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## Evidence: Oklahoma's Hospital Records Exception

Ronnie Main

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## EVIDENCE: OKLAHOMA'S HOSPITAL RECORDS EXCEPTION

An important aspect of personal injury litigation is the introduction of hospital records into evidence. The relative importance of hospital records in the trial of a personal injury case is not reflected by the number of cases in Oklahoma which have questioned their admissibility. These records are quite susceptible to attack as being hearsay evidence, because the person who actually made the entries is rarely called upon to testify to the truth of the facts stated therein. Therefore, many jurisdictions have developed an exception allowing these records into evidence, or will admit them as books of account, public records, or as part of the *res gestae*.<sup>1</sup>

The first Oklahoma case questioning the admissibility of hospital records was *Metropolitan Life Ins. Co. v. Bradbury*.<sup>2</sup> In this case the court held that a "clinic card" should have been excluded by the trial court as hearsay evidence. The court did not state any reasons for the exclusion other than that they considered the card to be hearsay and, therefore, inadmissible. A definitive test to determine the admissibility of hospital records was stated by the court four years later, in *Hembree v. Von Keller*, when the court, in excluding the hospital chart of a patient, stated:

"In order for book accounts of a hospital and the charts of patients therein to be admissible in evidence, they must be shown to have been correctly kept, to have been kept in the ordinary course of business as an essential part of the system of business, to have been made at or reasonably near the time of the transaction, to be books of original entries, and shown to be relevant and material to the issue."<sup>3</sup>

The court cited as authority for this test, *Sharp v. Pawhuska Ice Co.*,<sup>4</sup> which did not concern hospital records, but merely books of account. Even though the *Sharp* court arrived at a test for the admission of books of account by summarizing past decisions,<sup>5</sup> this test was dictum because the court stated that the admission into evidence of books of account was not a question before the court. Although dictum, and concerned only with books of account, the test was utilized in the *Hembree* case to determine the admissibility of hospital records.

<sup>1</sup> *Brown v. St. Paul City Ry.*, 241 Minn. 15, 62 N.W.2d 688 (1954), Annot., 44 A.L.R.2d 553 (1955); See 32 C.J.S. *Evidence* § 728 (1942).

<sup>2</sup> 179 Okla. 253, 65 P.2d 433 (1937).

<sup>3</sup> 189 Okla. 439-440, 119 P.2d 433 (1937).

<sup>4</sup> 90 Okla. 211, 217 Pac. 214 (1923).

<sup>5</sup> *Id.* at 215, 217 Pac. at 217, citing *Whitcomb v. Oller*, 41 Okla. 331, 137 Pac. 709 (1913); *Pacific Mut. Life Ins. Co. v. O'Neil*, 36 Okla. 792, 130 Pac. 270 (1913); *Missouri, K. & T. Ry. v. Walker*, 27 Okla. 849, 113 Pac. 907 (1911); *First Nat'l Bank v. Yeoman*, 14 Okla. 626, 78 Pac. 388 (1904); *Navarre v. Honea*, 41 Okla. 480, 139 Pac. 310 (1914).

In *City of Altus v. Martin*,<sup>6</sup> the defendant attacked the test utilized by the court in the *Sharp* and *Hembree* cases as being mere dictum and, therefore, not binding upon the court. This argument was brushed aside, the court contending that while the test might be dictum, it was still part of the body of law of Oklahoma, had not been over-ruled, and was applicable to the hospital records in question.

In arriving at the test to be used in determining the admissibility of hospital records, the court has created an interesting dichotomy: although treating hospital records as if they were books of account, the court has ignored the statutory provision which provides tests for determining the admissibility of books of account. The Oklahoma Statute provides:

"Entries in books of account may be admitted in evidence, when it is made to appear by the oath of the person who made the entries, that such entries are correct, and were made at or near the time of the transaction to which they relate, or upon proof of the handwriting of the person who made the entries, in case of his death or absence from the county, or upon proof that the same were made in the usual course of business."<sup>7</sup>

It can be observed that the test, as applied in the *Hembree* and *Altus* cases, and the statutory provisions, have many similarities; but the importance in comparing the two comes not from the similarities, but from their dissimilarities. Arguably, since the statute is stated in the disjunctive, it makes three tests applicable in differing situations; the first test requires the oath of the person who made the entries, the second is applicable where the person who made the entries is dead or absent, and the third makes entries admissible upon a showing that they were made in the usual course of business. In *Hemisphere Oil & Gas Co. v. Oil Well Supply Co.*,<sup>8</sup> the court interpreted the statute, and declared that the phrase "made in the usual course of business," furnished "another way" to test the admissibility of books of account. Therefore, by its own rulings the court has declared that the provisions of the statute are severable, and furnish not one, but three tests.<sup>9</sup>

The court in the *Hembree* case does not cite the statutory provisions, however, it does use some language of the statute. The *Hembree* court applied the statute's language conjunctively instead of disjunctively, and thereby made one test out of two statutory tests. Instead of utilizing the "ors" of the statute, the *Hembree* test applies the statutory language as if it were separated by "and's." The *Hembree* court takes the first test of the statute, which re-

<sup>6</sup> 268 P.2d 228 (Okla. 1954).

<sup>7</sup> 12 OKLA. STAT. § 501 (1961).

<sup>8</sup> 104 Okla. 83, 230 Pac. 245 (1924).

<sup>9</sup> See, *State ex rel Shull v. Banta*, 148 Okla. 239, 247, 299 Pac. 479, 487 (1931).

quires that the records must be shown to have been correctly kept; adds the third statutory test, "made in the usual course of business," to make one test, and then proceeds to add "as an essential part of the system of business . . . to be books of original entries and shown to be relevant and material to the issue."<sup>10</sup>

The result is that under the *Hembree* test, the litigant offering the records must show much more than he is required to under the statutory enactments as interpreted by the *Hemisphere Oil & Gas* case. Under the statute's third test, the litigant need only show that the records were made in the "usual course of business," but by virtue of the present rulings in Oklahoma his burden would just be beginning. He must further show that the records were made at or near the time of the transaction to which they relate, that they are an essential part of the system of doing business, that they are books of original entry, and relevant and material to the issue.

It has been argued by writers in the field,<sup>11</sup> that hospital records should be admitted, either on identification of the original by the keeper of the records, or by an offer of a certified or sworn copy. The argument is made that the purpose of the hospital records exception is to prevent a disruption of the staff of a hospital. The charts of even a single patient are compiled by a number of physicians, interns, nurses, and technicians and these charts should be admitted without calling these people to testify which would interfere with the routine of the hospital. This is clearly a rule of necessity. It is also felt that since hospital records are relied upon in affairs of life and death and are, therefore, meticulously kept, they contain a circumstantial guarantee of trustworthiness; and the occasional omissions and errors occurring in the routine work are no more an obstacle to the general trustworthiness of the records than are the errors of witnesses on the stand.

These scholars also note that because hospitals handle large numbers of patients in their day-to-day operations, the person who made the entries could recall from actual memory few or none of the specific events recorded. To call these people to the stand would ordinarily add little or nothing to the information furnished by the records alone. Therefore, the writers feel that an offer by the keeper of the records would satisfy protective evidentiary rules, facilitate trial, and relieve hospital staffs of an unnecessary burden.

The legislature of Oklahoma has demonstrated a willingness to trust the veracity of hospital records in habeas corpus proceedings for the release of the mentally ill.<sup>12</sup> No requirements are imposed upon the admission of these records and they are no different than any other hospital records. Could it not be argued that be-

<sup>10</sup> 189 Okla. at 440, 119 P.2d at 76 (syl 4). Compare this language with 12 OKLA. STAT. § 501 (1961).

<sup>11</sup> 6 WIGMORE, EVIDENCE § 1707 (3d ed. 1940); McCORMICK, EVIDENCE § 290 (1954).

<sup>12</sup> 43A OKLA. STAT. § 99 (1961).