

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
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Re: Spencer v. Goodill
C.A. No. 08C-06-183 RRC

Submitted: November 19, 2009
Decided: December 4, 2009

On Plaintiff's Application to Admit Life Expectancy Tables into Evidence.
GRANTED.

Dear Counsel:

The issue raised by Plaintiff's application is whether "normal" life expectancy tables should be admitted in an informed consent case, where the patient died as a result of a medical procedure, to assist the jury in awarding damages absent a stipulation to allow the use of such tables and where

Plaintiff's expert has testified that the decedent had a "less than normal" life expectancy.

This case stems from the alleged failure of Defendant, John Goodill, M.D., to have provided the decedent, Muriel Stewart (Plaintiff's mother), adequate information necessary to make an informed decision prior to her bronchoscopy. Plaintiff alleges that Decedent needed this information to render an informed consent to the medical procedure, and Defendant should be held liable for not providing the requisite information. Plaintiff has also brought a wrongful death claim on her own behalf alleging that the death of her mother caused her to suffer "mental anguish."¹

Decedent was a forty-six year old woman with chronic medical conditions including "chronic obstructive pulmonary disease ("COPD"), [] diabetes, end-stage renal disease ("ESRD") . . . and respiratory failure requiring mechanical ventilation."² She also was a chronic smoker.³

¹ This Court previously held that Plaintiff may proceed on her claim of "mental anguish" absent a showing of physical injury. *See Spencer v. Goodill*, 2009 WL 3823217 (Del. Super.). Additionally, this Court has held that Plaintiff must prove, as a matter of proximate causation, that a reasonable patient in Decedent's position would have decided against the medical procedure if properly informed of the risks. *See Spencer v. Goodill*, 2009 WL 4652960 (Del. Super.).

² Def. Op. Br. at 2.

³ *Id.*

At the deposition of Plaintiff's expert witness, Dr. Byron Cooper, the witness was asked a series of questions regarding Ms. Stewart's life expectancy:

Q: What would be the prognosis for Muriel Stewart, prior to the bronchoscopy and transbronchial biopsy?

A: Are you asking me whether she had anything – nothing had been done – what her life expectancy would have been?

Q: That's part of it, sure.

A: Well, I think that is difficult to answer. The autopsy report doesn't show the presence of any incurable disease in her lungs. The major finding was pulmonary hemorrhage. She had dialysis and diabetes, so her prognosis for a normal life expectancy would certainly be less than any other 46 year old individual.

Q: Do you have an opinion on her life expectancy?

A: I do not have an opinion.

Q: You just know that it was less than normal?

A: Yes.⁴

In the pretrial stipulation filed on October 30, 2009, Plaintiff proposed using "accepted life expectancy tables" to demonstrate to the jury the number of years Decedent would have lived, but for the alleged negligence of Defendant. Plaintiff asserts that "[l]ife [e]xpectancy tables are generally admitted to assist the trier of fact to determine damages."⁵ Plaintiff further argues that a party wishing to challenge the use of the life expectancy tables (Defendant in this case) must produce expert testimony in support of the exclusion of the life expectancy tables, and that Defendant cannot challenge

⁴ *Id.* Ex. A at 29.

⁵ Pl. Op. Br. at 1 (citing *In re: Asbestos Litig. Pusey Trial Group v. Owens-Corning Fiberglas Corp.*, 669 A.2d 108 (Del. 1995)).

the introduction by Plaintiff of the life expectancy tables because Defendant has failed to identify an expert for that purpose.⁶

Defendant has refused to stipulate to the use of the “normal” life expectancy tables “asserting that life expectancy is subject of expert opinion or testimony, and part of Plaintiff’s burden of proof in establishing the damages element of their claims.”⁷ Additionally, Defendant argues that, in this particular case, the life expectancy tables are “irrelevant” and should be excluded pursuant to Delaware Rule of Evidence 401-403 because Plaintiff’s own expert has testified that Decedent’s life expectancy was “less than normal.”⁸

1. The Life Expectancy Tables are Relevant

A decision on whether to admit evidence in a particular case rests in the sound discretion of the trial court.⁹ Although life expectancy tables are often admissible to assist the jury in awarding damages,¹⁰ the introduction of life expectancy tables by a party is not automatic. Indeed, a party seeking to

⁶ *Id.* at 2.

⁷ Def. Op. Br. at 2.

⁸ *Id.* at 3-4.

⁹ See *Mercedes-Benz of N. Am. Inc. v. Norman Gershman’s Things to Wear, Inc.*, 596 A.2d 1358, 1366 (Del. 1991) (holding that a determination of relevancy is a matter “within the sound discretion of the trial court”).

¹⁰ *In re: Asbestos Litig. Pusey Trial Group v. Owens-Corning Fiberglas Corp.*, 669 A.2d 108, 114 (Del. 1995).

introduce any evidence must first establish that the evidence is relevant to the case at bar.¹¹ Pursuant to D.R.E. 401:

Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.¹²

Generally, all relevant evidence is admissible. However, even relevant evidence may be excluded pursuant to D.R.E. 403:¹³

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.¹⁴

In the instant case, Plaintiff seeks to introduce life expectancy tables related to a “normal” life on behalf of her decedent, but who, according to Plaintiff’s own expert, would have life expectancy “less than any other 46 year old individual.”¹⁵

No reported Delaware case has apparently addressed the issue of whether to admit life expectancy tables, absent a stipulation, where the person in question is or was not in good health, and where the party seeking the admission of the tables has identified an expert who has opined that the

¹¹ *Kidwell v. Delaware Hosp., Inc.*, 2007 WL 136744, at *1 (Del.Super.) (holding all relevant evidence is admissible, but irrelevant evidence is inadmissible).

¹² D.R.E. 401.

¹³ *Jerome v. Jerome*, 1995 WL 48358, at *2 (Del. Supr.).

¹⁴ D.R.E. 403.

¹⁵ Def. Op. Br. Ex A at 29.

party (or the party's decedent) does not have a "normal" life expectancy.

There is a split in authority from other jurisdictions on whether life expectancy tables should be admitted as evidence in a case even where the person is not in good health.¹⁶ It appears that the majority rule is to admit the tables in such circumstances:

[a]ccording to the weight of authority, lack of normal health in a person whose life expectancy is sought to be determined does not render such tables inadmissible in evidence, it being frequently pointed out in these cases that such ill-health or disease goes only to the weight of the evidence and not its admissibility.¹⁷

For example, in *Groat v. Walkup Drayage & Warehouse Company*, a case involving a claimant with "high blood pressure, hardening of the arteries, and diseased kidneys and heart,"¹⁸ the Court stated:

The objection which goes to use of the tables, not their admissibility, was correctly handled in the instructions. The court told the jury that the tables did not establish the length of time any particular person of a given age would live but tended merely to show the ordinary experience as to a person of the age named in ordinary or average health. It further instructed the jury that "in estimating the probable length of a particular man's life, as compared with the average duration of life of a person of the same age, the individual's state of health, occupation, habits and surroundings as disclosed by the evidence, must be taken into account; and the reasonable and proper weight is to be given to all such elements in fixing that person's expectancy, and either increasing or decreasing, according to the facts and

¹⁶ 29A Am. Jur. 2d *Evidence* § 1351 (2009) (stating that some jurisdictions hold that the life expectancy tables are inadmissible, while other jurisdictions hold that the life expectancy tables are admissible, and further stating the fact that the person is not in good health goes to the weight that the jury may afford to such tables).

¹⁷ 116 A.L.R. 416, *Admissibility and Weight of Mortality Tables as Evidence as Affected by Lack of Normal Health* (West 2009).

¹⁸ *Groat v. Walkup Drayage & Warehouse Co.*, 58 P.2d 200 (Cal. Dist. Ct. App. 1936).

circumstances of the particular case, the figures set out in the tables for the average person of the same age”.¹⁹

Similarly, in *Smiser v. State*, the Appellate Court of Indiana held that the admission of mortality tables was not error, even though the decedent suffered from bronchitis and lung trouble, because:

life tables are not taken as fixing the expectancy of life of the particular person, or as forming a legal basis for a calculation, but are accepted as furnishing some evidence, to be considered by the jury in connection with all other pertinent evidence, in ascertaining the probable duration of the life in question.²⁰

However, and even though the “weight of authority” indicates that life expectancy tables should be admissible, “[i]n a few jurisdictions, mortality tables are not admissible as bearing upon the life expectancy of one not in average good health.”²¹ For example, in *Norris v. Detroit United Ry.*, the Supreme Court of Michigan refused to admit mortality tables where plaintiff suffered from a goiter and a weak heart.²² The *Norris* Court held:

it was error to receive the mortality tables and submit them for the consideration of the jury. In the absence of any testimony to show how much her expectancy of life was impaired by the pre-existing pathological condition, the tables could furnish no safe guide as to the probable duration of the disabling injury.²³

¹⁹ *Id.* .

²⁰ *Smiser v. State*, 47 N.E. 229, 230 (Ind. App. 1897).

²¹ 116 A.L.R. 416, *Admissibility and Weight of Mortality Tables as Evidence as Affected by Lack of Normal Health* (West 2009) (citing *Norris v. Detroit United Ry.*, 160 N.W. 574 (Mich. 1916); *Colbert v. Rhode Island Co.*, 67 A. 446 (R.I. 1906)).

²² *Norris*, 160 N.W. at 581.

²³ *Id.*

At first blush, one might think that life expectancy tables would be irrelevant in this case because Plaintiff's own expert has testified that Decedent's life expectancy was "less than normal." However, and despite evidence that Decedent might not have led a "normal" life, the prevailing view of most courts is that the "normal" life expectancy tables are relevant under D.R.E. 401 to help the jury determine the amount of time a "normal" person would have lived. The jury is then free to decide how much weight to give these tables, if any, based on testimony concerning Decedent's various ailments. Although there is a split between jurisdictions as to whether life expectancy tables are admissible when a person is not in good health, this Court will follow the "great weight of authority" and now holds that the normal life expectancy tables are relevant and admissible even in this case where there is an expert opinion that the person did not have a normal life expectancy.

Finally, the Court will not exclude these tables pursuant to D.R.E. 403. These tables do have some probative weight in helping the jury to award damages. The probative weight is not "substantially outweighed" by the risks of "confusion of the issues or misleading the jury." Therefore, the Court holds that the evidence is both relevant and admissible.

2. The Court will take Judicial Notice of the Normal Life Expectancy Tables

Defendant has also argued that “an individual's life expectancy is based upon a number of factors including age, health, gender, ethnicity and, at a minimum, constitutes an expert opinion.”²⁴ Despite Defendant’s assertion, in such situations life expectancy tables are often appropriate evidence of which the Court may take judicial notice.²⁵ Pursuant to D.R.E. 201(b):

A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

The life expectancy of a “normal” person is capable of “accurate and ready determination” by using the tables proffered by Plaintiff. These tables are the product of detailed analysis by actuaries and their accuracy, insofar as they relate to a normal individual, “cannot be reasonably questioned.” Therefore, this Court will take judicial notice of the proffered normal life

²⁴ Def. Reply at 2.

²⁵ D.R.E. 201(b); *see Coleman v. City of Pagedale*, 2008 WL 341720, at *2 (E.D. Mo. 2008) (holding that the Court will take judicial notice of life expectancy tables); 29 Am. Jur. 2d. *Evidence* § 58 (2009) (“The courts take judicial notice of matters of common knowledge with respect to the span of life of human beings, and the existence of standard mortality, or life expectancy, tables which seek to approximate the lifespan of human beings . . .”).

expectancy tables if Plaintiff seeks to admit recognized life expectancy tables.²⁶

Accordingly, Plaintiff's application to admit the "normal" life expectancy tables is **GRANTED**. An appropriate jury instruction akin to the jury instruction in *Groat* will be given, upon the application of either party.

Richard R. Cooch

cc: Prothonotary

²⁶ The Court deems Defendant to have been afforded the "[o]pprotunity to be heard" on the issue of judicial notice of life expectancy tables. D.R.E. 201(e).