Washington Law Review

Volume 28
Number 3 *Washington Legislation—1953*

8-1-1953

Evidence—Cross Examination of Defendant's Character Witness—Scope

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testify that she had not suffered from these afflictions prior to the accident, and then prevent the only available impeaching testimony from being disclosed, by a claim of privilege, it would seem that a mockery is being made of justice, and we do not think our statute contemplates such a condition " This expression, if it represents the new attitude of the court toward the statute, calls for a re-appraisal of the case of *Neolle v. Hoquiam Lumber & Shingle Co.*, 47 Wash. 519, 92 Pac.372 (1907). *Cf. Wesseler v. Great Northern R. Co.*, 90 Wash. 234, 157 Pac. 461 (1916). In the *Noelle* case the court held that where the *P* takes the stand and describes his injuries as to their cause and extent, he does not waive the privilege as to any physician who attnded him for such alleged injuries. The danger in this type of situation is that a naked fraud may be perpetrated under the guise of legality. As was forcefully stated by Judge Root in the dissenting opinion in the *Neolle* case, the secrets of the sick room having been voluntarily exposed by the *P*, the reason for the privilege no longer obtains. Invoking the privilege at this stage of the proceedings is to use the privilege "as a sword instead of as a shield." Professor Wigmore has this comment to make: "Certainly it is a spectacle fit to increase the layman's traditional contempt for the chicanery of the law when a plaintiff describes at length to the jury and a crowded court room the details of his supposed ailment, and then neatly suppresses the available proof of his falsities by wielding a weapon nominally termed a privilege." 8 WIGMORE, EVIDENCE § 2389 3rd ed. (1940). The language of the principal case indicates that the Washington court is beginning to take cognizance of the realities of the situation.

The patient-physician privilege, if not strictly confined, results in an unwarranted obstruction to the attainment of substantial justice. *P* comes into court seeking to recover damages for personal injuries, yet the amount of damages that can properly be awarded is dependent upon *P's* physical condition both prior and subsequent to the accident.

Some jurisdictions, notably New York, have approached a satisfactory solution. Examples are *Heither v. Johns*, 233 N.Y. 370, 135 N.E. 603 (1922), holding testimony of plaintiff alone as to his physical condition and past medical treatment may waive the privilege and *Apter v. Home Life Insurance Co.*, 266 N.Y. 333, 194 N.E. 846 (1935), holding that in action on a policy of disability insurance, defendant may call plaintiff's physician to testify as to whether the disease originated or became evident prior to issuance of policy.

A more realistic solution is the method that has been tried and proved in California of amending the statute itself. Cal. Code Civ. Proc. Ann., §1881 (Deering 1948). See *Ballard v. Pacific Greyhound Lines* 28 Cal.2d 357, 170 P.2d 465 (1946).

If the Washington statute could be similarly amended it would be a long overdue legislative advancement. Such an amendment could be to the effect that where any person brings an action to recover damages for personal injuries or brings any civil action where his or her physical condition is materially in issue, such action shall be deemed to constitute a consent by the person bringing such action that any physician who has prescribed for, treated or examined said person and whose testimony is material shall be competent to testify.

JAMES F MCATEER

Evidence—Cross Examination of Defendant's Character Witnesses—Scope. *D* was convicted of second degree burglary. During the cross examination of three character witnesses for the defense, the prosecuting attorney asked, over the objections of the defense, the following questions: "Did you know that in 1941 *D* had his operator's

license suspended?", "Did you know that *D* spent twelve days in jail and was fined twenty-five dollars for drunkenness on January 10, 1949?" and "Did you know *D* was given twenty days for vagrancy in the city jail of Walla Walla?" *Held*: The form of the questions was proper as long as it was not for the purpose of discerditing the person on trial. *State v. Cyr*, 40 Wn. 2d 840, 246 P.2d 480 (1952).

The holding in the instant case puts Washington among the small minority of states which allow the prosecution to ask, on cross-examination of defendant's character witness, whether such witness has any personal knowledge of specific acts of misconduct committed by the defendant. *State v. Jacobs*, 195 La. 281, 196 So. 347 (1940). The Washington cases which support the minority rule and upon which the court relied in the instant case are *State v. Austin*, 83 Wash. 444, 145 Pac. 451 (1915) and *State v. Stilts*, 181 Wash. 305, 42 P. 2d 779 (1935). In these cases the court held that questions asked of character witnesses as to their knowledge of specific acts of the accused were within the bounds of legitimate cross-examination as long as the purpose was only to discredit the testimony of the witness. See also *State v. McMullen*, 142 Wash. 7, 252 Pac. 108 (1927); *State v. Bozovich*, 145 Wash. 227, 259 Pac. 395 (1927); *cf. State v. Coates*, 22 Wash. 601, 61 Pac. 726 (1900) (testimony as to general reputation alone allowed).

The majority rule allows the prosecution to cross-examine defendant's character witnesses only as to rumors or reports of particular acts of misconduct committed by the defendant. *Stewart v. United States*, 104 F.2d 234 (App. *D.C.* 1939); *Michelson v. United States*, 335 U.S. 469 (1948); *State v. Miller*, 60 Ida. 79, 88 P. 2d 526 (1939); 3 WIGMORE, EVIDENCE § 988 (3rd ed. 1940). In the *Michelson* case, the basis for the majority rule was concisely explained by Mr. Justice Jackson: "Since the whole inquiry, . . . is calculated to ascertain the general talk of people about defendant, rather than the witness' own knowledge of him, the form of inquiry 'Have you heard?' has general approval, and 'Do you know' is not allowed . . it is not the man that he is, but the name that he has which is put in issue."

The form of inquiry, "Do you know?" indicates to the jury that the prosecutor has definite information that the defendant has been guilty of a series of offenses by not in any way distinguishing between rumor and fact of such offenses. This results in prejudicing the accused in the mind of the jury. It is suggested that the form of question allowed by the majority, "Have you heard?," keeps the prosecution within the stated purpose of cross-examination of character witnesses and lessens the chance of prejudicing the defendant in the mind of the jury by minimizing references to the fact that the defendant has been guilty of prior acts of misconduct.

MICHAEL MINES

Insurance—Conflict of Interests—Bad Faith of Insurer. *P*, the insured under a public liability insurance policy with *D*, had been sued by an injured party; one of the grounds alleged for recovery was expressly excepted by the terms of the policy. *D* insisted on its policy right to control the defense and also to withdraw and disclaim all liability if at the trial the loss was found to be outside the policy coverage. *P* objected to the reservation of rights by *D*, pointing out that it would be to *D's* interest at the trial to allow proof of the loss on grounds outside the policy coverage and thus escape all liability. *D* then offered to allow *P's* counsel to assist in the defense and P accepted. *P*, subject to potential liability in excess of the policy's limits, negotiated a settlement within the policy's limits, to which *D* refused to contribute. *P* paid the settlement and