Admissibility of Hospital Records into Evidence

Robert E. Powell
ADMISIBILITY OF HOSPITAL RECORDS INTO EVIDENCE.

By Robert E. Powell*

INTRODUCTION†

One of the most complex areas of evidence relates to the admissibility of hospital records. Generally speaking, this area subdivides itself into three questions: (1) Is a hospital record prima facie admissible? (2) If not, what parts, if any, are admissible? (3) For what purposes are they admissible? Behind each of these questions lie multiple problems of privilege, hearsay, relevancy, and opinion (both lay and expert). It is the purpose of this article to point up these problems and to show the manner in which

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* Of the Maryland Bar; A.B. 1957, Johns Hopkins University; LL.B. 1960, University of Maryland.
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SUMMARY

The term "hospital records" as used herein includes records of all medical institutions, e.g. sanitariums, asylums, nursing homes, and clinics, as well as records of ordinary hospitals. Under the law all of these records appear to be offered under the same conditions and are admissible if they satisfy the rules herein discussed. Kirkpatrick v. Wells, 319 Mo. 1040, 6 S.W. 2d 591 (1928); Norville, The Uniform Business Records as Evidence Act, 27 Or. L. Rev. 188 (1948). It is noted that in most jurisdictions the term equally applies to the records of physicians or psychiatrists. Freedman v. Mutual Life Ins. Co. of New York, 342 Pa. 404, 21 A. 2d 81 (1941); Wojciechowski v. States Marine Corp. of Delaware, 155 F. Supp. 874 (D.C. Md. 1957). However, in Baltimore & Ohio R.R. Co. v. Zapf, 192 Md. 403, 411, 64 A. 2d 139 (1949), the Court, in holding an x-ray report to be inadmissible where such report was prepared by a radiologist on request by a physician, indicated that such a report could not be admitted as a hospital record. The result in that case is possibly distinguishable on the grounds that the report was requested and made as an extraordinary measure, and not in the regular course of business.
they have been handled by the courts of the several states, with particular emphasis on Maryland.

Before dealing directly with the admissibility of hospital records, it is necessary to examine their nature and contents. They generally can be broken down into those prepared by nurses or doctors on the admission of the patient, the "history" of the patient, the records of his medication and treatment, notes and comments of his nurse (particularly in the case of psychiatric patients), records of discharge or death, and official records, required by state law, of birth, stillbirth, death, death of the fetus, and of certain highly contagious and dangerous diseases. Each of these types of records may contain information which was personally known to the entrant, or was deduced as opinion from direct observation and recorded by the nurse, diagnostician or both, or was narrated to the entrant by the patient or someone speaking on his behalf.

PRIVILEGE AND LACK OF CONFRONTATION

The proffer of a hospital record presents at the outset two basic questions: first, whether the contents thereof are privileged; and second, whether the lack of confrontation by the declarant, due to the hearsay quality of the record, as discussed below, deprives a criminal defendant against whom the record is proffered of any constitutional rights. In some jurisdictions a hospital record may be excluded from evidence because the matter contained therein is privileged. There is no problem in this regard in Maryland, since no physician-patient privilege has been recognized.

Applicable statutes in Maryland are: 4 Md. Code (1957) Art. 43 § 11 — which requires physicians to file reports of certain diseases contracted as a result of one's employment; § 14(a) — which makes it mandatory that the State Board of Health collect certificates of birth, death and stillbirth and that it preserve the same; § 17 — which specifies the required contents of birth certificates; § 18 — which provides for the execution and filing of death certificates; and § 20 — which provides for the execution and filing of birth and stillbirth certificates. See also 2 Md. Code (1957) Art. 22, § 8, which requires the preparation and recording of records of post mortem examinations by the state medical examiners.


recorded, and the diagnostic opinions based thereon, are privileged. In regard to routine entries made by nurses, attendants and technicians, there is some disagreement as to whether a privilege exists. Since the physician-patient privilege is not a creature of the common law, but one of statute, the problem is usually one of statutory interpretation. And, because the statutes creating the privilege are in derogation of the common law, they have generally been given strict interpretations and therefore, hospital records prepared by persons not specifically mentioned in the statutes have been admitted without regard to the privilege. However, it is to be noted that nurses and attendants, being considered to be agents of the physician, have been barred from testifying by reason of the privilege. Following this concept it would appear that even where nurses, for example, are not specifically mentioned in the statute, the privilege should apply to records prepared by them for physicians as well as to the records of the physicians themselves. Nevertheless, the question appears to depend completely upon how the applicable statute is interpreted, and the tendency is toward a literal reading.

The second question, that relating to the lack of confrontation in the production of a hospital record, is not as problematical as the first. It has been argued that the production of a hospital record containing assertions by the victim of a crime violates the defendant's right to confrontation secured by the Sixth and Fourteenth Amendments to the Constitution of the United States and by Article 21 of the Maryland Declaration of Rights. It is true that there is a lack of confrontation present, as in all hearsay declarations; however, it has generally been held that the admission of such matter does not abridge any constitutional guarantees. Thus, there is no basis for

6 Kaplan v. Manhattan Life Ins. Co. of New York, 109 F. 2d 463, 465 (D.C. Cir. 1939); Weis v. Weis, supra, n. 3; MCCORMICK, loc. cit. supra, n. 3.
6 MCCORMICK, op. cit. supra, n. 3, § 101, 211; 8 WIGMORE, EVIDENCE (3rd ed. 1940), 2380; Chafee, No Justice Served by Closing the Doctor's Mouth, 52 Yale L.J. 607 (1943).
7 Weis v. Weis, supra, n. 3; Leusink v. O'Donnell, 255 Wis. 627, 39 N.W. 2d 675 (1949).
treat bearing hospital records differently in criminal cases; and
the same rules governing their admission are applicable
in both criminal and civil trials.

THE HEARSAY PROBLEM

In the first instance, it is clear that hospital records,
being written accounts of acts or observations of various
individuals, which are offered to prove the truth of the
matters asserted therein, constitute hearsay evidence,
which McCormick defines as:

"... testimony in court or written evidence, of a
statement made out of court, such statement being
offered as an assertion to show the truth of matters
asserted therein, and thus resting for its value upon
the credibility of the out-of-court asserter."10

It follows from this definition that where the witness
through whom the record is offered was not the entrant,
the asserted facts contained in a written record, when
offered for their truth, are of necessity hearsay, for
belief of those assertions rests upon the credibility of the
entrant or one who dictated or narrated them to the
entrant. If, on the other hand, the witness was the en-
trant and could sufficiently vouch for the accuracy of the
record, although he could not presently recollect the facts
contained therein, then the record could be offered as
the testimony of the witness — the record constituting past
recollection recorded.11 However, in the main, the hospital
record as a whole constitutes a compilation of hearsay
assertions; and in order for it to be admissible, it must
fall within some exception to the rule against hearsay.

HOSPITAL RECORDS AS SATISFYING A HEARSAY EXCEPTION

I. Circumstantial Probability of Trustworthiness
and Necessity

The exceptions to the rule against hearsay are con-
sideered to be based upon a special necessity for the ad-

(1937). For a more thorough discussion of this problem see 5 Wigmore,
Evidence (3rd ed. 1940) §§ 1395-1418.
11 Cogswell v. Frazier, 183 Md. 654, 661, 39 A. 2d 815 (1944) ("The
witness' adoption of his written report made it his present assertion.");
McCormick, op. cit. supra, n. 10, §§ 276-280, 590-595; 3 Wigmore, Evidence
(3rd ed. 1940) §§ 734-757; Note, Past Recollection Recorded, 23 Iowa L.
Rev. 530 (1943); cf. Riley v. Naylor, 179 Md. 1, 16 A. 2d 857 (1940);
mission of the hearsay declaration, or upon a high circumstancial probability of trustworthiness. Generally both are present although one may be more pertinent than the other, depending on the exception. Necessity may be found to exist in either the unavailability of the declarant, or an inability to obtain the evidence contained in the assertion from another source. These two factors are considered to offset the lack of the recognized counterweights to hearsay evidence — oath, confrontation, and cross-examination.

Hospital records have been admitted into evidence under two separate exceptions: (1) that for public or official documents and records, and (2) that for business records. No matter which exception has been used, the reliability of the records has been found to exist in the fact that they are prepared under a duty owing by the entrant to both his employer and patient, the recovery — or even life — of the patient depending on their accuracy; and, additionally, in the case of the business records exception, because the records are kept in the regular course of the hospital business.

In *Globe Indemnity Co. v. Reinhart*, the leading Maryland case on the reliability of hospital records, the Court of Appeals expressed the view which prevails today as follows:

"The question here presented is whether evidence represented by the hospital chart contains a sufficient guarantee of its truthfulness. We are of the opinion..."
that it does. It is a record required by the hospital authorities to be made by one whose duty it is to correctly make the entries therein contained. So far as the hospital is concerned, there could be no more important record than the chart which indicates the diagnosis, the condition, and treatment of the patients. * * * On the other hand, there is the strongest reason why [the entrant should make the entries correctly and accurately]: First, because of the great responsibility, he knowing that the treatment of the patient depends largely upon his record, and if it be incorrect it may result, and probably will result, in the patient's failure to receive proper surgical or medical treatment, which failure might be followed by serious consequences or even death. Second, the entrant must realize and appreciate that his position is dependent upon the accuracy with which the record is made. Third, as was stated by Tindall, C.J., in *Poole v. Dicas*, 1 Bing. N.C. 649: 'It is easier to state what is true than what is false; the process of invention implies trouble in such a case unnecessarily incurred.'

The court may well have added an additional reason — that a doctor or nurse may in all likelihood expose himself to tort liability if he is not accurate in his recorded statements and such inaccuracy results in serious illness, injury, or death; or, in some cases, to criminal liability. It clearly follows that there is every reason to accept hospital records as being reliable insofar as they are offered merely to prove that the beliefs and experiences of such an entrant are accurately reported. However, as will be shown later, recorded statements of the patient cannot be afforded the same degree of reliability, and what reliability can be afforded them cannot logically be said to rest upon the same bases.

There is some confusion as to whether it is required that there be a necessity for admitting the record. At common law it was generally required that the declarant either be produced in court or be shown to be unavailable. As
mentioned above, if the entrant was produced in court and was unable to testify from his present recollection as to the original facts reported in the record, the record could sometimes be admitted as past recollection recorded. On the other hand, where the entrant was unavailable, the record would be admitted into evidence under an exception to the rule against hearsay, and in such cases the necessity for receiving the hearsay evidence was found in the unavailability of the entrant. However, due to the development of large scale business enterprises — wherein numerous persons would be involved in a single transaction — the unavailability requirement was relaxed so as to allow the production of a record on a showing that it would be inconvenient to produce the entrant, or other persons involved in the transaction, if they could be identified at all.

The exception as it exists today in most jurisdictions under either the Model Act for Proof of Business Transactions or the Uniform Business Records as Evidence Act does not appear to require the entrant to be either produced or shown to be unavailable. There is no mention in the former of any such requirement, and the latter merely requires that the record be identified by the “custodian or other qualified witness.”

In those jurisdictions which admit hospital records as public documents, the trend seems to be toward merely


Supra, n. 11.

Globe Indemnity Co. v. Reinhart, 152 Md. 439, 137 A. 43 (1927); Wigmore, loc. cit. supra, n. 22. 5 Wigmore, op. cit. supra, n. 12, § 1530, 379 states:

"... that where an entry is made by one person in the regular course of business, recording an oral or written report, made to him by other persons in the regular course of business, of a transaction lying in the personal knowledge of the latter persons [the entrants], there is no objection to receiving that entry under the present Exception, verified by the testimony of the former person only, or of a superior who testifies to the regular course of business, provided the practical inconvenience of producing on the stand the numerous other persons thus concerned would in the particular case outweigh the probable utility of doing so."

The same opinion is implied in Globe Indemnity Co. v. Reinhart.

McCormick, op. cit. supra, n. 10, 606.

Infra, supra, n. 45-49.

McCormick, op. cit. supra, n. 10, 608.
having the custodian or some other person qualified to
vouch for its authenticity identify it.\(^{28}\) In relation to
public documents the necessity requirement has generally
been found to rest upon the inconvenience that would be
causd public officials if they were required to appear in
court every time such documents were proffered.\(^{29}\)

II. Hospital Records as Public Documents

Five states, Massachusetts, Mississippi, Missouri, Ohio
and Texas, each of which have statutes requiring hospitals
to keep records, have reached the conclusion that such
records, if kept in accordance with the statutory provi-
sions, constitute public records and are admissible in evi-
dence as such,\(^{30}\) but they are only considered to be com-
petent in regard to facts required by law to be kept
therein.\(^{31}\) Therefore, it follows that, despite the fact that
the record is legally considered to be a public document,
all of it is not necessarily admissible. Following this con-
cept, hospital records have been admitted to prove that a
decided person died of natural causes rather than by
reason of the defendant's negligence\(^{32}\) and to prove that
a workman's compensation complainant had suffered from
epilepsy before his injury;\(^ {33}\) but a narrative statement of
an unidentified relative of a deceased person has been
held to be inadmissible where it was included in the rec-
ord.\(^ {34}\)

There is little logical basis for giving the average
hospital record the dignity of a public document, espe-
cially where the hospital is not supported by the state.
The entrant, whether a doctor or nurse, is not a sworn
representative of the public; he is not performing any
governmental function; he is not responsible to the state
legislature or governor; and the records themselves carry
no official seal or certification. Therefore, how can it
logically follow that such records are public documents?

\(^{28}\) Schaefer v. Lowell-Krekeler Grocery Co., 49 S.W. 2d 209 (Mo. 1932); Kirkpatrick v. Wells, 319 Mo. 1040, 6 S.W. 2d 591 (1928); Galli v. Wells, 209 Mo. App. 460, 239 S.W. 894 (1922).

\(^{29}\) 5 Wigmore, Evidence (3rd ed. 1940) §§ 1630-1633.

\(^{30}\) Kimber v. Kimber, 317 Ill. 461, 148 N.E. 293 (1925); Motley v. State, 174 Miss. 568, 165 So. 290, 298 (1936); Key v. Cosmopolitan Life, Health and Acc. Ins. Co., 102 S.W. 2d 797 (Mo. 1937). It is noted that Illinois has admitted such records under both exceptions. Cf. Wright v. Upson, 303 Ill. 129, 135 N.E. 269 (1922).

\(^{31}\) Cassidy v. Cincinnati Traction Co., 31 N.E. 2d 463 (Ohio, 1940).

\(^{32}\) Kirkpatrick v. Wells, 319 Mo. 1040, 6 S.W. 2d 591 (1928).

\(^{33}\) Lamkins v. Copper-Clad Malleable Range Corporation, 42 S.W. 2d 941 (Mo. 1931).

\(^{34}\) Collins v. Leahy, 102 S.W. 2d 801 (Mo. 1937).
In some instances there seems to be more justification. For instance, most states require the preparation and official filing of birth, stillbirth, death, and death of the fetus certificates, and impose a criminal penalty for failure to do so or for impropriety in doing so. In addition, these certificates are generally compiled and preserved by an agency of the state. However, are we to consider the copy or record retained by the hospital, physician, or coroner as a public document? In many states, including Maryland, there no longer is any problem as to the admissibility of records of this nature as they have statutes declaring them to be admissible, and moreover, to be prima facie evidence of the facts contained therein.

III. Business Records Exception

The business records exception to the rule against hearsay appears to be an outgrowth of the common law "Shopbook Rule," which admitted records of merchants and handicraftsmen for the purpose of proving the particulars of a transaction and the delivery of wares.
This exception was limited by a statute enacted in England in 1609. However, a need for such evidence persisted due to the fact that parties to a litigation were considered incompetent as witnesses and without being able to produce their records had no available evidence, and due to the growth and development of large scale business and trade. As a result a slightly broader rule existed in nearly all American jurisdictions by the early 1800's.

Requirements for satisfaction of this rule remained strict, but because of a gradual relaxation of the rules disqualifying interested witnesses from testifying and a general feeling against exclusionary rules, further relaxation of the rule was made. The result was the presently existing common law exception for business records: A record is admissible if it was made in the regular course of business by one who had a duty to make an entry and who had personal knowledge of the facts (or to whom the information in the record was communicated by one who had such knowledge and who had a duty to report the information). In addition, the entry must have been made contemporaneously with the recorded event or transaction, and, probably, the entrant or person having personal

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20 7 Jac. 1 c. 12; for a summary of this act see Wigmore, op. cit. supra, n. 38, § 1518, 347-348. Under this statute the rule was considerably limited so as to only admit mercantile books which represented transactions below a specified value and for only a period of one year following the making of the transaction. Furthermore, due to a strong feeling against self-made evidence, the courts placed a very strict interpretation upon the statute. Sikes v. Marshall, 3 Esp. 705 (1798); Glyn v. Bank of England, 2 Ves. 38 (1750); Grouch v. Drury, 1 Keble 27 (1661); Wigmore, loc. cit. supra, n. 38.

21 Wigmore, op. cit. supra, n. 38, § 1537.

22 Id., McCormick, loc. cit. supra, n. 38.

23 Id. In England the rule was considerably broadened by the enactment of other statutes in the late 1800's. Wigmore, loc. cit. supra, n. 38.

The major limitations as listed by Wigmore (Wigmore, op. cit. supra, n. 38, §§ 1537-1557) were: (1) that the party must have been his own bookkeeper (it is noted that Maryland held contra, demanding that a party could not have made 'the entry; Romer v. Jaeckch, 39 Md. 585 (1874); GOSPER, Law of Evidence (1916) 121); (2) that the entry could not evidence a delivery of goods to a third party on the credit of the defendant; (3) that the entry could not be offered to prove the terms of a special contract (it is noted that the probable reason for this requirement is that such a contract should have been in writing, which writing would be the best evidence of the transaction); (4) that the transaction involved could not exceed a set value; (5) that a special oath to the justness of the account had to be filed; and (6) that the books must have borne an honest appearance. The above listed limitations were not uniform — some colonies, and later states, possessed most of them, others only one or two.
knowledge must be either unavailable or produced as a witness in court. 44

Regardless of the broadening of the rule, the steady growth of business demanded that additional steps be taken, and in 1927 a committee of experts appointed by the Commonwealth Fund of New York published the Model Act for Proof of Business Transactions, 45 which was adopted almost verbatim by the Maryland Legislature in 1929. 46 This act gave statutory force to the common law

44 McCORMICK, op. cit. supra, n. 38, § 283, 599. It is noted that in Maryland there was one additional general requirement — that the entrant must have had no particular motive to misrepresent. Gorter, op. cit. supra, n. 43, 120. This limitation appears to exist today to some extent in Maryland and other states, as it has been held that self-serving statements are inadmissible through hospital and other records. Hoffman v. Palmer, 129 F. 2d 976 (2d Cir. 1942); Needle v. New York Railways Corporation, 227 App. Div. 276, 237 N.Y.S. 547 (1929); Weis v. Weis, 147 Ohio St. 416, 72 N.E. 2d 245 (1947). In Maryland this requirement was very strong and generally prevented the admission of a record which was prepared by one of the parties to the litigation. Deland Mining Co. v. Hanna, 112 Md. 528, 76 A. 550 (1910); Stallings v. Gotschalk, 77 Md. 429, 26 A. 524 (1893); Romer v. Jaecksch, 39 Md. 585 (1874).


46 Md. Laws 1929, Ch. 517, read as follows:

"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 in evidence in proof of said act, transaction, occurrence or event, if made in the 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 they shall not affect its admissibility. The term 'business' shall include business, profession, occupation and calling of every kind."

This statute was strengthened somewhat in 1933 by a supplementary act authorizing the admission of photostatic and photographic reproductions of records. This enactment, now 4 Md. Code (1957) Art. 35, § 59 reads:

Any writing or record, or a photostatic or photographic reproduction thereof, 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 in evidence in proof of said act, transaction, occurrence or event, if made in the regular course of any business, and if it was the regular course of such business to make such memorandum or record, or photostatic or photographic reproduction thereof at the time of such act, transaction, occurrence or event or within a reasonable time thereafter, and photostatic or photographic reproductions of such admissible documents, photostated or photographed at a later time, shall likewise be admissible for such purpose if photostated or photographed in the regular course of business in good faith and without intent to defraud. All other circumstances of the making of such writing or record, or photostatic or photographic reproduction thereof, including lack of personal knowledge by the entrant or maker, may be shown to
rule (with the exception that it removed the requirement that the entrant have personal knowledge)," dispensed with the need for the entrant to be produced or be shown to be unavailable, and extended the rule so that the term "business" included "business, profession, occupation and calling of every kind," thus bringing medical records within the purview of the business records rule.

On the national scene other steps were taken in 1936 when the Commissioners on Uniform State Laws recommended the adoption of the Uniform Business Records as Evidence Act,48 which was substantially the same as the Model Act except that it expressly provided that a record would be competent evidence if the custodian or other qualified witness testified to its identity, thus clearly dispensing with the need to produce the entrant or those individuals who were involved in the recorded transaction.49

In order for a given record to be admissible the Uniform Act expressly requires that it be authenticated by an appropriate witness.50 Although the Model Act and the Maryland Act do not expressly so provide, it is plain from the cases that by implication the same requirement is made.51 In short, a foundation must be laid before the

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47 Beth. Shipyard v. Scherpenisse, 187 Md. 375, 50 A. 2d 256 (1947) (the Court expressly stated that the purpose of the Maryland Act was to put an end to the requirement that the entrant have personal knowledge or have personally observed the recorded facts).

48 9A UNIFORM LAWS Annotated (1957) §§ 1-2, 299, provide that:

"The term 'business' shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not."

"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."


50 Supra, n. 48.

record itself is offered in evidence. It clearly follows from the foregoing discussion of the general requirements that the witness through whom the record is offered need only identify it as being part of the customary records of the particular business, and as having been prepared in the normal course of the particular business.

Admissibility of Particular Entries

In order for a hospital record to be admissible, the entries contained therein must be pathologically germane to the physical or mental condition which caused the patient to seek medical assistance. In essence, this requirement is an adaptation to the particular case of hospital records of the general rule that the subject matter of the entry in a business record must be within the scope, or course, of the business, as well as the record being prepared in the regular course of business. The problem, at the outset, is how strict an interpretation is to be given to the words "pathologically germane"? There are certain types of information which possess no immediate medical value, but may possibly later aid in the treatment of the patient and which are required, as a matter of routine, to be obtained on the admittance of the patient to the hospital. As an example, admissions clerks or nurses are often required to obtain information as to the circumstances in which an injury was sustained. This information may contain statements of the patient which amount to admissions, but possess no immediate medical

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It is noted that "hospital records" as used in this discussion means "hospital medical records" solely. Records of financial accounts of hospitals are of course treated in the same manner as the ordinary business records of any business and need not be pathologically germane to a patient's physical or mental condition.


The Maryland Act states that a record is admissible "if made in the regular course of business, and if it was the regular course of such business to make such memorandum or record. . . ." In Lee v. Housing Auth. of Baltimore, 203 Md. 453, 101 A. 2d 832 (1954), the Court of Appeals, in applying that requirement of the Act to the hospital "business," borrowed the phrase "pathologically germane." A more direct statement of the rule is that of the Watts case where the court said an entry "may be received in evidence at a trial only if so related to the complaint or injury involved as to facilitate prompt and intelligent diagnosis and treatment."
value. It is clear that where the requirement that the subject matter be pathologically germane is taken in its strictest sense such information would be excluded. Nonetheless, there still appear to be logical grounds for admitting it, since the entrant was under a duty to make the entry as a matter of routine, and it contained statements amounting to admissions. Therefore, the entry should be as reliable as those which are truly pathologically germane and should constitute competent evidence.

The requirement that an entry be pathologically germane is, however, the universal rule, but a finding that an entry was pathologically germane is not in itself conclusive. The evidence contained therein must also be competent and free from objection on other grounds. Thus, aside from making a determination as to whether an entry is pathologically germane, it is necessary to test the competency of the proffered evidence in regard to other matters. There are many evidential problems which may arise due to either the basic type of evidence or the means through which it was obtained. These problems vary, to a large degree depending on whether a proffered entry was a recordation of information supplied by medical authorities which resulted from their personal observation or opinion, or a recordation of statements of the patient or his representative.

To a large extent, the problems relating to the admissibility of hospital records lie in the fact that many entries constitute hearsay upon hearsay. This is particularly true in regard to recordations of statements made by the patient or his representative, but also applies to some of the entries made by medical authorities without reliance upon any information supplied by the patient. A record is produced in court which represents the declarations or thoughts of the entrant, but in many cases those declarations or thoughts were themselves mere representations of the statements of another person, and therefore, the credibility of the record depends not only upon the accuracy of the entrant in making the entry but


55 Globe Indemnity Co. v. Reinhart, 152 Md. 439, 451, 137 A. 43 (1927), by way of strong dictum said that:

"... if [the hospital record's] contents upon examination would be open to other objections, such as immateriality, irrelevancy, or that it was an expression of opinion by persons not competent to express an opinion, these objections are not precluded. . . ."
also upon the veracity of the declarant. Thus, two levels of hearsay are present and it would appear that each level must satisfy some exception to the rule against hearsay before the record can be admitted into evidence.

It has been indicated by some cases that the hospital record need only satisfy the business records rule in order to make all of the matters contained therein admissible, thus not requiring that double hearsay entries be treated specially. However, the weight of authority, and of reason, is contrary. Thus, although the admissibility of the record itself is determined solely by the business records exception, for the entries contained therein to satisfy that exception by being a proper part of the record, many of the important ones must themselves satisfy one of the other exceptions.

Up to this point discussion has dealt solely with the first level of hearsay — that relating to the hearsay quality of the record itself. It is clear from that discussion that, if the record satisfies the exception for business records or that for official documents it is admissible for any purpose for which the testimony of the entrant would be admissible, if he were in court. Much of the discussion following is concerned with the second level of hearsay which would be present even if the entrant was called to testify.

Aside from the hearsay problems, hospital records present questions as to the admissibility of scientific and opinion evidence. Many entries made by medical authori-

56 Schaefer v. Lowell-Krekelor Grocery Co., 49 S.W. 2d 209 (Mo. 1932); Kirkpatrick v. Wells, 319 Mo. 1040, 6 S.W. 2d 591 (1928); Motley v. State, 174 Miss. 565, 165 So. 290 (1936). See also 4 Md. Code (1957) Art. 43, § 27 (supra, n. 37); Smiley v. Bergmore Realty Co., 222 Mo. App. 141, 73 S.W. 2d 836 (1933); Smith v. Missouri Ins. Co., 60 S.W. 2d 730 (Mo. 1933).

57 Hale, Hospital Records as Evidence, 14 So. Cal. L. Rev. 99 (1941). Although the courts do not as a rule speak specifically in terms of testing both levels of hearsay, it is evident that they do. See Brown v. Saint Paul City Ry. Co., 241 Minn. 15, 62 N.W. 2d 688 (1954); Case v. Vearrindy, 339 Mich. 579, 64 N.W. 2d 670 (1954). Cf. Shirks Motor Express v. Oxenham, 204 Md. 626, 106 A. 2d 46 (1954). All of these cases speak the language of the res gestae exception for statements of present bodily condition, infra, circa ns. 111-113. It is noted that such utterances are necessarily pathologically germane, and there is therefore no obvious necessity for a court to discuss both levels. However, in Pollack v. Metropolitan Life Ins. Co., 138 F. 2d 123 (3rd Cir. 1943), noted in 43 Mich. L. Rev. 421 (1944), the courts specifically stated that entries relating to the age of the patient satisfied the exception for matters of pedigree; Pickering v. Peskind, 43 Ohio App. 401, 183 N.E. 301 (1930).

58 It is noted that the exception for business records cannot be applied to the first level of hearsay, regarding statements made by the patient, since he does not make them in the regular course of a business with which he is connected.
ties contain information derived by the use of scientific or mechanical devices or by laboratory tests. The competency of such information is dependent upon the accuracy and competency of such devices or tests, and could therefore be objectionable if the device or test involved is not considered reliable by the court. A much more complex problem arises in relation to the expression of opinion in hospital records. Although some opinion can be found in the recorded statements of the patient, the problem as to the competency of opinion — whether the declarant was competent to draw it; whether it was well founded; or whether it was related to an ultimate fact or issue — arises in every entry stating a physician's diagnosis, and in many entries expressing medical observations. Thus, the same objections can be raised to the admission of a record as would be available if the entrant were on the stand; and the record, although satisfying the business records rule (and another hearsay exception, if two levels of hearsay are present) can be excluded because of the incompetency of its contents.

I. Recordations Made by Medical Authorities

The vast majority of entries contained in hospital records are recordations of fact or opinion derived from the personal observation of a doctor, intern, nurse, or other hospital employee. There rarely will exist any grounds for claiming that these entries are not pathologically germane to diagnosis or treatment, as they are in essence notations concerning the bases for diagnostic opinion, the diagnostic opinion itself, action taken in preparing one for an operation, incidents occurring in the performance of an operation, the patient's reaction, treatment rendered, rehabilitation and steps taken in that regard, medications prescribed and administered, or orders given to a nurse or intern for the purpose of treating the patient.

Such information can be classified into three categories: (1) statements of facts directly observed, e.g. temperature, pulse, blood pressure, respiration, medicine administered, food, behavior, results of tests, x-ray examinations, details of operations, and facts revealed by autopsies; (2) opinions or diagnoses drawn from the facts listed under category (1) or from observed facts which are not so recorded; and (3) orders given to nurses or interns.

In so far as these entries are concerned there may be only one level of hearsay involved. In most cases the
entrant is the person who observed the recorded facts, but in a few the entrant records what is dictated by a superior or equal. It could be argued that in such cases there is a double hearsay problem. However, it seems clear that under such circumstances the entrant is considered to be an agent of the declarant, or both are considered to be agents of the hospital.

A. Recordations of Matters Directly Observed

Similarly, most of the entries included in category (1) theoretically involve hearsay without regard to the record itself, although the law does not generally recognize it as such. In the main they depend upon the assumed accuracy of some scientific or mechanical device not subject to cross examination, such as a watch, thermometer, microscope, or pressure gauge for their credibility, as well as upon the accuracy with which the entrant read and recorded what the device indicated. However, the law does not exclude information based upon scientific devices which have long been recognized as being accurate. To the contrary, evidence obtained by use of a scientific device is admissible if it is proved that the device is generally accepted (or if it is such that the court will take judicial notice of its accuracy) and was of a standard make and in reasonable condition, and that the person using the device and testifying as to its revelations was skilled in its use. Thus, entries based upon facts derived by the use of scientific devices are not excluded by the rule against hearsay unless the matter contained therein does not qualify as acceptable scientific evidence or the record itself fails, for some other reason, to satisfy the exception for business records.

B. Opinion — Diagnoses

The primary problem with entries of the nature under discussion is that many constitute representations of

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59 Stidger v. McPhee, 15 Colo. App. 252, 62 P. 332 (1900); Cohen v. Bogatzky, 149 Md. 134, 131 A. 32 (1925); Heiskell v. Rollins, 82 Md. 14, 33 A. 263 (1895); 2 JONES, EVIDENCE (5th ed. 1958) § 290. The entry must be made by a person having personal knowledge or from information coming to him in the regular course of business. Thus, this kind of double hearsay is permitted by the authorities.

60 Boeche v. State, 151 Neb. 368, 37 N.W. 2d 593 (1949); MCCORMICK, EVIDENCE (1954) § 170. For discussion of the analogous question of whether there is a hearsay problem in relation to entries made from personal observation but based in part, if not in whole, on knowledge derived from lectures, books, or the experience of others, see infra, n. 62.

opinion. For the most part these opinions are as to matters which require expert or skilled knowledge and experience. It is generally held that an expert may voice his opinion as to such matters if he shows a reasonable basis for such an opinion, but he probably does not have to state all of the salient facts which constitute the bases for that opinion. A specific problem which is not present where an expert is himself on the stand arises in relation to opinion contained in a hospital record, since there is no opportunity for cross-examination. Thus, counsel for the side against which a record is offered does not have the same opportunity to attack the validity of the opinion as he would have if the expert was testifying. Although the courts have not expressly dealt with this problem, the results of their decisions imply that the recordation of facts in the hospital record present sufficient bases for the various opinions which may be contained therein. In this regard expert opinion as to diagnoses has been admitted through a hospital record where it was stated that the patient was suffering from a "fractured right clavicle," a deviation of the nasal septum, a cerebral hemorrhage, an ulcer — "chronic prostatitis and seminal vesiculitis," venereal disease (listed as cause of death), nephritis, and "moderately advanced tuberculosis," although the bases for such opinions were not specifically stated. Similarly,


66 Buckminster's Estate v. Commissioner of Int. Rev., 147 F. 2d 331 (2d Cir. 1944).


69 Kirkpatrick v. Wells, 319 Mo. 1040, 6 S.W. 2d 591 (1928).

in *Watts v. State*\(^{70a}\) a criminal case wherein the defendant entered a plea of not guilty by reason of insanity, it was held that it was not reversible error to admit the testimony of an expert psychiatric witness who had personally examined the defendant and had also reviewed objective data which had been recorded by another expert who had also examined the defendant. In so holding, the Court, after restating the general rule that an expert may not base his opinion upon the opinions or conclusions of other experts, said:

“But the prohibition does not extend to data of an objective nature duly entered in hospital or similar records, even though the tests employed may require a considerable measure of skill and judgment for proper evaluation.”\(^{70b}\)

Although the records utilized by the witness were not placed in evidence, the *Watts* case clearly indicates that not only can the objective data contained in a medical record be used to support a diagnostic opinion contained therein, but also can be used to support expert testimony which is given by one other than the entrant. On the other hand, in *Baltimore & Ohio R.R. Co. v. Zapf*,\(^{71}\) the Court of Appeals of Maryland held that an x-ray report of a radiologist to whom Zapf had been sent by his doctor was inadmissible when proffered through the doctor. In so holding the Court treated the recorded material as opinion evidence and indicated that such a report could not be admitted without the declarant being present so as to be “subject to cross-examination as to the reasons for his findings.” Thus, in relation to this record the Court indicated that the facts revealed in the report were not in themselves satisfactory support for the written opinion.

It is to be noted that many diagnostic opinions are based in part, if not in whole, upon facts related by the patient. This factor will not generally prevent the stating of the opinion, since most courts admit the diagnosis of a physician which is based to some degree upon facts re-

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\(^{70a}\) 223 Md. 268, 164 A. 2d 334 (1960).

\(^{70b}\) Id., 272.

\(^{71}\) 192 Md. 403, 64 A. 2d 139 (1949). In the Zapf case the Court, although not absolutely clear upon the subject, indicated that the opinions contained in the x-ray report, being those of the radiologist and not of the witness, could not be received through that report since the witness was “not competent to testify as to what [the radiologist] concluded from an examination of those x-ray plates.” Furthermore, the court said that the report was not of the nature of a hospital record and could not therefore, be admitted as a record prepared in the regular course of business. *Supra, circa n. 1.*
lated to him by the patient. This rule appears to be based upon one or both of the following theories: (1) that the statement, in so far as it is made for the purpose of treatment, is highly reliable, since it is not likely that one honestly seeking medical assistance will consciously misrepresent his physical condition; and (2) that the physician is competent to decide whether or not the statement is true and significant in making his diagnosis. On the other hand, if the physician was consulted for the purpose of qualifying him as an expert, there is present in the patient a motive to misrepresent, and therefore in that case the opinion is not received. If, therefore, a physician is permitted to voice an opinion on the stand which is partially based on the statements of a patient on which he relied for treatment, there is no reason for excluding such opinion when contained in a hospital record, so long as from the facts so received and those personally observed the physician's diagnostic opinion was reasonable.

In regard to hospital records containing opinion, the courts have generally ignored the opinion problem in rendering their decisions. The majority has admitted entries, such as those cited above, whether or not any objection was made to their being opinion. A second, and minority, view restricts admissibility to entries where the diagnostician is clearly identified, and his professional training and experience is such as to qualify him as an expert in the field in which the diagnosis is made.

93 Kansas City Southern Ry. Co. v. Clinton, 224 F. 806 (8th Cir. 1915); Block v. Milwaukee St. Ry. Co., 89 Wis. 371, 61 N.W. 1101 (1895); 2 Wigmore, Evidence (3rd ed. 1940) § 660.
94 Meany v. United States, 112 F. 2d 538, 130 A.L.R. 975 (2d Cir. 1940); McCormick, Evidence (3rd ed. 1940) § 206. For a more complete discussion of such statement see infra, II, C, ns. 114-116.
95 McCormick, op. cit. supra, n. 73, § 16, 33.
96 Nashville C. & St. L. R. Co. v. York, 127 F. 2d 606 (6th Cir. 1942); Greinlki v. Chicago City R. Co., 234 Ill. 564, 85 N.E. 327 (1908); Reid v. Yellow Cab Co., 131 Ore. 27, 279 P. 635, 67 A.L.R. 1, 7 (1929); 3 Wigmore, Evidence (3rd ed. 1940) § 688.
97 Becker v. United States, 145 F. 2d 171 (7th Cir. 1944); Reed v. Order of United Commercial Travelers, 123 F. 2d 252 (2d Cir. 1941); Wickman v. Bohle, 173 Md. 854, 196 A. 326 (1938); Conlon v. John Hancock Mut. Life Ins. Co., 56 R.I. 88, 183 A. 850 (1936). Cf. Glass v. Metropolitan Life Ins. Co., 278 Mass. 127, 154 N.E. 563 (1927) ("Unless radiation accomplishes a miracle the outcome will be fatal" excluded as being a prophesy as distinguished from a diagnostic opinion). It is noted that, in view of the Glass case, entries which make predictions or voice opinions as to results of treatment are not considered to be part of a proper diagnosis and fall into the category of mere speculations. See Norville, The Uniform Business Records as Evidence Act, 27 Ore. L. Rev. 188 (1948).
98 West v. Fidelity-Balto. Bank, 219 Md. 258, 147 A. 2d 559 (1950); Globe Indemnity Co. v. Reinhart, 152 Md. 439, 137 A. 43 (1927); Freed-
third view restricts admissibility to diagnoses upon which qualified doctors would not differ.\footnote{78}

Maryland appears to conform with the second view requiring that it be shown that the declarant was a qualified expert.\footnote{79} In *West v. Fidelity-Balto. Bank*,\footnote{80} a will contest case, the Court held that a conclusion of insanity in regard to the testator reached by trained psychiatric nurses from observations of numerous strange acts and recorded on medical charts was inadmissible because the nurses were incompetent to draw the recorded conclusion. In so holding, the Court said:

"While the charts would have been admissible as entries made in the regular course of business . . . it does not follow that everything in them was competent evidence. We think it is clear that the statute\footnote{81} did not modify or alter the rule which forbids an expression of opinion by a person who is not competent to express [it]."\footnote{82}

This decision seems extremely harsh, especially when almost every state, including Maryland,\footnote{83} has held that even lay witnesses are competent to give their opinion as to the sanity of the testator.\footnote{84} However, where a lay witness testifies to the insanity of the testator, he is generally required to give the bases for such opinion. In the *West* case the Court implied that the bases for the recorded opinion were insufficient, but rather than determine the issue on those grounds, it expressly stated that the entrants were incompetent to draw such an opinion.

It would appear from the cases that a stricter view is taken of entries containing diagnostic opinion where they relate to one's psychiatric condition,\footnote{85} or probably to any

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\begin{itemize}
  \item man v. Mutual Life Ins. Co., 342 Pa. 404, 21 A. 2d 81 (1941); Norville, \textit{supra}, n. 76.
  \item New York Life Ins. Co. v. Taylor, 147 F. 2d 297 (D.C. Cir. 1945); Norville, \textit{supra}, n. 76.
  \item 219 Md. 258, 147 A. 2d 859 (1959).
  \item \textit{Supra}, n. 46.
  \item \textit{Supra}, n. 80, 265.
  \item Smith v. Biggs, 171 Md. 528, 180 A. 756 (1937); Harris v. Hippsley, 122 Md. 418, 434-5, 89 A. 852 (1914); Safe Deposit & T. Co. v. Berry, 93 Md. 500, 49 A. 401 (1901); Williams v. Lee, 47 Md. 321 (1877); Brooke v. Berry, 2 Gill 62 (Md. 1842); \textit{Gorter, Law of Evidence} (1916) 212.
\end{itemize}
condition which is subject to diverging medical views. The fact that psychiatric diagnoses are subject to debate, and rarely of such a nature that psychiatrists will be in unanimous agreement, has been expressed as the reason for rejecting entries containing such opinions.86

In the final analysis, it seems clear that an entry which states a diagnosis upon which reasonable physicians would not differ would be admissible in all states for the purpose of proving that the patient had such an ailment. However, where the diagnosis is subject to debate, it would not be admissible at all in a jurisdiction such as New York,86a and would be admissible in some states, including Maryland, only if the competency of the diagnostician is shown.

Entries involving opinion evidence other than diagnoses have been admitted. These have consisted of statements concerned with the behavior of the patient while at the hospital,87 laboratory tests performed,88 and the general condition of the patient, e.g. "odor of alcohol on the breath."89 Since it can be argued that some of these matters do not require expert opinion, they may present a problem which the courts have not as yet discussed. With the exception of cases involving sanity, it is generally held that an expert, in testifying on matters on which laymen are competent to voice an opinion, is not considered to be an expert and must conform with the same requirements as laymen.90 In short he must give the bases for his opinion, if such bases can reasonably be put into words.91 If from the facts as stated by a witness the jury is capable of reaching a reasonable conclusion, the witness is not generally permitted to state his opinion.92 It therefore appears that, if an entry con-

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86 New York Life Ins. Co. v. Taylor, 147 F. 2d 297 (D.C. Cir. 1945). This case represents the strictest view requiring the opinion to be free from objection by medical authorities, but the same concept seems to exist in Maryland and Pennsylvania where the rules are not so rigid.
86a Id.
87 Weis v. Weis, 147 Ohio St. 416, 72 N.E. 2d 245 (1947).
90 McCormick, Evidence (1954) § 13, 26, states that to justify the use of expert testimony, "the subject of the inference must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average laymen."
91 Gorres, loc. cit. supra, n. 88.
92 Grant v. Curtin, 194 Md. 393, 384-5, 71 A. 2d 304, 314 (1950) said: "When evidence to show mental incapacity relates to circumstances which are not obscure and need no explanation by a physician and
tains an opinion which did not require expert knowledge or experience and the bases for it could be intelligibly stated to the jury if the declarant were present in court, it should be excluded either because (1) the facts upon which the opinion is based are not stated, or because (2) the facts (which are stated) should go to the jury so that it can reach the proper conclusion. The chief problem with recorded opinion evidence is that neither can the declarant be required to show the bases for his opinion before stating it, nor is there any opportunity to attack its validity on cross-examination. In short, the opinion must be either admitted or excluded on the strength of what bases are indicated in the record itself. As in the case of expert opinion, the courts have not directly dealt with this problem. However, those cases which have admitted opinions of the nature under discussion imply that the problem under discussion is not of importance.

An additional problem is present if the opinion is such that it expresses a conclusion of law or an ultimate fact which is to be determined by the judge or jury. There is considerable confusion as to how far a witness may go toward suggesting the answer to an ultimate issue. All jurisdictions bar the expression of statements as to what the witness feels should be the outcome of the case. Aside from that rule, there appear to be two views as to the admissibility of opinions relating to an ultimate issue. First, many courts hold that a witness cannot voice his opinion upon an ultimate fact in issue, but if it is necessary for the judge or jury to intelligently determine an issue, expert opinion, and in some cases lay opinion, as to that issue may be received. Under this view it is the necessity for receiving the opinion that appears to be controlling, and unless such is shown to be present the opinion should be excluded. The second view is really one of semantics — that if the witness signifies clearly that what he states to be an ultimate fact is his opinion, it is admissible, but if he states such as being an established fact, are legally insufficient to support an inference of incapacity, the testimony of a medical expert is not admissible to show that he draws such an inference from such evidence, and if admitted, is not legally sufficient to show incapacity.


United States v. Spaulding, 293 U.S. 498, 506 (1935); McCormick, loc. cit. supra, n. 94, 26; Morgan, loc. cit. supra, n. 54; Wigmore, op. cit. supra, n. 84, § 1951.

McCormick, loc. cit. supra, n. 94, 20.
it is excluded. It would appear that this view is based mainly on a fear that the expert witness will over-impress the jury if he is allowed to voice an opinion without clearly indicating it to be such. In Maryland it is fairly well settled that an expert cannot "usurp the function of the judge or jury" by stating his opinion as to an ultimate fact in issue. However, the Court of Appeals has also recognized that the rule must be liberalized in accordance with the nature of the case and the necessity for receiving expert opinion, thus granting a preference in relation to such opinion required by necessity. There is no question but that these same views apply to opinions voiced in hospital records since they have been held to be incompetent for proving the existence of an ultimate fact. However, in each of the cited cases there was a lack of strict necessity for the receipt of the proffered opinion, and hence the question remains open as to whether a preference will be given to the receipt of such evidence through a hospital record where a strict necessity is present.

C. Orders to Nurses and Attendants

It is common practice in all cases involving hospitalization for the attending physician to prepare records which contain his orders and directions to nurses and attendants for the care and treatment of the patient. These records are of special significance in malpractice cases, where the patient has suffered bodily harm while undergoing medical treatment, since they constitute direct and original evidence of what the physician ordered for correcting what he diagnosed to be the physical or mental condition of the patient. In such situations no double hearsay problem is

97 Id., 27, and cases cited therein.
98 Baber v. John C. Knipp & Sons, 164 Md. 55, 163 A. 862 (1933); McClee v. Cohen, 158 Md. 60, 148 A. 124 (1930); Baltimore C. & A. Ry. Co. v. Moon, 118 Md. 350, 84 A. 536 (1912); Hanrahan v. City of Baltimore, 114 Md. 517, 80 A. 312 (1911). The ultimate issue doctrine appears to this writer to be unnecessarily harsh. Where the person possessing such opinion is testifying on the stand, there is ample opportunity to test the validity of his conclusions, and they can be either qualified or destroyed by intelligent cross-examination. However, there is more justification for the rule when applied to hearsay opinion since in such a case there is no opportunity for cross-examination.
100 Scott v. James Gibbons Co., 192 Md. 319, 64 A. 2d 117 (1949); Case v. Vearrindy, 339 Mich. 579, 64 N.W. 2d 670 (1954) (entry by one other than the defendant held to be inadmissible to show that defendant in a malpractice suit had known of a serious condition and negligently disregarded it); Kelly v. Ford Motor Co., 250 Mich. 378, 273 N.W. 737 (1937) (inadmissible to prove accident had in fact happened); Schmitt v. Doehler Die Casting Co., 143 Ohio St. 421, 55 N.E. 2d 644 (1944).
involved since the proffer of the entry is made only to show that a particular statement was made, and not the truth of it. These records may show that the physician was negligent in handling the case by ordering improper treatment, or they may, along with evidence of what treatment was actually rendered, show that a nurse or attendant was negligent in the way he carried out the physician's orders. There is no apparent basis upon which records of this nature can be excluded from evidence in so far as they are offered to prove what the orders of the attending physician were. They are, in most cases, direct and original evidence of those orders and are unquestionably germane to treatment. Thus, they are properly a part of a hospital record and should be admitted with the record under the business records rule.

II. Recordations of Statements of Patient or His Representative

As indicated earlier, the main problem relating to recorded declarations of the patient or his representative lies in the fact that most of these entries contain two levels of hearsay. The record, itself being hearsay, constitutes the first level; and since the credibility of the record depends, in part, upon the veracity of the declarant who was not the entrant, the recorded declaration creates the second level of hearsay. The problem of double hearsay, or hearsay upon hearsay, was of occasional interest in relation to recordations made by medical authorities from personal observation or information gathered by assistants or superiors. In the ensuing discussion it is of constant importance, and much of the discussion is directed toward the problems presented by the second level of hearsay.

There are essentially three categories into which information afforded by the patient or his representative may fall: (1) matters of pedigree, including (a) matters relating to the patient's personal status and identification — his date of birth, occupation, nationality, and religion, and (b) information concerning familial medical history — the names and ages of close relatives, cause of death of the patient's parents, familial tendencies toward disease, and history as to insanity, imbecility, hereditary diseases, and behavior; (2) matters relating to present bodily condition — signs and symptoms of the patient's injury or disease, statements of any previous treatment, and a synopsis of the patient's medical history including illnesses
(with or without complications), operations and injuries, habits, social conditions, environment, and any other data which may be pertinent to the existing illness or injury; and (3) in accident cases often a statement as to how the injury was sustained, including information as to why, when, and where the injury was sustained.

A. Admissions and Declarations Against Interest

Statements made by patients which fall under any of the above categories may constitute an admission or a declaration against interest. Such declarations clearly satisfy an exception to the hearsay rule in so far as the second level of hearsay is concerned. The primary problem with them is in determining whether they are pathologically germane for the purpose of qualifying the record under the business records rule. In Watts v. Delaware Coach Co.,\(^1\) the court, in holding that a hospital record containing a statement by the plaintiff that he "twisted his ankle while walking along the sidewalk" was admissible as an admission against his interests in a suit against a bus company for negligently causing the injury which resulted in his hospitalization, said:

"The rule . . . seems clearly to be this — that admissions against their interests by patients regularly entered in hospital records . . . may be received in evidence at a trial only if so related to the complaint or injury involved as to facilitate prompt and intelligent diagnosis and treatment."\(^2\)

Compare Young v. McLaughlin,\(^3\) in which the plaintiff in seeking to recover the custody of her child from its maternal grandparents, alleged that the said grandparents were mentally incompetent. The court there held that a statement made by the plaintiff and recorded while she was hospitalized, that her parents were mentally sound, was inadmissible as being either confidential information or hearsay. Similarly, in Cohen v. Borough of Bradley Beach,\(^4\) the court held that a statement by the plaintiff as to how she had sustained an injury was inadmissible through a hospital record although it was clearly against her interest at the trial.

\(^{101}\) 44 Del. 283, 58 A. 2d 689 (1948), noted in 47 Mich. L. Rev. 124 (1948).
\(^{102}\) Id., 695. Emphasis added. See also Shivers v. Carnaggio, ....Md. .... , 165 A. 2d 898 (1960).
\(^{103}\) 126 Colo. 188, 247 P. 2d 813 (1952).
\(^{104}\) 135 N.J.L. 276, 50 A. 2d 882 (1947).
Although the court in the Watts case specifically discussed the question as to whether the admission was pathologically germane, the courts in the Young and Cohen cases said no more than that the entries were hearsay and hence inadmissible. Nevertheless, the decisions in the later two cases would seem to imply that the entries failed to satisfy the business records rule because the contents were not pathologically germane.

Entries of the nature under discussion are usually made as a matter of routine and in accordance with directives of the hospital staff. They, therefore, are generally prepared in the regular course of the hospital’s business. Nonetheless, if they do not comply with legal concepts as to what information is pertinent to the making of an intelligent diagnosis or to the rendering of treatment, they will be excluded. This result seems to be unjust, since in qualifying as an admission or declaration against interest, a particular statement is considered to have a high circumstantial probability of trustworthiness and, similarly, the entry itself should be considered trustworthy since it was made in the regular course of business by one having a duty to make it. Therefore, should emphasis really be placed on whether the statement was pathologically germane?

B. Matters of Pedigree

Those matters included in category (1) might appear on their face to satisfy the exception to the rule against hearsay for declarations of family history or pedigree. This exception is generally held to cover information concerning familial history, which is possessed (often by reason of hearsay or double hearsay declarations) and narrated by one who is a close blood relative, or closely related by marriage, to the person to whom the declaration refers. However, a definite problem arises in connection with these entries since a declaration, in order to satisfy the exception for matters of pedigree, is supposed to have made ante litem motam —, before any motive to misrepre-


sent arises, and in most cases involving hospital records a cause of action has already come into being which gives the declarant a motive to misrepresent. This is especially true in cases involving personal injury resulting from a transaction which occurred outside of the hospital. If, on the other hand, the injury was sustained while in the hospital, as happens in many malpractice cases, there would be no grounds for objection, since the patient's statements concerning his family history would have been taken and recorded ante litem motam. Despite the presence of possible objection on these grounds, the courts have generally admitted entries of this nature under the exception for matters of pedigree.

It has been stated that matters relating to the age, status, and identification of the patient, even though satisfying the hearsay rule, should be excluded unless they are of assistance to the attending physicians, nurses, or attendants. This argument is sound if the "pathologically germane" rule is accepted, for otherwise the entry would not be pathologically germane and therefore would not satisfy the hearsay exception for the first, i.e. business records, level of hearsay.

Statements relating to a party's occupation, nationality, race, or religion cannot be considered to be medically important except in rare cases, and hence should be excluded on the strength of the argument offered in support of excluding entries relating to age. Furthermore, such information is not usually relevant to any issue under litigation. There are, of course, cases where occupation or nationality may be of importance. However, even if it can

109 However, in Pollack v. Metropolitan Life Ins. Co., 138 F. 2d 123, 128 (3rd Cir. 1943), an entry as to the patient's age was admitted in defense of a suit on an insurance policy to show that the deceased patient's age had been misstated on the policy, which misstatement expressly invalidated the policy. There was no indication that the age of the deceased was of particular medical importance. The court without discussing this factor merely stated that:
   "A patient's age is, as a matter of common knowledge, a relevant part of medical history and the record should be admissible ... as proof of the fact."
   Thus, it would appear that, at least according to this case, age is always to be considered as being pathologically germane.
110 It is noted that such information could be pathologically germane to treatment; e.g., in a malpractice case where a doctor is charged with having been negligent for failing to administer whole blood to a patient, it would be pertinent to show that the patient was a Jehovah's Witness, the members of which sect do not believe in the administration of whole blood.
be found that such information is relevant to the litigation, it is hard to find that it was pathologically germane to diagnosis or treatment — and under legal standards a proper part of the hospital record.

Information concerning other members of the family and familial medical history are not open to as many objections. Entries as to the age of ancestors are, of course, subject to the same criticisms; but it is clear that declarations relating to the manner in which one's parents' died, diseases which have frequented the family, familial history as to insanity, inebriety, and general behavior, have definite value in making a medical diagnosis, at least where the patient is suffering from a disease. It is questionable whether such information is pathologically germane in an accident case where the injuries are purely external.

Therefore, it appears that the courts will often admit entries containing matters of pedigree under the appropriate hearsay exception despite the fact that in more cases than not they fail to satisfy that exception since they were made after the declarant had a motive to misrepresent. However, it may well be that an objection on these grounds would be sustained if specifically raised. Aside from that, there appears to be no hearsay objection to the type of entry under discussion; but there may well be a valid objection to the receipt of the record itself since the matter contained in the entry was not pathologically germane and therefore should not have been included in the record.

C. Statements of Physical or Mental Condition

Statements about the physical or present mental condition of the declarant will, as a rule, satisfy one of the three res gestae exceptions — statements of present bodily condition, declarations expressing state of mind or emotion, and excited utterances. With the exception of statements evincing state of mind, the reliability of the statements included in these exceptions depends to a large extent upon

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11McCormick lists a fourth exception, declarations of present sense impressions, which is considered to cover statements "accompanying non-starting events or relating to a condition which the declarant is observing." Such statements, in that they are made while an event is happening, are considered to be reliable in that they are free from a possible failure of memory and there is little opportunity to make a deliberate misstatement. See McCormick, op. cit. supra, n. 106, § 273, 254; Morgan, A Suggested Classification of Utterances Admissible as Res Gestae, 31 Yale L.J. 229, 236-39 (1922).
the spontaneity with which they are uttered. The law requires that the declaration be spontaneous, that is, it must be made contemporaneously with and growing out of the transaction to which it refers. It is noted that this requirement is not the same as the "contemporaneous" requirement of the business record rule. There the requirement is simply that the record must be prepared at the same time or soon after the happening of the recorded transaction. The problem as to what is considered to be "spontaneous" is more complex.

Under the exception for statements of present bodily condition, the normal expressions of pain or mental suffering made by one at the time an injury is sustained or a disease becomes apparent, are admissible. This exception has also been held to have been satisfied by state-

112 Gorter, Law of Evidence (1916) 93; McCormick, loc. cit. supra, n. 111, 557; McKelvey, Evidence (5th ed. 1944) § 277, 498; 6 Wigmore, Evidence (3rd ed. 1940) § 1745, 139. Wigmore states: "The utterance, it is commonly said, must be 'spontaneous,' 'natural,' 'impulsive,' 'instinctive,' 'generated by an excited feeling which extends without let or breakdown from the movement of the event they illustrate.'"


The prevailing view is that for a declaration to be "spontaneous" it must be connected with the transaction in such a manner as reasonably to be a part thereof. Baltimore City v. Lobe, 90 Md. 310, 45 A. 192 (1900); 2 Jones, Evidence (5th ed. 1958) § 319; 6 Wigmore, Evidence (3rd ed. 1940) § 1745. It cannot be the result of premeditation or reflection; Hoffman v. Palmer, 129 F. 2d 976, 980 (2d Cir. 1942), aff'd. 318 U.S. 109 (1943). And, although the declaration need not be made at the identical point of time as the transaction, it must have been made at a time close enough thereto as to fairly be a part thereof; Baltimore City v. Lobe, 90 Md. 310, 45 A. 192 (1900). In short, the rule is that the declaration must be a part of the res gestae. However, as to what is truly a part of the res gestae or "contemporaneous" with a transaction is a matter of considerable confusion. Most writers and courts alike have criticized the use of the term res gestae as being too vague and of no meaning; McCormick, op. cit. supra, n. 107, § 274, 557; Wigmore, supra, n. 107, § 1767; Morgan, A Suggested Classification of Utterances Admissible as Res Gestae, 31 Yale L.J. 229 (1922). Oliver Wendell Holmes once said, "The man that uses that phrase shows that he has lost temporarily all powers of analyzing ideas." 2 Morgan, Basic Problems of Evidence (1954), 284, n. 1. Similarly, Judge Learned Hand commented, "and as for 'res gestae' . . . if it means anything but an unwillingness to think at all, what it covers cannot be put in less intelligible terms." United States v. Matot, 146 F. 2d 197, 198 (2d Cir. 1944); Morgan, supra.

114 Atlantic Coast Line R. Co. v. Dixon, 207 F. 2d 939 (5th Cir. 1953); Yellow Cab Co. v. Henderson, 183 Md. 546, 39 A. 2d 546, 550 (1944); Bacon v. The Inhabitants of Charlton, 61 Mass. 551 (1851); Northern Pac. R. Co. v. Urlin, 158 U.S. 271, 274 (1895); Freedman v. Mutual Life Ins. Co. of N.Y., 342 Pa. 404, 21 A. 2d 61, 135 A.L.R. 1249 (1941) (symptoms recorded in medical records admissible).
ments of medical history. Such a "history," however, must be pertinent to the existing disease or injury, or in other words, it must be germane to diagnosis or treatment. It would appear that in regard to this form of declaration the required circumstantial probability of trustworthiness is found more in the natural instinct of man to truthfully state his physical condition so as to receive the relief he seeks, than upon spontaneity.

However, in many cases, the material contained in a declaration of symptoms constitutes opinion or mere speculation, and may be inadmissible because the patient was not capable of reliably stating such an opinion since it was a matter only for a medical expert. Thus, if a patient stated that he had been suffering from repeated heart tremors, the entry recording that belief should be excluded. The patient would be capable of stating that he had suffered sharp pains in his chest, but he is not competent as a layman to draw the conclusion that the pains stemmed from his heart.

Not all of the statements of a patient reveal symptoms of physical injury or disease. In many cases his state of mind is of the utmost importance and germane to both diagnosis and treatment. This is especially true in psychi-

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116 Arabia v. John Hancock Mut. Life Ins. Co., 301 Mass. 397, 17 N.E. 2d 202 (1938). It is to be noted that, if a statement in a hospital record does satisfy the exception under discussion, it automatically satisfies the corresponding element of the business records exception, since it would have already been found to be pathologically germane, and hence, properly recorded in the course of ordinary hospital business.

117 For a complete discussion of the opinion rule see ASSOCIATION OF AMERICAN LAW SCHOOLS, SELECTED WRITINGS ON EVIDENCE AND TRIAL (1957, Chap. 6, 467-604); 2 JONES, COMMENTARIES ON EVIDENCE (2d ed. 1926) §§ 1241-1375; McCormick, EVIDENCE (1954) §§ 11-18, 21-39; 7 Wigmore, EVIDENCE (3rd ed. 1940) §§ 1917-2026. A patient may not testify as to his own mental condition, Frisone v. United States, 270 F. 2d 401 (9th Cir. 1959); existence of an ulcer, United States v. McCreary, 105 F. 2d 297 (9th Cir. 1939); existence of diabetes, United States v. Johnson, 94 F. 2d 539 (8th Cir. 1938); existence of tuberculosis, Cox v. United States, 103 F. 2d 539 (8th Cir. 1938); or a past heart attack, Peters v. Mutual Life Ins. Co. of New York, 28 F. Supp. 50 (D.C. M.D. Pa. 1939). However, a lay witness has been held capable of testifying that he was treated for a throat infection, Smith v. Weber, 70 S.D. 322, 16 N.W. 2d 537 (1944); and that he had suffered a broken bone, Kinner v. Boyd, 139 Iowa 14, 116 N.W. 1044 (1908). The underlying rationale in these cases is that a lay person is incapable of conclusively determining the nature of a serious illness since such is beyond his knowledge, while he is capable of realizing that he has certain minor physical disorders.
atric cases where medical authorities are interested in indications of mental condition rather than mental grievance or suffering as exemplified by personal injury cases producing shock. Declarations evincing a presently existing state of mind — e.g. intent, motive, desires, design, purpose, assent, knowledge, or belief — as distinguished from a present memory of a past event, have been admitted under a separate exception to the hearsay rule when offered to prove the truth of the matters asserted. It is noted that in many cases it is what the patient believes that is pathologically germane, and the truth of any assertion contained in the declaration is of no importance. In such cases there is of course no double hearsay problem, and the entry should be admitted even if it constitutes unqualified and incompetent opinion.

Under the hearsay exception for excited utterances, statements or exclamations made by a patient and recorded could satisfy the second level of hearsay, if they were made under the immediate influence of the occurrence which produced the nervous excitement, and if the expressions related to that occurrence. It is the spontaneous nature of the declaration which provides the necessary circumstantial probability of trustworthiness. Spontaneity being the important factor, time cannot have provided the declarant with an opportunity to continue and misrepresent. Applying the above rules to declarations entered in a hospital record, it would appear that the declaration would have to relate to a personal injury case, since in cases involving disease there rarely is present an exciting event. The main problem with excited utterances lies in the first level of hearsay. Under the requirement that the exclamation relate to the occurrence which produced nervous excitement, the exclamation will not generally be pathologically germane to diagnosis or treatment; and according to legal concepts it would not be a proper part of the hos-

118 Raborn v. Hayton, 34 Wash. 2d 105, 208 P. 2d 133 (1949); McCormick, op. cit. supra, n. 117, § 268, 567; 2 Morgan, Basic Problems of Evidence (1954) 290-291; 6 Wigmore, Evidence (3rd ed. 1940) § 1714; Hutchins and Slesinger, State of Mind in Issue, 29 Col. L. Rev. 147 (1929). Examples of such statements are: declarations of a testator as to his intent to make a will of certain tenor, Or to disown someone, 126 A.L.R. 1129, 1139 (1940); statements indicating an intent to commit suicide, 83 A.L.R. 426, 434 (1935).

119 Supra, circa n. 10.

120 Showalter v. Western R. Co., 16 Cal. 2d 460, 106 P. 2d 895 (1940).


hospital record. However, in *Murphy Auto Parts Company v. Ball*, the United States Court of Appeals for the District of Columbia voiced the opinion that the question of whether an utterance "explained or illuminated" the exciting event was only one factor to be considered in deciding whether the exclamation was spontaneous and that it was not in itself controlling on the question of admissibility. Thus, by this view, the exclamation could relate facts stemming from, but not directly related to, an exciting event, and it is more likely that it would be pathologically germane. Nonetheless, if the exclamation relates matters which are pertinent to diagnosis or treatment they probably would not be considered excited utterances, but statements of presently existing bodily or mental condition, and admissible under this separate and distinct hearsay exception.\(^{124}\)

D. Entries Containing Narratives by a Patient as to How Injury is Sustained

From the above, there appears to be little difficulty in placing into evidence entries which indicate bodily or mental conditions or feelings. Such entries are primarily relevant in proving extent of injury and damages and should be admitted for that purpose.\(^{125}\) However, in the vast majority of cases it is the entries which relate the manner and circumstances in which a personal injury was sustained that have real legal significance. These entries are pertinent in proving the essential elements of a given action, whether civil or criminal, and are, therefore, of more interest to the parties to an action. Of course, in malpractice cases some of the other entries may be of more significance than any narrative by the patient, but in most of the other cases involving personal injury the parties to the litigation are primarily interested in entries which in some manner sustain their position as to how the transaction which produced the injury occurred.

Due to the variety of form and content that these entries assume, in order for them to escape exclusion due to their double hearsay nature, they bring into use almost every exception to the rule against hearsay. In most cases

\(^{124}\) 249 F. 2d 508 (D.C. Cir. 1957).

\(^{125}\) *Supra, circa ns. 111-116.*

\(^{126}\) Gile v. Hudnutt, 279 Mich. 358, 272 N.W. 706 (1937) (hospital record competent evidence as to the question of whether an infant, who had been struck by an automobile, had died instantly or had survived and suffered for a short period of time.)
they constitute admissions,\textsuperscript{126} dying declarations,\textsuperscript{127} or spontaneous statements (satisfying one of the so-called \textit{res gestae} exceptions).\textsuperscript{128} The courts generally have not specified which exception a given entry must satisfy or which one it did satisfy. However, it is clear that, though an entry would normally satisfy an exception, the information contained therein may not qualify as a proper part of the hospital record which is ultimately being offered into evidence, because the information may not be pathologically germane to medical diagnosis or treatment. Thus, without fully discussing the entry in terms of being a dying declaration, although it clearly appears to have been one,\textsuperscript{129} the Pennsylvania court in \textit{Commonwealth v. Harris}\textsuperscript{130} held that a declaration by a murder victim that he had been shot "by a white man" was inadmissible on behalf of a negro defendant because it did not aid in medical diagnosis or treatment. The fact that the declarant was shot certainly was pertinent to diagnosis, but the entry was excluded by the excessive language which tended to identify the assailant. It would clearly appear that most statements which ordinarily satisfy the exception for dying declarations, although the exception itself requires that they relate to the circumstances surrounding the cause of death,\textsuperscript{131} would necessarily be excluded for this reason.

The basic idea is that the cause of an accident or injury is a proper part of the medical history of the patient, but that the statement of that cause must be confined to matter


\textsuperscript{127}\textit{Commonwealth v. Harris}, 351 Pa. 325, 41 A. 2d 688 (1945). Although the court did not so term the deceased's declaration, it appears to qualify as one.


\textsuperscript{129}McCORMICK, \textit{op. cit. supra}, n. 117, §§ 258-264; McKelvey, (5th ed. 1944) §§ 200-204; 5 \textit{WIGMORE, EVIDENCE} (3rd ed. 1940) §§ 1447-1452.

\textsuperscript{130}\textit{Supra}, n. 127.

\textsuperscript{131}McCORMICK, \textit{op. cit. supra}, n. 133, § 558; McKelvey, \textit{op. cit. supra}, n. 129, § 477; \textit{Wigmore, loc. cit. supra}, n. 129.
having medical significance. Thus, in *Scott v. James Gibbons Co.* the Court said:

"It is proper for the record to show the patient was hurt in an . . . accident, but the particulars of such accident, contained in a hospital record, should be deleted and not submitted to the jury. . . ."

Following this line of thought, entries have been excluded which stated where an accident happened, that the patient "fell off a ladder at Parker-Wolverine Company on October 1st," that the patient while boarding a streetcar on the sixteenth of May, 1950, was thrown from the step when the door was closed suddenly in her face; that the patient at "... 12 a.m. slipped and fell across a pipe which was about 1 foot off floor," and that a doctor who was the defendant in a malpractice suit had told the patient, "there [was] nothing to [her ailment]."

In comparison, entries have been admitted which showed that the patient was injured in an automobile accident; had suffered convulsions before driving into a parked car, and "cut [his] left foot and developed an infection involving [his] entire leg," and had broken his ankle when he twisted it while walking on a sidewalk.

It is plainly apparent that all of the above entries which were held to be admissible said little or nothing that was not germane to medical diagnosis or treatment, while those excluded went further. No clear line can be drawn as to what is pathologically germane. Some decisions, such as that in the *Harris* case, have been very restrictive; but

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133 192 Md. 319, 330, 64 A. 2d 117 (1949).
134 Id., 330.
135 North American Acc. Ins. Co. v. Hill's Adm'x., 182 Ky. 125, 206 S.W. 170, 171 (1918). It is to be noted that in some cases where an accident happened could be of special significance and hence admitted.
the prevailing view seems to be that announced in *Lee v. Housing Auth. of Baltimore*, where the Court, in holding an entry containing a declaration that the patient was injured when her "gas stove exploded" was admissible, said:

"In the instant case we think the record of the alleged cause of the burns to be treated was a proper part of the medical history. The entries do not undertake to establish the cause of the explosion, but merely relate to the nature of the substance causing the burns, gas, and the character of the combustion, an explosion. It is certainly customary and proper to record the type of accident causing the injury, and this information may have an important bearing upon the diagnosis, as indicating what the doctors should look for, and upon the treatment to be applied. We think the information recorded, from whatever source obtained, was not outside the regular course of professional inquiry."

What appears to be the true basis for determining what is pertinent to diagnosis or treatment is founded in part in the supposed circumstantial probability of trustworthiness of declarations made to medical authorities for purposes of treatment. A statement as to the cause of an injury, being medically significant, is not likely to be mistated; but related matter, such as where or why an injury was sustained, rarely has medical value and in more cases than not is self-serving and not truly trustworthy.

Therefore, it appears that a patient's statement will be considered pertinent to diagnosis or treatment if it states what directly caused an injury (as distinguished from what caused an accident which produced the injury); and in some instances when and where it was sustained; while in most cases, where and why an accident happened or who caused the accident or injury are not medically, and hence legally, relevant, and therefore are inadmissible.

Even though an entry may appear to be pertinent to diagnosis or treatment and within an exception to the hearsay rule, there may be some additional factor present which renders it inadmissible. In *Beverly Beach Club v. Marron* the entry merely stated that the patient's "foot [was] cut by broken glass," but the Court held it to be inadmissible. Similarly in *Slater v. United Fuel Gas Co.*

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145 Id., 460-461.
146 172 Md. 471, 475, 192 A. 279 (1937).
147 120 W. Va. 127, 27 S.E. 2d 486 (1943).
an entry stating “that while playing over a creek someone must have lighted a match and set ablaze natural gas” was excluded. Although the entry in the Slater case may have possessed excess verbiage both of the above entries were incompetent because they constituted declarations of unfounded opinion and speculation. In the Beverly Beach case the declarant had cut his foot while playing in the water. He had found the remnants of a broken bottle, but he was unable to say for sure that he had cut his foot on the bottle. In the Slater case the declarant had not seen anyone light a match and could only speculate upon the alleged fact that it was natural gas which was ignited. Thus, it is clear that if an entry is based upon opinion, such must be competently drawn, and probably sufficient facts must be given indicating the basis of that opinion so that the opinion rule is satisfied.\footnote{See discussion of recorded opinion evidence, supra, circa I B, ns. 62-100, and n. 117.}

**Summary**

In final analysis, it becomes apparent that a hospital record, without regard to the physician-patient privilege, due to its high degree of reliability is admissible in evidence under either the business records exception to the hearsay rule or that for public documents, if the matters contained therein were recorded in the regular course of the hospital’s business, contemporaneously with the transaction to which the record refers, and were pathologically germane to either diagnosis or treatment. But in order for these requirements to be met, the recorded matter must be in itself competent evidence and relevant to the issue in litigation. If the entry is a recordation of a physician’s diagnosis, laboratory reports, medications prescribed, orders to nurses or attendants, or other matters within the personal knowledge or opinion of the entrant, the entry is admissible as long as any evidence based on scientific devices was derived from those which have been recognized as being reliable and any opinion contained in the entry is shown to be competently drawn from reasonable bases. On the other hand, if the entry is a recording of statements made by the patient or his representative, there is a double hearsay problem and the first level of hearsay must satisfy some exception to the hearsay rule in order for it to qualify as a competent part of the hospital record.