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Outside Counsel

Keeping Alcohol Use Out Of Hospital Records

By Sherri Sonin And Robert J. Genis

When reviewing the hospital records of a plaintiff in a personal injury lawsuit, occasionally one encounters entries concerning the alleged use of alcohol. The purpose of this article is to assist the parties in redacting such highly prejudicial entries from these records.

In the seminal case of *Williams v. Alexander*, 309 N.Y. 283 (1955), the Court of Appeals clearly held that notations in hospital records are admissible only as they relate to the diagnosis, prognosis or treatment of the patient.

As the statute makes plain, and we do not more than paraphrase it, entries in a hospital record may not qualify for admission in evidence unless made in the regular course of the business' of the hospital, and for the purpose of assisting it in carrying on that business. The business of a hospital, it is self-evident, is to diagnose and treat its patients' ailments. Consequently, *the only memoranda that may be regarded as within the section's compass are those reflecting acts, occurrences or events that relate to diagnosis, prognosis or treatment or are otherwise helpful to an understanding of the medical or surgical aspects of...* [the particular patient's] hospitalization. 309 N.Y. at 287 (emphasis added).

In order to attempt to establish the foundation for the admission of a statement concerning the alleged use of alcohol, the proponent must produce the witness who recorded the statement. See, *Mikel v. Flatbush General Hosp.*, 49 A.D.2d 581 (2nd Dept. 1975); *Gunn v. City of New York*, 104 A.D.2d 848 (2nd Dept. 1984). Only that witness can say what the basis of his or her notes was.

Without the foundation witness, it is unknown who wrote the note, what it means and for what purpose it was written! What, if any, significance is to be attached to the note is a matter of sheer speculation and conjecture. The author of the note and expert testimony are required in order to even attempt to lay foundation for its admission.

The witness should then be produced for a hearing outside the presence of the jury in an attempt to lay the foundation for the admission of the statement as an admission against interest. Because of the extremely prejudicial value of the statement, if the requisite foundation is not laid, there will then be no prejudice to the plaintiff. If a proper foundation is laid, the testimony can either be read back to the jury or the witness may now be questioned in front of the jury, or the statement will now be allowed into evidence and read to the jury.

Where the source of the information in the hospital or doctor's record is unknown, the record is inadmissible. *Ginsberg v. North Shore Hospital*, 213 A.D.2d 592 (2nd Dept. 1995), lv. to app. den., 86 N.Y.2d 701 (1995). The recorder must have an unequivocal recollection concerning the statement and its source. *Musaid v. Mercy Hospital of Buffalo*, 249 A.D.2d 958, 960 (4th Dept. 1998); *Sanchez v. MABSTOA*, 170 A.D.2d 402, 404 (1st Dept. 1991).

Moreover, CPLR 4518 does not make admissible voluntary hearsay statements by third persons not employed by the hospital nor under any duty in relation to the hospital or its business. *Del Toro v. Carroll*, 33 A.D.2d 160, 165 (1st Dept. 1969). If the hospital record is to be used against the plaintiff as an admission, it should affirmatively appear that he furnished it. Id. It must be established by the proponent of the evidence that the (decedent) plaintiff was the source of the information recorded, and that the translation was provided by a competent, objective interpreter whose translation was accurate. *Quispe v. Lemle & Wolff, Inc.*, 266 A.D.2d 95, 96 (1st Dept. 1999). See, *Gaudino v. NYCHA*, 23 A.D.2d 838 (1st Dept. 1965); *Scotto v. Dilbert Bros., Inc.*, 263 App. Div. 1016 (2nd Dept. 1942).

Where the plaintiff makes the purported statement through an interpreter, the recorder can only testify to what the interpreter said, and as such constitutes inadmissible hearsay. *Gaudino v. NYCHA*, 23 A.D.2d 838 (1st Dept. 1965); *Scotto v. Dilbert Bros., Inc.*, 263 App. Div. 1016 (2nd Dept. 1942); *Quispe v. Lemle & Wolff, Inc.*, 266 A.D.2d 95 (1st Dept. 1999).

Expert Testimony

If the defendant is attempting to claim that the alleged statements were relevant to medical diagnosis, prognosis and treatment, then it can only do so through expert testimony. Obviously, only an expert witness can determine whether a statement is relevant to medical diagnosis, prognosis and treatment and that such a determination is outside the ken of ordinary lay people. See, *Haulotte v. Prudential Ins. Co of America*, 266 A.D.2d 38, 39 (1st Dept. 1999). Moreover, in many cases, the defendant does not have any eyewitnesses or independent admissible proof that the plaintiff was allegedly intoxicated when he became injured.

Usually, the plaintiff has served a Notice for Discovery and Inspection, and pursuant to that notice and/or a typical Preliminary Conference Order, the defendant was required to serve all the names of all witnesses, including expert witnesses. The failure of the defendant to furnish CPLR 3101(d)(1) expert disclosure on these topics should result in the defendant being precluded from attempting to offer such testimony at trial. Without expert testimony, the defendant cannot prove that the purported alcohol use was related to the plaintiff's medical diagnosis, prognosis or treatment. Without expert testimony, how can the notation be interpreted without engaging in total speculation?

The courts have held that even an expert may not be permitted to give testimony based on a review of the records that the plaintiff was intoxicated at the time of his or her accident and that said intoxication was a proximate cause of the accident. *Haulotte v. Prudential Ins. Co. of America*, 266 A.D.2d 38, 39 (1st Dept. 1999) (trial court affirmed for precluding defendant's pathologist from testifying as to plaintiff's blood alcohol level at the time of the accident and its effect on his balance and ability); See, *Romano v. Stanley*, 90 N.Y.2d 444, 450 (1997) (it is well known that the effects of alcohol consumption may differ greatly from person to person); *Sorensen v. Denny Nash Inc.*, 249 A.D.2d 745, 747-748 (3rd Dept. 1998) (it is well established, however, that the effects of alcohol consumption, as well as alcohol tolerance, may differ in significant respects from one individual to another). Cf., *Adamy v. Ziriakus*, 92 N.Y.2d 396 (1998). Moreover, such testimony by its very nature would be impermissibly speculative, prejudicial and improper. See, *Kaminer v. John Hancock Mut. Ins. Co.*, 199 A.D.2d 53 (1st Dept. 1993).

If an expert cannot give such testimony, how can the defendant be allowed to offer a bare hospital record on this issue without engaging in total speculation? If there is no proof that the plaintiff was intoxicated at the time of the accident, and that said intoxication was a proximate cause of the accident, the prejudice to the plaintiff outweighs any purported probative value to such an entry.

Where there is no evidence of intoxication at the time of the subject accident, an entry indicative of alcohol use is devoid of probative value. How much, if any, alcohol may have allegedly been ingested, and over what period of time; what, if any, alcohol was allegedly in plaintiff's body and what, if any, effect it allegedly had on plaintiff; was the accident itself in any manner causally related to the alleged use of alcohol, are all unanswerable questions that require impermissible speculation, and all to the detriment and prejudice of the plaintiff.

BAT Inadmissible

In *Amaro v. City of New York*, 40 N.Y.2d 30 (1976), the Court of Appeals upheld the trial court's ruling that a laboratory report of a blood sample that indicated a blood alcohol level of .09 percent was inadmissible. The blood sample was not tested until a number of hours after it was taken; a lapse in time that could only work in favor of the plaintiff by causing a lower reading of alcohol content.

In *Marigliano v. City of New York*, 196 A.D.2d 533, 535 (2nd Dept. 1993), the Appellate Division reversed the lower court for allowing into evidence a blood alcohol test which indicated a reading of .0439 percent, and noted that had this been a prosecution under the VTL, the Court would have been required to instruct the jury that a blood alcohol reading under .05 percent constituted prima facie proof that the

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plaintiff's ability to operate a motor vehicle was not impaired. 196 A.D.2d at 535.

The Court held that, we find that reversible error was committed in the admission of this evidence absent any proof as to the test's authentication, satisfactory care in the collection of the sample, its analysis, or in the chain of custody (see, *Matter of Nyack Hosp. v. Government Empls. Ins. Co.*, 139 A.D.2d 515, 526 N.Y.S.2d 614). 196 A.D.2d at 535. See also, *Roy v. Reid*, 38 A.D.2d 717 (2nd Dept. 1972).

Evidence of Drinking

In *Amaro v. City of New York*, 40 N.Y.2d 30 (1976), the Court of Appeals upheld the exclusion of a doctor's testimony that he detected an odor of alcohol on the plaintiff's breath. 40 N.Y.2d at 36.

In *Marigliano v. City of New York,* 196 A.D.2d 533, 535 (2nd Dept. 1993), the Appellate Court held that further reversible error was committed when the court permitted the city to introduce and comment on ambulance reports containing notations referring to an odor of alcohol on the plaintiff's breath. Id.

In *Roberto v. Nielson*, 262 App. Div 1034, aff'd, 288 N.Y. 581 (1942), the Appellate Division reversed the lower court for admitting into evidence an entry in the hospital record that stated but evidently, after a day of beer and wine drinking, he was somehow involved in an auto accident.

In *Senn v. Scudieri*, 165 A.D.2d 346 (1st Dept. 1991), the Appellate Division held the trial court committed reversible error when it admitted into evidence a notation in the New York Hospital Emergency Room Record that stated the patient is drunk and uncooperative!

The Appellate Division also stated that

We have held that the slurring of one's speech, in and of itself, when that person is at the same time coherent, is insufficient to conclude that person is intoxicated.... Further as discussed supra, the single fact that alcohol has been consumed by a person, does not in and of itself constitute intoxication....

165 A.D.2d at 351-352. See, *Arroyo v. The City of New York,* 171 A.D.2d 541, 543 (1st Dept. 1991).

In *Mercedes v. Amusements of America,* 160 A.D.2d 630 (1st Dept. 1990), the Appellate Division held that the admission of the history portion of the hospital record indicating that the injury occurred while the plaintiff was intoxicated, was fundamental error.

In *Kaminer v. John Hancock Mut. Ins. Co.*, 199 A.D.2d 53 (1st Dept. 1993), the Appellate Division affirmed the trial court's determination that the defendant's expert testimony that the 73 year old plaintiff's medication causes drowsiness in about 50 percent of those who take it and a drunken type of walk (ataxia) in about 30 percent, was impermissibly speculative and influenced the jury to such an extent that it effectively deprived the plaintiff of a fair trial in a trip and fall case.

In *Del Toro v. Carroll,* 33 A.D.2d 160 (1st Dept. 1969), the Appellate Division reversed the lower court for allowing into evidence portions of hospital records showing prior incidents of intoxication. In our opinion, the introduction of these portions of the hospital records showing prior incidents of intoxication was highly prejudicial and was calculated to establish in the minds of the jury that appellant was intoxicated at the time of the accident.... 33 A.D.2d at 163-164.

In sum, the introduction of portions of the hospital records showing prior drug abuse, seizures and subsequent psychiatric treatment was highly prejudicial and calculated to establish in the minds of the jurors that plaintiff was either intoxicated by drugs or alcohol, or that he had suffered a seizure at the time of the accident.... Defense counsel's questioning, the admission of the hospital records ... all served to deprive plaintiff of a fair trial and clearly had a prejudicial effect on the jury.... The jury was adversely affected by plaintiff's less than exemplary habits and lifestyle. *Arroyo v. The City of New York,* 171 A.D.2d 541, 543 (1st Dept. 1991).

Moreover, in a case involving a claim for wrongful death, pursuant to CPLR 4504, a hospital record indicating a history of alcoholism may be inadmissible because it tends to disgrace the memory of the decedent. *Tinney v. Neilson's Flowers Inc.,* 61 Misc. 2d 717, 719, aff'd, 35 A.D.2d 532 (2nd Dept. 1970).

Evidence of chronic alcoholism, standing alone, is inadmissible to impeach a witness's character or to allow a jury to infer that the witness was intoxicated at a particular time. *People v. Fappiano*, 134 Misc. 2d 693, 696, aff'd, 139 A.D.2d 524 (2nd Dept. 1988), app. den., 72 N.Y.2d 918 (1988).

In fact, a trial is tainted with unfairness because of the prejudicial errors in allowing the testimony concerning arrests and convictions for intoxication in past years. The errors were not sufficiently cured by belated instructions....*Kowalczyk v. Krum*, 19 A.D.2d 803 (1st Dept. 1963); *McQuage v. The City of New York*, 285 App. Div. 249, 253 (1st Dept. 1954). Cf., *Carr v. U.S. Mattress Corp.*, 166 A.D.2d 172, 173 (1st Dept. 1990)

Prior Treatment

Records of treatment for substance abuse may be confidential and therefore, non-discoverable, and inadmissible. Mental Hygiene Law, Section 23.05 (a) provided that a person's participation in a substance abuse program shall not be used against such person in any ... proceeding in any court. While this section of the Mental Hygiene Law was repealed (effective Oct. 5, 1999), section 33.13 (c) (1) is still in effect, and requires confidentiality of said records, as does section 22.05 (b). Pursuant to 42 CFR Part 2, P. 21796, the United States Department of Health and Human Services promulgated regulations for the confidentiality of drug abuse patient records, and concluded that good cause warranting a court order permitting disclosure should be limited to those instances where there is a threat to life or serious bodily injury of another person ... or if the patient brings the matter up in any legal proceeding, and that even in those instances, the disclosure should be limited to that information which is necessary to carry out the purpose of the disclosure. See, In re Guardianship of Alexander, 149 Misc. 2d 200 (Surrogate Bronx 1990); *In re W.H.,* 158 Misc. 2d 788 (Family Ct. Rockland 1993).

In the case of *In re Maximo M.*, ___ Misc. 2d ___, 710 N.Y.S.2d 864 (Family Ct. Kings 2000), a thorough analysis of the interplay between the federal regulations and the New York State Mental Hygiene Law was recently made. *In re Maximo M.*, supra, dealt with the vital interests of a ward of the court; a child that was the subject of an abuse or neglect proceeding. In its analysis of the various statutes and competing needs, the court noted that in child protective proceedings, the court must have the ability to assess the parent's actual ability to care for the subject child. It is compelling in this context that the court be able to determine the extent to which the respondent's drug use impairs her ability to provide proper supervision and guardianship of her child. In the court's view, the respondent's access to drug rehabilitation services without meaningful compliance would be further evidence of child neglect, in addition to the drug abuse itself. 710 N.Y.S.2d at 872-873.

The court pointed out that:

under 42 CFR 2.64(d), the court must apply a two part analysis to determine whether good cause exists for disclosure of drug treatment records. Once the court determines that the public interest and need for the disclosure outweigh the potential injury to the patient, the physician-patient relationship and the treatment services, the court must consider whether other ways of obtaining the information are available or would be effective. It clearly is the intent of the applicable federal law that this determination be made with regard to the facts of the specific case.

Id., 710 N.Y.S.2d at 872.

The court then found that given the compelling public interest at stake in a child abuse or neglect proceeding; given the fact that otherwise confidential communications are expressly admissible in such cases; and considering the relevant case law, this court finds that good cause does exist for the production of respondent's treatment record from ARTC. 710 N.Y.S.2d at 873.

Thus, however important a right of confidentiality may be with respect to these types of records, it must yield to the greater right of a child to be free from parental neglect or abuse. 710 N.Y.S.2d at 873.

In discussing the procedure to be followed, the court held that the court's order to produce the records must contain certain protections against unnecessary disclosure.

An order authorizing a disclosure must limit disclosure to those parts of the patient's record which are essential to fulfill the objective of the order. This requires that the court examine the patient's records in camera to determine which portions reveal evidence of the respondent's voluntary and regular participation in the program, or lack of such participation; and any evidence of child neglect, including continued drug use. The federal statute, regulations and state law do not authorize the wholesale disclosure of such portions of the records as do not relate to these issues. The federal regulations also require that the court limit disclosure to those persons whose need for information is the basis of the order; and include such other measures as are necessary to limit disclosure for the protection of the patient, the physician-patient relationship and the treatment services. The regulations specify that the court for example, should seal from public scrutiny the record of any proceeding for which disclosure of a patient's record has been ordered. Id.

Because the unique circumstances and needs attendant to a child abuse or neglect proceeding are not present in a personal injury lawsuit, such records should not be disclosed in an ordinary negligence case. See, *Cronin v. Gramercy Five Associates,* 233 A.D.2d 263 (1st Dept. 1996). Because the records ought not be disclosed, it may be improper to allow cross-examination of a party regarding their participation in a drug treatment program. *People v. Torres,* 119 A.D.2d 508, 509-510 (1st Dept. 1986); *People v. Simms*, 174 A.D.2d 979 (4th Dept. 1991).

Conclusion

PLAINTIFF SHOULD MAKE AN APPROPRIATE MOTION IN LIMINE PRIOR TO COUNSEL GIVING THEIR OPENING STATEMENTS SEEKING TO PRECLUDE THE DEFENDANT FROM DISCUSSING THE PREJUDICIAL HISTORY CONTAINED IN PLAINTIFF'S HOSPITALRECORD IN DEFENDANT'S OPENING STATEMENT, DURING CROSS-EXAMINATION OF THE PLAINTIFF, DURING QUESTIONING OF ANY EXPERT OR LAY WITNESSES, AND TO HAVE ANY SUCH ENTRIES IN THE HOSPITAL RECORDS REDACTED.