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Civil Procedure And Evidence—Evidence—Hospital Records

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persons other than the witness.[39] It is better that a witness testify to what he saw and not to what another saw. If the other person's evidence is of value, he may himself be called as a witness, and in this way the jury may see and hear from actual experience and observe the witness's reactions as he is being subjected to cross-examination. Thus the jury may determine his credibility for themselves and weigh his testimony accordingly.

One exception to the hearsay rule is the "res gestae" rule[40] which allows the introduction of unsworn statements into evidence if such statements are a spontaneous and natural utterance.[41] The necessity for the declaration to be spontaneous and natural is to eliminate any chance of fabrication.[42]

In the instant case,[43] the Court of Appeals held a witness could testify about a statement made by a deceased truck driver concerning the condition of the brakes on a truck. The witness rode alongside deceased and heard him declare, just ten seconds before the accident: "The brakes do not work." Plaintiff was injured in the accident, and her allegation that the accident was caused by defective brakes was supported by this statement, and made out a prima facie case.

There is no doubt that statements made by one person and testified to by another are hearsay declarations and should be excluded, but a too rigid application of the hearsay rule might eliminate the only possible evidence in a case and thus bar many rightful and just claims. This case presents a classic example of a claim that would have been barred but for the res gestae rule.

Admission of Evidence—Hospital Records

A memorandum or record of any act, transaction, occurrence or event is admissible in evidence if the trial court finds that it was made in the regular coure of any business and that it was the regular course of such business to make such memorandum or record.[44] This exception to the usual rules of evidence requiring confrontation and cross-examination of witnesses rests upon the probability of trustworthiness, inherent in routine entries made by the person whose business involves the keeping of such records in its regular course and whose in-

39. *Carrier v. Arrow Exterminating Co.*, 201 Misc. 786, 108 N.Y.S. 2d 603 (1951).
40. 1 WHARTON CRIMINAL EVIDENCE §279 (12th ed. 1955).
41. *People v. Del Vermo*, 192 N.Y. 470, 85 N.E. 690 (1908); *People v. Curtis*, 225 N.Y. 519, 122 N.E. 623 (1919).
42. *Greener v. General Elec. Co.*, 209 N.Y. 135, 102 N.E. 527 (1913).
43. *Swensson v. New York, Albany Despatch Co.*, 309 N.Y. 497, 131 N.E. 2d 902 (1956).
44. N. Y. CIV. PRAC. ACT, §374-a.

terest lies in having them truthful, accurate and reliable.[45] *Williams v. Alexander*,[46] a case of first impression in New York, concerned the scope to be given to the phrase "regular course of business" with respect to entries in hospital records.

The majority opinion adopted a narrow construction of the phrase, holding that the entry in a hospital record must relate to diagnosis, prognosis or treatment and that anything not germane to such purpose failed to satisfy the underlying rationale of section 374-a. This result was found to be in harmony with the decisions of almost all other states, construing comparable statutes.[47] Where the particulars of an accident had no medical significance, it could not be said that entries were made in the regular course of a hospital's business, and therefore they failed to support the probability of trustworthiness.[48] Since the Court was unable to find that the portions of the hospital record, improperly admitted, had not influenced the jury's verdict for defendant, it remanded the case for a new trial.

Three dissenters contended that section 374-a was not in issue, but rather that the case concerned an admission against interest, an exception of the hearsay rule,[49] proved by a record, the accuracy of which had been vouched for by the plaintiff. Since the plaintiff had introduced the record to prove the extent of his injury, the dissent felt that it was an unnecessary and undesirable construction to deny the defendant's use of the same record to show an admission against interest. The dissent then looked to section 374-a, holding that the terms of the statute are broad and leave to the trial court the discretion in ascertaining whether the entires were made in the regular course of business, a discretion which should not be curtailed by an unnecessarily restrictive interpretation.

Despite the persuasive discussion by Judge Desmond in dissent, it would seem that the majority position in preventing extension of this exception to an important evidentiary rule was fully justified. To allow the introduction in evidence of hospital record entries other than those dealing with diagnosis, prognosis or treatment would be to invite persons injured to make broad statements concerning the cause of the accident for the single purpose of later using them in a law action.

45. *Johnson v. Lutz*, 253 N.Y. 124, 128, 170 N.E. 517, 518 (1930).
46. 309 N.Y. 283, 129 N.E. 2d 417 (1955).
47. MCCORMICK, EVIDENCE §290, p. 611 (1954); RICHARDSON, EVIDENCE §233, pp. 209-212 (8th ed., 1955).
48. WIGMORE, EVIDENCE §1707, p. 36 (3d ed. 1940).
49. *Reed v. McCord*, 160 N.Y. 330, 54 N.E. 737 (1899).