



Lack of Memory Renders a Witness Unavailable for Purposes of Hearsay Rules

The Massachusetts Supreme Judicial Court (“SJC”) recently adopted Proposed Mass. R. Evid. 804(a)(3), thereby allowing a declarant in a civil case to be deemed unavailable if he or she testifies to a lack of memory about the subject matter in question.

In *Hedberg v. Wakamatsu*, plaintiff Leslie Hedberg (“Hedberg”) suffered injuries following a surgery performed by the defendant with the assistance of a third-year medical student, Davis Stephen (“Stephen”). Hedberg testified in an affidavit that Stephen had made certain statements to her, including an apology, the day after surgery which indicated wrongdoing on the part of the defendant. Stephen subsequently testified during his deposition that he did not recall the surgery or Hedberg’s post-surgery care. In response to a motion in limine filed before trial, the trial judge excluded Stephen’s statements as inadmissible hearsay. A jury entered judgment for the defendant, and Hedberg appealed, arguing that Stephen’s statements should have entered into evidence as statements against interest by an unavailable declarant under Mass. G. Evid. § 804(b)(3).

Although the SJC agreed that there was no error under current law, it nevertheless vacated the verdict and remanded for a new trial after adopting lack of memory as a means of establishing unavailability in Massachusetts. The SJC noted that, in an unavailability analysis, “the crucial factor should not be the unavailability of the witness but rather the unavailability of his testimony” and pointed out that an overwhelming majority of other states recognized lack of memory as a means of establishing unavailability. In order for a party to take advantage of this rule, however, the judge must make a preliminary factual finding that the declarant’s claimed lack of memory is credible.

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