33); Liability (1LI55); Personal & Family Law (1PE02); Personal Injury Law (1PE04))

Region: (Americas (1AM92); Massachusetts (1MA15); North America (1NO39); U.S. New England Region (1NE37); USA (1US73))

Language: EN

Other Indexing: (Brodin) (May Wakamatsu; Brian H. Sullivan; Nicholas I. Merrill; Leslie Hedberg; David A. Lowy; Heidi E. Brieger; Patrick T. Jones; Rebecca A. Cobbs; Thomas J. Murphy; Thomas J. Murphy; Mark S. Brodin; Peter; Richard W. Paterniti; Chad P. Brouillard; Davis "Mac" Stephen; Daniel I. Small; Thomas J. Carey Jr.; Emily A. Chadbourne; Elizabeth N. Mulvey)

Keywords: Legal activity (lawsuits etc.)Keywords:

Word Count: 1824