Washington Law Review

Volume 33
Issue 2 *Washington Case Law—1957*

7-1-1958

Evidence

Douglas M. Fryer

EVIDENCE

Physician-Patient Privilege—Waiver. In the recent case of *Randa v. Bear*,[1] respondent Bear, sued by the assignee of a hospital which had treated her for hypertension, cross-complained against the appellant Grays Harbor County Medical Bureau on the ground that under her contract with the Bureau it was liable for the charges. The parties stipulated as to the fact of treatment, the necessity therefor, and the reasonableness of the charges; but when in defense the Bureau made an offer of proof by the respondent's doctor, the hospital records, and the testimony of respondent herself that the ailment treated antedated the service contract, and hence was not covered by its terms. Respondent objected on the ground that the proffered testimony violated the physician-patient privilege.[2] The trial court sustained the objection and entered judgment for the stipulated amount against the Bureau. On appeal the supreme court granted a new trial and held that the appellant should have been allowed to present its defense, since the filing of the cross-complaint waived the physician-patient privilege.

There was no physician-patient privilege regarding confidential communications at common law.[3] The purpose of the statute creating the privilege[4] is to encourage the patient to more freely disclose the symptoms of his illnesses and injuries without fear that the physician might reveal the communications in court.[5] Thus, the legislature has regarded that the slight possibility that certain symptoms might not be disclosed to a doctor because of this fear outweighs the court's search for truth and justice. The utility of such a statute rests upon very narrow grounds. The only type of condition that is commonly felt to be embarrassing is one which society considers immoral, such as an illegitimate pregnancy or a venereal disease.[6] The privilege has become a potent weapon in the hands of a plaintiff seeking to recover for an alleged injury or illness, and the manifest unfairness of it has led the courts to find a waiver in cases where it was abused.[7] Actual testimony

[1] 50 Wn.2d 415, 312 P.2d 640 (1957).

[2] RCW 5.60.060 (4): "A regular physician or surgeon shall not, without the consent of his patient, be examined in a civil action as to any information acquired in attending such patient, which was necessary to enable him to prescribe or act for the patient."

[3] Duchess of Kingston's Trial, 20 How. St. Tr. 573. Lord Mansfield: "If a surgeon was voluntarily to reveal these secrets, to be sure he would be guilty of a breach of honour, and of great indiscretion; but, to give that information in a court of justice, which by the law of the land he is bound to do, will never be imputed to him as any indiscretion whatever."

[4] Note 2 *supra*.

[5] 8 WIGMORE, EVIDENCE, 3rd Ed., § 2380a, P. 810.

[6] Note 5 *supra*.

[7] RCW 5.60.060 (4): "A regular physician or surgeon shall not, without the *consent*

concerning the injury is a more typical form of waiver as found by the courts than is commencement of the action. In *Noelle v. Hoquiam Lumber & Shingle Co.*,[8] where the plaintiff had testified as to his injuries without referring to what his physician had told him, the court held there was no waiver of the privilege. The *Randa* case mentions that this case is no longer the law in Washington.[9] In *McUne v. Fuqua*,[10] also an action to recover for personal injuries, it was held that plaintiff's testimony and that of certain physicians called by him waived the privilege as to that injury.[11]

The weight of authority holds that the commencement of an action in which the plaintiff's illness or injury is an issue is not a waiver.[12] This view will allow a plaintiff to bring an action to recover for an injury, which he will allege is serious, and at the same time deny the defendant the opportunity to show that there is no injury or that the injury is less serious than claimed, because the disclosure would be too embarrassing to the plaintiff to be allowed in open court.[13] Two recent New York cases hold to the contrary.[14]

---

of his patient, be examined..." (emphasis added). In re Quick, 161 Wash. 537, 297 Pac. 198 (1931). (Two physicians involved, both treated deceased at the same time, all parties claiming under deceased. Held, the calling of one physician was a waiver of the privilege as to the other); McUne v. Fuqua, 42 Wn.2d 65, 253 P.2d 632 (1953). (Personal injury action. Plaintiff testified as to his injuries and also had three physicians testify. Defendant tried to get in testimony concerning plaintiff's health prior to the alleged injury. Held, a waiver as to any testimony that would impeach or contradict the testimony of the plaintiff or that which he offered.)

[8] 47 Wash. 519, 522, 92 Pac. 372 (1907). "The legislature made no exception to the rule of secrecy where it was necessary to contradict falsehood, but provided for an exception only in case of consent of the patient." Root J., joined by Hadley, C.J., in a vigorous and persuasive dissent said that there should be a waiver when the patient demonstrates that he no longer desires to keep the matter a secret by his own testimony concerning the illness.

[9] The court in the Randa case says that the Noelle case was previously abrogated by Rule of Pleading, Practice and Procedure 35 (Rule 35 itself was abrogated subsequent to the trial of the instant case by Rule 44). Rule 35 provided that the court could order a physical examination of a party whose health is in issue, and that if the party examined requested a copy of the report of the examination, he waived any privilege he may have had regarding that condition. It is difficult to see how this rule actually abrogated the Noelle case, unless it is considered that it is the power of the court that operated as a waiver.

[10] 42 Wn.2d 65, 253 P.2d 632 (1953).

[11] It is unclear from the opinion whether either calling the physicians or the testimony of the plaintiff would by itself be a waiver of the privilege. Hence the case does not seem to directly overrule the Noelle case.

[12] Ostrowski v. Mockridge, 242 Minn. 265, 65 N.W.2d 185 (1954). (Bringing a personal injury action, plaintiff testified, and called expert witnesses to testify, concerning her injuries. Held, no waiver.); see 8 WIGMORE, EVIDENCE, 3rd Ed., § 2389, p. 832 *et. seq.*

[13] 8 WIGMORE, EVIDENCE, 3rd Ed., § 2389 p. 832 (quoted in the Randa case).

[14] Van Heuverzwyn v. State, 134 N.Y.S.2d 922 (N.Y. Ct. Cl. 1954). (In personal injury action maintained by guardian ad litem of infant inmate of state hospital, state claimed matters concerning the infant's injuries were privileged on a motion for discovery; held, the guardian could waive for the infant and the bringing of the action was

The *Randa* case pinpointed the problem. To sustain a recovery in the action, respondent Bear would have had to show that the illness did exist, that it was necessary that it be treated, and that the compensation requested for the services was reasonable. However, the parties stipulated these facts, and the respondent thus avoided any possible waiver under the rule of the *McUne* case. The court felt that the respondent should not be allowed to take an unfair advantage of the stipulation, and held that since she obviously intended to introduce medical testimony, she also intended to waive the privilege by bringing the action.

The result in the *Randa* case is sensible. The case could be the beginning of a trend to gradually cut down the privilege and limit it to situations where it possibly belongs. It is hoped that such a waiver will be found in all situations in which a plaintiff has "tendered his injury into court," since the plaintiff thereby manifests his intention that a disclosure of such injury will no longer embarrass him.

Hearsay — Business Records Exception — Hospital Records — Scope of Admissible Matter. In *Young v. Liddington*[1] respondent brought a malpractice action for an alleged negligent diagnosis and treatment of a child. Respondent offered, and the trial court received in evidence, a hospital record stating the maker's opinion as to the cause of the patient's current ailment, the statement being based solely on a narrative of the patient's mother and the patient's present condition. On appeal from judgment on a verdict for respondent, the supreme court reversed and granted a new trial. The court held that while the Business Records Act[2] will qualify a hospital record without resort to the common law exception to the hearsay rule, it applies only to an "act, condition, or event" and will not permit the maker to express, through the record, an *opinion* which he could not express in court because not based upon evidence before the jury.

a waiver since proof of the injuries is necessary to recover); *compare* Eder v. Cashin, 281 App. Div. 456, 120 N.Y.S.2d 165 (1953). (Personal injury suit; held, a waiver of privilege as to previous mental illness of deceased was made by bringing the action. The plaintiff put in issue the worth of the deceased's life and had to prove it. However, another statute against disgracing the memory of the deceased kept the testimony out.)

[1] 50 Wn.2d 78, 309 P.2d 761 (1957).

[2] RCW 5.45.020: "A record of an act, condition or event, shall in so far 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 (formerly RCW 5.44.110).

Business records are sufficiently accurate as a general rule for the jury to consider them as evidence without the safeguard of cross examination, and at common law are admissible as an exception to the hearsay rule. This rule, however, involves the preliminary proof of identification and unavailability of the recorder, which in many cases is too burdensome to be practical. Also, because the common law exception is limited to those entries that were "regular," the cases are in some conflict as to when an entry was "casual" or regularly in the course of business.[3] In *Toole v. Franklin Inv. Co.*,[4] decided prior to the adoption of the Business Records Act, an offer of a hospital record was categorically rejected as hearsay. While the point was not discussed as such, the court evidently did not regard the record as a "business record."

The Business Records Act was adopted to allow the admission of hearsay evidence contained in business records without resort to the common law rule and its accompanying complexities. Hospital records may be classed as business records within the meaning of the statute,[5] and may be introduced to show a diagnostic finding by a physician.[6]

In the *Young* case, however, the opinion contained in the record was not one which could have been admitted by means of oral testimony.[7] As in *Berndt v. Department of Labor and Industries*,[8] an expert medical opinion is not admissible if not made in response to facts established in the record or made in response to a hypothetical question that omits relevant facts established by the record. In the *Young* case the record contained an opinion made without reference to another previous hospital record (which was admitted as evidence in the

[3] McCORMICK, EVIDENCE, § 287, p. 603.

[4] 158 Wash. 696, 291 Pac. 1101 (1930).

[5] RCW 5.45.010: "The term 'business' shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not" (formerly RCW 5.44.100).

[6] RCW 5.45.020: "A record of an act, *condition*, or event..." (emphasis added). See, McCORMICK, EVIDENCE, § 290, pp. 609, 612.

[7] McGowan v. City of Los Angeles, 100 Cal.App.2d 386, 223 P.2d 862 (1940). (In a personal injury action the defendant attempted to get introduced as evidence a record of a bloodtest without proof of whose blood was tested. Held, the Business Records Act is only an exception to the hearsay rule and such a record is inadmissible without proper identification.); *accord*, Reisman v. Los Angeles City School Dist., 123 Cal. App.2d 493, 267 P.2d 36 (1954).

[8] 44 Wn.2d 138, 265 P.2d 1037 (1954). (The plaintiff attempted to prove that the dermatitic condition contracted on her deceased husband's genitals had caused his death. The allegation was that the infection had caused such a degree of worry—that the wife would think it was a venereal disease—as to induce a coronary thrombosis. In answer to a hypothetical question a medical expert testified that there was such causation. Held, such an opinion was inadmissible where the hypothetical had not included the established fact that the deceased had been advised by a doctor in the presence of his wife, a nurse, that it was not a venereal disease.)

instant case) and made in ignorance of a case of measles contracted by the child subsequent to his last hospitalization.

It seems apparent that, while the Business Records Act has waived the necessity for cross examination concerning certain hearsay records, under the rule of the *Young* case opinions contained in the record must meet the same standards as oral testimony.

DOUGLAS M. FRYER

LABOR RELATIONS

Federal Pre-Emption under Taft-Hartley—Interference with Employment as an Unfair Labor Practice as well as a Common Law Tort. In *Selles v. Local 143*[1] the plaintiff had been a member of the defendant union in which there was, early in 1952, some internal strife. Selles was one of several members of the union who organized a meeting of those dissatisfied with union policies concerning election of officers and dissemination of information about union funds. Some 150 members who were not sympathetic to Selles marched en masse into the meeting hall and broke up the meeting.

Within a few days following, Selles went to the union's hiring hall to get a job assignment and was told there was no work for him. It was determined as an ultimate fact that this was done in retaliation for Selles' activities in organizing the grievance meeting. Selles was not regularly employed for more than a year thereafter, and was finally compelled to find less remunerative nonteamster work.

Selles filed a complaint with the National Labor Relations Board. After they took jurisdiction, he withdrew the complaint and brought suit in superior court on a common law tort theory—interference with employment—and recovered damages measured by his loss of earnings.

On appeal the union maintained that its alleged misconduct constituted an unfair labor practice under the Labor Management Relations Act[2] and that, by this act, Congress had preempted the field. The court, while agreeing that the union's conduct amounted to an unfair labor practice under this section of the LMRA, nevertheless[2]

[1] 50 Wn.2d 660, 314 P.2d 456 (1957).

[2] 61 STAT. 140 (1947) 29 U.S.C.A. § 157 (1956). "Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in 158 (a) (3)."

61 STAT. 140 (1947), 29 U.S.C.A. § 158 (b) (1) (A) (1956). "It shall be an unfair