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Part II: Procedural Law - Evidence

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PART II: PROCEDURAL LAW

EVIDENCE

by

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DURING the past year the cases of greatest significance in the law of evidence seem to fall under the general classification of hearsay. Each of the cases selected for examination considers several exceptions to the hearsay rule.

I. MEDICAL DIAGNOSES

Taylor v. Anderson[1] is the latest decision to apply the doctrine announced in *Loper v. Andrews*,[2] concerning the admissibility in evidence of medical opinion or diagnoses included in hospital records. A review of the *Loper* doctrine and its development is in order before examining the particular facts in *Taylor*.

In *Loper* the court held that medical opinion was admissible under the Business Records Act[3] "only in those instances where it can be said that the diagnosis records a condition resting in reasonable medical certainty."[4] In solving the general problem of admissibility, the court created a specific problem. Justice Pope, in his concurring opinion, pointed out the difficulties presented to a court in deciding whether the diagnosis or other medical opinion was conjectural.[5] More specifically, the problem may be stated: Which party, if either, has the burden of producing evidence or of persuading the judge of the nature of the diagnosis?

Three possible solutions to this problem have been suggested.[6] (1) The judge should take judicial notice of whether the diagnosis is controversial or noncontroversial. (2) The offering party should be required to prove that the diagnosis is noncontroversial before it is admitted. (3) The opposing party should be required to prove that the diagnosis is controversial before it is excluded. The third solution is the best approach, and it appears that it is being followed.[7]

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[1] 474 S.W.2d 541 (Tex. Civ. App.—San Antonio 1971), *error ref. n.r.e.*

[2] 404 S.W.2d 300 (Tex. 1966).

[3] TEX. REV. CIV. STAT. ANN. art. 3737e (1971).

[4] 404 S.W.2d at 305.

[5] *Id.* at 306. The problem was also mentioned in three commentaries on *Loper*: Comment, *Opinion Entry Problems in Medical Records*, 19 BAYLOR L. REV. 122 (1967); 20 SW. L.J. 686 (1966); 44 TEXAS L. REV. 1627 (1966).

[6] *See* 44 TEXAS L. REV. 1627 (1966).

[7] The argument for adoption of the third solution is persuasive:

> The opposing party would be less likely to object unless the diagnosis is a critical factor in the case and unless he believes that the diagnosis is controversial. The total expense of litigation would be substantially reduced, while the jury, in its determination of the issues, would benefit from the additional relevant evidence. The modern trend is toward admission of all recorded diagnoses and allowance of the jury to consider the controversial nature, if any, of these diagnoses in determining the weight of the evidence. Although Texas has chosen a more conservative view, there is no strong reason to restrict

In *Weicher v. Insurance Co. of North America*[8] the hospital record contained the diagnosis of "heat exhaustion." Although the question was not squarely before the court, it was indicated that the opponent of the evidence would have "the task of showing that upon demonstrable medical facts the . . . diagnosis was an opinion which would be the subject of genuine dispute between doctors."[9] Language in the opinion in *Otis Elevator Co. v. Wood*[10] reinforces this view. The medical opinion in question in *Otis Elevator* was that at some time the patient had suffered a heart attack. The court stated: "Since it is not disputed that the diagnosis recorded a condition that rested in reasonable medical certainty, the policy behind Article 3737e . . . is satisfied."[11] In *Eubanks v. Winn* the court rejected contentions that diagnoses or expressions of medical opinion were not admissible because there was "nothing in the record which might indicate that the business records show a condition or diagnosis upon which competent doctors would likely disagree."[12]

In one case the party offering evidence of three diagnoses adopted the second alternative and proved that the diagnoses were noncontroversial.[13] The diagnoses were of asthma, severe obesity, and diabetes mellitus. The first two diagnoses were clearly admissible, the first because it was substantiated by medical fact findings in the record, and the second since it was obvious to a lay person. For the third, two doctors testified at the trial that the diagnosis rested in reasonable medical certainty, and that reputable physicians would not even argue over it.

In the recent case of *Taylor v. Anderson*[14] the third proposed alternative seems to be adopted. The plaintiff claimed that she received a cervical sprain in an automobile accident. Shortly after the accident she was examined at a hospital, where the entry in the records was "unable to find anything on physical examination." The court noted that when viewed in the context of the case, the entry was a report that the physician found no evidence of a cervical sprain. Recognizing that *Loper* required the courts to determine whether the diagnosis was "non-controversial" and admissible, or "controversial" and inadmissible, the court stated: "In the absence of expert testimony on the question of whether a particular diagnosis rests in reasonable medical certainty or not, a court must simply set about the task of determining, as best it can, whether a diagnosis rests in reasonable medical certainty or whether it rests primarily on 'expert opinion, conjecture and speculation.' "[15]

The court then examined the diagnosis in detail, compared it with the diagnosis in *Loper*, attempted to fit it within the three reasons for excluding

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further the admissibility of recorded diagnoses by placing the burden of proof on the offering party.

Id. at 1631.

[8] 415 S.W.2d 220 (Tex. Civ. App.—Fort Worth 1967), *aff'd*, 434 S.W.2d 104 (Tex. 1968).

[9] *Id.* at 221.

[10] 436 S.W.2d 324 (Tex. 1968).

[11] *Id.* at 330.

[12] 469 S.W.2d 292, 296 (Tex. Civ. App.—Houston [14th Dist.] 1971), *error ref. n.r.e.*

[13] Buchanan v. American Nat'l Ins. Co., 446 S.W.2d 384 (Tex. Civ. App.—El Paso 1969), *error ref. n.r.e.*

[14] 474 S.W.2d 541 (Tex. Civ. App.—San Antonio 1971), *error ref. n.r.e.*

[15] *Id.* at 543.

the diagnosis in *Loper*,[16] and finally held that the diagnosis was admissible. The court concluded: "We find nothing in the record which would justify our setting aside the determination of the trial judge on the theory that the entry which he received in evidence shows a condition or diagnosis upon which competent doctors would likely disagree. Stated more simply, appellants have failed to establish that the trial court erred in allowing the hospital record to be read to the jury."[17]

The court could have simplified its reasoning by adopting the basic holding of *Eubanks* that the diagnosis will be admissible unless the opponent comes forward with evidence to show that it is controversial because it is not based on reasonable medical certainty. In other words, the rule of *Loper* should be reformed to read: Diagnoses in medical records are admissible under the Business Records Act unless it is shown that they are controversial or not based on substantial medical certainty.

II. THE LONE WORKER

In *Texas Employers' Insurance Ass'n v. Butler*[18] the problem of the lone worker who suffers an injury while on the job and later dies was again considered. Butler was the operator of a dioxane plant for Dow Chemical Company. When he left home to go to work on the day in question, he was in apparent good health. At about 5:00 p.m., however, he called his foreman on the telephone and complained of illness. The foreman went to see Butler, and later testified that his face "looked flush and pale and looked like he just didn't feel good at that time."[19] He took Butler to a clinic for treatment and made an entry in his log book, a record kept in the course of his employment. The entry stated that "Butler got sick and went to Industrial Medicine about 6:00 o'clock. He seemed to think E-Column OH vapors caused it."[20] At the clinic and later at a hospital, Butler made similar statements concerning the cause of his illness to treating personnel, and those statements were a part of the hospital records. After Butler was taken to the clinic, another employee inspected the dioxane plant where Butler had been working. He did not find any leak, but later testified that there had been some gas odors in the area.

The court held that the statements concerning causation in the hospital record were admissible only to explain the experts' opinion of the cause of death, and not as proof of the matters stated. However, the statements in the foreman's log book were admitted on two bases. First, the log book was authenticated as a business record, and the court held that Butler himself had

[16] The diagnosis was held inadmissible in *Loper* because: (1) the entry recited merely that the physician believed there was a fracture; (2) the diagnosis did not purport to be based upon demonstrable medical facts; and (3) the existence of a fracture was the subject of genuine dispute between doctors who examined the plaintiff.

[17] 474 S.W.2d at 545, citing Eubanks v. Winn, 469 S.W.2d 292 (Tex. Civ. App.—Houston [14th Dist.] 1971), *error ref. n.r.e.*

[18] 483 S.W.2d 530 (Tex. Civ. App.—Houston [14th Dist.] 1972), *error ref. n.r.e.*; *see* Elliott, *Evidence, Annual Survey of Texas Law*, 25 SW. L.J. 135, 141 (1971), for a more thorough discussion of the problem of the lone worker.

[19] 483 S.W.2d at 532.

[20] *Id.*

a business duty to report the information that the foreman entered in the log book, so that the entire log book entry was admissible as proof of the matters it contained.[21] Second, the court distinguished the cases of *Hartford Accident & Indemnity Co. v. Hale*[22] and *Truck Insurance Exchange v. Michling*,[23] and held that there was sufficient independent proof of the occurrence of an exciting event so that the statements made to the foreman were admissible under the excited utterance exception to the hearsay rule.[24] The court recited the following facts as independent evidence establishing the event:

> Butler went to work in apparent good health. While admittedly on his employer's premises and performing the duties of his job, he became ill. That illness was evidenced not only by his statements as to his physical condition . . . but also by testimony as to his physical appearance. The onset of his illness was sudden and dramatic. It continued with little remission until it produced his death. It is apparent that his death was caused by a sudden deterioration of the walls of his stomach. He had previously had injury and surgery to his stomach but it had been comparatively trouble free for several years. The very suddenness with which illness developed and progressed to produce his death is indicative of the fact that it was brought on by some external agent. . . . Dioxane gas has the capacity to injure the stomach walls. The plant of which he was operator processed dioxane gas. Though the worker who followed him on the job testified that he found no gas leak, he did not exclude the possibility of such leak in the overhead tower and said that the odor of gas was present. A medical expert testified that the signs and symptoms shown in the medical record were consistent with the intake of dioxane gas.[25]

The court surely reached a correct result, but it is suggested that a close comparison of the evidence in the present case with that presented in the two previous cases will show that they have not been distinguished. In reality, the court has adopted the position of the dissent in *Travelers Insurance Co. v. Smith*[26] that the startling event which triggers the exception to the hearsay rule is the injury itself, and that there is clearly independent evidence of the injury. It is certainly to the court's credit that it searched the record for evidence which could be said to show independently that the startling event did occur, but it would be preferable for the supreme court to retreat from the harsh position which it announced in *Hale* and *Michling*, as suggested in this forum two years ago.[27]

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[21] The Texas Business Records Act, TEX. REV. CIV. STAT. ANN. art. 3737e (1971), requires that it be the regular course of business for an employee with personal knowledge of the event to make a record or to transmit information to be included in the record. Here, Butler had personal knowledge of the event and it was held to be in his regular course of business to transmit the information to the foreman, who in the regular course of business recorded it.

[22] 400 S.W.2d 310 (Tex. 1966).

[23] 364 S.W.2d 172 (Tex. 1963). These two cases held that in order for a hearsay statement to be admitted under the excited utterance exception, there must be independent evidence of the exciting event; that is, the statement itself could not establish the fact that the event occurred.

[24] The court used the term *res gestae*, but the author converts that language to "excited utterance" in the interest of clarity. *See* 1 C. MCCORMICK & R. RAY, TEXAS LAW OF EVIDENCE § 911 (1956) [hereinafter cited as MCCORMICK & RAY].

[25] 483 S.W.2d at 533-34.

[26] 448 S.W.2d 541 (Tex. Civ. App.—El Paso 1969), *error ref. n.r.e.*

[27] Elliott, *supra* note 18, at 141-45.

III. VICARIOUS ADMISSIONS

In *Big Mack Trucking Co. v. Dickerson*[28] the plaintiff's spouse, Dickerson, had been standing behind his truck when a fellow employee, Leday, parked another truck behind Dickerson's truck and left it unattended. The second truck rolled forward, pinning Dickerson between the two vehicles and killing him. Workmen's compensation benefits were paid, but suit was brought against Leday and the employer, Big Mack Trucking Company, under a provision of the Workmen's Compensation Act which allows an action for damages against the employer when he collects any part of the premium for the compensation insurance from an employee.[29]

The jury found that Leday was an employee of Big Mack; that he knew the brakes on his truck were defective; that parking his truck behind Dickerson's was negligence and a proximate cause of the death; that his failure to warn Dickerson was negligence and a proximate cause of the death; and that Big Mack had withheld from Dickerson's wages premiums to be paid on the compensation insurance. Judgment was rendered in favor of Dickerson's beneficiaries against Leday and Big Mack for $220,000. Big Mack appealed on the ground that there was no evidence to support the submission of any of the issues, since the only testimony offered was inadmissible hearsay and therefore incompetent.

The disputed evidence was contained in three out-of-court statements, two of them by Leday and one by Stiles, vice president of Big Mack. Stiles' statement was found in a deposition in which he stated that some of the premiums had been withheld. It was held properly admitted as an admission of Big Mack, since Stiles had been expressly authorized by the corporation to speak for it.[30]

The first statement of Leday was found in a report to Stiles. Stiles testified that after Leday returned to the office of Big Mack, he talked to him about the accident. In this conversation Leday told Stiles that he had not been maintaining the proper air pressure as needed to make the braking system work. The court held that the statement was admissible, not as an admission by Big Mack because adopted by its officer, Stiles,[31] but as a vicarious admission by Big Mack through its agent Leday. Stated another way, since Leday was authorized to report the facts concerning the accident to his superior in the corporation, the report was within the scope of his employment, and thus admissible as the admission of Big Mack.[32]

In the absence of adoption of the statement by the principal, the courts are divided on the admissibility of statements made by an agent to his principal as vicarious admissions of the principal.[33] The arguments for admissibility are

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[28] 482 S.W.2d 1 (Tex. Civ. App.—Houston [1st Dist.] 1972), *error granted.*

[29] TEX. REV. CIV. STAT. ANN. art. 8306, § 12g (1967).

[30] *See* C. MCCORMICK, EVIDENCE § 267 (2d ed. 1972) [hereinafter cited as MCCORMICK].

[31] *See id.* § 269.

[32] It is interesting to note that Leday's report to Stiles would not have been discoverable under either rule 167 or rule 186a of the Texas Rules of Civil Procedure.

[33] *See* MCCORMICK § 267, at 642.

persuasive,[34] and whether the authorities cited for the proposition in the instant case are really on point or not,[35] the decision is a good one.

The third statement consisted of the same or similar facts as those recited by Leday to Stiles, and was made by Leday to an investigating officer. The court stated: "It is not necessary to determine whether the statement made to Officer Harwell was also admissible as res gestae."[36] Thus, the court avoided an issue which has created much of the confusion in the Texas cases concerning vicarious admissions.[37] At least five variations of the fact situation of the instant case might develop.

First, a witness to the accident testifies that he saw Leday standing nearby when his truck started rolling. At the moment of impact Leday shouted, "My God, I let the air pressure get too low." The witness could testify concerning Leday's statement, since the excited utterance exception to the hearsay rule would surely apply.[38]

Second, a newspaper reporter testifies that the public relations officer of Big Mack told a press conference several days later that an investigation had shown that the air pressure was too low. Again, the statement would be admissible against the principal, since it was made within the scope of authority of the officer making the statement. In this situation the statement did not have to be made under the stress of excitement.[39]

Third, the investigating officer testifies that some time after the accident, when Leday was calm and unexcited, he stated that he had allowed the air pressure to become too low. Leday has since met with an unfortunate accident himself, and is unavailable as a witness. His statement to the officer would be admissible as a declaration against interest, and could be considered by the jury in a suit against Big Mack.[40]

Fourth, the officer testifies as in the third hypothetical fact situation, but Leday is available to testify in a suit brought against him and Big Mack. Leday's statement is certainly admissible against him as an admission of a party opponent.[41] Since the liability of Big Mack is derivative, and the jury would not be asked about Big Mack's negligence, there would be no occasion for a limiting instruction. It would be strange to say that the employer could be successful in a motion for instructed verdict on the grounds that the statement, the only evidence of negligence, was inadmissible against Big Mack, when no personal negligence of Big Mack is required. Big Mack is liable because Leday was negligent, and his own statement is certainly competent to

[34] *See id.* at 643.

[35] The court cited West Tex. Produce Co. v. Wilson, 120 Tex. 35, 34 S.W.2d 827 (1931); Argonaut Southwest Ins. Co. v. Morris, 420 S.W.2d 760 (Tex. Civ. App.—Austin 1967), *error ref. n.r.e.*; J. Weingarten, Inc. v. Reagan, 366 S.W.2d 879 (Tex. Civ. App.—Waco 1963).

[36] 482 S.W.2d at 4.

[37] *See* McCORMICK § 288; McCORMICK & RAY §§ 911, 1164. *See also* Moore v. Drummet, 478 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1972); McWilliams v. Snap-Pac Corp., 476 S.W.2d 941 (Tex. Civ. App.—Houston [1st Dist.] 1972), *error ref. n.r.e.*; Garcia v. Sky Climber, Inc., 470 S.W.2d 261 (Tex. Civ. App.—Houston [1st Dist.] 1971), *error ref. n.r.e.*, for other examples of the problems involved in vicarious admissions.

[38] *See* McCORMICK § 297; McCORMICK & RAY §§ 912-19.

[39] *See* McCORMICK § 267; McCORMICK & RAY § 1164.

[40] *See* McCORMICK §§ 276-80; McCORMICK & RAY §§ 1001-11.

[41] *See* McCORMICK § 262; McCORMICK & RAY § 1121.

prove that fact. A contrary rule would lead to the peculiar result of a finding of liability of an employee acting within the scope of his employment, but an exoneration of his employer, who is supposed to be responsible in such a situation.[42]

Fifth, the officer testifies as in the third hypothetical fact situation, Leday is available, but Big Mack is sued alone. The statement would not be admissible as an excited utterance, as a declaration against interest, or as an admission of the driver as party opponent. The only theory of admission remaining is that of a vicarious admission of Big Mack. The Texas rule has generally been stated as: "The assertions of an agent are admissible against his principal when made within the scope of the agent's express or implied authority to make assertions."[43] Under this approach Leday's statement would be excluded, since it is clear that he was not authorized to make this sort of assertion. However, the trend is toward a broader admission of statements by agents.[44] They should be admitted when the statement *concerns a matter* within the scope of employment, and is made during the existence of the agency relationship.[45] "The rejection of such post-accident statements coupled with the admission of the employee's testimony on the stand is to prefer the weaker to the stronger evidence. The agent is well informed about acts in the course of the business, his statements offered against the employer are normally against the employer's interest, and while the employment continues, the employee is not likely to make the statements unless they are true."[46] Leday's statement concerning the air supply should be admissible in this situation, since the care of the brake system was within the scope of his employment, and the statement concerned that fact. It is suggested that a re-examination of the Texas position on the matter is long overdue.

IV. IMPEACHMENT

In *Loper v. Beto*[47] the United States Supreme Court has, in effect, adopted the position of the dissent of Judge Onion in *Simmons v. State*,[48] discussed in the last edition of this *Survey*.[49] The Court held that the Constitution forbids the use of prior convictions, obtained in violation of the right to counsel, for impeachment purposes.

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[42] *See* Madron v. Thomson, 245 Ore. 513, 419 P.2d 611 (1966).
[43] MCCORMICK & RAY § 1164, at 57.
[44] *See* MCCORMICK § 267, at 641.
[45] *See* UNIFORM RULE OF EVIDENCE 63(9)(a); Proposed Federal Rules of Evidence, rule 801(d)(2), 31 L. ED. 2D 88 (1973).
[46] MCCORMICK § 267, at 641.
[47] 405 U.S. 473 (1972).
[48] 456 S.W.2d 66 (Tex. Crim. App. 1970).
[49] Elliott, *Evidence, Annual Survey of Texas Law*, 26 SW. L.J. 185 (1972).