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Recommended Citation

Donad Needle, *Competency Of Medical Witnesses As Experts On Disability In Negligence - Shivers v. Carnaggi*, 22 Md. L. Rev. 38 (1962)
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Competency Of Medical Witnesses As Experts On Disability In Negligence

*Shivers v. Carnaggio*¹

On the facts described at the beginning of the preceding Note, the Court of Appeals, in reaching the conclusion that the proffered testimony should have been received, found that the medical witnesses had sufficient familiarity with the activities and occupation of plaintiff² to enable them to express an opinion on the extent to which the injury to her back would cause personal and economic loss;³ and also that without the aid of this medical testimony the jury could not have reached a proper conclusion in its deliberation.⁴

The issue of the competency of medical witnesses to render opinions on disability was raised in an article appearing in the American Medical Association Journal; the conclusion there reached is in accord with the position taken by the trial court: a physician is not expert on the effect of physical impairment on job performance and is usually unqualified to evaluate social and economic effects of impairment.⁵ The article draws a distinction between *impairment*, which is said to be a purely medical problem, and *disability*, which is affected by various non-medical factors and involves a patient's ability to engage in gainful activity.⁶

¹ 223 Md. 585, 165 A. 2d 898 (1960).

² *Id.*, 588-589.

³ A search of the appeal briefs of the parties, and the trial testimony as included in the Court of Appeals' decision reveals a complete lack of any such testimony.

⁴ One of WIGMORE's tests on the admissibility of opinion testimony is: "On *this subject* can a jury from *this person* receive appreciable help?" 7 WIGMORE, EVIDENCE (3d ed. 1940) § 1923. There is ample authority for the view that it is not within the realm of medical expertise to interpret the effect of physical limitation on a person's ability to engage in gainful employment.

⁵ Journal of the American Medical Association, Special Edition, Feb. 15, 1958, written by the Committee on Medical Rating of Physical Impairment, after careful study of the problem and the views of numerous medical authorities.

⁶ *Ibid.* "The following explanations of generally-used terms in programs for the disabled will suffice for all practical purposes:

"1. *Permanent Disability*. This is *not* a purely medical condition. A patient is 'permanently disabled' or under a 'permanent disability' when his actual or presumed ability to engage in gainful activity is reduced or absent because of 'impairment' and no fundamental or marked change in the future can be expected.

"2. *Permanent Impairment*. This *is* a purely medical condition. Permanent impairment is any anatomic or functional abnormality or loss after maximal *medical* rehabilitation has been achieved and which abnormality or loss the physician considers stable or non-progressive

The negligence cases found in Maryland touching on this problem are inconclusive. The Court of Appeals was free to adopt either the distinction drawn by the *Shivers* trial court and the American Medical Association, or any other rule which it felt better suited.⁷ For example, in *Adams v. Benson*⁸ a dermatologist testified that since the plaintiff was unable to make a complete dorsal flexion of her wrist, he estimated the disability at ten per cent. The opinion did not clearly indicate whether this testimony was objected to; but even assuming that it was, it is obvious from the way in which the dermatologist answered the question that he was not speaking of economic disability, but rather of limitation of movement, i.e., anatomical loss of use.

In *Williams v. Dawidowicz*⁹ a doctor testified that the plaintiff who had operated a precision screw machine had a limitation in the motion of his left wrist of about fifty per cent. Then another witness who had been operating

at the time evaluation is made. It is always a basic consideration in evaluation of permanent disability. It should be remembered, however, that *permanent impairment* is a contributory factor to, but *not* necessarily an indication of the extent of a patient's permanent disability.

"3. *Evaluation (Rating) of Permanent Disability.* This is an *administrative*, not medical, responsibility and function. Evaluation of permanent disability is an appraisal of the patient's present and probable future ability to engage in gainful activity as it is affected by non-medical factors such as age, sex, education, economic and social environment and the medical factor — permanent impairment. Non-medical factors have proved extremely difficult to measure. For this reason 'permanent impairment' is, in fact, the sole or real criterion of 'permanent disability' far more often than is readily acknowledged. Evaluation of permanent disability forms the basis for a *determination of permanent disability* which is an *administrative* decision as to the patient's entitlement.

"4. *Evaluation (Rating) of Permanent Impairment.* This is a function which physicians alone are competent to perform. Evaluation of permanent impairment defines the scope of medical responsibility and, therefore, represents the physician's role in the evaluation of permanent disability. Evaluation of permanent impairment is an appraisal of the nature and extent of the patient's illness or injury as it affects his personal efficiency in the activities of daily living. These activities are self care, normal living postures, ambulation, elevation, traveling and non-specialized hand activities. It is not and never can be the duty of physicians to evaluate the social and economic effects of permanent impairment. These effects must be evaluated by administrators in making determinations of permanent disability.

"Competent evaluation of permanent impairment requires adequate and complete medical examination, accurate objective measurement of function and avoidance of subjective impressions and non-medical factors such as the patient's age, sex or employability."

⁷ Many cases are to the *permanency* of an impairment is admittedly allowed in Maryland. See *Cogswell v. Frazier*, 183 Md. 654, 39 A. 2d 815 (1944) and cases therein cited.

⁸ 208 Md. 261, 117 A. 2d 881 (1955).

⁹ 209 Md. 77, 120 A. 2d 399 (1956).

the same type of machine for twenty-nine years was allowed, over objection, to answer a hypothetical question that a man so limited was not competent to operate the screw machine.

A Fourth Circuit decision, *Standard Oil Co. v. Sewell*,¹⁰ held merely that it was not *reversible* error for a doctor, after testifying as to the nature of the injuries, to state that the plaintiff would have a total permanent disability of fifty per cent. Also, *Isaac Benesch & Sons v. Ferkler*¹¹ is of little assistance, for in that case the attending doctor was asked the effect of the injuries on the nervous condition of the appellee and on her ability to perform her household duties, this being from *personal observation*.

Outside of Maryland various positions have been adopted. Some courts have held that a doctor can give his opinion as to how far a patient's personal and economic activities would be curtailed. Some have limited opinions to everyday simple activities. Others have completely denied such testimony.¹²

In *Price v. Industrial Commission of Utah*,¹³ the Utah Court, like the *Shivers* trial court, concluded that doctors may testify as to the amount of anatomical impairment of a bodily member. But it held that unless they clearly know what bodily activities a vocation embraces, doctors can not testify as to the percentage of industrial or economic disability consequent on the loss of certain physical functions. It is noteworthy that this case was remanded

¹⁰ 37 F. 2d 230 (4th Cir. 1930).

¹¹ 153 Md. 680, 139 A. 557 (1927).

¹² *Mintz v. Atlantic Line R. Co.*, 236 N.C. 109, 72 S.E. 2d 38 (1952) admitted a doctor's opinion that patient could not do any kind of work; *DeVore v. Mutual Life Ins. Co. of New York*, 103 Mont. 599, 64 P. 2d 1071 (1937) admitted a doctor's opinion that patient could not engage in an occupation requiring physical effort; *Marland Refining Co. v. McClung*, 102 Okla. 56, 226 P. 312 (1924) admitted a doctor's opinion that skull injury would interfere with plaintiff's occupational ability; *Southern Underwriters v. Knight*, 107 S.W. 2d 1097 (Tex. 1937) allowed testimony that a back injury would prevent manual labor; *Southwest Metals Co. v. Gomez*, 4 F. 2d 215 (9th Cir. 1925) a doctor's opinion on plaintiff's ability to earn a living allowed; *Corrigan v. United States*, 82 F. 2d 106 (9th Cir. 1936).

Cases limiting such testimony to simple activities are *Silver King Coalition M. Co. v. Industrial Commission*, 92 Utah 511, 69 P. 2d 608 (1937); *Price v. Industrial Commission*, 91 Utah 152, 63 P. 2d 592 (1937).

Testimony expressed in percentages was allowed in *Standard Oil Co. v. Sewell*, 37 F. 2d 230 (4th Cir. 1930); *Ott v. Perrin*, 116 Ind. App. 189, 63 N.E. 2d 163, 166 (1945); *Acme-Evans Co. v. Schnepf*, 14 N.E. 2d 561 (Ind. 1938); *Seal v. Blackburn Tank Truck Service*, 64 N.M. 282, 327 P. 2d 797, 800 (1958); *Hartford Accident and Indemnity Co. v. Harris*, 138 S.W. 2d 277, 278 (Tex. 1940).

¹³ 91 Utah 152, 63 P. 2d 592 (1937).

to the Commission specifically to take testimony on the duties of a fireman, which was the claimant's occupation.

The policy argument of not permitting a doctor without special knowledge to testify can be seen from this practical example. A musician, or golf professional would be seriously disabled by the loss of a finger while a lawyer or judge suffering from the same injury would at most be only slightly disabled. A physician without detailed knowledge of these non-medical factors involved obviously becomes unqualified to answer.¹⁴

One proper method of getting "disability" testimony before a jury would seem to be to have the injured party himself testify as to his physical and vocational limitations, this being followed by expert medical testimony on physical impairment. Another equally acceptable way, and one which was followed in Maryland in *Williams v. Dawidowicz*,¹⁵ would be to call in an expert on the occupation in question, after medical testimony as to impairment has been given, and allow the occupational expert to answer a hypothetical question based on the limitation of motion allegedly suffered by the plaintiff.

*Silver King Coalition M. Co. v. Industrial Commission*¹⁶ set forth a compromise position in which the court held that where testimony is as to *common* activities, such as housework, climbing ladders, digging, etc., a doctor can state the patient's ability to function — it being *presumed* that the doctor has knowledge of the physical movements employed in these activities. Perhaps this compromise position of allowing medical testimony as to common activities is the explanation for the opinion in the *Shivers* case since the vocation in question was only housework. But the Court of Appeals did not in any way indicate that such was its viewpoint — nor did it express that such a presumption of medical knowledge as to common activities exist in Maryland. The soundness of this compromise position is placed in doubt, at any rate, when we consider that any man of average intelligence sitting on a jury should presumably know the functions and duties of a housewife, and thus there is no necessity in the first place to present evidence by one supposedly better qualified because of medical skill or training.

This brings the problem full circle. If we say a doctor, because of his special training, is qualified to determine

¹⁴ "Disability" has reference to wage earning ability. *Miller v. McGraw Co.*, 184 Md. 529, 540, 42 A. 2d 237 (1945) and cases therein cited.

¹⁵ *Supra*, n. 9.

¹⁶ 92 Utah 511, 69 P. 2d 608 (1937).

the extent to which anatomical impairment will cause economic disability, we must first actually determine that the doctor has certain extra-medical knowledge of his patient. If he lacks this extra-medical knowledge his competency to answer should be challenged. But, if the extra-medical factor is uncomplicated, there is a lack of necessity for admitting expert opinion on the point. As has been determined, the only reason expert opinion evidence is admitted is because the jury would be hard pressed or unable to reach a proper conclusion without it.

The *Shivers* jury being apprised of anatomical disability by the medical witnesses, backed up by the plaintiff's own testimony as to her physical and economic condition could have reached a proper conclusion. This was the trial court's position. The reversal on this ground by the Court of Appeals is unfortunate.

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