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NOTES

COMPULSORY PRE-TRIAL PHYSICAL EXAMINATION OF PLAINTIFF IN PERSONAL INJURY SUITS

John Smith, alleging permanent injuries to his spine as the result of a collision caused by the negligence of a motorman employed by the X Street Railroad Co., sues the Company for $25,000 damages. Smith, of course, will use the expert testimony of his own physicians at the trial. The defendant, in order to check on the nature, extent and permanency of the injuries and to enable it to properly defend, requests Smith to submit to a pre-trial physical examination by defendant's physicians. If Smith complies with the request, well and good. But if he refuses, does the trial court, on proper motion of defendant, have power to issue an order against Smith to submit to such a pre-trial examination? If so, under what conditions will the power be exercised? How may the court enforce the order?

Do trial courts have this power? Today, the answer is "yes," in the great majority of states, including Pennsylvania,[1] and since 1938, in the federal district courts.[2] The method of enforcement is by staying the proceedings until the plaintiff complies, or by dismissing the case altogether. In Pennsylvania, the trial courts have long asserted the existence of the power and have exercised it in proper cases. But in the federal courts, the existence of the power was denied for forty-seven years, and it was not until the promulgation of the Federal Rules of Civil Procedure[3] in 1938 that the federal courts stepped into line.

The purpose of this article is to examine the arguments for and against the existence of the power of a trial court to order a pre-trial physical examination of plaintiff in personal injury actions; to note briefly the common law analogies, if any; and to set forth the practical application of this power by the trial courts of Pennsylvania.

I PUBLIC POLICY AND COMMON LAW ANALOGIES

Our plaintiff, John Smith, has alleged permanent spinal injuries, and will offer the expert testimony of his physicians to support the claim. The jury will sympathize with the crippled plaintiff and will be impressed by the testimony of the experts. How can the Railway Company properly defend the action? It cannot, unless it can in some way secure an examination of Smith by its own physicians, thereby qualifying them to testify.

Fairness demands that the defendant be entitled to discover the nature and extent of plaintiff's injuries. Justice insists that all material facts be presented to the jury; otherwise a thorough search for the truth is impossible, with a vital avenue to the disclosure of important facts closed by a court-made barrier. If the court refuses to order such an examination, justice will be denied the defendant; the court will have robbed the jury of its opportunity, and rendered impossible the performance of the jury's duty, of hearing and weighing all relevant facts; and the portals of the halls of justice will be opened wide to plaintiffs with fraudulent or exaggerated claims. Is it the function of courts to deny justice to defendants, to suppress important facts, to encourage exaggerated or downright fraudulent claims? Of course not. A wise public policy has always demanded that trial courts compel pre-trial physical examination of a plaintiff in personal injury actions. Most state courts have consistently followed this policy. Yet for forty-seven years the United States Supreme Court denied not only the power, but also the wisdom of such a practice!

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[1] 17 AM. JUR. sec. 55 et. seq.; 8 WIGMORE ON EVIDENCE (3rd ed. 1940), sec. 2220, n. 13; *and see* 63 U. OF PA. L. REV. 207, 84 U. OF PA. L. REV. 1001.

[2] 28 U.S.C.A. following sec. 723c.

[3] *Ibid.*

At common law, there is no recorded decision asserting or denying the existence of the power. However, in analogous cases, the courts uniformly asserted and exercised the power to order a physical examination whenever fairness, truth and justice required.

The writ *de ventre inspeciendo* was a writ to inspect the body of a widow suspected of feigning herself with child in order to produce a suppositious heir to her deceased husband's estate, thus defrauding the rightful heirs or devisees. The writ directed that, in the presence of knights and women, the widow be examined.

> The writ is ". . . a proceeding at common law, where a widow is suspected to feign herself with child, in order to produce a suppositious heir to the estate . . . In this case with us, the heir-presumptive may have a writ de ventre inspeciendo to examine whether she be with child, or not; and if she be, to keep her under proper restraint till delivered."[4]

This writ also lay where a woman sentenced to death pleaded pregnancy.[5]

Physical examination by court order was also provided for in the appeal of mayhem.

> "In an appeal of mayhem, the court may at the prayer of the defendant, try, upon inspection of the part, whether there be a mayhem . . . If the court, upon inspecting the part in an appeal of mayhem, be doubtful whether there be a mayhem, a writ may be awarded to the sheriff, to return some able physicians and surgeons for the better information of the court."[6]

Also, in a divorce proceeding where impotency was charged, the court had no hesitation in arriving at the truth by ordering a physical examination of one or both parties.

> "Whenever the present condition of the sexual organs is an essential element in the proofs, the court orders what is termed an inspection of the person by medical experts. Acting under oath as *quasi* officers of the court, their duty is to examine the private parts of the parties, and report whether or not they are severally capable of marriage consummation, and whether or not the woman presents indications of having had connection with man.
> "The parts concerned being concealed from public observation, if inspection could not be compelled, *justice would in many instances fail* . . . Therefore in England, Scotland, France, and probably every other country in which this impediment to marriage is acknowledged, the courts have required the parties, when the exigencies of the proofs demanded, to submit their persons to examination."[7]

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[4] 1 Bl. 456.
[5] 4 Bl. 495.
[6] Bacon, ABRIDGEMENT (1736), Amer. ed. 1854, v. 9, p. 554, as cited in 8 WIGMORE ON EVIDENCE (3rd ed. 1940) p. 86, n. 2.
[7] 2 BISHOP ON MARRIAGE, DIVORCE AND SEPARATION (1891), sec. 1298-99.

These three examples of the exercise by the old English courts of a power analogous to that of requiring a plaintiff alleging personal injuries to submit to a physical examination, are highly important for this reason: they indicate the readiness and willingness of the common law courts to order the physical examination of a person whenever fair play and the interests of truth and justice dictated. The demands of truth and justice are every bit as compelling in a personal injury action as they were in the three common law situations cited. But when, in each state, worried defendants began to ask the court to order an examination of the plaintiff, the results were conflicting. Some jurisdictions answered the demands of public policy, recognized the common law analogies, and asserted the power. Others, while conceding the need for such a power, failed to find it in the absence of statute. And the United States Supreme Court not only denied the power, but, ignoring the plight of the defendant without a defense and the demands of fairness and justice for a thorough search for the truth, went on to say that its exercise would result in an unjust deprivation of the plaintiff's sacred right of immunity of his person![8] In these three ways did our courts meet the challenge of a problem that was new in detail but old and well-settled in principle.[9]

II THE EXISTENCE OF THE POWER

(1) *In the Federal Courts*

In 1891, in the leading case of *Union Pacific Ry. Co. v. Botsford*,[10] the majority, speaking through Justice Gray, affirmed the holding of the Circuit Court that it had no legal right or power to make or enforce an order requiring plaintiff to submit to a pre-trial physical examination. The inviolability of one's person is far too sacred a right to permit such an invasion, said the court.

> "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law . . .
>
> The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel anyone, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault and a trespass."

That this right cannot be violated "without lawful authority" is obviously true. But the court is begging the question: if it should hold that it has such a power, the violation of the person is then made, *ipso facto, with* the authority of law, and hence is not a trespass. Furthermore, one's right to freedom from touch-

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[8]Union Pacific Ry. Co. v. Botsford, 141 U.S. 250, 35 L. ed. 734, 11 S. Ct. 1000 (1890).

[9]An analysis of these conflicting decisions, state by state, is beyond the scope of this article. For an excellent discussion of the early development of the law on this subject in the United States, *see* article by Shastid in 1 MICH. L. REV. 193, 277.

[10]141 U.S. 250, 35 L. ed. 734, 11 S. Ct. 1000 (1890).

ing is not an absolute unqualified right; in self-defense, or in defense of one's property, for example, another can violate that sacred right even to the point of killing.

Further, said the court, there is no legal precedent for the existence of such a power, therefore it does not exist. The court dismissed the analogy of the bill of divorce charging impotency, in two ways: first, by pointing out that the examination for impotency is derived from the civil and canon law, as administered in spiritual and ecclesiastical courts, and not from the common law; second, by asserting that in divorce cases the public, as well as the parties, had an interest. But conceding that the public has an interest in the upholding or dissolution of the marriage relation, is not the public's interest in encouraging disclosure of the truth and in barring fraud from the courts of justice just as great?

As for the writ *de ventre inspeciendo,* the court recognized the analogy but refused to apply it, saying that the writ was a child of ancient days and no longer in use. It would seem, however, that the passing away of conditions requiring the use of the writ bears no relation whatsoever to the really important question: did the common law, in proper cases, assert a power to order a physical examination? The foundation of the power is the difficulty of reaching the truth in any other way than by an examination of the person. At common law, wherever this foundation existed, the power was asserted and exercised. The question of the existence of power to order examination of a plaintiff in a personal injury case is merely a modern variation of a fundamental problem. The fact that an earlier variation of this fundamental problem no longer exists proves nothing. It is the principle, not the existence or non-existence of a particular application of the principle, that is important. A dead limb does not prove that the tree is dead.

The defendant will be adequately protected, the court continued, because the jury may infer from plaintiff's refusal to be examined that such examination will be prejudicial to his claim. Protection by inference offers poor consolation to a defendant who really needs positive evidence to properly defend. The jury may draw an inference, and again it may not. To deprive a party of the opportunity to obtain positive evidence, and then to tell him he will be protected by whatever inferences the jury cares to draw, is one for the cold comfort department.

The court noted that several state courts, particularly in the West and the South,[11] had asserted the power to grant such an order. The rule in Indiana, where the Circuit Court which had refused to grant the order was sitting, was unsettled, but even if Indiana had clearly asserted the power it would have made no difference, because, said the court, "this is not a question which is governed by the laws or practice of the state in which the trial is had. It depends upon the power of the National Courts under the Constitution and laws of the United States."

[11]Iowa, Ohio, Kansas, Wisconsin, Minnesota, Nebraska, Missouri, Arkansas, Texas, Georgia and Alabama were mentioned by the court.

A strong dissent was registered by Justice Brewer, Justice Brown concurring. Justice Brewer, balancing the right of personal inviolability of the plaintiff against the claims of truth and justice, found the scales tipped by the latter. He said:

> "The end of litigation is justice. Knowledge of the truth is essential thereto . . . It seems strange that a plaintiff may, in the presence of a jury, be permitted to roll up his sleeve and disclose on his arm a wound of which he testifies; but when he testifies as to the existence of such a wound, the court, though persuaded that he is perjuring himself, cannot require him to roll up his sleeve, and thus make manifest the truth, nor require him in the like interest of truth, to step into an adjoining room, and lay bare his arm to the inspection of surgeons. It is said that there is a sanctity of the person which may not be outraged. We believe that truth and justice are more sacred than any personal consideration."

As to the enforcement of such an order, Justice Brewer suggests that it be enforced not by contempt proceedings against a disobedient plaintiff, but by staying or dismissing the case. Looking backward, one sees that while Justice Brewer lost the battle, he won the war, for his dissenting view has been followed in the great majority of state courts, and in 1938 it became the rule in the United States district courts, by virtue of the Federal Rules of Civil Procedure.[12] His suggested method of enforcement—by staying or dismissing, and not by contempt—has also been followed, universally.[13]

Justice Brewer was not the first to present these common sense views. In 1879, fourteen years before the *Botsford* decision, the highest court of Iowa, in reversing the trial court for refusing to comply with defendant's request for an order upon plaintiff to submit himself for examination, answered in advance all of Justice Gray's arguments against the existence of the power:

> "The plaintiff, as it were, had under his own control testimony which would have revealed the truth more clearly than any other that could have been introduced. The cause of truth, the right administration of the law, demand that he should have produced it."

On the invasion of plaintiff's sacred immunity from unconsented touching:

> "As to indignity . . . it is probably more imaginary than real. An examination of the person is not so regarded when made for the purpose of administering remedies. Those who effect insurance upon their lives, pensioners for disability incurred in the military service of the country, soldiers and sailors enlisting in the army and navy, all are subjected to rigid examination of their bodies, and it is never esteemed a dishonor or indignity."

And on the plight of the defendant if no such order can be made:

> "The defendant is left to depend upon the inference of the jury, which might or might not have been exercised, instead of having the

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[12]28 U.S.C.A. following sec. 723c.
[13]For Pennsylvania cases, see notes 34 and 35.

> truth disclosed by direct and positive evidence. The law will not require it to depend upon such inference when it can afford the means of producing competent evidence upon the question in issue."[14]

The exalted perch erected by the *Botsford* case for a plaintiff's delicate feelings was gradually lowered by later federal decisions. Where the state in which the federal court sits has an enabling statute authorizing the state courts to direct an examination, the federal court must comply with the state statute, in accordance with the terms of R. S. 721.[15] This was decided in the case of *Camden & Suburban Ry Co. v. Stetson.*[16] The court reaffirmed the holding in the *Botsford* case where there is no enabling statute. In the *Stetson* case, the court distinguished the *Botsford* case by saying that in the latter case there was no statute of the state, and no intimation in the opinion that such a statute would violate the United States Constitution or be invalid for any other reason. On this latter point there is room for debate. In the *Botsford* decision, Justice Gray had said, without reservation, that, "this is not a question which is governed by the laws or practice of the state in which the trial is had. It depends upon the power of the National Court under the Constitution and laws of the United States." Furthermore, he had hinted that such a practice would be unconstitutional. A later federal case[17] states expressly that one of the reasons for the *Botsford* decision was the unconstitutionality of *any* assertion by the federal courts of the power to compel plaintiff to be examined, and that the *Stetson* decision therefore overrules that portion of the *Botsford* decision.[18]

Whether the one case partially overruled the other, or whether the two are distinguishable, is of only academic interest here. The important point is, a wedge was driven into the *Botsford* decision, the size of the hole depending upon the number of states with enabling statutes.[19]

A second limitation of the *Botsford* decision was soon made. Where plaintiff voluntarily exhibits his injuries to the jury, he thereby waives his immunity from being examined, and defendant is entitled to require him to submit to an examination, the court having power so to order independent of any statute.[20] Judge Amidon remarks that the *Botsford* decision is at variance with a large majority of state courts, and that "we do not feel, therefore, disposed to extend the decision beyond the facts there involved."

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[14]Schroeder v. The C.R.I. & P.R. Co., 47 Iowa 375 (1877).

[15]28 U.S.C.A. sec. 725. "The laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

[16]177 U.S. 172, 44 L. ed. 721, 20 S. Ct. 617 (1900).

[17]Chicago & N.W. Ry. Co. v. Tendall, 167 F. 62 (1909).

[18]The holding in the Botsford case is not clear on the constitutional point. After hinting that the assertion and exercise of power to compel plaintiff to be examined would be unconstitutional, Justice Gray immediately contradicts himself by implying that a United States statute authorizing such an order would be valid.

[19]Less than one-fourth of the states have such statutes. Pennsylvania has no such statute. For listing, *see* 8 WIGMORE ON EVIDENCE (3rd ed. 1940), sec. 2220, n. 13.

[20]Chicago & N.W. Ry. Co. v. Tendall, 167 F. 62 (1909).

Thus hardly had the *Botsford* decision been delivered, when federal judges indicated their dissatisfaction with the views of Justice Gray by refusing to extend them and by actually whittling away part of the original doctrine. But the federal district courts, of course, were obligated to refuse to order a physical examination of plaintiff in cases arising in states where there was no enabling statute or where plaintiff did not first voluntarily exhibit his injures to the jury. That a note of dissatisfaction sometimes appeared is shown in *Brace v. Central R. Co.*[21] Though duty-bound to deny the defendant's motion, because the court was sitting in Pennsylvania where there was no enabling statute, Judge Whitmer openly admired the sound reasoning of two Pennsylvania trial courts in asserting and exercising the power.[22]

It was not until 1938, however, that the federal courts stepped into line. In that year, the Federal Rules of Civil Procedure became effective.[23] The new rules were promulgated by the United States Supreme Court pursuant to authority conferred by the Act of June 19, 1934.[24] The notes of the Commissioners indicate that Rule 35 (a) is intended to overrule the *Botsford* decision. Rule 35 (a) is as follows:

> "In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made."

Enforcement of the order is provided for in Rule 37 (b) (2). Note that the Rule expressly forbids enforcement by a contempt order against plaintiff. Three means of enforcement are provided:

1. An order that the physical condition shall be taken to be established in accord with the claims of defendant.
2. An order refusing to allow plaintiff to introduce evidence of physical condition.
3. An order striking out pleadings or parts thereof, or staying proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment against plaintiff.
4. "In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders *except an order to submit to a physical or mental examination.*" (Italics supplied.)

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[21] 216 F. 718 (1914).
[22] Hess v. Lake Shore, etc., R. Co., 7 C.C. 565 (1890); 34 W.N.C. 295.
[23] 28 U.S.C.A. following sec. 723c.
[24] 28 U.S.C.A. sec. 723b.

Final victory awaited a test in the United States Supreme Court. That test came with the case of *Sibbach v. Wilson & Co., Inc.*,[25] and Rule 35 (a) squeezed through to a five-to-four victory.

The facts are as follows: Plaintiff had sued in the Federal District Court for Northern Illinois for automobile injuries sustained in Indiana. The district court ordered plaintiff to submit to examination under Rule 35 (a), and upon his refusal found him guilty of contempt of court. The contempt proceedings were in palpable violation of Rule 37 (b) (2), and it was on this ground that the Supreme Court eventually reversed. But plaintiff did not appeal on this ground. He appealed to the Circuit Court of Appeals on the ground that Rule 35 (a), authorizing the examination order, was invalid. He argued that the enabling act of 1934 authorized only *procedural* changes, and that Rule 35 (a) permits the invasion of a *substantive* right and is therefore invalid. To sustain his argument that plaintiff's right of personal immunity is a substantive right, plaintiff relied heavily on the *Botsford* decision. The Circuit Court of Appeals held that Rule 35 (a) changed the rule of the *Botsford* case, and that the change was one of procedure. The Court said:

> " . . . regardless of prior court decisions holding to the contrary, both the Supreme Court and Congress [by approving the Rules, which had been prepared with the assistance of an Advisory Committee of legal experts after two and one-half years' work] have construed the right as not being substantive as that term was used in the Enabling Act."[26]

Plaintiff then brought certiorari to the United States Supreme Court. Justice Roberts, for the majority, affirmed the holding of the Circuit Court of Appeals. The rule is procedural, not substantive, he said, and pointed out that even the *Botsford* case admitted this by acknowledging that a United States statute authorizing such an order would be valid.

Four justices dissented, however, with Justice Frankfurter writing the dissenting opinion (Justices Black, Murphy and Douglas concurring):

> "So far as national law is concerned, a drastic change in public policy in a matter deeply touching the sensibilities of people or even their prejudices as to privacy, ought not to be inferred from a general authority to formulate rules for the uniform and effective dispatch of business on the civil side of the federal courts . . . That disobedience of an order under Rule 35 cannot be visited with punishment as for contempt does not mitigate its intrusion into an historic immunity of the privacy of the person."[27]

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[25]312 U.S. 1, 85 L. ed. 479, 61 S. Ct. 422 (1941).
[26]108 E. (2d) 415 (1939).
[27]312 U.S. 1, 14 (1941).

All nine justices agreed in reversing the lower courts on the ground that the order was improperly enforced by a contempt order, in direct violation of the terms of Rule 37 (b) (2).

Whether Rule 35 (a) is procedural or substantive is not within the purview of this article. Suffice it to say here that one not in sympathy with the disproportionate emphasis of the *Botsford* decision upon the "sacred" immunity of the plaintiff's person, even at the expense of the proper administration of justice and of the suppression of important facts, will applaud Rule 35 and will welcome the decision of the majority in upholding the validity of the Rule.

(2) In the Pennsylvania Courts

The tortuous path trod by the Federal courts was successfully by-passed by the Pennsylvania courts. As in most states, it has long been settled in Pennsylvania that a trial court has inherent power to order the plaintiff to submit to a physical examination.

Even before the *Botsford* case, our lower courts asserted and exercised the power. In *Lawrence v. Keim*,[28] the court said it had no doubt of its power to make such an order, either before or at the trial, when it appeared to be necessary for a fair and intelligent investigation of the case. However, the court failed to discuss the basis or origin of the power. An order without comment was also issued in *Harvey v. Philadelphia Transit Co.*[29]

The bases of the power were explored by President Judge Gunnison in the case of *Hess v. Lake Shore, etc., R. R. Co.*[30] Ignoring completely the idea of the inviolability of plaintiff's person, the judge found an analogy in the power to indirectly compel a party to produce for inspection writings which the adverse party conceives to be material, by continuing the trial until inspection is allowed. Furthermore, justice demands such a power to order a physical examination: otherwise, a defendant cannot defend a case brought against him "by an unprincipled adventurer whose claim has no merit." No harm can befall a plaintiff with a meritorious claim. Then he adds:

> "Impartial justice could not be expected in such cases (that is, if the order is not granted) at the hands of juries, who were not permitted to know the truth, and whose sympathies were aroused by the recitations of sufferings which could not be controverted . . . To permit such a practice would be to encourage perjury and properly subject courts of justice to public contempt."

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[28] 19 Phila. 351 (1888).
[29] 26 W.N.C. 231 (1890).
[30] 7 C.C. 565 (1890).

In another case,[31] the trial judge relied partly upon the analogy of the writ *de ventre inspeciendo,* and stresses that without such a physical examination any defense to an alleged injury such as the notorious "Railway Spine" would be hopeless. The court mentions the *Botsford* decision only to ignore it.

The Supreme Court of Pennsylvania has never had occasion to decide directly the precise question of the existence of the power. But almost as decisive is the fact that in at least three cases it has *assumed* that the trial court possessed such power. In *Cohen v. Phila. Transit Co.,*[32] defendant appealed from a judgment for plaintiff after the lower court in the exercise of its discretion had refused to grant an order for a physical examination in view of the fact that the plaintiff had already voluntarily submitted to several examinations by the defendant's physicians. Said Justice Moschzisker, in holding that the lower court had not abused its discretion:

> "We entertain no doubt of the right of a court, when one sues for alleged injuries to the person, to afford the defendant a proper opportunity to have a physical examination made by skilled medical men. Of course, the court cannot order a plaintiff to submit to such an ordeal against his will, but it can, and, when the ends of justice so require, should refuse to permit the case to proceed until the plaintiff undergoes an examination."[33]

III THE EXERCISE OF THE POWER IN PENNSYLVANIA

The defendant has no absolute right to an order from the trial court directing the plaintiff to submit to a physical examination; granting or refusing the order is in the sound discretion of the trial court,[34] and the appellate court will reverse only for abuse of discretion. There have been no reversals on this ground in Pennsylvania.

How is the order enforced? If plaintiff refuses to obey, the court will stay the proceedings until he complies,[35] or will dismiss the case;[36] but his refusal is never treated as a contempt, one court saying that it is not necessary to resort to such an extreme measure.[37] Usually, the court merely refuses to proceed with the case until plaintiff obeys. But in *Heilig v. Harrisburg Rys. Co.*[38] the case was dismissed. There, plaintiff had alleged that the nerves controlling his eyesight were permanently injured to such an extent that within five days after the accident

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[31]Demenstein v. Richardson, 2 Dist. Rep. 825 (1893).
[32]250 Pa. 15 (1915); *also see* Twinn v. Noble, 270 Pa. 500 (1921); and Schroth et ux. v. Phila. R. T. Co., 280 Pa. 36 (1924).
[33]250 Pa. 15, 17 (1915).
[34]Twinn v. Noble, 270 Pa. 500 (1921); Schroth et ux. v. Phila. R.T. Co., 280 Pa. 36 (1924).
[35]Cohen v. Phila. R. T. Co., 250 Pa. 15 (1915); Hess v. R.R. Co., 7 C.C. 565 (1890).
[36]As in Heilig v. Harrisburg Rys. Co., 17 D. & C. 509 (1932).
[37]Hess v. R. R. Co., 7 C.C. 565 (1890).
[38]17 D. & C. 509 (1932).

he became totally blind. Plaintiff repeatedly and persistently refused to obey the court order directing him to submit to an examination by defendant's eye specialists. After eight months' delay, caused wholly by plaintiff's stubbornness, plaintiff died, and his executrix was substituted as party plaintiff. On petition of defendant, the court dismissed the case. Said President Judge Hargest:

> "The plaintiff was stubborn and recalcitrant. If the plaintiff were alive we would be justified in dismissing this proceeding, but owing to his own obstinancy no examination was made and he died without preserving any evidence as to the cause of his injury. The defendant was entitled to have that evidence by a physical examination. It cannot be secured. No good will come of continuing the case. It would be an injustice to try it, the plaintiff having himself prevented a reasonable and proper physical examination."

When should defendant request a physical examination order? The request should be promptly made, and before the case is called for trial.[39] But defendant will not be barred by laches where he delays his application for over a year, the delay in the trial having been caused by plaintiff.[40] Said the court:

> "The defendant may ask for a physical examination at any reasonable time prior to the trial. If a plaintiff chooses to delay the trial of his cause for a year, there is no reason why the defendant should not have the right, before the trial proceeds, to a physical examination of the plaintiff when permanent injuries are alleged."

To how many examinations of plaintiff is defendant entitled? Usually one is sufficient, but where advisable and necessary the court will order another. Thus in *Narzisi v. Meyer Dairy Corp.*,[41] the court ordered a second examination where two and one-half years had elapsed between the first examination and the time for trial, and plaintiff had alleged permanent injuries. The court said:

> "The power to order an examination is not exhausted by one examination . . . Where the disease is progressive, or the injuries are alleged to be permanent, the defendant ought to have an opportunity to examine again before trial, where two years and six months have elapsed since the first examination."

Conversely, where no benefit will accrue from an additional examination, the court will refuse to order it.[42]

The examining physicians are usually appointed by defendant, because they are to be his witnesses in the case, but it is within the power of the court to make the appointment if it desires to exercise the power.[43] If plaintiff presents a valid

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[39]Narzisi v. Meyer Dairy Corp., 22 D. & C. 258 (1933).
[40]Heilig v. Harrisburg Rys. Co., 17 D. & C. 509 (1932).
[41]22 D. & C. 258 (1933).
[42]Cohen v. Phila. R. T. Co., 250 Pa. 15 (1915); Twinn v. Noble, 270 Pa. 500 (1913); Schroth et ux. v. Phila. R. T. Co., 280 Pa. 36 (1924).
[43]*Supra*, n. 38.

objection to the doctor or doctors selected, the court will require defendant to name one suitable to plaintiff, or the court itself will make the appointment. But a frivolous or petty objection by plaintiff will not be accepted.[44]

The number of physicians is usually limited by the court order to two or three.[45] The typical court order directs plaintiff to submit to a physical examination at such time as plaintiff shall appoint, plaintiff to give reasonable notice of the time to defendant (sometimes the time is to be determined by agreement of counsel, and if they fail to agree, by order of court); the examination to be conducted by not more than two (or three) physicians appointed by defendant, in the presence of both counsel and not more than two (or three) of plaintiff's own physicians and no one else. The order also contains an admonition to the physicians and counsel not to ask plaintiff any questions as to the nature and extent of the injury, except to ask him where he suffered pains so they can locate the injury, and to ask no questions about the circumstances of the infliction of the injury or in any way relating to plaintiff's claim.

The examination must be conducted in such a manner as to avoid the infliction of pain, the subjection to indignity, or the endangering of health or life.[46] Loose language has been used in some opinions to the effect that no anesthetics, opiates or drugs are to be used.[47] But this language is too broad: anesthetics, opiates or drugs may be employed where required if their use does not cause pain or endanger life or health. Thus in *Heilig v. Harrisburg Rys. Co.*,[48] defendant's doctors found it necessary to place in each of plaintiff's eyes three drops of holocain, a local anesthetic, something like a weak solution of cocaine. After the first drop, plaintiff, complaining of pain, stopped the doctor. The doctor explained to the court that the "pain" was a little sting, as when a drop of pure water hits the eye. In holding the use of such an anesthetic proper, the court said:

> "In the present case the mild anesthetic would have prevented pain. It was necessary to use in order to make the examination which was required to be made . . . It could not have hurt the plaintiff, and therefore he ought to have submitted himself to what was, in the development of science, a proper examination."

A realistic test as to the proper use of drugs and anesthetics was set forth and applied in a Kansas case:[49]

> "Drugs are of infinite shades of potency from the rankest poisonousness to absolute innocuousness . . . The question, therefore, is not if drugs should be used, but if an examination shall be made without serious inconvenience and without deleterious effect.

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[44] *Ibid.*
[45] *Ibid.*; Stasko et ux. v. Smith, 16 D. & C. 726 (1932).
[46] Hess v. R. R. Co., 7 C.C. 565 (1890).
[47] *Ibid.*
[48] Heilig v. Harrisburg Rys. Co., 17 D. & C. 509 (1932).
[49] Atchison, etc., Ry. Co. v. Palmore, 68 Kans. 545, 75 Pac. 509 (1904).

> "The conclusion to be drawn from the decisions, therefore, is that due precautions for the comfort and safety of the subject are the matters for primary consideration. With these provided for, the method and means employed should be left to the discretion of the expert making the examination."

X-ray examinations have been ordered, the court taking judicial notice of the fact that the X-ray is now in common use and that the science and art thereof have developed to a point where, in the hands of a specialist, there is little or no danger.[50]

The limits beyond which the court will not go in ordering an examination are illustrated in two cases from other jurisdictions. In one, a Wisconsin case,[51] plaintiff alleged permanent injuries to her bladder. She submitted to an examination by defendant's doctors, but refused to permit the introduction of a catheter into her bladder, on the ground that it would endanger her health. Defendant's doctors testified that their object was to withdraw all the urine from the bladder; that this was perfectly safe in a healthy bladder, but there were conditions of the bladder where this might be absolutely dangerous, causing the walls to come together, excite inflammation and produce decomposition. The trial court refused to grant the order. The appellate court affirmed, saying that it would have been an abuse of discretion to force the plaintiff to submit to such an experiment with instruments, under the circumstances stated.

And in a Kentucky case,[52] plaintiff, an unmarried girl, alleged internal injuries. In objection to defendant's request for a physical examination order, plaintiff's physicians told the court that the injury could not be determined objectively by an examination of her person, except by exploring the vagina and breaking the hymen, which was then intact, and that an examination could not be made without injury to her, causing her considerable pain. The order was refused, the appellate court affirming.

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[50]Stasko et ux v. Smith, 16 D. & C. 726 (1932).
[51]O'Brien v. City of La Crosse, 99 Wisc. 421, 75 N.W. 81 (1898).
[52]Louisville Ry Co. v. Hartledge, 74 S.W. 742 (1903).