CHAPTER 22

Evidence

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§22.1. Escobedo and admissibility of confessions. Because previous chapters in this volume have discussed in great detail the decisions of the Supreme Judicial Court which attempted to apply the principles of *Escobedo v. Illinois*[1] to various fact patterns, a detailed discussion will not be repeated here.[2] Pending clarification of its scope by the United States Supreme Court, the Massachusetts Supreme Judicial Court strictly construed its application by requiring that the defendant must have actually requested counsel and been unsuccessful before there is any right to exclude from evidence any confession made to the police.[3] This construction was made over vigorous dissent of Mr. Justice Whittemore in *Commonwealth v. Tracy*,[4] in which the incriminating statement was made in the hospital by the defendant after he had been wounded by police bullets. At least part of the reluctance of the Court to reverse criminal convictions might have been caused by the fact that the cases presented during the 1965 SURVEY year dealt with crimes which took place before the *Escobedo* decision. It can be argued that it is unfair to impose upon the police a standard of conduct which was not promulgated at the time the interrogations took place.

§22.2. Use of treatises in malpractice cases. The legislature by Chapter 425 of the Acts of 1965 modified General Laws, Chapter 233, Section 79C, by taking away the discretion of the trial courts to exclude otherwise qualified statements in medical treatises, and by changing the notice requirements.

By eliminating the words "in the discretion of the court" from the statute, the legislature has now made it possible for a party to introduce written expert evidence in a malpractice case if he can show: (1) that it is a relevant statement of fact or opinion, and (2) that the writer is recognized in his profession or calling as an expert on the subject. The first of these two requirements is not a substantial hurdle to the introduction of a writing into evidence. Proof that a writer is a recognized

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§22.1. 1 378 U.S. 478, 84 Sup. Ct. 1758, 12 L. Ed. 2d 977 (1964).

2 See §§11.4, 12.3 *supra*.

3 Compare Commonwealth v. Guerro, 1965 Mass. Adv. Sh. 869, 207 N.E.2d 887, in which counsel was requested and conviction was reversed, with Commonwealth v. Ladetto, 1965 Mass. Adv. Sh. 823, 207 N.E.2d 536, and Commonwealth v. Tracy, 1965 Mass. Adv. Sh. 653, 207 N.E.2d 16, in which counsel was not requested and convictions were upheld.

4 1965 Mass. Adv. Sh. 653, 207 N.E.2d 16.

authority can present a hurdle if the author is not well known, but sometimes the defendant can be cross-examined into admitting the expertise of the author. If that device is not available, a doctor may be willing to come to court for the limited purpose of qualifying an author as an expert, whereas he might be reluctant to give an opinion on the malpractice itself. If these alternatives are impracticable there is always the possibility of using the device attempted in the case of *Reddington v. Clayman*,[1] in which the plaintiff attempted to use the *Directory of Medical Specialists* and *Who's Who* as compilations published for persons engaged in an occupation under General Laws, Chapter 233, Section 79B, to prove that the author was an expert. If this latter route is taken there must be in addition some evidence that the compilations are commonly relied upon by persons in the trade. This type of testimony could probably be given by a librarian in a medical library. Thus if a lawyer can find a statement in a writing which will make out a prima facie malpractice case for him and can establish through one device or another the expertise of the writer, the trial judge, no matter what his personal feelings about the value of this type of evidence, must under the revised statute either admit it or commit reversible error, whereas in the past his failure to admit such evidence was not effectively reviewable.

The full effect of this statutory amendment cannot be determined until the Supreme Judicial Court indicates how strictly it will curtail the discretion of the trial court. Moreover, even if an attorney is not faced with the hurdle of adverse discretion at the trial court level, he is still faced with the problem of finding a statement in a medical textbook which will be an effective substitute for the expert testimony of a doctor in proving negligence.[2]

The other amendment to the statute increases the time period of the notice of intention to reply upon a writing from three to thirty days, and requires the party proposing to use a book or other writing to specify the exact page or pages where the statement upon which he is relying appears. This amendment was designed to bring the statute into conformity with modern concepts of pre-trial discovery. If a party to a malpractice action is to be faced with expert evidence from a book, he should know in advance of trial the exact content of this evidence so that he can meet it. This requirement does not place a substantial additional burden upon the party proposing to use the statute. If he has prepared his case in advance he can easily give the thirty-day notice required. If the evidence is discovered at a time shortly before trial, the actual start of the trial could either be delayed until the thirty-day notice period expires, or the opposing counsel could waive the requirement. Only when such a writing is discovered during the course of trial would a problem arise. This problem is not substantially greater, however, than it was when the three-day notice was required.

§22.2. [1] 334 Mass. 244, 134 N.E.2d 920 (1956), noted in 1956 Ann. Surv. Mass. Law §§22.5, 22.6.

[2] See, generally, Kehoe, Massachusetts Malpractice Evidentiary Statute — Success or Failure? 44 B.U.L. Rev. 10 (1964).

§22.3. Practice on motions to suppress evidence. Ever since the case of *Mapp v. Ohio*[1] has rendered evidence procured as a result of unreasonable search and seizure inadmissible in Massachusetts, the motion to suppress has been the proper and perhaps only procedural device for objecting to such evidence if its existence is known prior to trial.[2] A hearing upon such a motion takes place before the trial and is designed to give the defendant an opportunity to show why certain evidence should not be admissible at trial. Witnesses are usually examined at such a hearing. It is easy to imagine how a skillful defense counsel might turn this hearing into a pre-trial discovery hearing and thus learn the details of the Commonwealth's case. Such a procedure was followed in the lower court in the case *Commonwealth v. Roy*.[3] Using a vaguely framed motion to suppress that did not state what evidence he wanted suppressed, the defense counsel conducted an 89-page pre-trial examination.

The Supreme Judicial Court condemned this practice and required that "[a] pre-trial motion to suppress, based upon an alleged illegal search and seizure, should specify the evidence sought to be suppressed, and the hearing should be directed to the specified evidence and to the grounds alleged for its suppression."[4] An enterprising lawyer might still obtain valuable information about the Commonwealth's case from a hearing upon a pre-trial motion, but a fishing expedition based upon a vaguely drawn motion is no longer permissible.

§22.4. Statement of deceased persons. The case of *Old Colony Trust Co. v. Shaw*,[1] decided during the 1965 SURVEY year, illustrated the usefulness of the declaration of deceased persons exception to the hearsay rule.[2] Quincy A. Shaw died in 1908 leaving the residue of his estate to his children for life and to his issue by right of representation in remainder. At the time of final distribution the testator required a deduction, from the share of each child and his issue, of certain amounts which he had advanced the children during his lifetime. The only evidence of the amount of these advances was a memorandum annexed to the inventory and signed by the deceased accountant for the testator and the estate. The trustees brought a petition for instructions as to whether the memorandum was sufficient evidence of advances to require them to deduct the amounts shown therein before final distribution.

The trial judge admitted the declaration, thereby making factual findings that it was made in good faith and of the personal knowledge of the declarant.[3] Hence, the fact that the deceased declarant was the testator's and the estate's bookkeeper and accountant led the court

§22.3. [1] 367 U.S. 643, 81 Sup. Ct. 1684, 6 L. Ed. 2d 1081 (1961).
[2] See Commonwealth v. Lewis, 346 Mass. 373, 382, 191 N.E.2d 753, 759 (1963).
[3] 1965 Mass. Adv. Sh. 799, 207 N.E.2d 284, also noted in §§11.5, 12.2 *supra*.
[4] Id. at 801, 207 N.E.2d at 285-286.

§22.4. [1] 1964 Mass. Adv. Sh. 1373, 202 N.E.2d 785.
[2] G.L., c. 233, §65.
[3] See Slotofski v. Boston Elevated Ry., 215 Mass. 318, 102 N.E. 417 (1913); Carroll v. Boston Elevated Ry., 210 Mass. 500, 96 N.E. 1040 (1912).

to the conclusion that he possessed personal knowledge of the facts stated in the memorandum.

Against an attack that the figures in the memorandum represented opinion and were therefore inadmissible, the Supreme Judicial Court declared a policy of construing this remedial statute liberally. It pointed out that the figures represented in the memorandum were summaries of individual facts which could be elicited if the deceased witness were on the stand. As in all exceptions to the hearsay rule the Court will not permit valuable evidence to be lost because it does not state the underlying facts with particularity.[4]

The memorandum was also attacked because the books of account themselves and not the memorandum were the best evidence of the facts contained therein. Because a diligent search was made for them and their loss was not the fault of any of the proponents of the memorandum the Court dismissed the best evidence objection.

The Court, by accepting the memorandum, carried out the intent of the testator, something which could not have been done without the memorandum. The Massachusetts statute that admits statements of a deceased person provided a vehicle for the admission of evidence which was probably trustworthy and which a trier of fact had a right to consider. In most states, however, such testimony would be either inadmissible or admissible only as an exception for recital in ancient writings, a little used and ill-defined exception to the hearsay rule.[5] In this area of the law, Massachusetts seems in the forefront of enlightened jurisprudence.

§22.5. Exclusion of proof of similar crimes. It is a common rule of evidence that, except where an earlier crime bears some special relationship to the crime for which the defendant is on trial, evidence of similar crimes committed by the defendant is inadmissible.[1] The reason for this rule is that this kind of evidence is highly prejudicial to the defendant and is of limited probative value. The prejudicial nature of the evidence is greatest in a jury trial, when minds untrained in the law are likely to conclude that the defendant is guilty now because he was guilty before. This doctrine had previously been applied without comment in a jury-waived trial in Massachusetts.[2] It was explicitly reaffirmed during the 1965 SURVEY year in *Commonwealth v. Welcome*,[3] in which, in a jury-waived trial, the judge erroneously admitted evidence of prior similar crimes. It could be argued that a judge is trained to disregard such legally irrelevant evidence, and that as long as there was sufficient evidence to warrant a conviction, the error was harmless. The Supreme Judicial Court reasoned, however, that this evidence is so dangerous that a uniform rule must be applied to both jury and jury-waived trials.

4 Kulchinsky v. Segal, 307 Mass. 571, 573, 30 N.E.2d 830, 831 (1941).
5 See McCormick, Evidence §298 (1954).

§22.5. 1 See McCormick, Evidence §157 (1954).
2 Commonwealth v. Bishop, 296 Mass. 459, 6 N.E.2d 369 (1937).
3 1964 Mass. Adv. Sh. 1197, 201 N.E.2d 827.