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Section: News

Evidence Unavailable witness Lack of memory

Mass. Lawyers Weekly Staff

Where (1) a plaintiff brought a medical malpractice action for injuries arising after surgery and (2) the trial judge excluded out-of-court statements made by a medical student who participated in the surgery, a new trial is warranted because the statements should have been admitted in evidence as statements against interest by an unavailable witness.

" The trial judge held that the statements could not be entered in evidence as statements of a party opponent made by an agent, and on a motion for reconsideration also determined that those statements were inadmissible as statements against interest by an unavailable declarant. While we conclude that there was no error in the judge's decision under our current law of evidence, we take this opportunity to adopt as a matter of common law Proposed Mass. R. Evid. 804(a)(3) (1980), which would allow a declarant, in a civil case, to be deemed unavailable if he or she testifies to a lack of memory about the subject matter in question. On this record, if the judge had had the benefit of the grounds for finding unavailability that we adopt in this opinion, it would have been an abuse of discretion for the judge not to have determined that the declarant was unavailable and that his statements were against his pecuniary interest. Because that testimony is particularly relevant to the cause of the defendant's injuries, and could be considered relevant to the question of duty of care, its absence is grounds for a new trial. As we have determined that the statements should have been admitted in evidence as statements against interest by an unavailable witness, we need not determine whether they also could have been admitted as statements by the agent of a party opponent. The jury's verdict is vacated, and the case is remanded to the Superior Court for a new trial consistent with this opinion."

Hedberg, et al. v. Wakamatsu (Lawyers Weekly No. 10-115-19) (12 pages) (Lowy, J.) Case tried before Brieger, J., in Superior Court. Patrick T. Jones (Richard W. Paterniti also present) for the plaintiffs; Brian H. Sullivan (Rebecca A. Cobbs also present) for the defendant; the following submitted briefs for amici curiae: Thomas J. Carey Jr. for Mark S. Brodin and another; Elise Sanguinetti, of California, Jeffrey R. White, of Connecticut, Amy Brogioli, of Illinois, Thomas R. Murphy, Kevin J. Powers and Elizabeth N. Mulvey for American Association for Justice and another; Chad P. Brouillard and Emily A. Chadbourne for Massachusetts Defense Lawyers Association (Docket No. SJC-12624) (July 11, 2019).

[Click here to read the full text of the opinion.](#)

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