DePaul Law Review

Volume 3
Issue 1 *Fall-Winter 1953*

Article 14

Evidence - Admissibility of Hosptial Records

DePaul College of Law

Obviously, there is a good deal of conflict in the decisions involving an "order-notify" situation, but this conflict seems to arise from confusion on the part of various courts. In following one of the three theories, the courts usually rely on numerous cases dealing with similar facts but not involving the "order-notify" situation, such as was done in the *Stoddard* decision. This confusion and conflict could be readily resolved by a clearcut decision by the United States Supreme Court, since nearly all the cases involve a shipment in interstate commerce. Because the United States Supreme Court has never decided the point the Massachusetts Supreme Court felt free in determining the matter according to its own notions.[26] It could hardly be said that the *Tri-State* decision will start a trend toward the "facts and circumstances" theory, or that the United States Supreme Court will adopt any "duty" theory, despite the statements of some courts.[27]

It is submitted that, of the three theories, the "facts and circumstances" theory is, perhaps, better suited to bring about substantial justice between the parties involved in an "order-notify" situation. The rigidity and curtness of the "absolute duty" and "no duty" rules can result in harsh decisions in cases which, with our ever expanding and complex mercantile structure, have a peculiar or at least singular factual background.

EVIDENCE–ADMISSIBILITY OF HOSPITAL RECORDS

Plaintiff sought to recover for personal injuries suffered when his automobile collided with a truck owned by the defendant. Judgment was for the defendant on grounds of the plaintiff's contributory negligence, one facet of which was that plaintiff was driving while under the influence of intoxicating liquor. On appeal, it was held that the trial court did not err in its admission into evidence of hospital records which referred to the plaintiff's alleged intoxication. The basis for the decision was that the information as to intoxication was necessary for proper diagnosis and treatment of the patient. Thus, the records were admissible as "business entries" under the Connecticut Uniform Act on

[26] The court in the Lapp case declared: "Where the Supreme Court of the United States has dealt with the question its decisions, of course, would be binding on this court. But where–as is the case here–the decisions of that court furnish no guide we are free to determine the appropriate rule to be applied, giving such consideration to the decisions of lower Federal courts as we think they are entitled." Lapp Insulator Co. v. Boston & M. R.R., 112 N.E. 2d 359, 362 (Mass., 1953).

[27] The Nashville decision recognized that there was conflict in the decisions concerned with the "order-notify" situation, but the Nashville court decided to follow the "absolute duty" theory, and added: "This rule has the approval of the United States Supreme Court and the Supreme Court of Georgia." Nashville, C. & St. L. Ry. Co. v. Dreyfuss-Weil Co., 150 Ky. 333, 335, 150 S.W. 321, 322 (1912).

Business Records.[1] *D'Amato v. Johnston*, 97 A. 2d 893 (Conn., 1953).

Generally, hospital records are not admissible unless there is a statute requiring the hospitals to keep such records. The courts ordinarily require strict adherence to the statute before admission of these records will be allowed.[2] There are several views as to admissibility, but under today's conditions strict limitations on the use of such records would be somewhat impractical since they might result in a denial of justice and a burdensome expenditure of money and time.[3]

Some authorities favor the theory that hospital records are admissible by virtue of statutes requiring that they be kept and made in the regular course of business, and that their use is a permissible exception to the hearsay rule because the records are public documents. Cases following this line of reasoning are numerous and comparatively uniform in requiring a proper foundation to be laid prior to admission of such records. *Grossman v. Delaware Electric Power Co.*,[4] it was held that hospital entries made coincidentally with examination of the patient and in the course of regular business were admissible as an exception to the hearsay rule, upon verification by doctors making them. A proper foundation for admission was deemed laid by a showing of compliance with the statute in the making of the records. *Borucki v. Mac Kenzie Bros. Co.*,[5] held that hospital entries or records were admissible in evidence in a personal injury case as long as they were made in the regular course of business and either at the time of the transaction or within a reasonable period thereafter. These records were admissible over the objection that they were not books of account, but merely information pertaining to the patient, because the records were in accord with requirements set forth by the statute. The Rhode Island court in *State v. Guaraneri*[6] similarly held that entries or hospital records containing details necessary or helpful for diagnosis or care are admissible in evidence if there is proper foundation for such admission. Specifically, the Rhode Island court held that prior to admission of hospital records, it should be shown that there was a positive duty to keep the record in the ordinary course of business of the hospital, and further that the person whose duty consisted of keeping the record was competent and, if living, would testify to the authenticity of the records. *Gearhart v. Des Moines*

[1] Conn. Gen. Stat. (1949), § 7903.

[2] 32 C.J.S., Evidence § 728 (1942).

[3] Johnson v. Lutz, 253 N.Y. 124, 170 N.E. 517 (1930).

[4] 34 Del. 521, 155 Atl. 807 (1929).

[5] 125 Conn. 92, 3 A. 2d 224 (1938).

[6] 59 R.I. 173, 194 Atl. 589 (1937).

Ry. Co.,[7] typifies the modern trend toward a more liberal attitude as to admissibility of hospital records. The court held that hospital charts could be admitted if it could be proven that they were charts regularly used in the care and treatment of the patient. The court explained its lack of further requirements by indicating that the well-being and even the life of the patient depended upon the veracity of the records and also that a party to an action is entitled to any information which may be used effectively, especially if such information may be acquired under circumstances which would seem to substantiate its truth.

The statute in Massachusetts providing for admissibility of hospital records presents a somewhat different line of reasoning than that indicated in the "regular course of business" jurisdictions. This statute states that those hospitals which derive their support partially or in entirety through contributions by the commonwealth or any town, inclusive of those hospitals which give free treatment and are associated with charities, must keep records as to treatment of cases under their care. The statute further provides that the records shall be admissible in state courts as evidence so far as they relate to the medical history of the case. Thus the Massachusetts court, in *Clark v. Beacon Oil Co.*,[8] said that a hospital record mentioning the odor of alcohol on the breath of an automobile driver was admissible under the statute, but except for the statute would be considered hearsay and inadmissible as evidence. Early Massachusetts law interpreted the statute as meaning that hospital records were admissible only as relating to treatment and medical history of the patient, but not as to evidence on liability in an action for personal injuries.[9] However, this interpretation was not generally accepted and was later modified to include personal liability evidence on the ground that the spirit of the statute would be defeated by too strictly limiting hospital records for use as evidence.[10] Hospital records may be refused admission as evidence if the authenticity of records is not proven satisfactorily to the court.[11] Another ground for refusal of admission of records is lack of proof that the hospital is supported by the commonwealth or town or that it offers free treatment or that it is a public charity.[12] However, a hospital is not excluded from the statute merely because it charges those able to pay. As long as it offers some patients treatment free of charge, it is complying with statutory requirements

[7] 237 Iowa 213, 21 N.W. 2d 569 (1946).

[8] 271 Mass. 27, 170 N.E. 836 (1930).

[9] Leonard v. Boston Elevated Ry. Co., 234 Mass. 480, 125 N.E. 593 (1920).

[10] Bibodeau v. Fitchburg, 236 Mass. 526, 128 N.E. 872 (1920).

[11] Commonwealth v. Millen, 289 Mass. 441, 194 N.E. 463 (1935).

[12] Karpowicz v. Manasas, 275 Mass. 413, 176 N.E. 497 (1931).

and records of said hospital are admissible as evidence.[13] The statute is not applicable to records only of those patients treated within walls of a hospital, but also applies to outpatients.[14] Thus, treatment at a dispensary or at a clinic would not disqualify records from being admissible if the case was administered by the hospital or the patient was treated by its staff.

A very common reason for holding a chart or record inadmissible is the lack of a proper foundation. A California court refused admission to hospital records simply because there was no testimony to the effect that the witness had directed that the entries be made or that he was familiar with the handwriting on the record.[15] A Connecticut case went so far as to hold that even though a hospital record complied with the statute and was made in the regular course of business, it was inadmissible because there was no affirmative finding by the trial court that the records were made in the regular course of business.[16] Records were excluded in *Hall v. Trimble*[17] because there was no indication of who made certain entries and therefore the court held that the records lacked a proper foundation. The court in *May v. Szwed*[18] indicated that lack of a proper foundation is actually non-compliance with the controlling statute.

Some cases hold that hospital records are inadmissible because they are protected by the privileged communication statute unless said privilege is waived.[19] In *Key v. Cosmopolitan Life, Health and Accident Insurance Co.*,[20] the court stated this proposition very lucidly:

> While it is true that official hospital records, properly identified, and shown to have been kept pursuant to statutory requirements, are admissible in evidence as an exception to the hearsay rule, they are nevertheless subject to an objection upon the ground of a privilege arising by virtue of the confidential relationship of physician and patient.[21]

The defense of privileged communication has been denied many times where entries concerned were made by internes and others to whom the privilege is not applicable.[22] Of course, as previously indicated, the privilege may be waived.[23]

[13] McGaffigan v. Kennedy, 302 Mass. 12, 18 N.E. 2d 344 (1938).

[14] Burke v. John Hancock Life Ins. Co., 290 Mass. 299, 195 N.E. 507 (1935).

[15] Lusardi v. Prukop, 116 Cal. App. 506, 2 P. 2d 870 (1931).

[16] Weller v. Fish Transport Co., 123 Conn. 49, 192 Atl. 317 (1937).

[17] 104 Md. 317, 64 Atl. 1026 (1906).

[18] 139 Ohio 272, 39 N.E. 2d 630 (1941).

[19] Allen v. American Life Ins. Co., 229 Mo. App. 752, 83 S.W. 2d 192 (1935); Vermillion v. Prudential Life Ins. Co., 230 Mo. App. 993, 93 S.W. 2d 45 (1936).

[20] 232 Mo. App. 110, 102 S.W. 2d 797 (1937).

[21] Ibid., at 112 and 798.

[22] Shepard v. Whitney Nat. Bank of New Orleans, 177 So. 825 (La., 1938).

[23] Rush v. Metropolitan Life Ins. Co., 228 Mo. App. 60, 63 S.W. 2d 453 (1933).

In Pennsylvania the law seems to be more strict and limited than the law in other jurisdictions. It certainly is more definite in its requirements and there is apparently less room for interpretation as most cases have adhered to the statutory interpretation as set forth by the court in *Paxos v. Jarka Corp.*[24] An excellent statement of the law as existing in Pennsylvania is found in *Leed v. State Workmen's Ins. Fund.*[25]

> . . . if hospital records are admissible in evidence, three probative elements must be present: (1) They must be made contemporaneously with the acts which they purport to relate; (2) at time of making, it was impossible to anticipate reasons which might subsequently arise for making a false entry in the original record; or (3) the statements or entries must be made by one possessing knowledge of their truth; and . . . where the records of a hospital are made not by physicians admitted to practice, but by internes or students not qualified as experts, and there is no evidence that they were made at the direction of the physician in charge, it is error to admit the records.[26]

Illinois cases uniformly hold that if hospital records are admissible at all, they are admissible only on the same basis that ordinary books of account are admissible and therefore require the same manner of proof for admissibility. All persons who have made entries in the record must testify as to correctness of the entries or the record will not be admissible.[27]

All of the cases discussing the admissibility of hospital records seem to indicate a definite trend. There is, at the present time, no dispute as to the admissibility of these records under the proper circumstances. Of course, there are different statutory requirements in the various jurisdictions. The prime point, however, is that generally these records are being admitted and serious injustices are being prevented. Even where the records are by statute required to be kept and are by statute specifically made admissible as evidence, trial counsel must be attentive to the laying of a proper foundation for their admission.

CIVIL RIGHTS–CLASS RELIEF DENIED ALTHOUGH CITY'S ACTS HELD DISCRIMINATORY

Kansas City, Missouri, operates a park for the amusement and recreation of its citizens generally. Swope Park is designed to provide a well balanced program for athletic as well as social entertainment. Among the many attractions is a swimming pool. Appellant sought to be admitted to the pool but was refused admittance in accordance with the park commissioner's

[24] 314 Pa. 148, 171 Atl. 468 (1934).

[25] 128 Pa. Sup. 572, 194 Atl. 689 (1937).

[26] Ibid., at 574 and 691.

[27] Monahan v. Chicago Transit Authority, 341 Ill. App. 250, 93 N.E. 2d 169 (1950); Kimber v. Kimber, 317 Ill. 561, 148 N.E. 293 (1925); Wright v. Upson, 303 Ill. 120, 135 N.E. 209 (1922).