Marquette Law Review

Volume 47
Issue 3 *Winter 1963-1964*

Article 16

Evidence: The Admissibility of Hospital Records Under Section 327.25 of the Wisconsin Statues

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> apply to a charge such as that against the petitioner, who was sentenced to two years imprisonment. . . .[7]

While these cases have indicated the general interpretation that courts are beginning to give the *Gideon* case, they have given no indication of how extended the indigent accused's right to counsel will become in the future.

At the present time, Wisconsin law requires appointment of counsel only when the accused indigent has been charged with a felony.[8] Clearly, section 957.26 has been shown to be inadequate in light of the *Gideon* and the *Melvin* decisions. The Wisconsin legislature must now determine where to draw the line regarding the requirement that counsel be appointed for the indigent defendant. The *Banmiller* and the *Otten* cases have indicated that *Gideon* can be applied to all criminal prosecutions; whereas, the *Melvin* case required a substantial penalty before *Gideon* could be invoked. It is this writer's opinion that counsel should be appointed in cases where the indigent could be sentenced to a prison term of one year or more.

FRANCIS J. PODVIN

Evidence: The Admissibility of Hospital Records Under Section 327.25 of the Wisconsin Statutes—The recent case of *Rupp v. Travelers Indemnty Co.*[1] pointed out a basic problem troubling many practicing attorneys in regard to one of the exceptions to the hearsay rule. This case involved an action for the recovery of damages for personal injuries sustained by the plaintiff in an automobile accident. The issue on appeal was whether the trial court erred in not admitting into evidence hospital records and records of an orthopedist, who had treated the plaintiff after the custodian of the records identified them as entries made in the usual course of business. The Wisconsin Supreme Court held that the trial court was correct in not admitting these records as regular entries under section 327.25.[2]

The plaintiff in the *Rupp*[3] case failed to call to the stand any doctor, nurse, intern, or employee of the hospital, who had made the various entries, or to offer to show that such persons were beyond the jurisdiction of the court, dead, or insane as required by section 327.25. Admissibility was denied on the ground that a proper foundation for such evidence had not been laid. The court held that it was error to admit these records without first laying a foundation by calling as witnesses those who made said entries or without first showing that the entrants were beyond the jurisdiction of the court, dead, or insane. The trial

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[7] Otten v. Warden, Baltimore City Jail, 216 F. Supp. 289 (D.Md. 1963).
[8] WIS. STAT. §957.26 (1961).
[1] Rupp v. Travelers Indemnity Co., 17 Wis. 2d 16, 115 N.W. 2d 612 (1962).
[2] WIS. STAT. §327.25 (1961).
[3] Rupp v. Travelers Indemnity Co., *supra* note 1.

court relied on *Bielke v. Knaack*[4] in which the Wisconsin Supreme Court held:

> The contention that the court erred to the prejudice of the defendants in admitting over their objection certain daily hospital records relating to the condition of the plaintiff and the treatment given to him as a patient, which constituted the history of the plaintiff's case while receiving treatment in the hospital, presents a more serious question. *The sisters who nursed the plaintiff and who, in large part, kept the daily records were not produced upon the trial nor was it shown that they were beyond the jurisdiction or insane as provided by sec. 327.25, Stats. . . . We think that the admission of these records was error. . . .*[5] (Emphasis added.)

The plaintiff in the *Rupp* case alleged at the trial that there was a practical necessity for the court to allow admission of the records without the testimony of each person who had made any entry therein, as there were some seventy-five persons who had made such entries. The supreme court recognized plaintiff's argument and questioned the logic of the *Bielke* case by stating:

> It would be an impossible task, and, if not, an impractical one, both from the standpoint of hospital administration and of the administration of justice under our trial procedure, to call as witnesses so large a number of persons, many of whom, no doubt, would be unable to recall any independent recollection of his particular entry other than it was in his handwriting and was true.[6]

But the supreme court noted that it could neither construe nor modify section 327.25 on appeal, but could only act in compliance with section 251.18.[7] This section in substance provides that a pleading, practice, or procedure statute may only be modified by a court rule after the court has held a public hearing and published the required notice. The court did, however, refer this problem to the Judicial Council of Wisconsin[8] for study and a report on the merits of a proposed change in section 327.25.

The problem in securing the admission of a party's account book and regular entry records into evidence was considered in an article in *Wisconsin Continuing Legal Education*[9] by Reserve Circuit Judge Francis X. Swietlik. It was there pointed out that the original reasons for the existence of the "Account Book Rule"[10] have ceased to exist,

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[4] Bielke v. Knaack, 207 Wis. 490, 242 N.W. 176 (1932).
[5] *Id.* at 495, 242 N.W. at 178, 179.
[6] Rupp v. Travelers Indemnity Co., *supra* note 1, at 22, 115 N.W. 2d at 616.
[7] WIS. STAT. §251.18 (1961).
[8] For the creation and membership of the 16 member council, see: WIS. STAT. §251.181 (1961).
[9] Swietlik, *Hearsay Rule in Wisconsin—Part 3,* Wis. Continuing Legal Ed., Vol. II, No. 2, p. 1 (1962).
[10] WIS. STAT. §327.24 (1961).

since parties to a lawsuit or those having an interest therein are now competent to testify.[11] Therefore, all entries regularly made, whether they be in the party's own account book, or in the account books of third parties, or in any other form of a book, become, in fact, "Regular Entries."[12] It was Swietlik's contention that section 327.24 should be repealed and that section 327.25 should be reworded to conform more closely with provisions of modern legislation.

In a scholarly article written by Norman C. Skogstad and Howard H. Koppa,[13] the history of the business entry rule is traced from 17th Century common law to the present. It is basically an exception to the hearsay rule, and has been codified in many states as well as by Congress. Wisconsin has two such statutes dating back to 1839,[14] the scope of which through the years have been greatly enlarged by the legislature and judicial interpretation. The federal "Shop Book Rule"[15] is probably the broadest of all such legislation, and as a practical matter, it admits as a record or writing contemplated by the statute any systematically kept record if it is the product of a routine procedure.

The supreme court's referral to the Judicial Council[16] resulted in a report followed by the court's adoption of a rule effective July 15, 1963 (pursuant to section 251.18) which reads as follows:

> Section 327.24, Wisconsin Statutes, is hereby repealed.
> Section 327.25 is hereby repealed and re-created to read as follows:
>
> > *Entries in the Usual Course of Business: Medical Records,* (1) any writing or record, whether in the form of an entry in a book or otherwise made as a memorandum or record of any act, transaction, occurrence or event, is admissible in evidence in proof of said act, transaction, occurrence or event, if the trial judge finds that it was made in the regular course of any business, and that it was the regular course of such business to make such memor-

[11] See WIS. STAT. §325.13 (1961).
[12] As regular entries they are admissible under WIS. STAT. §327.25 (1961).
[13] Skogstad and Koppa, *Admissibility of Business Entries,* 1958 WIS. L. REV. 245.
[14] WIS. TERR. STAT. §§77-80 (1839).
[15] 62 Stat. 945 (1948), 28 U.S.C. §1732 (a) (1958), which reads as follows:
"(a) *Record Made in Regular Course of Business.* In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.
"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 such circumstances shall not affect its admissibility.
"The term 'business,' as used in this section, includes business, profession, occupation, and calling of every kind."
[16] See preceding discussion in text *supra* of the action taken by the court in the *Rupp* case.

> andum or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter. 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 they shall not affect its admissibility. The term "business" includes businesses, professions, occupations and callings of every kind.
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> (2) Subsection (1) applies to entries made in medical or hospital records if entries relate to treatment given or examination conducted within this state. No such entry or portion thereof which constitutes a medical opinion or diagnosis may be admitted in evidence under this subsection except by stipulation of the parties or except when offered against the interest of a party by whom or under whose supervision such entry or portion thereof was made.[17]

This statute liberalized the rule as to the admissibility of business records. Subsection (1) no longer required the appearance and testimony of all those who made entries therein, and its wording was almost identical to the federal "Shop Book Rule."[18]

Subsection (2) of section 327.25, as adopted by the supreme court, was intended to limit specifically the *content* of hospital records which were made admissible under subsection (1). In the Judicial Council study, the two major proposals for revision[19] both sought to exclude medical opinions and diagnoses and also to exclude record of treatment and examination received out-of-state which were included in these hospital records. By excluding medical opinions or diagnoses contained in the hospital records, subsection (2) did not allow the plaintiff to prove by the record such material facts as the cause of the injury, the nature and extent of the patient's pain and suffering, and the probable extent of any temporary or permanent disability. In other words, the plaintiff would not be allowed to establish a prima facie case simply by the admission of the hospital record, without calling the physician as a witness and allowing the opposing party to cross-examine him as to his opinions and diagnoses. Subsection (2) also excluded any portion of a hospital record which related to treatment given or examination conducted by a physician outside of the state. There would be, it was felt, too great a risk of fraud involved in allowing the admission of such entries contained in the hospital record. The basis for this feeling was that a physician rendering treatment or conducting an examination

[17] WIS. STAT. §327.25 (1961), as re-created by Supreme Court Rule at 20 Wis. 2d XXV (effective July 15, 1963), as recommended by the Judicial Council.
[18] 62 STAT. 945 (1948), 28 U.S.C. §1732 (a) (1958).
[19] See Judicial Council Minutes, November 16, 1962, wherein Atty. Gerald T. Hayes of Milwaukee proposed subsection (2) to §327.25. See also, Judicial Counsel Minutes, February 22, 1963, wherein Atty. Theron Pray of Ashland proposed creation of a new statute §327.251 instead of subsection (2) to §327.25.

outside of the state could not be easily reached by subpoena to testify to the inaccuracy of such entries so as to rebut the evidence submitted by the plaintiff.

Whether or not the question is one of exclusive judicial competency,[20] the supreme court's rule does not in fact preclude the state legislature from acting on the same matter. Section 251.18 provides that the supreme court's action does not "abridge the right of the legislature to enact, modify, or repeal statutes or rules relating to pleading, practice, or procedure,"[21] and pursuant to this section, the legislature repealed and re-created section 327.25 to read as follows:

> *Business Records as Evidence.* Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if the custodian or other qualified witness testifies to its identity and mode of preparation, and if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event (*sic*)[22] within a reasonable time thereafter. 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 such circumstances shall not affect its admissibility. The term "business," as used in this section, includes business, profession, occupation and calling of every kind.[23]

This statute in effect purports to repeal the court's rule amending section 327.25.

It is important to note, especially, the deletion of subsection (2) of the court's rule in the legislative enactment. This is the most startling difference between the two statutes. Where the court apparently intended a *moderately-liberal* rule, the legislature on the other hand chose an *ultra-liberal* rule. The legislative statute permits the introduction of all entries contained in the hospital record including opinions, diagnoses, and prognostications of the attending physician without the necessity of calling the entrants, including the physician, even though they are available at the time of the trial. This allows the plaintiff to establish a prima facie case merely by the introduction of a hospital record and to thereby meet his burden of proof without calling the physician so

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[20] See *In re* Constitutionality of Section 251.18 Wisconsin Statutes, 204 Wis. 501, 510, 236 N.W. 717, 720 (1931), wherein the court stated: "It is concluded that the power to regulate procedure, at the time of the adoption of the constitution, was considered to be essentially a judicial power, or at least not a strictly legislative power, and that there is no constitutional objection to the delegation of it to the courts by the legislature." This case clearly presents the constitutional questions involved with WIS. STAT. §251.18 (1961).

[21] WIS. STAT. §251.18 (1961).

[22] The addition of *or* is necessary to correct an obvious typographical error.

[23] Wis. Laws 1963, ch. 256.

that he may be available for cross-examination by the opposing party. Due to the deletion of subsection (2) of the supreme court's rule, the statute also allows admission of evidence contained in the hospital record involving examination or treatment outside the state. Apparently the legislature chose to disregard the possibility of fraud where out-of-state witnesses could not, without out-of-state depositions, be reached by subpoena. Once the plaintiff has introduced a hospital record containing an entry of examination or treatment outside the state, the opposing party has no possibility of disproving the accuracy of such entry (because of his inability to reach any of the out-of-state entrants by subpoena), unless he has prior notice that the plaintiff intends to rely entirely on the hospital record or unless he can secure a continuance so that he may be able to take depositions from out-of-state entrants.

In conclusion, it is no longer necessary under section 327.25 to call all the entrants who made entries in a hospital record as required by the *Rupp*[24] case. But, assuming its essential validity,[25] the present legislative enactment opens the door to fraud and also allows the plaintiff to establish a prima facie case without the necessity of calling the attending physician whose opinions and diagnoses are contained in the hospital record. This leaves the opposing party without opportunity to cross-examine the physician. It is the opinion of this author that subsection (2) of the supreme court's rule should be added to the legislative statute in order to alleviate these problems.

DENIS J. WAGNER

[24] Rupp v. Travelers Indemnity Co., *supra* note 1.
[25] See note 20 *supra*.

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5. LOCATION OF HEADQUARTERS OR GENERAL BUSINESS OFFICES OF THE PUBLISHERS *(Not printers)*: 1103 W. Wisconsin Ave.; Milwaukee, Wisconsin.

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