professor hutter on evidence: plaintiff’s pre-trial statements and expressions of physical sensations and condition: the questionable status of new york’s rules governing their admissibility

by professor michael j. hutter, jr.

as a general proposition, a plaintiff may testify at trial as to his/her past and present pain and suffering, past and present physical condition and the events preceding the onset of such pain and suffering and physical condition. where a plaintiff has, pre-trial, made statements regarding past and/or present pain and suffering and physical condition or manifested by words or otherwise such pain and suffering and physical condition, new york law on admissibility is not clear, and where clear, the law’s status is questionable in light of modern evidence law. this article surveys the various rules which address the issue of the admissibility of a plaintiff’s pre-trial statements and expressions of physical sensations and condition.

expressions of present pain and suffering

new york law recognizes that a witness may testify to a plaintiff’s expressions of present pain, such as screams, cries, groans and moans, or any other manifestation of plaintiff’s pain and suffering. such exclamations are admissible regardless as to whom they are uttered or exhibited, to non-health care personnel and physicians alike. in that regard, this rule is equally applicable to the examining physician who may testify to his/her observation of plaintiff’s condition as manifested by expressions of pain or inability to do things while undergoing the examination, and a non-physician’s testimony regarding the plaintiff’s expression of pain as observed while in the company of the plaintiff. furthermore, such expressions are admissible “long after the accident, and in fact during the progress of the trial”.

the court of appeals in roche v. brooklyn city & newtown rr co. provided the following rationale in support of this rule: “evidence of exclamations, groans and screams is now permitted more upon the ground that it is a better and clearer and more vigorous description of the then existing physical condition of the party by an eye-witness than could be given in any other way.... it was an involuntary and natural exhibition and proof of the existence of intense soreness and pain therefrom. true, it might be simulated, but this possibility is not strong enough to outweigh the propriety of permitting such evidence as fair, natural, and original corroborative evidence of the plaintiff as to his then physical condition. its weight and propriety are not, therefore, new sustained upon the old idea of the necessity of the case.” notably, the court’s rationale recognizes that the admissibility of such expressions raises an issue of relevancy, and does not present any hearsay problem. as to the latter, such exclamations do not in fact invoke the hearsay rule because they are not “statements” for purposes of the hearsay rule.

statements of present pain and physical condition generally

while a witness may testify to a plaintiff’s involuntary expressions of pain, the witness may not testify to the plaintiff’s statement or description of his/her present suffering or bodily condition, i.e., “i cannot walk” or “my neck hurts” or “i have a lot of pain in my leg”. in roche v. brooklyn city and newtown rr co. the court of appeals held that such statement or description is inadmissible, but not mere expressions of pain, on the basis that the former were “easily stated, liable to gross exaggeration and of a most dangerous tendency...” the court also alluded to the hearsay nature of such a statement. of note, the court of appeals subsequently held that a plaintiff’s description of present pain will be admissible, presumably as a hearsay exception, if the plaintiff is deceased at the time of trial.

this new york rule is contrary to the rule recognized in the federal courts under fre 803 (3) and in most state courts, which recognizes as an exception to the hearsay rule the admissibility of a plaintiff’s out-of-court statement regarding his/her present physical condition. the federal rule does not require the statement to be made to a physician; it may be testified to by members of the plaintiff’s family, friends or other persons. thus, the federal rule would permit the admissibility of such statements as “i have a pain in my leg”, “i feel sick”, and “my head hurts”. however, the statement “i was sick yesterday” would not be admissible under the federal rule.

it has been over 115 years since the court of appeals has addressed this. whether this rule should be continued to be recognized is questionable. in that regard, not only is the new york rule out of the mainstream of modern evidence, but also the rule itself rests upon a questionable basis. as pointed out by leading commentary, its policy basis, namely that such statements are subject to “gross exaggeration”, is surely equally applicable to supposedly involuntary expressions such as moans and groans, which are admissible. furthermore, there exists no principled distinction between this rule and the new york cases which permit the admissibility of
a declarant’s statement of intent to not only prove the declarant carried out that intent, but to prove that others named in the statement did so.\textsuperscript{14} It must also be noted that statements of present pain and suffering or bodily condition may be admissible, and unaffected by the present rule, if they qualify under another hearsay exception rule, such as the present sense impression exception and excited utterance exception.\textsuperscript{15} These exceptions present, of course, requirements involving the time such statements were made relative to the event precipitating the making of the statement.\textsuperscript{16}

**STATEMENTS OF PRESENT PAIN AND PHYSICAL CONDITION MADE TO PHYSICIANS**

While New York law excludes generally a plaintiff’s statement of presently existing pain and physical condition, it has recognized the existence of a hearsay exception for the admissibility of such statements when made to a physician for the purpose of securing treatment or advice.\textsuperscript{17} In Davidson v. Cornell\textsuperscript{18} the Court of Appeals, building upon its prior decision in Roche covered only statements of current physical condition made to treating doctors. Specifically, the Court stated “statements expressive of [a] present condition are permitted to be given as evidence only when made to a physician for the purposes of treatment by him”.\textsuperscript{19} The basis for this statement was: “It may be seen that, when attended by a physician for the purpose of treatment, there is a strong inducement for the patient to speak truly of his pains and sufferings, while it may be otherwise when medically examined for the purpose of creating evidence in his own behalf”.\textsuperscript{20} Thus, the rule is designed to prevent unreliable and unfair bolstering of the plaintiff’s own testimony.\textsuperscript{21} Applying this rule to the facts before it, the Court held that the hearsay exception’s requirements were not established because the plaintiff’s statements included past consequences of the injury, going back almost 15 months; and the physician was retained solely for the purpose of giving testimony.

When courts admit a plaintiff’s statements of present pain and suffering and medical condition to the plaintiff’s treating physician, it is frequently stated that such statements are admissible to show the basis of the physician’s opinion, and the trial judge further noted that he would strike if the plaintiff’s claimed loss was not established by other evidence. Subsequently, the plaintiff testified that he had lost his sexual power.

The Court of Appeals held that the trial court erred in permitting the physician to testify as to what the plaintiff told him regarding his “loss of sexual power”. In so ruling, the Court held that the pertinent hearsay exception previously alluded to in Roche covered only statements of current physical condition made to treating doctors. Specifically, the Court stated “statements expressive of [a] present condition are permitted to be given as evidence only when made to a physician for the purposes of treatment by him”.\textsuperscript{19} The basis for this statement was: “It may be seen that, when attended by a physician for the purpose of treatment, there is a strong inducement for the patient to speak truly of his pains and sufferings, while it may be otherwise when medically examined for the purpose of creating evidence in his own behalf”.\textsuperscript{20} Thus, the rule is designed to prevent unreliable and unfair bolstering of the plaintiff’s own testimony.\textsuperscript{21} Applying this rule to the facts before it, the Court held that the hearsay exception’s requirements were not established because the plaintiff’s statements included past consequences of the injury, going back almost 15 months; and the physician was retained solely for the purpose of giving testimony.

When courts admit a plaintiff’s statements of present pain and suffering and medical condition to the plaintiff’s treating physician, it is frequently stated that such statements are admissible to show the basis of the physician’s opinion.\textsuperscript{22} However, when such statements are admitted, they are coming in for their truth, and may be used for their truth, as the basis of their admission is a hearsay exception.\textsuperscript{23} Thus, it is not necessary when such a statement is admitted to establish by other independently admissible evidence the condition referred to in the statement.

In the absence of any pertinent case law, an issue arises as to whether this recognized hearsay exception covers statements to health care personnel other than doctors, such as nurses, physician’s assistants, paramedics, and orderlies. While Davidson can be read as limiting the exception strictly to physicians, there appears to be no principled basis to exclude health care personnel generally when the statements are made to them for purposes of medical treatment.\textsuperscript{24}

As noted in Davidson, statements concerning present pain and suffering and physical condition are not admissible under this hearsay exception when they are made to a physician who has examined the patient, not for purposes of treatment, but solely to enable the physician to testify as an expert at trial.\textsuperscript{25} While there will be little doubt that a single consultation or examination of the plaintiff by a physician, arranged by the plaintiff’s attorney, who later testifies as an expert on behalf of the plaintiff will be deemed a non-treating physician under Davidson,\textsuperscript{26} there may be situations when it will be difficult to determine whether a plaintiff seeks a physician for purposes of treatment rather than in preparation for litigation.\textsuperscript{27} For example, after an accident, an injured party may be examined by a physician for both treatment and future litigation purposes. In such a situation, the preferable view would seem to be that so long as the examination was made for treatment, any litigation purpose should not render the physician a non-treating physician for purposes of Davidson.\textsuperscript{28} Such view seems compatible with the reason Davidson
distinguished between a treating physician and a non-treating physician, namely, the incentive to provide accurate and truthful information concerning the plaintiff's medical condition. In view of Davidson it appears to be the position of the Court of Appeals that a physician who has not “treated” the plaintiff may not testify to the plaintiff’s statements during the physician's examination, even for the non-hearsay purpose of showing, in whole or in part, the basis for the physician's opinion. Several decisions support this observation. However, the Third Department has expressly held that such statements are admissible as the foundation proof for the non-treating physician's opinion, a view with which the Second Department agrees. While there is much to commend this view, it is clearly contrary to the rule set forth in Davidson. In that regard, Davidson only allows the non-treating physician to state that (s)he had conversations with the plaintiff without stating their contents in establishing the basis for his/her opinion. The New York rule is contrary to the rule recognized in the federal courts under FRE 803(4) and in most state courts which, inter alia, abolishes the distinction between treating and non-treating physicians and permits the admissibility under the hearsay exception of recognized statements both to treating physicians and non-treating physicians. This view of the hearsay exception was taken due to the difficulty in determining the status of the physician in a given action, i.e., treating or non-treating, and because in federal practice the statement made to a non-treating physician would be admissible to show the foundational basis for the physician's opinion and the resultant difficulty of a juror to understand and apply the difference of such statement not being able to be used for its truth but able to be used in assessing the weight of the expert's opinion. Are these sufficient justifications for aligning the New York rule with the federal rule? So long as New York permits a medical expert to base his/her opinion upon statements made to the expert by the plaintiff, upon a proper foundation, relying upon the physician's skill, experience and judgment to then screen out unreliable statements, there seems to be no reason for an outright per se ban as to the admissibility of such statements to the non-treating, testifying physician.

**STATEMENTS OF PAST PAIN AND SUFFERING AND PHYSICAL CONDITION AND THE CAUSE THEREOF**

The hearsay exception recognized in Roche and Davidson only encompasses a statement of the plaintiff’s then present pain and suffering and physical condition, i.e., current at the time of the examination and treatment by the treating physician. Thus, statements regarding the plaintiff's past pain and suffering, as well as statements regarding the cause of such pain and suffering, i.e., plaintiff’s medical history, are inadmissible even if made to a treating physician. The Court in Davidson was very clear in that regard, noting the admissibility of statements made to treating physicians only if they were “expressive of.... present condition.” Subsequent appellate decisions have followed Davidson unhesitatingly. Of note, there are other appellate decisions which have permitted a treating physician to testify to the history obtained from the plaintiff, provided it is germane to diagnosis and treatment. These decisions do not cite to or otherwise discuss Davidson, which is surprising because they are contrary to Davidson, which has not been expressly overruled by the Court of Appeals. Is Davidson still valid on this point 110 years later? Several factors point to a conclusion that its continuing validity is highly doubtful. First, excluding plaintiff's statements of past symptoms and conditions but admitting plaintiff's statement of present symptoms and conditions is logically inconsistent. As noted by the Supreme Court of Minnesota in Richardson v. Plaza, Inc.:

“[I]f the statements of the patient are deemed trustworthy for the reason that proper treatment rests on the truth of such statements, it is difficult to distinguish between the reliability of statements made in the doctor's presence as to subjective symptoms existing at the time and statements made which relate to similar symptoms, pertaining to the injury or ailment which the doctor seeks to diagnose, that the patient has experienced before coming to the doctor's office.”

For this reason FRE 803(4) and most state courts permit the admission of statements by the plaintiff regarding past symptoms, provided they are pertinent to diagnosis and treatment. Secondly, as pointed out by the late Irving Younger, Davidson itself does not support the proposition it stands for, and for which it is cited. In that regard, Davidson involved a non-treating physician, and its holding regarding the plaintiff’s history is dictum. Furthermore, the New Hampshire case, which the Court cites for this dictum holds only that a declaration of present pain is admissible though made to a person not a physician. Lastly, the Davidson dictum is inconsistent with the Court of Appeals' subsequent decision in Williams v. Alexander. In Williams the Court held that statements made to a physician by a plaintiff, as recorded in a hospital record, were admissible under the business records exception, now CPLR 4517, if they “relate to diagnosis, prognosis or treatment or
CONCLUSION

As can be seen, New York law regarding the admissibility of a plaintiff’s pre-trial statements and expressions of physical sensations and conditions has many rules, most of which are outdated and inconsistent with modern evidence law. Such rules are ripe for change, for which the trial lawyer is the engine of change under New York’s common law of evidence scheme.

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Notes

2. Id.
4. See, Richardson, supra, §8 - 610.
6. 105 NY 294, 11 N.E. 630 (1887).
10. 105 NY 294, 297, 11 N.E. 630, 634 (1887).
11. Id.
15. See, Fisch, supra, §995.
16. See, Richardson, supra, §§ 8 - 603, 8 - 604.
17. See, Martin, Capra & Rossi, supra, §§8.3.34.
18. 132 NY 228, 30 N.E. 573 (1892).
19. Id. at 237-238, 30 N.E. at 576.
20. Id. at 237, 30 N.E. at 576.
21. Id. at 238, 30 N.E. at 576.
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30. See, Richardson, supra, §8-610.
34. See, Martin, Capra & Rossi, supra, §§8.3.3.
36. See, Advisory Committee Note to FRE 803(4); Martin, Capra & Rossi, supra, §§8.3.3.
37. See, Hambusch v.
38. See, Richardson, supra, §§8-610.
42. 89 N.W. 2d 712, 721 (Minn. 1958). Accord, Meaney v. U.S., 112 F. 2d 538 (2d Cir. 1940) (Hand, J.).
43. See, 2 McCormick, Evidence §277, at 234 (5th ed. 1999) (past symptoms received based on assurance of reliability arising from patient's belief that effective treatment requires accuracy as to past, as well as current, symptoms).
45. Id. at p. 2, col. 3.
46. Id.
48. 309 N.Y. at 287, 129 N.E. 2d at 419.
49. See cases cited in footnote 41.
50. See, Richardson, supra, §§8-310; Martin, Capra & Rossi, supra, §§8.3.3.4, 8.3.3.6.
51. Id.