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Evidence—The Uniform Business Records as Evidence Act Applied to Medical Records

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Notes

Evidence—The Uniform Business Records as Evidence Act Applied to Medical Records

In *Fries v. Goldsby*,[1] decided in December 1956, the Nebraska Supreme Court held, *inter alia*, that a chiropractor's permanent record of plaintiff's history, examination, diagnosis, care, and treatment were not admissible into evidence under the Uniform Business Records as Evidence Act.[2] Because the court treated the chiropractor as an expert in his field, this holding probably applies to other medical witnesses who testify as experts in their fields of knowledge. Thus, the court has seemingly held that the permanent records of physicians, surgeons, and dentists do not fall within the purview of the Uniform Act. This note is a discussion of that holding.

Plaintiff's automobile collided with defendant's truck on July 20, 1953. On August 7, 1953, the plaintiff consulted a licensed chiropractor who had been practicing his profession in Nebraska for thirty years. He took X-ray pictures of plaintiff's spine, diagnosed her injuries, and prescribed care and treatment. He also gave plaintiff chiropractic adjustments at intervals until September 1954. At the trial he testified by deposition as a witness for the plaintiff upon the stipulation that he might testify from records and notes which were a permanent part of his records in plaintiff's case. However, upon defendant's objections, the trial court refused to admit the witness's testimony regarding the history given to him by plaintiff, his findings of plaintiff's condition, and

[1] 163 Neb. 424, 80 N.W.2d 171 (1956).

[2] Neb. Rev. Stat. § 25-12,108 (Reissue 1956). "The term 'business' shall include every kind of business, profession, occupation, calling, or operation of institutions, whether carried on for profit or not.

"25-12,109. A record of an act, condition, or event, shall, insofar as relevant, be competent evidence if the custodian or other qualified witness 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.

"25-12,110. Sections 25-12,108 to 12,111 shall be so interpreted and construed as to effectuate their general purpose to make uniform the law of those states which enact it.

"25-12,111. Sections 25-12,108 to 25-12,111 may be cited as the Uniform Business Records as Evidence Act."

his interpretaton of the X-ray pictures he had taken of the plaintiff. The trial court also refused to admit the X-ray pictures even though a proper foundation had been laid as to the taking of them. Finally, the trial court refused to admit the chiropractor's permanent records.

On appeal, the Supreme Court acknowledged that a chiropractor is competent to testify as an expert witness in the field of chiropractics and held that all of the evidence except the chiropractor's records should have been admitted. With regard to those records the court said:

> ...Higgins v. Loup River Public Power Dist., 159 Neb. 549, 68 N.W.2d 170, is controlling here. Plaintiff's contention has no merit. The chiropractor testified as a witness. As such it is elementary that he had a right to refresh his memory from his own records and notes and to appropriately testify at length with regard to plaintiff's history, examination, diagnosis, and treatment, together with an interpretation of the X-rays taken by him, which were admissible in evidence. Viewed in such light, his record and notes would ordinarily be only cumulative evidence.[3]

Thus, the court based its holding on two grounds: (1) that the records would "ordinarily be only cumulative," and (2) that *Higgins v. Loup River Public Power District* is controlling. On the first of these points the court said, in effect, "if the chiropractor had been allowed to testify from his records, those records would have been cumulative and, therefore, inadmissible." However, the chiropractor was not allowed to testify. This makes it difficult to see why those records were cumulative at this stage of the action. The court could have limited itself to indicating that such records may be cumulative, and, as such, admissible only in the discretion of the trial court. This result would have been in accord with the court's prior treatment of cumulative evidence.[4] Other jurisdictions have reached a similar result.[5]

The second point, that *Higgins v. Loup River Public Power District* is controlling, requires an examination of that case. In a condemnation action to acquire an easement for a transmission line, Higgins alleged that the Power District had not made a good faith effort to contact him and to enter negotiations on the price he should receive for the easement. On this issue the Power Dis-

[3] 163 Neb. at 438, 80 N.W.2d at 179.

[4] O'Dell v. Goodsell, 152 Neb. 290, 41 N.W.2d 123 (1950); Horky v. Schroll, 148 Neb. 96, 26 N.W.2d 396 (1947).

[5] Moore v. State Finance Co., 202 Ore. 265, 274 P.2d 559 (1954); Veatch v. State, 221 Ark. 44, 251 S.W.2d 1015 (1952); Croll v. John Hancock Mut. Life Ins. Co., 198 F.2d 562 (3d Cir. 1952).

trict offered a document which had been prepared by the head of its right-of-way department. The document recited that he went to the Higgins home, that he attemped to contact Mr. Higgins, that he talked with Mrs. Higgins, that she expressed dissatisfaction with publicity the Higgins had received in connection with the case, that she denied that she had told him previously that "her husband would positively not allow anyone on the premises and if anyone should attempt to do so, he would be immediately shot," and that Mrs. Higgins would not talk to him further. The trial court admitted the document, but the Supreme Court reversed. Relying heavily on *Palmer v. Hoffman*,[6] the court held that the document was not made "in the regular course" of the business of the Power District because it was made solely for the purpose of litigation.

It is difficult to see why the *Higgins* case should be controlling here. Plaintiff consulted the chiropractor eighteen days after the accident. He diagnosed her injuries and prescribed care and treatment for them. He also prescribed a brace which plaintiff obtained and wore to support her back.[7] Thus, it appears that the records were made pursuant to consultations for the purpose of care and treatment,[8] not for the purpose of litigation.[9] Certainly the court would not contend that chiropractors (or other medical men) keep records only because they may be of use in patients' litigation.[10]

[6] 318 U.S. 109 (1943). This is the only United States Supreme Court case decided under the Federal counterpart of the Uniform Act. It held that a railroad employee's accident report which was made pursuant to an established routine of the railroad company was not made "in the regular course" of the railroad business within the meaning of the act.

[7] 163 Neb. at 434, 80 N.W. 2d at 177.

[8] At 163 Neb. 436, 80 N.W.2d 178, the court approves the rule that, "The opinion of a physician or surgeon as to the condition of an injured or diseased person is not rendered incompetent by the fact that it is based upon the history of the case given by the patient to the physician or surgeon on his examination of the patient, *when the examination was made for the purpose of the treatment and cure of the patient.*" (Emphasis supplied.) It would appear that the circumstantial probability of their trustworthiness would warrant the application of this rule to the experts' records. See 5 Wigmore, Evidence § 1422; and compare 3 Wigmore § 688 with 6 Wigmore § 1721.

[9] For a case admitting doctor's records prepared for use in the controversy, see Ellis v. State Dept. of Public Health and Welfare, 285 S.W.2d 634 (Mo. 1956). *Distinguish,* Curtis v. Atchison, T. & S. F. Ry., 363 Mo. 779, 253 S.W.2d 789 (1952) admitting a doctor's report of a pre-employment examination.

[10] Cf. language in Higgins v. Loup River Public Power Dist., 159 Neb. 549, 557, 68 N.W.2d 170, 175 (1955).

We do not mean to indicate that the theory behind the *Higgins* case[11] cannot be applied to medical records. Instead, our criticism is that in the principal case there is no indication that these particular records were made with a view to litigation. Furthermore, it should be emphasized that some medical records may be excluded on other grounds. For example, they should not be admitted over the patient's objection when they contain privileged information.[12] Nor should they be admitted unless the "custodian or other qualified witness testifies to its identity and the mode of its preparation."[13]

In addition, it must be remembered that while the purpose of the act was to obviate the necessity, expense, inconvenience, and sometimes the impossibility of calling the persons who collaborated to make the patient's record,[14] the act was not intended to open the door to the avoidance of cross-examination.[15] Thus, to be admissible the patient's record must have been made in the regular course of business,[16] and must not contain information which is not germane to the diagnosis or treatment.[17] Therefore, records which contain statements like "Hold for police"[18] or "Diagnosis: (1) prob. criminal abortion"[19] are inadmissible. Closer cases arise when the medical record contains a statement of the cause of the injury as related to the doctor by the patient and the proponent argues that this is something that the doctor needed to know in order to properly care for

[11] See also Palmer v. Hoffman, 318 U.S. 109 (1943); Owens v. Seattle, 299 P.2d 560 (Wash. 1956).

[12] Neb. Rev. Stat. § 25-1206 (Reissue 1956); O'Donnell v. O'Donnell, 142 Neb. 706, 7 N.W.2d 647 (1943); Cf. Willis v. Order of Railroad Telegraphers, 139 Neb. 46, 296 N.W. 443 (1941).

[13] Neb. Rev. Stat. § 25-12,109, supra note 2; Gray v. St. Louis-San Francisco Ry., 363 Mo. 864, 254 S.W.2d 577 (1953); State v. Phillips, 90 Ohio App. 44, 103 N.E.2d 14 (1951).

[14] Cantrill v. American Mail Line, 42 Wash.2d 590, 257 P.2d 179, 189 (1953).

[15] New York Life Ins. Co. v. Taylor, 147 F.2d 297 (D.C.Cir. 1945); similar prior opinion disapproved in Buckminster's Estate v. Commissioner, 147 F.2d 331 (2d Cir. 1944).

[16] Baltimore & O. R.R. v. O'Neill, 211 F.2d 190 (6th Cir. 1954); McGuire v. Corn, 92 Ohio App. 445, 110 N.E.2d 809 (1952).

[17] Williams v. Alexander, 309 N.Y. 283, 129 N.E.2d 417 (1955).

[18] Flemming v. Thorson, 231 Minn. 343, 43 N.W.2d 225 (1950).

[19] People v. Terrell, 138 Cal.App.2d 35, 291 P.2d 155, 169 (1956).

the patient.[20] The Minnesota Supreme Court answered such an argument, saying, "... It may well be that a doctor might desire to know many things, but that fact alone does not make statements which are otherwise inadmissible admissible by the simple expedient of including them in hospital records. We can see no reason why such inadmissible statements may not be eliminated from the hospital records and the admissible portion permitted to go to the jury."[21] Similar questions may be presented when the medical record contains a diagnosis, particularly if it is a diagnosis of a mental condition.[22]

Because many of these complex problems can be properly solved only by reference to the particular medical record in issue, some courts vest the problem in the discretion of the trial judge and apply the usual rule that he will not be reversed unless there has been a manifest abuse of that discretion.[23]

In conclusion it should be noted that although several of the cited cases exclude particular medical records, no case has been found to hold that medical records per se are inadmissible. It is submitted that Nebraska should follow that lead and rule that doctors' office records fall within the purview of the Uniform Act. Such a ruling would not "open the door to the avoidance of cross-examination" because the admission of particular records could be controlled case by case.

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[20] See Watts v. Delaware Coach Co., 5 Terry 283, 58 A.2d 689 (Superior Ct. Del. 1948), where defendant offered a hospital record which contained a statement that plaintiff had injured his ankle while walking along the street. A doctor testified that it was necessary for him to know how the injury occurred in order to properly treat it. The court admitted the statement on the ground that it was "pathologically germane" to the injury.

[21] Brown v. St. Paul City Ry., 241 Minn. 15, 62 N.W.2d 688, 696 (1954). The suggestion that the inadmissible portion must be separated was repeated in Zuber v. Northern Pacific Ry., 246 Minn. 157, 74 N.W.2d 641 (1956). See also State v. Meyer, 226 P.2d 204 (Wash. 1951).

[22] New York Life Ins. Co. v. Taylor, supra note 15, at 306: "... There is no magic in the word diagnosis which makes everything which can be included in that term admissible. Some diagnoses are a matter of observation, others are a matter of judgment, still others a matter of pure conjecture. The admissibility of such diagnoses must depend upon their character." For a discussion of the various types of hospital records the courts may be asked to accept see Polasky and Paulson, Business Entries, 4 Utah L. Rev. 327, 349f (1955).

[23] Cantrill v. American Mail Line, supra note 14; Choate v. Robertson, 195 P.2d 630 (Wash. 1948); York v. Daniels, 241 Mo. App. 809, 259 S.W.2d 109 (1953).