

Legal Letters by Andrew Agatston Legal List 2.3.12

In Nebraska, An Important Hearsay Decision Affecting Forensic Interviews

State v. Vigil

Nebraska Supreme Court

283 Neb. 129

(Decided January 27, 2012)

Background: The Defendant was convicted of two counts of sexual assault of his stepdaughter in a trial where the trial court allowed the child's videotaped forensic interview into evidence. The F.I. was conducted in a CAC that was located in a local hospital.

On appeal, the Defendant argued that the forensic interview was inadmissible hearsay, and it was harmful error for the trial court to allow it be played to the jury.

This case is an excellent follow up to the Georgia Supreme Court case highlighted in the Legal Letter related to *Hatley v. State* (Georgia Supreme Court: Forensic Interviews are "Testimonial") where the Georgia Supreme Court decided that the forensic interview in that case was improperly admitted because it violated the Defendant's confrontation rights. (See February 10, 2012 Legal Letter.) I said in that Legal Letter that I was disappointed that the GA Supreme Court did not more fully analyze potential hearsay exceptions. This Nebraska case shows why.

The issue in this case was whether the trial court erred by allowing the testimony of the forensic interviewer and her videotaped F.I. into evidence. The Defendant argued that it was inadmissible hearsay, for which there were no legal exceptions, and that neither the forensic interviewer's testimony or the F.I. itself should not have been admitted.

This case did not involve a confrontation clause challenge, as did the Georgia *Hatley v. State* case of two weeks ago. Instead, it was an appeal over the trial court's decision that the forensic interviewer's testimony about what the child said, and the child's statements in the forensic interview, fell within a particular hearsay rule exception.

That exception is set out by statute in Nebraska, and more than likely your state. (As always, the qualified attorney of your CAC's choice will easily be able to research your state's statute for you.)

The Nebraska statute, provides that the hearsay rule does not exclude from evidence at trial ***“[s]tatements made for purposes of diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause of external source thereof insofar as reasonably pertinent to diagnosis or treatment.”***

This hearsay exception is commonly known in short-form as “Statements made for purposes of medical treatment,” but as this case shows, it can, and in Nebraska does, involve much more than that.

Much heavy legal lifting was done by the Nebraska Supreme Court in reaching its decision, and the specific facts of the case were, it seems to me, critical in its ultimate finding.

I have often said that to fully understand court decisions and state statutes, it is very important to try to determine what public policy that the court opinion or the statute is seeking to advance. Here, the tension is between inadmissible hearsay on one side and a hearsay exception -- hearsay statements made for purposes of medical diagnosis or treatment -- on the other.

The policy of inadmissible hearsay is straightforward. When someone testifies about what *someone else* said, and that *someone else* is not in court to testify herself, then the opponent of that hearsay evidence has no opportunity to test the veracity of that hearsay statement through cross-examination of the *someone else*. After all, the person who made the statement isn't in court -- her version of events is only being relayed by a witness who happened to hear her at some point in time.

But there are policies supporting exceptions to hearsay. Those policies always boil down to one thing: the hearsay statement has a certain indicia of reliability, and its reliability for some reason means that cross-examination of it is not required.

So we come to the hearsay exception for medical diagnosis and treatment, and the question that needs to be asked is: Why reliable?

The Nebraska Supreme Court explained: *“[The Rule] is based on the notion that a person seeking medical attention will give a truthful account of the history and current status of his or her condition in order to ensure proper treatment.”*

Yes, it is a rule of survival -- and therefore trustworthy.

However, before it may be admitted, as with today’s case, the party seeking to introduce the evidence must first clear two hurdles: (1) show that the circumstances under which the statements were made were such that the declarant’s (the child here) purpose in making the statements was to assist in the process of a medical diagnosis or treatment and (2) show that the statements were of a nature reasonably prudent to medical diagnosis or treatment by a medical professional.

You should be asking: How can this apply to a forensic interviewer’s interview of a child?

My answer is that it is case-specific, and in this case, the appellate attorneys in Nebraska did an astonishing job in creating a record that led to this result.

Important!!! This is the rule of Nebraska. Each state will have its own rules, and your state may not have reached this result. Mine sure hasn’t, yet. That said, here is how Nebraska analyzes it, and prosecutors and child advocate lawyers would do well to see whether such arguments are effective in their states.

This involves a “dual statement,” that is, a statement with mixed medical and investigatory purposes. That is not fatal in Nebraska’s analysis of the medical diagnosis hearsay exception, because in Nebraska **“the fundamental inquiry is whether the statement, despite its dual purpose, was made in legitimate and reasonable contemplation of medical diagnosis or treatment.”** If so, that provides the requisite motive -- the motive to provide reliable information that is important to a proper diagnosis and treatment plan.

Now let’s look at the minefield through which the State ran, other than the dual medical-investigative purpose, to obtain this result.

(1) ***A forensic interviewer is not a physician.*** The Supreme Court ruled that she need not be. In Nebraska, such statements can be made to therapists, or a child’s foster mother in the right cases. And after today’s case, in Nebraska it can now include social workers and forensic interviewers in the right cases. What is the “right case?” To start, it involves a case where the person obtaining the child’s statement is a **“member of a medical diagnostic team or is part of the ‘chain of medical care’”** according to the opinion.

(2) ***A forensic interview does not often occur in a medical setting.*** In today’s case it did -- a hospital, leading the Nebraska Supreme Court to write: **“We agree that statements made by a child victim of sexual abuse to a forensic interviewer in a medical setting may be admissible [under the rule] even though the interview has the partial purpose of assisting law enforcement’s investigation of the crimes.”**

This raises a basic question: What is a forensic interview? The forensic interviewer in today’s case, whose background was counseling and social services, testified that her role as a forensic interviewer was to gather information from the patient to determine possible abuse or traumatic injury. If the treating M.D. is there, the M.D. watches via closed circuit. If the treating M.D. is not there, then the forensic interviewer summarizes the interview so the M.D. does not have to

retake the history. The forensic interviewer testified that the M.D. uses the forensic interview to determine proper treatment and therapy for the patient.

In sum the forensic interviewer testified that the purpose of the F.I. was not to aid and assist law enforcement, but ***“simply . . . to gather the information for all, for everyone involved so that the child only has to go through it one time.”***

(1) ***The victim and her mother knew law enforcement was watching and listening to the F.I.***

Recall in the Georgia case, *Hatley v. State*, this seemed fatal to finding that the F.I. was a “testimonial” statement of the victim, and therefore subject to the Crawford rule. Here, however, the Court determined that law enforcement’s viewing does not preclude the hearsay statement from being for a medical purpose. Further, the Court found that the evidence supported the medical nature of the statements, because both the victim and her mother considered the F.I. to be a tool to diagnose physical and/or emotional injuries.

The legal nature of a forensic interview, and its interaction with legal rules and their exceptions, will continue to be a moving target for lawyers. For example, in Nebraska, we have today’s case and its groundbreaking rule. In Georgia, we have a case, *Hatley v. State*, where a Georgia Supreme Court justice, with no analysis, simply labeled a forensic interview of a child as testimonial in nature and subject to a defendant’s Constitutional confrontation rights.

That said, today’s hearsay exception case is an important topic to discuss with your MDT.

Best regards.

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