PROFESSOR HUTTER ON EVIDENCE: Hospital Record Entries

By Professor Michael J. Hutter, Jr.

A hospital record may contain a wide range of information, acquired from various sources, concerning a person who has been treated at the hospital. Such information can include statements of the physical condition of the person on arrival at the hospital, encompassing complaints of pain, symptoms, injuries presented with, presence or absence of intoxication or influence of drugs; recordation of the person's medical history, encompassing present and past complaints of pain, cause of the injuries complained of, prior medical treatment; descriptions of treatment, including medical and surgical services, and medication; recordation of routine medical measurements, *e.g.*, pulse, temperature, blood pressure; description of physical condition while hospitalized, *i.e.*, "lethargic", "doing well", "irrational", etc.; reporting of standard or routine diagnoses as well as results of x-rays, MRI's, EKG's, etc., and routine laboratory tests; and the names of the health care professionals attending or treating the person. In a subsequent personal injury action commenced by the patient, whether a medical malpractice action or an ordinary negligence action, this information may be relevant -- it could support or defeat the person's claim. Thus, the question is posed: When, if ever, is the information contained in a hospital record admissible at the trial of the action?

As a general proposition, the entries contained in hospital records are potentially admissible under New York's business records exception to the hearsay rule, CPLR 4518(a). A hospital is embraced within the statute's broad definition of "business", namely, "a business, profession, occupation or calling of every kind".[1] As noted by a prominent commentator: "This result is appropriate for the safeguards of trustworthiness of records of the modern hospital are at least as substantial as the guarantee of reliability of records of business establishments generally".[2]

Merely because hospitals are businesses under the statutory business records exception does not, of course, automatically mean that everything contained in their records is admissible. Rather, only an entry which is a recordation of an "act, transaction, occurrence or event" can be admitted under CPLR 4518(a).

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Furthermore, admission of an entry that is a recordation of such an "act, transaction, occurrence or event" will require compliance with the foundation requirements mandated not only by CPLR 4518(a) - "*[F]irst*, that the record be made in the regular course of business - essentially, that it reflect a routine, regularly conducted business activity, and that it be needed and relied on in the performance of functions of the business; *second*, that it be the regular course of such business to make the record (a double requirement of regularity) - essentially, that the record be made pursuant to established procedures for the routine, habitual, systematic making of such a record; and *third*, that the record be made at or about the time of the event being recorded - essentially, that recollection be fairly accurate and the habit or routine of making the entries assured,"[3] - but also the judicially imposed *Johnson v. Lutz* requirement[4] - "[E]ach participant in the chain producing the record, from the initial declarant to the final entrant, must be acting within the course of regular business conduct or the declaration must meet the test of some other hearsay exception...."[5] With respect to these foundation requirements, it is worth repeating that a hospital record, like records of any "business" encompassed by CPLR 4518(a), "cannot be admitted simply because it is trustworthy; the requirements of CPLR 4518(a) *must be satisfied*."[6]

This article will discuss the recurring issues that arise when an attorney is seeking to have admitted an entry in a hospital record under CPLR 4518(a). Initially, it will address what information in a hospital record is potentially admissible under the statute. Discussion of the two foundation requirements that generate most of the problems - "regular course of business" and "Johnson v. Lutz" - will then follow.[7] Lastly, a brief discussion of the method to satisfy foundational requirements for the admissibility of the entry will be made.

"ACT, TRANSACTION, OCCURRENCE OR EVENT"

Observations, Treatment, Diagnosis

Courts in New York have given the statutory phrase "any act, transaction, occurrence or event" the "broadest possible interpretation".[8] As a result, almost all entries in a hospital record will be encompassed within the phrase, and they will be admissible provided the foundation requirements as to such entries are met.[9]

Thus, entries regarding direct observations of fact, or conclusions readily inferable from such observed facts, concerning the person are potentially admissible.[10] Such entries include observations of injuries sustained[11] or diagnosis thereof[12] as well as physical or mental condition,[13] including intoxification,[14] and drug influence,[15] and medical treatment/services rendered.[16] Likewise, results of routine laboratory tests or diagnostic testing[17] and reports thereof,[18] as well as the reports of non-hospital employed physicians and medical specialists[19] are potentially admissible. Additionally, entries regarding personal data of the person,[20] dates of the person's entry and discharge,[21] and the identities of those attending or treating the person[22] are potentially admissible.

History

The case law also recognizes that the person's "history" as recorded in a hospital record is potentially admissible.[23] Thus, the recordation of the events and symptoms leading up to the injury sustained and subsequent hospitalization may be admissible,[24] as well as a recordation of prior illnesses and medical treatment or absence thereof.[25]

Opinion

In addition to entries recording standard or routine diagnosis being potentially admissible,[26] entries recording elaborate or difficult diagnoses and prognoses are also potentially admissible.[27] While "opinions" are not specifically enumerated in CPLR 4518(a), unlike in its federal counterpart FRE 803(6), the New York Court of Appeals in its first full discussion of CPLR 4518(a)'s predecessor, CPA §374-a, in *People v. Kohlmeyer*,[28] held that a hospital entry recording an opinion of a physician can be admissible under the statute. Its rationale was stated as follows: "We fail to see why the recorded conclusions of the hospital physicians on scientific matters should be deemed objectionable on any ground when they would not be objectionable were the physician whose diagnosis is contained in the record called personally to the witness stand".[29] In *Kohlmeyer*, the opinion admitted reflected a physician's diagnosis of insanity of an inheritable character.

Consistent with *Kohlmeyer*, the case law indicates that opinions are routinely admitted if the appropriate business records foundation requirements are established[30] and the opinion is not otherwise inadmissible.[31] Argument that allowing the admissibility of an opinion via an entry in a hospital record denies the adverse party of cross-examination has been rejected.[32]

Whether the qualifications of the physicians who made the opinion and the basis thereof must be affirmatively established or may be presumed is not entirely clear.[33] The argument that such conditions, which are imposed when a physician testifies at trial in order to show the reliability of the opinion, need not be separately shown rests upon the view that they are unnecessary because reliability is present once the foundation requirements for the entry as a business record are met.[34] Proper qualifications and basis for the opinion would be presumed.[35] The contrary argument is based on the view that the opinion evidence foundation requirements should not be permitted to be easily evaded by a stratagem of having the expert's opinion received through the record rather than by the expert's testimony.[36] A suggested resolution is that the trial judge should have the discretion to require an affirmative showing of proper qualifications and basis, and, depending upon the circumstances of the particular case and indicia of lack of trustworthiness regarding the opinion, such discretion could be invoked to require an affirmative showing of qualifications and basis of the opinion.[37]

Foundation Requirement: "Germane To Diagnosis or Treatment"

It is well settled that an entry in a hospital record is admissible under the business records exception only if it is relevant to diagnosis or treatment of the person hospitalized.[38] This requirement is a result of the Court of Appeals' interpretation in *Williams v. Alexander*[39] of CPLR 4518(a)'s "regular course of such business".

In *Williams*, plaintiff testified that he was struck by defendant's car while crossing an intersection and that defendant before striking him had not slowed down while approaching the intersection. To establish his injuries, plaintiff introduced a hospital record recording the injuries he had sustained. Defendant, on the other hand, testified that he had been stopped at the intersection, waiting for the traffic light to change, and that he was struck in the rear by another car, which caused his car to strike plaintiff. To support this testimony, he offered into evidence another portion of the hospital record which contained a statement made by the plaintiff to a treating physician and recorded by the physician, which read: "[H]e was crossing the street and an automobile ran into another automobile that was at a standstill, causing this car (stand-still) to run into him". The plaintiff denied making the statement and the physician who recorded it did not testify. The trial court admitted that portion of the hospital record over the

plaintiff's objection.

The Court of Appeals in a 4 to 3 decision held that the trial court erred in admitting the objected-to part of the hospital record. The majority, after stating that the admissibility of business records under the statutory exception to the hearsay rule rested upon a rationale that they would be reliable upon a showing of compliance with the exception's foundation requirements, was of the view that only those records as were made for the purpose of assisting the business in carrying on its business would be ones that were made "in the regular course of business" foundation requirement, thereby ensuring the records' reliability.[40] Only when the information recorded is related to the business of the entity making the record will there be, the majority opined, sufficient incentive to assure the accuracy of the information recorded.[41]

Applying this rationale to a hospital, the majority stated:

> "The business of a hospital, it is self-evident, is to diagnose and treat its patients' ailments. Consequently, the only memoranda that may be regarded as within the compass of the section are those reflecting acts, occurrences or events that relate to diagnosis, prognosis or treatment, or are otherwise helpful to an understanding of the medical or surgical aspects of ....[the particular patient's] hospitalization...."[42]

While this analysis has been criticized,[43] it continues to be followed by the New York courts. Thus, the mere fact that a physician or other health care professional has made an entry in a hospital record reflecting information about the patient does not mean the entry is automatically admissible. Rather, the entry must be germane to the diagnosis or treatment of the patient.

Difficulty in determining whether an entry is relevant to diagnosis or treatment ordinarily arises with respect to the hospitalized person's "history".[44] *Williams* itself is the source of the difficulty.

In *Williams*, it was held that the objected-to entry, relating to how the accident occurred, specifically, how defendant's car had come to strike plaintiff, was not relevant to medical diagnosis or treatment.[45] Quoting from an Ohio Supreme Court decision, the majority wrote: "'[I]t was the business of the hospital to diagnose plaintiff's condition and to treat her for her ailments, not to record a statement describing the cause of the accident in which plaintiff's injuries were sustained.'"[46] "There is no need", the majority continued, "[in the case of statements detailing the circumstance of an accident where they are immaterial to, and were never intended to be relied upon in the treatment of the patient] for the physician to exercise care in obtaining and recording the information or to question the version, whatever it may be, that is given to him. The particulars may be a natural subject of the doctor's curiosity, but neither the inquiry nor the response properly belongs in a record designed to reflect the regular course of the hospital's business".[47] Yet, the majority concluded that "[I]n some instances, perhaps, the patient's explanation as to how he was hurt may be helpful to an understanding of the medical aspects of his case; it might, for instance, assist the doctors if they were to know that the injured man had been struck by an automobile. However, whether the patient was hit by car A or car B, by car A under its own power or propelled forward by car B, or whether the injuries were caused by the negligence of the defendant or of another, cannot possibly bear on diagnosis or aid in determining treatment."[48] In essence, the majority indicated that in some situations details of the accident may be germane to treatment and diagnosis, but does not provide much guidance as to how specific the details can be and how it is to be determined what specific details are then admissible.

Cases applying the *Williams v. Alexander* standard are numerous.[49] Notably, the results are unpredictable and not always consistent regarding the extent of the "particulars" details of the accident causing the injury.[50] Representative cases concluding that details as to how the accident occurred are germane to medical treatment and diagnosis include *Wright v. New York City Housing Auth.*,[51] *Nieves v. New York City Housing Auth.*,[52] *Barzaghi v. Maislin Trans.*,[53] *Schanberg v. State*,[54] *McDermott v. Barker*,[55] and *Tyson v. Bittner*.[56] Cases concluding that details of the accident are not germane include *Haulotte v. Prudential Ins. Co.*,[57] *Schroder v. Con. Ed. Co.*,[58] *Echeverria v. City of New York*,[59] *O'Connor v. Village of Port Jefferson*,[60] *Gunn v. City of New York*,[61] *Edelman v. City of New York*,[62] and *Roberto v. Nielson*.[63]

The above cases do suggest that a court considers what in its view would be germane to treatment and diagnosis, and, as well that the court may not be bound by what the medical profession deems to be germane.[64] However, the suggestion is not convincing as analysis of the cases show that the results reached in these "history" cases were largely based on expert testimony as to whether or not the entry was germane to diagnosis and treatment.[65] Thus, whether a particular "history" entry was germane to diagnosis and treatment will turn upon expert testimony,[66] a point recent cases seem to be emphatically stressing.[67]

It must also be noted that when an

entry in a hospital record pertaining to a party in an action is considered not to be germane to diagnosis or treatment, the entry does not become admissible simply because it is adverse to or contrary to that party's position at trial, thereby making it a potentially admissible admission against the party's interest.[68] This, of course, is the precise holding in *Williams v. Alexander*, where the offered history portion of the hospital record, as related by plaintiff, which contained a version of the accident which was contrary to his trial testimony, was ruled inadmissible as not germane to treatment or diagnosis.[69] For the jury to hear the content of that excluded portion of the hospital record, the person who recorded the statement will have to testify that such statement was made to him/her by the party[70] or that the statement most likely came from the party,[71] or that the excluded portion is admissible under the past recollection recorded exception of the hearsay rule.[72]

Foundation Requirement: "Johnson v. Lutz"

Entries in a hospital record will not be admissible merely because they are determined to be germane to the patient's diagnosis and treatment.[73] Rather, like all records that are sought to be admitted under CPLR 4518(a), the relevant entry must be made upon the recorder's own personal knowledge, or from information given by one with personal knowledge and a duty to transmit the information to the recorder, or the entry must be encompassed within another hearsay exception or be considered "non-hearsay".[74] The fact that this requirement was not mentioned in *Williams v. Alexander* is of no legal significance because no issue concerning it was raised therein, or was necessary to the decision.

Initially, the applicability of this requirement to hospital records means that any entry therein for which the identity of the person who was the source thereof is unidentifiable will be inadmissible.[75] The reason is that absent such proof the *Johnson v. Lutz* requirement cannot be determined in the first instance. Thus, it is always necessary to identify the source for the information recorded in the record.

With respect to the business duty element, it cannot be doubted that where the source of the information is a health care professional employed by the hospital or one who has privileges at the hospital or one who maintains an ongoing relationship with the hospital, all of whom have the requisite personal knowledge, and that person makes the entry or transmits it to the recorder, the element is met.[76] A person unaffiliated with the hospital, or a mere "outsider" who is the source of the information lacks the requisite duty.[77]

What about the patient who is the source of the information? Does the patient have the requisite business duty or is s/he an "outsider"? It has been argued that the patient has such a duty because when providing information about the injury/condition, s/he is "an essential part of the hospital's business".[78] However, the weight of authority rejects this view.[79]

For information whose source is the patient, or other "outsiders", resort must then be made to other exceptions to the hearsay rule to determine if the transmittal of that information comes within one of those exceptions. Which hearsay exception is applicable is irrelevant; all that matters is that there is an applicable exception.

If the party were the source of the information and the information is against the party's present interest and offered against the party, the entry recording that statement will be admissible under the party admission exception to the hearsay rule.[80] It must, of course, as discussed previously, be germane to diagnosis and treatment.[81]

Where the patient's statement as recorded does not fall within the party admission exception, a situation which would occur where the patient is offering into evidence the entry (whether it be observation, history or opinion), the case law recognizes that the entry is nonetheless admissible where it is germane to diagnosis and treatment.[82] These cases are problematic because there is no separate hearsay exception presently recognizable by the Court of Appeals covering statements made for medical diagnosis; indeed, the Court of Appeals has refused to recognize such an exception covering the transmittal of one's medical "history".[83] Notwithstanding this precedent, it would appear that modern New York law is in fact embracing such an exception, and an overruling of the precedent by the Court of Appeals seems likely, especially when its decision in *Williams v. Alexander* conflicts with it.[84]

Under the proper circumstances other exceptions may be available to encompass the patient's transmittal of the information, such as the excited utterance, present sense impressions or dying declarations exceptions. Such other exceptions may also cover the transmittal of information by other "outsiders" to the recorder of the statement.[85]

Laying The Foundation

It goes without saying that the

party who offers into evidence a hospital record must lay the appropriate foundation for its admission, unless admissibility is stipulated too. Two methods are available, foundation testimony by an appropriate witness pursuant to CPLR 4518(a) or certification of the record pursuant to CPLR 4518(c). If neither of these methods is complied with, the record will not be admitted.[86]

As required by CPLR 4518(a), it will be necessary to lay a proper foundation for the record by eliciting testimony from someone with knowledge of the hospital's record-keeping procedures that such record was made in the regular course of hospital business, that it was the regular business of the hospital to make such record, and that the record was made at or soon after the information was obtained.[87] The *Johnson v. Lutz* foundation requirement may also have to be addressed, either by the witness or by reliance on the record itself.[88]

Reliance upon CPLR 4518(c) as the method to have the record admitted should seriously be considered. The certification should establish that the record meets the foundation required for all business records under CPLR 4518(a).[89] By utilizing the certification process provided by that section, the need for the calling of a foundation witness is eliminated. Moreover, under recent case law the certification makes the record conclusively admissible,[90] and the *prima facie* evidence effect created by the certification establishes a rebuttable presumption that the record's entries are an accurate statement of the facts stated.[91] Lastly, certification of the record renders any test results contained therein admissible without the need for any separate foundation showing for them.[92]

Conclusion

Needless to say, careful consideration is necessary when one plans to introduce a hospital record as to specific entries therein. Don't overlook the issues discussed.

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Notes

1. *See, People v. Kohlmeyer*, 284 NY 366, 370, 31 NE2d 490, 492 (1940) ("Hospital records concededly are included within the records to which [CPLR 4518 (a) is applicable.")

2. 2 McCormick, Evidence (5th ed) §293, at pp. 263-264.

3. *People v. Kennedy*, 68 NY2d 569, 579-580, 510 NYS2d 853, 859-860, 503 NE2d 501, 507-508 (1986); *see also People v. Cratsley*, 86 NY2d 81, 89, 629 NYS2d 992, 996, 653 NE2d 1162, 1166 (1995).

4. *See generally* Hutter, Accident Reports and the Business Records Hearsay Exception: The *Johnson v. Lutz* Judicially Created Requirement, *Bill of Particulars*, Winter 2003, p. 12.

5. *Matter of Leon RR*, 48 NY2d 117, 123, 421 NYS2d 863, 866, 867, 397 NY2d 374, 377 (1979).

6. Martin, Capra & Rossi, *NY Evidence Handbook* (2d ed.) §8.3.3.6, at p. 757.

7. Determining whether the entry in the hospital record was made pursuant to established procedures for the recording of such entry and whether such entry was made in a timely fashion will ordinarily not present any difficulty.

8. 5 Weinstein, Korn and Miller, *NY Civil Practice* 4518.09. at p. 45-508.1.

9. Compare *Osleeb v. Block*, 36 AD2d 605, 318 NYS2d 601 (1st Dept. 1971) (post-mortem history statement given by decedent's son not admissible).

10. *See*, 5 Bender's *New York Evidence* §19.03(3), at p. 19-43 - 19-45.

11. *See, e.g., Meiselman v. Crown Heights Hosp.*, 285 NY 389, 34 NE2d 367 (1941) (wounds/injuries plaintiff was suffering as recorded upon entry to hospital); *Duffy v. Thomas A. Edison, Inc.*, 240 App. Div. 1002, 268 NYS 959 (2d Dept. 1933).

12. *See, e.g., Pekar v. Tax*, 43 AD2d 957, 352 NYS2d 39 (2d Dept. 1974); *People v. Davis*, 95AD2d 837, 463 NYS 2d 876 (2d Dept. 1983); *People v. Richardson*, 38 AD2d 990, 329 NYS2d 425 (3d Dept. 1972); *DiRusso v. Kravitz*, 27 AD2d 927, 282 NYS2d 159 (1st Dept. 1967), *affd.*, 21 NY2d 1008, 290 NYS2d 928, 238 NE2d 329 (1968); *Polsea v. East River Management Corp.*, 8 Misc. 2d 798, 160 NYS2d 658 (App. T. 1957).

13. *See, e.g., Nieves v. New York City Housing Auth.*, 200 AD2d 427, 606 NYS2d 224 (1st Dept. 1994) (patient arrived at hospital alert and with

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stable vita signs); *Allstate Insurance Co. v. Oberfast*, 36 AD2d 708, 319 NYS2d 562 (1st Dept. 1971) (patient was unconscious); *Spoar v. Fudjack*, 24 AD2d 731, 263 NYS2d 340 (4th Dept. 1965) (patient slept comfortably, was "up and about" and made no complaints to nursing staff); *Matter of Boyle's Will*, 271 App. Div. 614, 67 NYS2d 348 (4th Dept. 1947) (patient's "rationality"); *Matter of Morrison's Will*, 270 App. Div. 552, 60 NYS2d 546 (1st Dept. 1946), affd., 296 NY 652, 69 NE2d 814 (1946) (patient was "mentally confused"); *Thall v. State*, 69 Misc. 2d 382, 329 NYS2d 837 (Ct. Cl. 1972), *affd.*, 42 AD2d 622, 344 NYS2d 453 (3d Dept. 1973) ("dangerous propensities"); *Kardas v. State*, 44 Misc.2d 243, 253 NYS2d 470 (Ct. Cl. 1964), *revd. on other grounds*, 24 AD2d 789, 263 NYS2d 727 (3d Dept. 1965) (suicide risk).

14. *See, e.g., Campbell v. MABSTOA*, 81 AD2d 529, 438 NYS2d 87 (1st Dept. 1981); *Tyson v. Bittner*, 3 AD2d 861, 161 NYS2d 710 (2d Dept. 1957).

15. *See, e.g., Cotter v. Mercedes-Benz Manhattan*, 108 AD2d 173, 488 NYS2d 390 (1st. Dept. 1985).

16. *See, e.g., Miller v. City of New York*, 286 App. Div. 1033, 145 NYS2d 295 (2d Dept. 1955); *Pivar v. Manhattan Gen.*, 279 App. Div. 522, 110 NYS2d 786 (1st Dept. 1952) (sideboards ordered); *Matter of O'Grady's Estate*, 254 App. Div. 691, 3 NYS2d 778 (2d Dept. 1938).

17. *See, e.g., Rodriguez v. Triborough Bridge and Tunnel Auth.*, 276 AD2d 769, 716 NYS2d 24 (2d Dept. 2001) (blood alcohol test); *Freeman v. Kirkland*, 184 AD2d 331, 584 NYS2d 828 (1st Dept. 1992) (laboratory reports); *Iovino v. Green Bus Lines*, 277 App. Div. 1002, 100 NYS 148 (2d Dept. 1950) (toxicologist report); *Maypole v. B. Crystal & Son, Inc.*, 266 App. Div. 1008, 44 NYS2d 411 (2d Dept. 1943) (electro-encephalogram test); *Hoffman v. City of New York*, 141 Misc.2d 893, 535 NYS2d 342 (Sup. Ct. Kings Co. 1988) (x-rays); *Hesseh v. Roman Catholic Church*, 80 Misc.2d 410, 363 NYS2d 297 (Civ. Ct. Queens Co. 1975) (laboratory reports).

18. *See, e.g., Lanport v. Savvas Corp.*, 244 AD2d 208, 664 NYS2d 285 (1st Dept. 1997) (x-ray report); *see also*, Friedman, Need For A Testifying Physician To Rely On Reports By A Non-Testifying Physician Poses Evidentiary Problems, 73 NYSBAJ, Dec. 2001, p. 28, at p. 28.

19. *See, e.g., Cohn v. Haddad*, 244 AD2d 519, 664 NYS2d 621 (2d Dept. 1997); *Freeman v. Kirkland*, 184 AD2d 331, 584 NYS2d 828 (1st Dept. 1992).

20. *See, e.g., Matter of Quinton A.*, 68 AD2d 394, 417 NYS2d 738 (2d Dept. 1979) (age); *Matter of Bourne*, 181 Misc. 238, 41 NYS2d 336 (Sup. Ct. Westchester Co. 1943) (residence).

21. *See, e.g., Palmer v. John Hancock Mut. Life Ins. Co.*, 150 Misc. 669, 270 NYS 10 (App. T. 1934).

22. *See, e.g., A.A. v. State*, 43 Misc. 2d 1004, 1012 252 NYS2d 800, 808 (Ct. Cl. 1964).

23. *See*, Richardson, *Evidence* (11th ed.) §8-310; McCormick, supra, §293, at pp. 264-265.

24. *See, e.g., Williams v. Alexander*, 309 NY 283, 129 NE2d 417 (1955); *People v. Conde*, 16 AD2d 327, 228 NYS2d 69 (3d Dept. 1962), *affd.*, 13 NY2d 939 (1963).

25. *See, e.g., Segretti v. Putnam Community Hosp.*, 88 AD2d 590, 449 NYS2d 785 (2d Dept. 1982); *Erickson v. Comm. Cas. Co.*, 265 App. Div. 327, 39 NYS2d 72 (3d Dept. 1942).

26. See cases cited in footnotes 12 and 13, *supra*.

27. *See*, Richardson, *supra*, §8-309, Martin, Capra & Rossi, *NY Evidence Handbook* (2d ed.) §8.3.3.6, at pp. 771-772.

28. 284 NY 366, 31 NE2d 490 (1940).

29. *Id.* at 369, 31 NE2d at 491.

30. *See, e.g., Ginsberg v. North Shore Hosp.*, 213 AD2d 592, 624 NYS2d 257 (2d Dept. 1995); *Matter of Harvey U.*, 116 AD2d 351, 501 NYS2d 920 (3d Dept. 1986); *Davis v. A.H. Robins Co.*, 99 AD2d 342, 473 NYS2d 182 (1st Dept. 1984) (plaintiff's infection was due to presence of Dalkon Shield IUD); *Lichtenstein v. Montefiore Hosp.*, 56 AD2d 281, 392 NYS2d 18 (1st Dept. 1977) (death by suicide); *Pekar v. Tax*, 43 AD2d 957, 352 NYS2d 39 (2d Dept. 1974).

31. *See, e.g., Wilson v. Bodian*, 130 AD2d 221, 519 NYS2d 126 (2d Dept. 1987) (purported diagnosis was not comprehensible); *Stevens v. Kirby*, 86 AD2d 391, 450 NYS2d 607 (4th Dept. 1982) (jury did not need the assistance of an opinion from an expert; opinion entry excluded).

32. 5 Bender's *NY Evidence*, *supra*, §19-03(3) at 19-50; Note, 10 Brooklyn L. Rev. 409, 411 (1941) ("It could not be argued that the right to cross-examine the expert is lost, for that, in substance, is but the objection of hearsay, to which section 374-a is an exception...)

33. *See*, Richardson, *Evidence* (10th ed.) §302, at p. 277; cf., Martin, Capra & Rossi, *supra*, §8.3.3.6, at pp. 771-772. The Second Department's decision in *Miller v. Alogna* (203 AD2d 264, 609 NYS2d 650 [2d Dept. 1994]), wherein the court specifically stated that the opinion in a police report was admissible as the officer who made it was show to be qualified,

should not be read as requiring affirmative proof in all cases as in that case the officer had been called by the party offering the record.

34. *See*, Note, Colum. L. Rev. 920, 930 (1948).

35. *See, Allen v. St. Louis Pub. Serv. Co.*, 285 SW2d 663 (Mo. 1956); 2 McCormick, *supra*, §293 at p. 265. ([I]f the record is shown to be from a reputable institution, it may be inferred that regular entries were made by qualified personnel in the absence of any indication to the contrary.").

36. *See*, Hale, Hospital Records As Evidence, 14 So. Cal. L. Rev. 99, 107-108 (1941).

37. *See, Matter of Harvey, supra*; 2 McCormick, *supra*, §293, at p. 265.

38. *See generally*, Richardson, *supra*, §8-310; Martin, Capra & Rossi, *supra*, §8.3.3.6, at pp. 760-761; Fisch, NY Evidence (2d ed.) §834; Barker and Alexander, Evidence in NY State and Federal Courts (2d ed.) §8.43, at pp. 891-892.

39. 309 NY 283, 129 NE2d 417, *supra*. Of note in *People v. Kohlmeyer* the Court stated that where the records in that case were offered into evidence, the portions relating to the history of the patient had been excluded from the record. (284 NY at 369, 31 NE2d at 493, *supra*).

40. *Id.* at 286-287, 729 NE2d at 418-419.

41. *Ibid.*

43. *See*, Martin, Capra & Rossi, *supra*, §8.3.3.6, at p. 761; Note, 25 Fordham Co. Rev. 353, 357 (1956).

44. *Cf., Goldstein v. Hauptman*, 131 AD2d 724, 516 NYS2d 783 (2d Dept. 1987) (procedures followed in monitoring intravenous connection not germane to treatment or diagnosis); *Moran v. DeMarine's*, 152 AD2d 546, 543 NYS2d 480 (2d Dept. 1989) (past dental history was relevant in present dental malpractice action); *Shaughnessy v. City of New York*, 7 AD2d 734, 180 NYS2d 621 (2d Dept. 1958) (admission of heavy drinking, over a pint of whisky a day, was relevant to diagnosis and treatment).

45. 309 NY at 287, 129 NE2d at 419.

46. *Id.* at 288, 129 NE2d at 419.

47. *Id.* at 288, 129 NE2d at 420.

48. *Ibid.*

49. *See*, Bender's *NY Evidence*, *supra*, at §19.04(3)(b), at pp. 19-98 - 19-104 (collecting cases).

50. *See*, Alexander, Practice Commentaries to CPLR 4518, 7B McKinney's Cons. Laws of NY, C4518:4.

51. 273 AD2d 378, 709 NYS2d 600 (2d Dept. 2000) (plaintiff had been running immediately prior to the accident).

52. 200 AD2d 427, 606 NYS2d 224 (1st Dept. 1994) (unlike *Williams*, here information recounting patient's version of how the accident occurred was relevant).

53. 115 AD2d 679, 497 NYS2d 131 (2d Dept. 1985) (plaintiff fell off loading platform at his job).

54. 30 AD2d 712, 291 NYS2d 35 (3d Dept. 1968) (injury happened when patient "forced" the handle of water faucet in order to turn it off).

55. 20 AD2d 546, 245 NYS2d 135 (2d Dept. 1963) (unlike *Williams*, manner of the happening of the accident relevant).

56. 3 AD2d 861, 161 NYS2d 710 (2d Dept. 1957) (intoxification).

57. 266 AD2d 38, 698 NYS2d 24 (1st Dept. 1999) (plaintiff was injured when he fell off ladder).

58. 249 AD2d 69, 670 NYS2d 856 (1st Dept. 1998) (manner in which plaintiff fell - tripped on pavement or on metal plate).

59. 166 AD2d 409, 560 NYS2d 473 (2d Dept. 1990) (plaintiff fell at home).

60. 104 AD2d 861, 480 NYS2d 376 (2d Dept. 1984) (plaintiff drank a six-pack of beer and consumed several valium tablets before diving into shallow water, striking his head).

61. 104 AD2d 848, 480 NYS2d 365 (2d Dept. 1984) (plaintiff slipped upon ice).

62. 81 AD2d 904, 435 NYS2d 603 (2d Dept. 1981) (plaintiff fell while getting out of cab).

63. 262 App. Div. 1035, 30 NYS2d 334 (2d Dept. 1941), affd., 288 NY 581, 42 NE2d 27 (accident was preceded by a day of beer and wine drinking).

64. *See*, McCormick, The Use of Hospital Records As Evidence, 26 Tul. L. Rev. 371, 375 (1952).

65. *See, e.g., Haulotte v. Prudential Ins. Co.*, 266 AD2d 38, 698 NYS2d 24, supra (expert testified that he only needed to know that plaintiff fell on something "hard" and not from what he fell in order to treat him properly); *People v. Pitti*, 262 AD2d 503, 692 NYS2d 166 (2d Dept. 1999) (expert testified treatment of condition complained of would be same regardless of possible causes); *Sanchez v. MABSTOA*, *supra* (expert testified that it was irrelevant to the treatment that plaintiff's injury was caused by being struck by a bus

bumper); *Schasberg v. State*, 30 AD2d 712, 291 NYS2d 35, *supra* (expert testified that details of how the accident happened were relevant to treatment and diagnosis).

66. *See*, Martin, Capra & Rossi, *supra*, §8.3.3.6, at p. 761, Alexander, *supra*, at p. 112.

67. *See, e.g., Rivera v. City of New York*, 293 AD2d 383, 741 NYS2d 30 (2d Dept. 2002) ("defendant failed to adduce evidence" to show that statement "plaintiff was struck by a thrown rock" could be admissible).

68. *See*, Richardson (10th ed.), *supra*, §302, at pp. 278-279. *See*, *Schroder v. Con. Ed.*, 249 AD2d 69, 70-71 670 NYS2d 856, 857 (1st. Dept. 1998).

69. 309 NY 283, 129 NE2d 417, *supra*.

70. *See*, *Eitner v. 119 West 71st St. Owners Corp.*, 253 AD2d 641, 642, 677 NYS2d 555, 556 (1st Dept. 1998); *Mikel v. Flatbush Gen. Hosp.*, 49 AD2d 581, 582, 370 NYS2d 162, 165 (2d Dept. 1975); *cf., Argenziano v. R.D.J. Holding Corp.*, 42 AD2d 970, 348 NYS2d 12 (2d Dept. 1973).

71. *See, McDermott v. Barker*, 20 AD2d at 546, 245 NYS2d at 136, supra (physician testified that he would not have recorded the admission-statement unless patient herself had made it). Compare, *Passino v. DeRosa*, 199 AD2d 1017, 606 NYS2d 107 (4th Dept. 1993) (history portion in record could not be read into evidence as admission by physician who recorded it as he could not state its source); *Gunn v. City of New York*, 104 AD2d 848, 480 NYS2d 365 (2d Dept. 1984) (same); *Dougherty v. City of New York*, 267 App. Div. 828, 45 NYS2d 808 (2d Dept. 1944), *affd.*, 295 NY 786, 66 NE2d 299 (1946) (same).

72. *See*, Richardson (10th ed.), *supra*, §302, at p. 279.

73. *See*, Richardson (11th ed.), *supra*, §8-310, at p. 611; 5 *Weinstein, Kevin & Miller*, *supra*, §4518.2, at pp. 45-526 - 45-529; 5 Bender's *NY Evidence*, *supra*, §19.03(3), at pp. 19-51 - 19-53.

74. *See*, Hutter, *supra*.

75. *See, Ginsberg v. North Shore Hosp.*, 213 AD2d 592, 592, 624 NYS2d 257, 258 (2d Dept. 1995); *Mercedes v. Amusements of America*, 160 AD2d 630, 559 NYS2d 252 (1st Dept. 1990); *Castro v. Allen-Leeds, Inc.*, 144 AD2d 613, 535 NYS 2d 73 (2d Dept. 1988).

76. *See, Spoar v. Fudjack*, 24 AD2d 731, 263 NYS2d 340, *supra*; *Tyson v. Bittner*, 3 AD2d 861, 161 NYS2d 710, *supra*; 5 Bender's *NY Evidence*, *supra*, §19.03(3), at pp. 19-43 - 19-51 n. 54.

77. *See, DelToro v. Carroll*, 33 AD2d 160, 165, 306 NYS2d 95, 100 (1st Dept. 1969); *Gerolami v. Fancy Fruit and Produce Corp.*, 249 App. Div. 221, 291 NYS 837 (1st Dept. 1936).

78. *See*, Richardson (10th ed.), *supra*, §302, at p. 278.

79. *See*, 2 McCormick, *supra*, §293, at p. 264; *DelToro v. Carroll*, 33 AD2d at 165, 306 NYS2d at 100.

80. *See*, e.g., *Eitner v. 119 West 71st St. Owners Corp.*, 253 AD2d at 641-642, 677 NYS2d at 642-643, *supra*; *Lichtenstein v. Montefiore Hosp.*, 56 AD2d at 285-286, 392 NYS2d at 21, *supra*.

81. *See, Mikel v. Flatbush Gen. Hosp.*, 49 AD2d 581, 370 NYS2d 162, *supra*.

82. *See, e.g., Segreti v. Putnam Community Hosp.*, 88 AD2d at 592, 449 NYS2d at 787, *supra*; *People v. Conde*, 16 AD2d 327, 330, 228 NYS2d 69, 71 (3d Dept. 1962), *affd.*, 13 NY2d 939, 244 NYS2d 314 (1963).

83. *See, Davidson v. Cornell*, 132 NY 228, 30 NE 573 (1982). *See generally*, Hutter, Plaintiff's Pre-Trial Statements and Expressions of Physical Sensations and Condition: The Questionable Status of New York's Rules Governing Their Admissibility, *Bill of Particulars*, Spring 2003, p. 33.

84. *Id.* at 35-36. In that regard, it would appear unlikely that the court in *Williams*, when it judicially created the germane to treatment and diagnosis rule, wanted to have such rule only in connection with the party admission exception as the means to satisfy *Johnson v. Lutz*.

85. *See*, 2 McCormick, *supra*, §293(a), at pp. 264-265.

86. *See, e.g., Kasovan v. Flushing Hosp.*, 224 AD2d 590, 638 NYS2d 687 (2d Dept. 1996); *Diamond v. Acker*, 78 AD2d 546, 432 NYS2d 34 (2d Dept. 1980).

87. *See, Blair v. Martin's*, 78 AD2d 895, 433 NYS2d 221 (2d Dept. 1980); *see also* Alexander, *supra*, C4518:2.

88. *See*, Yachnin, The Business Record Rule, *NYLJ*, 5/30/95, p. 1, at p. 12, col. 6; Martin, Capra & Rossi, *supra*, §1.5.2, at pp. 18-19.

89. *See*, Richardson (11th ed.), *supra*, §8-309, at p. 608.

90. *See, Rodriguez v. Triborough Bridge and Tunnel Auth.*, 276 AD2d 769, 716 NYS2d 24, *supra*.

91. *See*, Alexander, *supra*, C4518:9.

92. *Id.* at C4518:10 (2002 supp.).