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# Evidence--Medical Malpractice--Expert Testimony of Defendant Physician When Called as Adverse Witness

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called for temperance in their application,<sup>25</sup> the need for some control is apparent.

Although the defendant's rights may be protected by the suggested methods, the eventual solution lies in a working agreement between the news media and the judiciary. An initial acceptance of the necessity for such controls and voluntary restraint by both the press and the Bar should effect an harmonious solution to the conflict.

*Jack William DeBolt*

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**Evidence—Medical Malpractice—Expert Testimony of Defendant Physician When Called as Adverse Witness**

*P*, brought a medical malpractice suit alleging that her colon was torn by the negligent use of a bardex tube during X-ray procedures in *Ds'* office. At the trial *Ds* were called as adverse witnesses. The court refused to permit *P* to adversely examine *Ds* on matters involving their judgment, knowledge and opinions as experts. The trial court, directed a verdict for *Ds*. *Held*, affirmed. In a medical malpractice action *P* will not be permitted to call a defendant physician as an adverse witness and extract expert testimony from him to prove a charge of malpractice. *Hoffman v. Naslund*, 144 N.W.2d 580 (Minn. 1966).

It is well settled that a defendant physician can be called as an adverse witness and be examined as to pertinent facts in the case.<sup>1</sup> However, the issue is not settled as to whether such defendant can be required as an adverse witness to give his expert opinion on the matters in question. Although the courts are about equally divided on this question, the trend is toward requiring defendant physicians to give testimony involving their expert knowledge and opinion when called as adverse witnesses.<sup>2</sup>

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<sup>25</sup> *The Supreme Court, 1965 Term*, 80 HARV. L. REV. 91, 185 (1966).

<sup>26</sup> U.S. CONST. amend. VI.

<sup>27</sup> *Geise v. United States*, 265 F.2d 659 (9th Cir. 1958).

<sup>1</sup> *McDermott v. Manhattan Eye, Ear & Throat Hosp.*, 15 N.Y.2d 20, 203 N.E.2d 469 (1964); *Hunder v. Rindlaub*, 61 N.D. 389, 237 N.W. 915 (1931).

<sup>2</sup> *Annot.*, 88 A.L.R.2d 1186 (1963).

The case of *Ericksen v. Wilson*,<sup>3</sup> upon which the principal case relied in reaching its decision, is a leading case supporting the proposition that expert testimony cannot be extracted from a defendant physician when called as an adverse witness in a malpractice action. In *Ericksen* the court stated that cross-examination under a rule similar to Federal Rule of Civil Procedure 43(b) was not designed to force a defendant into becoming a plaintiff's expert witness and held that the trial court in its discretion could limit the extent of the cross-examination of the adverse party. The rationale followed by the courts in reaching the position reflected in the *Ericksen* case is simply that it is not the *purpose* of a rule allowing examination of adverse witnesses to permit the plaintiff to establish his case in chief by expert opinion secured from the defendant.<sup>4</sup> The underlying basis for this rationale seems to be that it would be unfair to allow the plaintiff to force the defendant to become his expert.<sup>5</sup> Other than this "not the purpose" of the rule argument the cases offer no insight into why such a line of inquiry by the plaintiff should not be permitted.

On the other hand, a series of more recent decisions have presented convincing arguments why expert opinion should be allowed to be elicited from the defendant physician when called as an adverse witness in a medical malpractice action. The California Supreme Court in *Lawless v. Calaway*<sup>6</sup> stated that the purpose of a statute allowing a defendant to be adversely examined is to enable a party to elicit from his adversary any relevant matter in issue in the case. Since expert testimony is ordinarily required to prove the relevant issues in an action for malpractice, it necessarily follows

<sup>3</sup> 266 Minn. 401, 123 N.W.2d 687 (1963). This case cites six cases as persuasive authority for the holding: *Forthofer v. Arnold*, 60 Ohio App. 436, 21 N.E.2d 869 (1938) and *Wiley v. Wharton*, 68 Ohio App. 345, 41 N.E.2d 255 (1941) were subsequently overruled by *Oleksiw v. Weidener*, 2 Ohio St. 2d 147, 207 N.E.2d 375 (1965); *McDermott v. Manhattan Eye, Ear & Throat Hosp.*, 16 App. Div.2d 374, 228 N.Y.S.2d 143 (1964) was appealed and reversed as reported in 15 N.Y.2d 20, 203 N.E.2d 469 (1964); *Hull v. Plume*, 131 N.J.L. 511, 37 A.2d 53 (1944) is distinguishable because of wording of the statute and a related local evidence ruling; leaving only a 1939 and 1913 case as proper authority, *Hunder v. Rindlaub*, 61 N.D. 389, 237 N.W. 915 (1931) and *Osborn v. Carey*, 24 Idaho 158, 132 Pac. 967 (1913).

<sup>4</sup> *Hundred v. Rindlaub*, 61 N.D. 389, 237 N.W. 915 (1931); *Osborn v. Carey*, 24 Idaho 158, 132 Pac. 967 (1913).

<sup>5</sup> *Oleksiw v. Weidener*, 2 Ohio St.2d 147, 207 N.E.2d 375 (1965); *Ericksen v. Wilson*, 266 Minn. 401, 123 N.W.2d 687 (1963).

<sup>6</sup> 24 Cal.2d 81, 147 P.2d 604 (1944).

that the standard of care ordinarily exercised by doctors in the community (being a relevant issue) can be established by the plaintiff under an "adverse witness" statute. A more recent case, *McDermott v. Manhattan Eye, Ear and Throat Hosp.*,<sup>7</sup> pointed out that modern rules have removed the common law disabilities of parties to testify as witnesses. The court went on to say that plain sense and reason suggest that any living witness who can throw light upon a fact in issue should state what he knows. The doctor's knowledge of proper medical practice and his possible awareness of his deviation from the standard is as much a "fact" as are the examination and diagnosis that was made. The Ohio court in *Oleksiw v. Weidener*<sup>8</sup> pointed out that the cases not permitting the adverse witness to give expert opinion do not specify anything inherently wrong with allowing such questioning, but seem to base their holding on the idea that it would not be fair or sporting to allow the plaintiff to force the defendant to become his expert. The court stated that fairness should not be the question, nor should the question be one of self-incrimination. "A civil defendant has no protection against subjecting himself to liability. If his testimony will provide facts which will aid the court in arriving at a just decision, he has a duty to testify." The benefit to the judicial system under this interpretation of "adverse witness" statutes far outweighs any loss to the sporting aspect of adversary proceedings.

In what appears to be the only federal case in point, the eighth circuit in *Thompson v. Lillehei*,<sup>9</sup> while not ruling on the issue, indicated that the plaintiff in a malpractice suit under Rule 43(b) of the Federal Rules of Civil Procedure<sup>10</sup> could elicit opinion from the adverse witness. The court, however, refused to reverse the trial court for limiting plaintiffs' line of inquiry because the plaintiffs failed to demonstrate that they were prejudiced by the trial court's ruling.

Rule 43(b) of the West Virginia Rules of Civil Procedure is

<sup>7</sup> 15 N.Y.2d 20, 203 N.E.2d 469 (1964).

<sup>8</sup> 2 Ohio St.2d 147, 207 N.E.2d 375 (1965).

<sup>9</sup> 273 F. 2d 376 (8th Cir. 1959) (dictum).

<sup>10</sup> "Scope of Examination and Cross-Examination . . . A party may call an adverse party . . . and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party . . ." FED. R. CIV. P. 43(b).

exactly the same as federal rule 43(b).<sup>11</sup> In construing this rule the West Virginia court in *Duling v. Bluefield Sanitarium, Inc.*,<sup>12</sup> by dictum, indicated that expert testimony could be extracted from an adverse witness. Although this was not a malpractice case, a doctor, being a director of the hospital, was called as an adverse witness under rule 43(b). The court, while not required to rule on the point, said that the trial court erred in holding that the doctor was not required to answer any proper question involving his expert knowledge or expert opinion as a member of the medical profession.

Although the *Duling* case is the only West Virginia case that deals directly with this question of law, prior West Virginia cases indicate that a liberal interpretation of 43 (b) is warranted. Rule 43(b) permits the calling of an adverse party and questioning him as if on cross-examination. This takes on special meaning when combined with the fact that in West Virginia a party to a suit may, on cross-examination, be questioned as to all pertinent issues.<sup>13</sup> Since a showing of lack of professional skill is a pertinent issue in a malpractice case generally provable only by expert testimony,<sup>14</sup> the conclusion seems inescapable that a physician in West Virginia should be required to give expert testimony as an adverse witness. The reasoning here developed gains added strength when combined with the fact that in West Virginia an expert can be subpoenaed and compelled to testify concerning his expert opinion and knowledge.<sup>15</sup>

The principal case stands for the proposition that a plaintiff in a medical malpractice suit can not compel the defendant physician under an "adverse witness" rule to give expert testimony. Although the holding is supported by authority, it appears not to be in keeping with the more recent decisions and has little argumentative support. The West Virginia court, by dictum, appears to be in accord with the recent trend, *i.e.*, would require answers to ques-

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<sup>11</sup> LUGAR AND SILVERSTEIN, W. VA. RULES, 353 (1960).

<sup>12</sup> 149 W. Va. 567, 142 S.E.2d 754 (1965) (dictum).

<sup>13</sup> Ingles v. Stealey, 85 W. Va. 155, 101 S.E. 187 (1919).

<sup>14</sup> Schroeder v. Adkins, 149 W. Va. 400, 141 S.E.2d 352 (1965). *But see* Buskirk v. Bucklew, 115 W. Va. 424, 176 S.E. 603 (1934).

<sup>15</sup> Ealy v. Shetler Ice Cream Co., 108 W. Va. 184, 150 S. E. 525 (1929). See Hull v. Plume, 131 N.J.L. 511, 37 A.2d 53 (1944) where an opposite holding was the basis for not requiring expert opinion under the New Jersey adverse witness statute.

tions put to a defendant physician called as an adverse witness involving his expert knowledge or expert opinion. This dictum is supported by related West Virginia cases and appears to be an accurate forecast of the court's position.

*K. Paul Davis*

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### Income Tax—Reincorporation and Liquidation

*D*, corporate stockholders of a closed corporation, adopted a section 337 plan of complete liquidation which provided for dissolution of the corporation and distribution of all the assets within twelve months. Pursuant to the plan, the operating assets of the liquidated corporation were transferred to a new corporation in exchange for stock. The remaining liquid assets of the liquidated corporation were distributed to the stockholders. The liquidated corporation was then dissolved. The transaction was bona fide in every respect and any tax avoidance purpose was negligible. *D* reported their gain on the liquidation as a long term capital gain. The liquidated corporation's return reported no taxable income on the sale of assets under section 337 of the Internal Revenue Code of 1954. The Commissioner contended that this transaction constituted a section 368 reorganization; therefore, the distributions to stockholders should be taxed as ordinary income and the gain on the sale of operating assets should be recognized. The Tax Court ruled in favor of the taxpayers and the Commissioner appealed. *Held*, affirmed. (1) Assets received by shareholders in a liquidation pursuant to a reincorporation transaction were taxable at capital gains rates; and, (2) the liquidated corporation received no recognizable gain on the sale of its assets. *Commissioner v. Berg-hash*, 361 F.2d 257 (2d Cir. 1966).

In recent years the tax avoidance possibilities of liquidation-reincorporations have been quite perplexing to tax advisors, the Commissioner, Congress and the courts. Three interrelated questions frequently arise in connection with this type of a transaction. (1) Should the transfer of operating assets to a new corporation controlled by the shareholders of the liquidated corporation and