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Expert Opinion From The Defendant-Physician

not contemplate extending coverage of the new rules to retrials. However, confusion will continue to exist until the problem disappears with the passage of time or at least until the United States Supreme Court provides definite guidelines.

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EXPERT OPINION FROM THE DEFENDANT-PHYSICIAN

Nearly every state has a statute allowing a litigant to call an adverse party to testify to "facts within his knowledge," that is, to what he actually saw and did.[1] In medical malpractice suits, however, the question arises whether an adverse witness may be required under the statute to testify not only to what he saw and did but also to whether his actions deviated from the accepted standard of medical practice in the community, testimony considered as "expert opinion." Most adverse witness statutes do not expressly prohibit one party from using the other as his expert witness.[2] While recognizing the right of a plaintiff in a malpractice action to call the defendant-physician as a witness, some courts have limited the testimony which may be elicited from such a witness to "non-expert opinion" testimony.[3] Other courts allow free and complete questioning just as if the witness had been called as an expert under ordinary circumstances.[4]

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[1]CAL. CIV. PRO. CODE § 2055 (West 1966); CONN. GEN. STAT. ANN § 52-178 (1958); COLO. REV. STAT. ANN. § 154-1-16 (1963); HAWAII REV. LAWS § 222-27 (1955); IDAHO CODE ANN. § 9-1206 (1967); ILL. REV. STAT. ch. 110, § 60 (Smith-Hurd 1958); IND. ANN. STAT. § 2-1728 (1958); KAN. STAT. ANN. § 60-243 (1964); MD. ANN. CODE art. 35, § 9 (1965); MASS. GEN. LAWS ch. 233:22 (1956); MICH. STAT. ANN. § 27A.2161 (1962); MINN. STAT. § 595.03 (1965); MISS. CODE ANN. § 1710 (1943); MO. REV. STAT. § 491.030 (1959); M.R. CIV. P., Rule 43(b) (1961); N.H. REV. STAT. ANN. ch. 516 § 24 (1947); N.J. REV. STAT. § 2A:81-11 (1937); NRCP 43(b) (1964); N.C. GEN. STAT. § 8-50 (1953); OHIO REV. CODE ANN. § 2317.07 (Baldwin 1966); OKLA. STAT. tit. 12, § 383 (1961); PA. STAT. ANN. tit. 28, § 324 (1958); S.C. CODE ANN. § 26-501 (1962); VT. STAT. ANN. tit. 12, § 1641 (1958); VA CODE ANN. § 8-291 (1950); WIS. STAT. ANN. § 885.14 (1961); and also, FED. R. CIV. P. 43(b).

[2]*See, e.g.*, CONN. GEN. STAT. ANN. § 52-178 (1958), "Any party to a civil action or probate proceeding may compel an adverse party, or any person for whose benefit such action or proceeding is instituted, prosecuted or defended, to testify as a witness in his behalf, in the same manner and subject to the same rules as other witnesses, and he may examine such party to the same extent as an adverse witness."

[3]*E.g.*, Osborn v. Carey, 24 Idaho 158, 132 P. 967 (1913); Ericksen v. Wilson, 266 Minn. 401, 123 N.W.2d 687 (1963); Hull v. Plume, 131 N.J.L. 511, 37 A.2d 53 (Ct. App. 1944).

[4]*E.g.*, Lawless v. Calaway, 24 Cal. 2d 81, 147 P.2d 604 (1944); Dark v. Fetzer, 6 Mich. App. 308, 149 N.W.2d 222 (1967); Rogotzki v. Schept, 91 N.J. Super. 135,

In *Dark v. Fetzer*[5] plaintiff consulted the defendant, Dr. Fetzer, in his capacity as an osteopathic physician. Upon examining the plaintiff, Dr. Fetzer found it necessary to perform a hysterectomy and to call in the second defendant, Dr. Sheets, for assistance. The operation resulted in the successful removal of a malignant tumor but also resulted in the puncture of the left ureter causing irregular drainage. The plaintiff later was readmitted to the hospital for a second operation which failed to correct the irregularity. She was finally referred to Dr. Reed Nesbit. At trial, plaintiff called Dr. Fetzer to the stand and cross-examined him under the adverse witness statute, but when plaintiff's counsel attempted to elicit expert opinion testimony from the defendant, an objection was raised and sustained. Judgment was entered for the defendant. On appeal the court found that the purpose of the adverse witness statute is to level former technical rules in order to arrive at the facts in issue. The court held that the plaintiff should have been allowed to call the doctors as adverse witnesses and to establish her case in chief through their expert testimony.[6]

If this practice is to be allowed there are two important questions peculiar to it that must be considered:[7] (1) Is it inconsistent for the plaintiff to present the physician as competent to testify as an expert witness, when by bringing the action he is attempting to discredit the physician's medical competence? (2) If the plaintiff's position is not inconsistent, will the court interpret the statute to *require* the physician to present evidence adverse to his defense?

The first and major question to be resolved is that of the witness' competency. In *Ericksen v. Wilson*[8] the court held that the plaintiff could not under the guise of the adverse witness statute force the de-

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219 A.2d 426 (1966); McDermott v. Manhattan Eye, Ear & Throat Hospital, 15 N.Y.2d 20, 203 N.E.2d 469 (1964).

[5]6 Mich. App. 308, 149 N.W.2d 222 (1967).

[6]*Id.* at 224-25.

[7]There is also the question of bias which is applicable to any testimony under an adverse witness statute but which deserves some mention here. In *Sturdivant Bank v. Wright,* 184 Mo. App. 164, 168 S.W. 355 (1914), an action on a note, defendant was placed on the stand by plaintiff and examined as a witness on plaintiff's behalf. Defendant testified that he had not signed the note; plaintiff subsequently asked for an instruction to the jury pointing out that the defendant had an interest in the suit and was biased. The court held that failure to give an instruction taking the interest of the adverse party into consideration was not reversible error. "[H]e was the witness called and placed upon the stand and examined by plaintiff, and it did not lie in the mouth of plaintiff to impeach or throw any slur in the character of the witnesses whom it had itself produced and tendered to the jury as a credible witness in the case." *Id.* at 357.

[8]266 Minn. 401, 123 N.W.2d 687 (1963).

fendant to become his expert witness. The court noted that this procedure should be disallowed particularly where, as in a malpractice action, the plaintiff is attempting to condemn the expertise of the defendant. The court apparently viewed the plaintiff's efforts to have the physician declared competent as a medical expert and incompetent as a medical practitioner to be inconsistent. The apparent inconsistency in this position requires careful scrutiny of the defendant-doctor's qualifications as an expert. Thus, the standard for measuring an expert's qualifications becomes particularly significant. If a common standard of qualifications can be found, this will at least supply plaintiff with a means of proving one of his seemingly self-contradictory points.

The court in *Dark* required that the calling party present the qualifications of the expert witness, but it did not mention standards for qualification. The court stated,

> Since there is no presumption that a witness is competent to give an opinion, it is incumbent upon the party offering the witness to show that the latter possesses the necessary learning, knowledge, skill, or practical experience to enable him to give opinion testimony.[9]

According to Professor Wigmore[10] the only true criterion is: can a jury receive appreciable help from the witness. In *State v. Killeen*[11] the Supreme Court of New Hampshire said,

> The test, therefore, to determine whether the court erred when it permitted the witness to testify [as an expert] . . . is to inquire whether there is any evidence from which it can be found that his knowledge . . . was such that his opinion might aid the jury in determining that issue.[12]

In keeping with this rather lenient standard, the court in *State v. Brewer*,[13] after allowing the judge to decide if the witness was qualified (the general rule today)[14] said, "[I]f there is any evidence that a witness is an expert, the decision of the court below will not be reviewed on appeal."[15]

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[9]149 N.W.2d at 225.

[10]7 J. WIGMORE, EVIDENCE § 1923 (3d ed. 1940).

[11]79 N.H. 201, 107 A. 601 (1919).

[12]*Id.* at 602.

[13]202 N.C. 187, 162 S.E. 363 (1932).

[14]Murray v. State, 214 Tenn. 51, 377 S.W.2d 918 (1964); Pruitt v. State, 216 Tenn. 687, 393 S.W.2d 747 (1965); State v. Brewer, 202 N.C. 187, 162 S.E. 363 (1932); State v. Cole, 67 Wash. 2d 522, 408 P.2d 387 (1965); State v. Moorer, 241 S.C. 487, 129 S.E.2d 330 (1963); State v. Percy, 80 S.D. 1, 117 N.W.2d 99 (1962); McNorton v. State, 338 S.W.2d 953 (Tex. Crim. App. 1960).

[15]162 S.E. at 364.

Notwithstanding the suggestion of incompetency in *Ericksen,* it is easily understandable that a physician could make a single mistake and still be considered proficient in his profession. It is possible for a doctor to make a medical mistake, or even be guilty of malpractice, and still be qualified to testify as an expert witness under the standard of Wigmore and *State v. Killeen.* The doctor would certainly have sufficient medical knowledge to aid and inform the laymen of the jury. Seemingly, the only time this would not be true is when a doctor attempted treatment entirely out of his field.

On the question of the intent of the adverse witness statute to require a defendant to render an expert opinion against himself, most courts stand firmly and decisively on one side or the other.[16] Courts not in accord with *Dark*[17] usually reason that it is not the intent of an adverse witness statute to allow a plaintiff to elicit expert opinion "under the guise of the cross-examination."[18] Prior to the enactment of these statutes, the calling party was bound by the testimony of an adverse witness and could not rebut such testimony by other evidence; nor could he impeach the witness by showing contradictory statements or lack of credibility under oath.[19] Courts not in accord with *Dark* hold that such statutes were enacted simply to alleviate this problem and to allow the calling party to have the adverse party testify without fear of being bound by his statements.[20] They reason that the statute was not intended to make adverse expert-opinion permissible. With this as the fundamental purpose of the statute, the courts seem to feel that there is little room for misunderstanding and that the statute is free from difficulty. These courts flatly reject the idea that the plaintiff should be allowed to make out his case in full through the testimony of the defendant-doctor.

In *Osborn v. Carey*[21] the court was in diametric opposition to the *Dark* rule when it said,

> Where a witness is called under the provisions of [the adverse witness statute] he may be examined by the adverse party as if under cross-examination, subject to the rules applicable to the examination of other witnesses, but it is contrary to the purpose

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[16]*See* Stearns v. Williams, 72 Idaho 276, 240 P.2d 833, 842 (1952); Plank v. Summers, 205 Md. 662, 109 A.2d 914 (1954). It was held that whether the adverse party witness testifies as an expert is within the discretion of the court.

[17]Ericksen v. Wilson, 266 Minn. 401, 123 N.W.2d 687 (1963); Osborn v. Carey, 24 Idaho 158, 132 P. 967 (1913); Hull v. Plume, 131 N.J.L. 511, 37 A.2d 53 (1944).

[18]Ericksen v. Wilson, 266 Minn. 401, 123 N.W.2d 687, 691 (1963).

[19]State v. Tilley, 239 N.C. 245, 79 S.E.2d 473 (1952).

[20]Forthofer v. Arnold, 60 Ohio App. 436, 21 N.E.2d 869 (1938).

[21]24 Idaho 158, 132 P. 967 (1913).

> and reason of that statute to allow the plaintiff to make out his case in chief by expert opinion evidence secured from the defendant on cross-examination.[22]

The court gave no reason for its decision other than interpretation of the statute. However, it has been held that a defendant-physician cannot be required to give expert testimony because under the rules of examination and cross-examination an expert may be asked for his testimony only when he has voluntarily contracted to give it.[23]

The leading case of *Lawless v. Calaway*[24] involved a malpractice suit for defendant-physician's negligence in making an incorrect diagnosis of appendicitis which resulted in the death of plaintiff's minor son. The case set the precedent for the modern trend toward allowing the plaintiff to utilize the defendant as his expert witness.[25] The court held that the defendant may be compelled to testify concerning facts and opinion material to the case and therefore, may be called to prove the entire case of the calling party. As pointed out in *McDermott v. Manhattan Eye, Ear & Throat Hospital*,[26] where plaintiff lost sight in her left eye after an operation by defendant-doctor, it is at least arguable that the doctor's knowledge of the standard of medical practice, as well as his knowledge of his own deviation from this standard, become matters of "fact" rather than opinion when the doctor testifies. In other words, an independent expert renders only an *opinion* of whether the defendant's conduct was negligent, but the defendant can testify "factually" as to whether his conduct was in keeping with local standards. Therefore, it might be said that what was traditionally rendered as expert opinion has now become fact because of the expert's (defendant's) peculiar position in the case. Because of the traditional requirement that expert opinion testimony is necessary to sustain plaintiff's case this theory results in plaintiff's failure to prove his case. By viewing defendant's testimony as fact rather than opinion, plaintiff would lack the expert opinion testimony vital to his case and would be subject to non-suit. It is submitted, however, that classifying the defendant-physician's testimony as fact should

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[22] *Id.* at 970.

[23] Hull v. Plume, 131 N.J.L. 511, 37 A.2d 53 (1944).

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

[25] Anderson v. Stump, 42 Cal. App. 2d 761, 109 P.2d 1027 (Dist. Ct. App. 1941); Lawless v. Calaway, 24 Cal. 2d 81, 147 P.2d 604 (1944); Scott v. Sciaroni, 66 Cal. App. 577, 226 P. 827 (1924); Harnden v. Mischel, 63 N.D. 122, 246 N.W. 646 (1933); Sax Motor Co. v. Belfield Farmer's Union Elevator Co., 62 N.D. 727, 245 N.W. 488 (1932); Rogotzki v. Schept, 91 N.J. Super. 135, 219 A.2d 426 (1966); *see* Bolles v. Kinton, 83 Colo. 147, 263 P. 26 (1928); Jacobs v. Grigsby, 187 Wis. 660, 205 N.W. 394 (1925).

[26] 15 N.Y.2d 20, 203 N.E.2d 469 (1964).

have no bearing on plaintiff's case. Admittedly, such a classification would deviate slightly from the traditional requirement of expert opinion testimony but it would come much closer to fulfilling the purpose of the requirement. The entire reason for requiring expert opinion testimony is to discover if, in the opinion of the expert, the defendant-physician's conduct was in keeping with the standards of the medical community. An independent expert was called simply because prior to the enactment of adverse witness statutes plaintiff was not allowed to gain this information by examining the defendant. Obviously, the defendant is in a better position to give this information than an independent expert and the purpose of the requirement is better served by allowing this practice.

McDermott also held that the "obvious" underlying purpose of the adverse witness rule is to allow the production of all relevant evidence available from the parties. Furthermore, the court did not feel that this practice was unfair. The defendant in a civil case, unlike his counterpart in a criminal case, has no inherent right to remain silent on questions that might adversely effect his case. Instead of remaining silent, he must, if called as a witness, deliver even information that may make out the plaintiff's case in full—including expert opinion testimony.[27]

> Courts are intent upon arriving at just decisions and upon employing properly expedient means to attain such an end. If a 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.[28]

It is well known that the inability of a plaintiff to obtain the indispensable part of a malpractice suit, expert medical testimony, is quite often a major problem. There is inherent in this problem a question of the propriety of soliciting one expert's (physician's) opinion of another, a question of ethics, and a general reluctance among physicians to comment adversely on their colleague's conduct.[29] A few doctors may be influenced by an "I may be next" feeling, fears of revocation of their insurance, social ostracism, or restriction of their practice. All of these reasons, coupled with the fact that the group

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[27]*Id.*

[28]*Id.* at 474.

[29]*See* Belli, *An Ancient Theraphy Still Applied: The Silent Medical Treatment,* 1 VILL. L. REV. 250 (1956); Note, *The California Malpractice Controversy,* 9 STAN. L. REV. 731 (1957).