EVIDENCE IN NEGLIGENCE CASES

Seventh Edition

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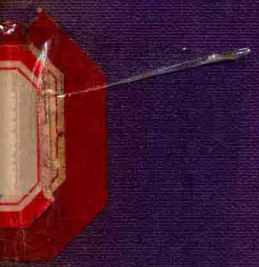
and
Daniel Kramer



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To the memory of Celia Kramer,
mother of Charles and grandmother of Daniel,
whose loss is deeply felt by the many who loved her.

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Preface

Someone once said, "The law is often spoken of as uncertain; but the uncertainty is not so much in the law as in the evidence."

The purpose of this book is to clarify some of the "uncertainty" and to provide an understanding of what may and what may not be offered in evidence. Fortunately, most of the rules of evidence are fairly well established and need only be stated so that they may be used as a convenient reference guide by the trial lawyer.

The techniques and strategy of using evidence are outside this volume's scope and, therefore, are not discussed.

1

The Direct Case

Exclusion from the Courtroom

Witnesses

At the beginning of the trial, either party may move that all prospective nonparty witnesses be excluded from the courtroom. It is within the court's discretion either to grant or to deny that motion. However, the appellate courts have said that unless there is good reason for denying such a request, "it is hard for us to understand what reason there is, or could be, for such a ruling, or why such a motion should not be granted as of course, especially in a capital case."[1]

Others

Neither a party nor his attorney can be excluded from the courtroom.[2]

In its discretion, the court may exclude the jury during the argument of either a motion to dismiss or a question concerning the

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1. People v. Cooke, 292 N.Y. 185, 190-91, 54 N.E.2d 357, 360 (1944); *see also* FED. R. EVID. 615; Philpot v. Fifth Ave. Coach Co., 142 A.D. 811, 128 N.Y.S. 35 (1st Dep't 1911).
2. Ajaeb v. Ajaeb, 276 A.D. 1094, 96 N.Y.S.2d 416 (2d Dep't), *aff'd,* 301 N.Y. 605, 93 N.E.2d 496 (1950); Leed v. Joshua, 72 N.Y.S.2d 3 (1st Dep't 1947). Annot., *Nonparty: Propriety and Prejudicial Effect of Permitting Nonparty to Be Seated at Counsel's Table,* 87 A.L.R.3d 238 (1978).

admissibility of evidence.[3] However, exceptions to the court's charge or requests to charge shall be "out of the hearing of the jury."[4]

The jurors' right to ask questions is within the trial judge's discretionary power.[5]

Order of Proof

Ordinarily, the plaintiff has wide latitude as to the order in which he calls his witnesses. He may himself testify either first, last, or between other witnesses. The court has the widest discretion to admit proof out of order and even subject to later connection.[6]

It is incumbent on the plaintiff to put in all his proof before he rests. However, the court may, in its discretion, permit a plaintiff to rest, subject to his producing his medical proof later, provided that the defendant will not be unduly prejudiced thereby.[7]

The plaintiff may not divide his proof, *i.e.,* he may not put in only enough for a prima facie case and then put in the rest in rebuttal. For example, in an automobile collision case the plaintiff's prima facie case had consisted only of his own testimony and that of a mechanic. After the defendant rested, the plaintiff offered the testimony of three persons who had been passengers in his car. The court excluded their testimony and the appellate court held that ordinarily such exclusion would have been proper, but since the defendant had a counterclaim, the plaintiff should have been permitted to call those witnesses to answer the counterclaim.[8]

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3. N.Y. CIV. PRAC. LAW Rule 4011 (McKinney 1963) (hereafter "CPLR").
4. CPLR § 411-b.
5. Sitrin Bros. v. Deluxe Lines, Inc., 35 Misc. 2d 1041, 231 N.Y.S.2d 943 (County Ct. 1962).
6. Feldsberg v. Nitschke, 49 N.Y.2d 636, 404 N.E.2d 1293, 427 N.Y.S.2d 751 (1980); United States Vinegar Co. v. Schlegel, 143 N.Y. 537, 539, 38 N.E. 729, 731 (1894); Seguin v. Berg. 260 A. D. 284. 21 N.Y.S.2d 291 (3d Dep't 1940); CPLR Rule 4011.
7. Brzyski v. Schreiber, 314 Pa. 353, 171 A. 614 (1934).
8. Sequin v. Berg, 260 A.D. 284, 21 N.Y.S.2d 291 (3d Dep't 1940); *see*

The court may, in its discretion, permit a party to reopen his case and to present additional evidence even after the jury has retired.[9]

It has been held to be an improvident exercise of discretion for the trial judge to refuse a plaintiff's requests for a reopening of his case and for an adjournment in order to bring in additional evidence so as to avoid being nonsuited as a result of the judge's ruling that the plaintiff had used an erroneous measure of damages.[10] It has also been held erroneous to refuse a request that summations be recorded.[11]

Competency of Witness to Testify

The general rule is that all adult witnesses are presumed to be competent until the contrary is shown to the court's satisfaction.[12]

Even though a witness is insane or has been adjudged incompetent, the court may permit him to testify if he understands the nature of the oath and can give a coherent account of the facts.[13]

An infant's testimony in a civil case (as distinguished from a criminal case) cannot be unsworn.[14] The court must determine whether an infant of tender years understands the nature of the oath.[15]

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also Pienewski v. Benbenck, 56 A.D.2d 710, 392 N.Y.S.2d 732 (4th Dep't 1977).

9. People v. Ferrone, 204 N.Y. 551, 98 N.E. 8 (1912).
10. Bianchi v. Markese, 276 A.D. 1048, 95 N.Y.S.2d 897 (4th Dep't 1950); *see* Scimeca v. New York City Transit Auth., 39 A.D.2d 596. 332 N.Y.S.2d 11 (2d Dep't 1972) (held that the court should be liberal in permitting plaintiff to reopen case after he rests, to cure a defect); *see also* LaTant v. Stark, 4 N.Y.2d 890, 150 N.E.2d 771, 174 N.Y.S.2d 469 (1958).
11. Robinson v. Ferens, 33 A.D.2d 688, 306 N.Y.S.2d 530 (2d Dep't 1969).
12. Aguilar v. State, 279 A.D. 103. 108 N.Y.S.2d 456 (3d Dep't 1951).
13. Barker v. Washburn, 200 N.Y. 280, 93 N.E. 958 (1911).
14. Stoppick v. Goldstein, 174 A.D. 306, 160 N.Y.S. 947 (2d Dep't 1916).
15. CPLR § 2309(b). However, if the infant is unable to testify because of age, then the jury may rely upon "circumstantial evidence." Stein v. Palisi, 308 N.Y. 293. 297, 125 N.E.2d 575, 577 (1955). *See* Annot., *Competency of Young Child as Witness in Civil Case,* 81 A.L.R.2d 386 (1962).

A witness who has been convicted of a crime[16] or who is interested in the proceeding[17] is not barred from testifying.

Swearing the Witness

A witness need not follow the regular procedure of swearing on the Bible if he objects to doing so. He may instead "declare and affirm" that he will tell the truth;[18] or he may be sworn according to the particular usages of his religion.[19]

Use of Interpreter

A witness who cannot speak English or who is deaf and dumb may use an interpreter. If there is no official interpreter, the court should appoint as an unofficial interpreter someone who can speak English and the language to be interpreted. The latter should be sworn that he will interpret accurately.[20]

Privileged Communications

In New York, the following relationships are privileged:[21]

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16. CPLR § 4513.
17. *Id.* § 4512.
18. *Id.* § 2309(b).
19. *Id.*
20. W. RICHARDSON, EVIDENCE § 476 (10th ed. J. Prince 1973) (hereafter "RICHARDSON").
21. A nonstatutory privilege is described in Annot., *Disgrace: Privilege of Witness to Refuse to Answer Tending to Disgrace or Degrade Him or His Family,* 88 A.L.R.3d 209 (1978). FED. R. EVID. 501 states that privileges shall be governed by state law.

1. Husband and wife[22]
2. Clergyman and penitent[23]
3. Physician, dentist, or nurse and patient[24]
4. Attorney and client[25]
5. Psychologist and client[26]
6. Social worker and client[27]

Physician and Patient

The physician-patient privilege is the one that is claimed most frequently in negligence cases. It exists only if at the time of the communication there was in fact a physician-patient relationship. The relationship does not exist where a physician examines the plaintiff not for the purpose of treating him but merely in order to report to the defendant on the former's injuries.[28]

Where the relationship does exist, the witness is not competent to testify unless the privilege is "expressly waived upon the trial or examination by the person confessing, the patient or the client."[29] The personal representative of a deceased person may waive the privilege, provided that his doing so does not "tend to disgrace the memory of the decedent."[30]

22. CPLR § 4502.
23. *Id.* § 4505.
24. *Id.* § 4504.
25. *Id.* § 4503; Priest v. Hennessy, 51 N.Y.2d 62, 409 N.E.2d 983, 431 N.Y.S.2d 511 (1980).
26. *Id.* § 4507.
27. *Id.* § 4508.
28. Griffiths v. Metropolitan St. Ry., 171 N.Y. 106, 63 N.E. 808 (1902); *see also* People v. Decina, 2 N.Y.2d 133, 138 N.E.2d 799, 157 N.Y.S.2d 558 (1956); Annot., *Construction and Effect of Statute Removing or Modifying in Personal Injury Actions Patient's Privilege Against Disclosure by Physician.* 25 A.L.R.2d 1429 (1952).
29. CPLR §§ 4503(a), 4503(b), 4504(c), 4505.
30. CPLR § 4504(c); Annot., *Death: Who May Waive Privilege of Confidential Communication to Physician by Person Since Deceased,* 97 A.L.R.2d 393 (1964).