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EVIDENCE-HEARSAY-ADMISSIBILITY OF HISTORY STATEMENTS IN HOSPITAL RECORD UNDER BUSINESS ENTRIES STATUTE

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EVIDENCE—HEARSAY—ADMISSIBILITY OF HISTORY STATEMENTS IN HOSPITAL RECORD UNDER BUSINESS ENTRIES STATUTE—Plaintiff sued for injuries allegedly resulting when the door of defendant's bus closed on plaintiff's ankle as he was attempting to board the bus, throwing him to the ground. Defendant offered in evidence, under the Uniform Business Records as Evidence Act, in effect in Delaware,[1] hospital records containing the entry: "Patient states he twisted ankle while walking along the street." The interne who treated plaintiff and qualified the records had no independent recollection of the statement. On appeal from judgment for defendant, *held*, the record was properly admitted, although no witness could testify of his own memory that he heard the statement made. A statement is made within the regular course of business as required by the statute only if it is so related to the injury as to facilitate prompt and intelligent diagnosis and treatment. Here the statement was "pathologically germane" as an indication of the nature of the injury. *Watts v. Delaware Coach Co.*, (Del. 1948) 58 A. (2d) 689.

In the twenty-four jurisdictions which have adopted either the Uniform Act of the principal case or the Commonwealth Fund Model Act for Proof of Business Transactions,[2] hospital records are uniformly allowed in evidence to show the injuries and medical treatment of the patient.[3] But when the record purports to relate the cause of the injury, courts have excluded it as "pure hearsay,"[4] or on the ground that it is self-serving,[5] or because the entrant had no personal knowledge of the facts recorded.[6] It has been argued that "regular course of business" is a term of art which requires an investigation of each case to determine the trustworthiness of the evidence.[7] The principal case

[1] 45 Del. Laws (1945) c. 252-4704A, § 19A. ". . . A record of an act, condition or event, shall, in so far as relevant, be competent evidence if the custodian or the person who made such record or under whose supervision such record was made testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission." Cf. 9 U.L.A. 264 (1942). Enacted in fourteen states, 9 U.L.A. 85 (1947 Supp.)

[2] "Any writing or record . . . made as a memorandum . . . of any act, transaction, occurrence or event shall be admissible in evidence . . . if . . . it was made in the regular course of any business and it was the regular course of such business to make such memorandum or record. . . . All other circumstances of the making of such writing or record including lack of personal knowledge by the entrant or maker, may be shown to affect its weight but . . . not its admissibility." MORGAN, THE LAW OF EVIDENCE 63 (1927).

[3] 144 A.L.R. 731 (1943); Hale, "Hospital Records as Evidence," 14 So. CAL. L. REV. 99 (1941).

[4] Sadjak v. Parker-Wolverine Co., 281 Mich. 84, 274 N.W. 719 (1937).

[5] Schmitt v. Doehler Die Casting Co., 143 Ohio St. 421, 55 N.E. (2d) 644 (1944); Kelly v. Ford Motor Co., 280 Mich. 378, 273 N.W. 737 (1937).

[6] Lane v. Samuels, 350 Pa. 446, 39 A. (2d) 626 (1944); Johnson v. Lutz, 253 N.Y. 124, 170 N.E. 517 (1930) (policeman's report).

[7] Hoffman v. Palmer, (C.C.A. 2d, 1942) 129 F. (2d) 976 (railroad engineer's accident report). By such a view, if examination revealed sufficient trustworthiness in the facts, the court would admit the record, whether or not made in the regular course of business.

expressly rejects this view to follow that line of cases which interpret the statute to allow the admission of those facts which are so related to the injury as to facilitate prompt and intelligent diagnosis and treatment.[8] Since the circumstantial guarantee of trustworthiness of hospital records as business entries is to be found in the fact that the medical personnel of the hospital commonly rely on the record for diagnois and treatment,[9] it seems logical to require that records admitted should bear some reasonable relation to that purpose. In the instant case, the court felt that the question of whether the ankle was crushed in the door or simply twisted was sufficiently important to the treatment to warrant the admission in evidence of the statement, in view of the fact that no X-ray specialist was on duty at the time of admission to the hospital. Some writers have suggested that if a statement falls within the scope of some other exception to the hearsay rule, it should be admissible when entered in the record, irrespective of its relation to diagnosis or treatment.[10] This rule has apparently not been accepted by the courts,[11] and the logic of the principal case indicates that a declaration against interest which is irrelevant to the treatment or diagnosis, although admissible if testified to directly, would be excluded if offered as part of the hospital record on the basis that there is no assurance of accurate reporting. On the other hand, if the entry is germane, it would be regarded as trustworthy, though self-serving, and thus not otherwise admissible.[12] It should be noted, however, that the statute gives the court power to consider the sources of information, and the court might consider the source of a self-serving statement not "such as to justify its admission." In *Green v. Cleveland*,[13] the failure of the record to show that the statement was made by the plaintiff was apparently considered a sufficient basis for exclusion in itself. In the principal case, the record said "patient states," and although plaintiff contended the source was unreliable because he was unconscious on admission to the hospital, the court referred to other evidence that plaintiff was conscious and the fact that the record did not show that he was unconscious, concluding that it

[8] Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477 (1943) (an engineer's accident report to the railroad was excluded on the basis that it had little or nothing to do with the operation of the business as such); Commonwealth v. Harris, 351 Pa. 325, 41 A. (2d) 688 (1945); Weis v. Weis, 147 Ohio St. 416, 72 N.E. (2d) 245 (1947).

[9] 6 WIGMORE ON EVIDENCE, 3d ed., § 1707 (1940).

[10] 23 TEX. L. REV. 178 at 186 (1945).

[11] Cf. Green v. Cleveland, (Ohio 1948) 79 N.E. (2d) 676, where the court, as in the instant case, admitted that the statement, "How happened: Fell off street car, caught heel," would be admissible as a declaration against interest if made by the plaintiff to a third person called to testify (in view of plaintiff's theory that the injury was caused by the sudden starting of the street car), but held its admission was reversible error, because not incident to the treatment and outside the knowledge or observation of those creating the record.

[12] Cerniglia v. New York, 182 Misc. 441, 49 N.Y.S. (2d) 447 (1944). Where the record as a whole is kept for a self-serving purpose, however, it would still be excluded as not germane to the treatment or business. The Delaware court in the principal case apparently considered Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477 (1943), as such a case.

[13] (Ohio 1948) 79 N.E. (2d) 676 at 677.

was for the jury to decide what weight to attach to the statement. While the Uniform Act seems to give the court greater discretion as to the reliability of the sources of information than the Model Act,[14] it is obvious that to require a showing that the statement was actually made by the patient would in many cases defeat the purpose of the act to avoid the necessity of showing personal recollection of the events recorded. Whether or not the record says "patient states" may depend simply on the wording of the blank form used for the hospital admission record. Some courts have concluded that it is immaterial whether the patient or a third party made the statement,[15] and exclusion because of the unreliable source of information has usually involved more serious failings.[16] But it is still uncertain under what circumstances the court will consider the unreliability of source sufficient for exclusion, and when it will affect only the weight of the evidence.

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[14] Cf. the Uniform Act, ". . . if, in the opinion of the court, the sources of information . . . are such as to justify its admission," 9 U.L.A. 264 (1942), with ". . . all other circumstances . . . may be shown to affect its weight but not its admissibility," MORGAN, THE LAW OF EVIDENCE 63 (1927).

[15] Bethlehem-Sparrows Point Shipyard, Inc. v. Scherpenisse, (Md. 1946) 50 A. (2d) 256; Medina, "Current Developments in Pleading, Practice and Procedure in the New York Courts," 30 CORN. L.Q. 449 at 454 (1945).

[16] Beverly Beach Club, Inc. v. Marron, 172 Md. 471, 192 A. 278 (1937) (plaintiff was not allowed to use his statement in the record where he admitted his lack of knowledge on the subject).