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Witnesses--Physician Defendant Called under Adverse-Witness Statute--Expert Testimony [*Oleksmw v. Weidener*, 2 Ohio St. 2d 147, 207 N.E.2d 375 (1965)]

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WITNESSES — PHYSICIAN DEFENDANT CALLED UNDER ADVERSE-WITNESS STATUTE — EXPERT TESTIMONY

Oleksiw v. Weidener, 2 Ohio St. 2d 147, 207 N.E.2d 375 (1965).

One of the major burdens placed upon a plaintiff in a malpractice suit is that of obtaining expert medical testimony.[1] Such testimony is essential if the alleged medical negligence is beyond the comprehension of a layman, since the failure to produce a medical expert under these circumstances can result in a directed verdict for the defendant-physician.[2] Since the procurement of medical experts can be a difficult task, many plaintiffs' attorneys have attempted to question the defendant-physician as an expert when called pursuant to an adverse-witness statute. Although the typical adverse-witness statute permits a litigant to examine an adverse party as an ordinary witness subject to the rules of cross-examination,[3] the state courts have split on the question of whether a defendant-physician, called pursuant to an adverse-witness statute, may be asked questions requiring expert opinion.[4] In the subject case of *Oleksiw v. Wei-*

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[1] Melvin Belli has pointed out that this inability to obtain medical testimony is one of the major problems in a malpractice suit. Belli, *An Ancient Therapy Still Applied: The Silent Medical Treatment*, 1 VILL. L. REV. 250 (1950). A survey made by the Boston University Law-Medicine Research Institute, and reported in Medical Economics, Aug. 28, 1961, revealed that out of 214 doctors, only 31% of the specialists and 27% of the general practitioners said they would be willing to testify for the plaintiff if a surgeon, operating on a diseased kidney removed the wrong one. PROSSER, LAW OF TORTS 167 (3d ed. 1964).

[2] See Morris, *The Role of Expert Testimony in the Trial of Negligence Issues*, 26 TEXAS L. REV. 1, 7-8 (1947).

[3] See, *e.g.*, OHIO REV. CODE § 2317.07, which provides in part: "At the instance of the adverse party, a party may be examined as if under cross-examination, orally, by way of deposition, like any other witness. . . . The party calling for such examination shall not thereby be concluded but may rebut it by evidence." See also: CAL. CODE CIV. PRO. § 2055; GA. CODE ANN. § 38-1801 (1954); IDAHO CODE ANN. 9-1206 (Supp. 1963); KAN. CIV. PRO. STAT. ANN. § 60-243(b) (Vernon 1963); MD. ANN. CODE art. 35, § 9 (1957); MASS. LAWS ANN. ch. 233, § 22 (1956); MICH. STAT. ANN. § 27.915 (1938); MINN. STAT. ANN. § 595.03 (Supp. 1964); N.J. REV. STAT. § 2A:81-11 (1951); WIS. STAT. § 325.14 (1961).

[4] See, *e.g.*, Lawless v. Calaway, 24 Cal. 2d 81, 147 P.2d 604 (1944); Libby v. Conway, 192 Cal. App. 2d 865, 13 Cal. Rep. 830 (1961); Osborn v. Carey, 24 Idaho 158, 132 Pac. 967 (1913); State v. Brainin, 224 Md. 156, 167 A.2d 117 (1961); Hull v. Plume, 131 N.J.L. 511, 37 A.2d 53 (Ct. Err. & App. 1944); McDermott v. Manhattan Hosp., 15 N.Y.2d 20, 203 N.E.2d 469, 255 N.Y.S.2d 65 (1964); Hunder v. Rindlaub, 61 N.D. 389, 237 N.W. 915 (1931); Oleksiw v. Weidener, 2 Ohio St. 2d 147, 207 N.E.2d 375 (1965). See also Annot. 88 A.L.R.2d 1186 (1963).

dener,[5] the Ohio Supreme Court answered this question in the affirmative.

In *Oleksiw*, the plaintiff brought a malpractice action against two physicians, alleging that their negligence in performing a bilateral, femoral arteriogram[6] necessitated skin graft operations. Plaintiff had no expert witness to testify in his behalf. However, after calling one of the defendant-physicians to the stand pursuant to Ohio's adverse-witness statute,[7] plaintiff's counsel attempted to elicit expert testimony from the physician. The trial court sustained objections to this attempt, and subsequently granted a directed verdict for the defendant on the basis that the medical problem involved was so complex that expert testimony was required.[8] The court of appeals affirmed the ruling, holding that a defendant under cross-examination had to testify only as to facts within his own personal knowledge.[9] The Ohio Supreme Court reversed, holding that "in a malpractice action, expert testimony may be elicited from a physician defendant called by plaintiff, 'as if under cross-examination,' pursuant to Section 2317.07, Revised Code."[10]

Although the question involved in the *Oleksiw* case has not previously been before the Ohio Supreme Court,[11] the Ninth District Court of Appeals had previously held that in malpractice actions a plaintiff could not require expert testimony of the defendant-physician called for cross-examination.[12] Thus, the *Oleksiw* case marks a significant departure from prior rules of evidence in Ohio.

The majority of the older decisions in other jurisdictions, while recognizing the right of a plaintiff to examine a defendant-physician in a malpractice suit, generally held that such examination was

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[5] 2 Ohio St. 2d 147, 207 N.E.2d 375 (1965).

[6] A bilateral femoral arteriogram is a form of x-ray taken of the femoral artery in the thigh by first injecting a fluid into the artery.

[7] See note 3 *supra*.

[8] Oleksiw v. Weidener, No. 715656, Ohio C.P., Cuyahoga County, May 8, 1963.

[9] Oleksiw v. Weidener, 195 N.E.2d 813 (Ohio Ct. App. 1964).

[10] Oleksiw v. Weidener, 2 Ohio St. 2d 147, 150, 207 N.E.2d 375, 378 (1965).

[11] *Id.* at 149, 207 N.E.2d at 377.

[12] Forthofer v. Arnold, 60 Ohio App. 436, 442, 21 N.E.2d 869, 872 (1938). This case held that the trial court committed no error in refusing to permit examination by the plaintiff of the defendant-physician in a malpractice case as an expert under OHIO REV. CODE § 2317.07. The court said that the plaintiff could not establish the standard of care, skill, and diligence by which the defendant's conduct was to be judged through cross-examination of the defendant. The *Forthofer* case was followed in Wiley v. Wharton, 68 Ohio App. 345, 41 N.E.2d 255 (1941).

limited to facts within the physician's knowledge.[13] The physician could be questioned as to what he actually saw and did, but could not be asked whether his actions deviated from the accepted medical practice in the community since this would require expert opinion. Generally, the reason advanced for denying questions requiring expert testimony was that adverse-witness statutes were never intended for such use.[14] In the earliest case of significance advancing this "restrictive" view of adverse-witness statutes,[15] the Supreme Court of Idaho stated that the purpose of its adverse-witness statute was to permit a party to the action to call the adverse party and examine him regarding some pertinent fact in the controversy, but not to permit the plaintiff to establish his cause of action through the expert opinion of the defendant-physician. Cross-examination rules were applied on the basis that the adverse party was likely to be hostile and evasive; therefore, leading questions and impeachment were to be permitted. In addition to subscribing to the theory that questions requiring expert testimony were not within the purview of adverse-witness statutes, proponents of *Osborn v. Carey*[16] felt that such questions would give plaintiff an unfair advantage, since under the guise of cross-examination a plaintiff could accept favorable testimony and refute or impeach the defendant as to any unfavorable testimony offered.[17] Approximately half of the jurisdictions with adverse-witness statutes have adopted this "restrictive" view.[18]

In the subject case, the Ohio Supreme Court rejected the above

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[13] See, *e.g.*, Osborn v. Carey, 24 Idaho 158, 132 Pac. 967 (1913); Hull v. Plume, 131 N.J.L. 511, 37 A.2d 53 (Ct. Err. & App. 1944); Hunder v. Rindlaub, 61 N.D. 389, 237 N.W. 915 (1931).

[14] Ericksen v. Wilson, 266 Minn. 401, 123 N.W.2d 687 (1963). This is the latest case to adopt the restrictive view. The court stated: "Undoubtedly the trial court felt, and properly so, that cross-examination under the rules was not designed to force a defendant into becoming a plaintiff's expert witness, particularly when the plaintiff is attempting to condemn the expertise of that witness." *Id.* at 406-07, 123 N.W.2d at 691.

[15] Osborn v. Carey, 24 Idaho 158, 132 Pac. 967 (1913).

[16] *Ibid.*

[17] "In our opinion section 7870, supra, was never intended to permit a party to an action to call an adverse party as an expert, examine him as such under the rules of cross-examination, and yet not be bound by the testimony." Hunder v. Rindlaub, 61 N.D. 389, 409, 237 N.W. 915, 922 (1931). The court then cited Osborn v. Carey, 24 Idaho 158, 132 Pac. 967 (1913). Section 7870 referred to in the above quote was North Dakota's adverse-witness statute, N.D. COMP. LAWS § 7870 (1913).

[18] See Ericksen v. Wilson, 266 Minn. 401, 123 N.W.2d 687 (1963). The court felt that this was the general rule, thus implying that more than half the jurisdictions follow the restrictive view. According to the subject case, Oleksiw v. Weidener, 2 Ohio St. 2d 147, 149, 207 N.E.2d 375, 377 (1965), the other jurisdictions which have considered the question are about evenly divided.

view and adopted the "liberal" view advanced in a number of more recent cases.[19] These cases have held that an adverse-witness statute does not restrict the scope of examination merely to facts within the knowledge of the adverse party, but that expert opinion, if the party is qualified to so testify, may also be elicited.[20] The 1944 case of *Lawless v. Calaway*[21] was the first significant case advancing this more liberal view. The California Supreme Court stated that "neither the letter nor the spirit of the statute suggests any reason why the defendant in such an action [a malpractice action] should not be examined with regard to the standard of skill and care ordinarily exercised by doctors in the community under like circumstances and with respect to whether his conduct conformed thereto."[22]

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[19] See, *e.g.*, Lawless v. Calaway, 24 Cal. 2d 81, 147 P.2d 604 (1944); Libby v. Conway, 192 Cal. App. 2d 865, 13 Cal. Rep. 830 (1961); State v. Brainin, 224 Md. 156, 167 A.2d 117 (1961); McDermott v. Manhattan Hosp., 15 N.Y.2d 20, 203 N.E.2d 469, 255 N.Y.S.2d 65 (1964).

[20] See, *e.g.*, McDermott v. Manhattan Hosp., 15 N.Y.2d 20, 203 N.E.2d 469, 255 N.Y.S.2d 65 (1964). The court stated that "a plaintiff in a malpractice action is entitled to call the defendant doctor to the stand and question him both as to his factual knowledge of the case (that is, as to his examination, diagnosis, treatment and the like) and, if he be so qualified, as an expert for the purpose of establishing the generally accepted medical practice in the community." *Id.* at 29-30, 203 N.E.2d at 475, 255 N.Y.S.2d at 73.

[21] 24 Cal. 2d 81, 147 P.2d 604 (1944).

[22] *Id.* at 90-91, 147 P.2d at 609. With reference to California's adverse-witness statute, CAL. CODE CIV. PRO. § 2055, the court stated: "Statutes such as Section 2055 were enacted to enable a party to call his adversary and elicit his testimony without making him his own witness.. They are remedial in character and should be liberally construed in order to accomplish their purpose." Lawless v. Calaway, 24 Cal. 2d 81, 90, 147 P.2d 604, 608 (1944).

This holding has been quite persuasive, for it has been followed by a number of jurisdictions adopting the same reasoning, *e.g.*, New York, Maryland, Ohio. The Maryland Supreme Court stated: "We think the reasoning of the *Lawless* case is persuasive." State v. Brainin, 224 Md. 156, 161, 167 A.2d 117, 119 (1961). New York was the last state to adopt the reasoning of the *Lawless* case prior to Ohio. In McDermott v. Manhattan Hosp., 15 N.Y.2d 20, 203 N.E.2d 469, 255 N.Y.S.2d 65 (1964), the New York Court of Appeals in a case of first impression had to decide whether a question requiring expert testimony could be elicited from a defendant-physician called by plaintiff. The question was answered in the affirmative in a rather extensive opinion which apparently had a significant influence on the Ohio Supreme Court in the subject case. The opinion contained the following reasoning:

> [B]y allowing the plaintiff to examine the defendant doctor with regard to the standard of skill and care ordinarily exercised by physicians in the community . . . the courts do no more than conform to the obvious purpose underlying the adverse-party-witness rule. That purpose, of course, 'is to permit the production in each case of all pertinent and relevant evidence that is available from the parties to the action.' . . . The issue whether the defendant doctor deviated from the proper and approved practice customarily adopted by physicians practicing in the community is assuredly 'pertinent and relevant' to a malpractice action. Indeed, absent such proof, the plaintiff's case would have to be dismissed. Moreover, evidence on this issue is, in most instances

The primary reason advanced in support of the liberal view is that the obvious purpose of adverse-witness statutes is to permit the production of all facts necessary to render a just decision.[23] Therefore, any relevant evidence should be made available to the parties, including evidence in the possession of the adverse party.[24] One of the major criticisms of the older, restrictive view is that such view depends solely upon a question of fairness. The court in *Oleksiw*, referring to the restrictive view, stated that "the real basis seems to be that it would not be fair or sporting to allow the plaintiff to force the defendant to become his expert."[25] Thus, the Ohio Supreme Court made the claim that no question of "fairness" should be involved in the matter.[26]

A closer analysis of the subject case raises some question as to the real basis for the modern or liberal view. In general, the more recent cases[27] have two factors in common. First, in each case the alleged medical negligence was beyond the comprehension of a layman, thus requiring expert testimony. Second, in each case the plaintiff called no other expert witnesses to testify in his behalf. Therefore, *in each case* the court's refusal to permit the eliciting of expert testimony from the defendant-physician would have necessitated the granting of a directed verdict for defendant; without ex-

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'available' from the defendant doctor. *Id.* at 27-28, 203 N.E.2d at 473-74, 255 N.Y.S.2d at 71.

The court then discussed the difficulty plaintiffs encounter in attempting to obtain expert witnesses. It stated:

> In consequence, the plaintiff's only recourse in many cases may be to question the defendant doctor as an expert in the hope that he will thereby be able to establish his malpractice claim.
>
> There is nothing unfair about such a practice. Unlike his counterpart in a criminal prosecution, the defendant in a civil suit has no inherent right to remain silent or, once on the stand, to answer only those inquiries which will have no adverse effect on his case. *Id.* at 28, 203 N.E.2d at 474, 255 N.Y.S.2d at 72.

In Oleksiw v. Weidener, 2 Ohio St. 2d 147, 150, 207 N.E.2d 375, 377 (1965), the Ohio Supreme Court cited the *McDermott* case twice, once quoting from it.

[23] See, *e.g.*, McDermott v. Manhattan Hosp., 15 N.Y.2d 20, 203 N.E.2d 469, 255 N.Y.S.2d 65 (1964); Oleksiw v. Weidener, 2 Ohio St. 2d 147, 207 N.E.2d 375 (1965).

[24] "If the defendant in a malpractice action may truthfully testify that his conduct conformed to the standard required, his case is, of course, substantially strengthened and, if he cannot so testify, the plaintiff's chances of recovery are unquestionably increased. In either case, the objective of the court in doing justice is achieved." Oleksiw v. Weidener, 2 Ohio St. 2d 147, 150, 207 N.E.2d 375, 377 (1965), quoting from McDermott v. Manhattan Hosp., 15 N.Y.2d 20, 28, 203 N.E.2d 469, 474, 255 N.Y.S.2d 65, 72 (1964).

[25] Oleksiw v. Weidener, 2 Ohio St. 2d 147, 149, 207 N.E.2d 375, 377 (1965).

[26] *Ibid.*

[27] See cases cited note 19 *supra.*

pert testimony, the issue of negligence could not have been presented to the jury.[28] The courts seem reluctant to grant a directed verdict, possibly feeling that it is the refusal of doctors to condemn the practices of their colleagues in open court that is largely responsible for the plaintiff's lack of expert witnesses.[29] Thus, it may be stated that the courts feel it would be "unfair" to grant a directed verdict for the defendant in a malpractice suit simply because of the common bond of silence existing among medical practitioners. Therefore, although the courts which permit questions requiring the expert testimony of a defendant-physician claim to be basing their determination on what they consider to be the real purpose of adverse-witness statutes, they are in fact doing no more than basing their determination upon concepts of "fairness." Yet, the major criticism of the restrictive view was that it was based upon "fairness." As previously indicated, the Ohio Supreme Court held that fairness should not be considered a determining factor.[30] Proponents of the modern view seem to be guided by the very theory which they claim to be rejecting.

A question may well arise with respect to what the Ohio courts will now do where a plaintiff in a malpractice suit not only attempts to elicit expert opinion from a defendant-physician, but also calls other expert witnesses. These facts came before a New York court in *Forman v. Azzura*[31] five months after the New York Court of Appeals had adopted the more liberal view in *McDermott v. Manhattan Hosp.*[32] In the *Forman* case, plaintiff's counsel requested permission to read into evidence answers made by the defendant-physician to questions requiring expert testimony. The answers had been given during a pre-trial examination. The Appellate Division of the New York Supreme Court affirmed a lower court ruling excluding the questions and answers. It stated that where a plaintiff's proof does, in fact, include the opinions of other experts, no error is committed by excluding the expert opinion of the defendant-physi-

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[28] See note 2 *supra.*

[29] The courts are undoubtedly justified in this belief. See note 1 *supra.* In McDermott v. Manhattan Hosp., 15 N.Y.2d 20, 203 N.E.2d 469, 255 N.Y.S.2d 65 (1964), the court said: "It is not always a simple matter to have one expert, a doctor in this case, condemn in open court the practice of another, particularly if the latter is a leader in his field." *Id.* at 27, 203 N.E.2d at 474, 255 N.Y.S.2d at 72.

[30] Oleksiw v. Weidener, 2 Ohio St. 2d 147, 149, 207 N.E.2d 375, 377 (1965).

[31] 23 App. Div. 2d 793, 259 N.Y.S.2d 120 (1965).

[32] 15 N.Y.2d 20, 203 N.E.2d 469, 255 N.Y.S.2d 65 (1964).