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Torts - Obstruction of a Civil Action - Coercion by a Medical Association to Preclude Availability of Expert Testimony in a Medical Malpractice Action

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TORTS—OBSTRUCTION OF A CIVIL ACTION—COERCION BY A MEDICAL ASSOCIATION TO PRECLUDE AVAILABILITY OF EXPERT TESTIMONY IN A MEDICAL MALPRACTICE ACTION — Plaintiff approached nine physicians in an attempt to secure an expert witness for a medical malpractice action.[1] All nine refused, allegedly as a result of threats by the county medical association to expel them and cause a cancellation of their malpractice liability insurance if they testified. The association's actions stemmed from a finding by its "malpractice committee" that the malpractice defendant had not been negligent. Plaintiff then brought this action against the association to recover compensatory and punitive damages for obstruction of a civil action.[2] On appeal from an order granting a motion for nonsuit, *held,* affirmed. No cause of action can arise from inducing one to assert his legal rights.[3] *Agnew v. Parks,* (Cal. App. 1959) 343 P. (2d) 118.

[1] The plaintiff's first malpractice trial ended in a nonsuit, reversed on appeal. Agnew v. City of Los Angeles, 82 Cal. App. (2d) 616, 186 P. (2d) 450 (1947). The second resulted in a judgment for the defendant, reversed on appeal. Agnew v. City of Los Angeles, 97 Cal. App. (2d) 557, 218 P. (2d) 66 (1950). The third trial, pending when the instant action was brought, resulted in a $37,883.91 judgment, affirmed on appeal, 134 Cal. App. (2d) 433, 286 P. (2d) 566 (1955).

[2] A second cause of action was directed against the medical association and a Dr. Parks, for conspiracy to defraud.

[3] A second basis for the decision was a holding that the action was partially barred by the statute of limitations.

The expert testimony of a local physician is necessary to make out a prima facie case in virtually every malpractice action.[4] It has been asserted that an awareness of this fact on the part of medical groups has in some instances resulted in the use of a "conspiracy of silence"[5] as a means of stemming the surging tide of malpractice litigation.[6] The principal case embodies the first direct action by a malpractice claimant against a medical association for damages as a result of its enforcement of such a "conspiracy." It is clear, as the court held, that an individual physician has no duty to testify upon the mere request of a claimant. A contrary result would mean that a claimant could indirectly compel expert testimony, a power which the law has placed within the discretion of the court.[7] But the court's further conclusion, that simply because a physician has no duty to testify the actions of a third party[8] forcing him not to testify are therefore necessarily lawful, seems unsound. While the actions of the medical association do not precisely fit into any nominate tort category, they do appear to fall within principles derived from closely analogous cases. Where one party is in need of services which in the normal course of events would be available to him, a third party whose negligent intervention is the sole reason why such services are not forthcoming has been held liable to the potential beneficiary for resulting damages, notwithstanding the fact that the potential source of such services was under no legal duty to render them.[9] The principal case presents

4 See 2 HARPER AND JAMES, TORTS §17.1, pp. 968, 969 (1956). Some moves have been made toward liberalizing the means whereby a plaintiff can get his case to the jury without expert testimony, such as a broadened doctrine of res ipsa loquitur [e.g., Ybarra v. Spangard, 25 Cal. (2d) 486, 154 P. (2d) 687 (1944)], an expansion of the field of "common knowledge" where the jury may fix the standard of care [e.g., Malone v. Bianchi, 318 Mass. 179, 61 N.E. (2d) 1 (1945)] and statutes permitting the use of textbooks in lieu of expert testimony [e.g., Mass Laws Ann. (1949) c. 233, §79c]. However, expert testimony is still necessary in the vast majority of cases.

5 See Huffman v. Lindquist, 37 Cal. (2d) 465 at 484, 234 P. (2d) 34 (1951) (dissenting opinion).

6 For a recent statistical treatment, see Stetler, "The History of Reported Medical Professional Liability Cases," 30 TEMPLE L.Q. 366 (1957).

7 The court has the inherent power to compel testimony, including expert testimony [2 WIGMORE, EVIDENCE, 3d ed., §563 (1940)], qualified in some jurisdictions by the requirement of a tender of adequate compensation before an expert will be compelled to prepare himself and to render expert opinion testimony. Note, 25 ILL. L. REV. 344 (1930). In California this power is codified in Cal. Code Civ. Proc. (Deering, 1949) §1871.

8 The plaintiff labelled her action as one for conspiracy, but the court held that since there was no legal wrong, there could be no conspiracy to commit a legal wrong. Cf. PROSSER, TORTS, 2d ed., 235 (1955). For the relevance of concerted actions in determining the existence of a legal wrong, see note 15 infra.

9 See PROSSER, TORTS, 2d ed., 188 (1955). In Concordia Fire Ins. Co. v. Simmons Co., 167 Wis. 541, 168 N.W. 199 (1918), the defendant negligently ruptured the municipal water intake pipe, shutting off all water service. Seven days later, plaintiff's house caught on fire and was lost solely because of the lack of water. The facts that the municipality was not providing the service to the plaintiff when the defendant acted and that it had no duty to provide such services were held immaterial, and the defendant was held liable. See also Gilbert v. New Mexico Constr. Co., 39 N.M. 216, 44 P. (2d) 489 (1935). The same

an even stronger basis for liability since the defendant's intervention was intentional and since the services lost were admitted by the demurrer to be otherwise available to the plaintiff.[10] Another line of authority would appear to be even more relevant.[11] The acts of a trade[12] or professional[13] association in unjustifiably[14] coercing its members into a concerted boycott[15] of the trade or profession of another has been held actionable. As one writer states the rule, ". . . it now seems generally agreed . . . that there are certain types of conduct, such as boycotts, in which the element of concert adds such a power of coercion . . . that it makes unlawful acts which one man alone might legitimately do."[16] Although these cases have arisen principally in the area of unfair competition, there seems to be little in principle to distinguish them from the principal case. On the one hand, a business is lost; on the other, a cause of action, but in both an unjustifiable internal group coercion has resulted in concerted action depriving another of the prospective advantage he was otherwise free to receive. In being deprived of voluntary expert testimony, the plaintiff suffered an injury. While it is true that a court could subpoena expert testimony, although this is not a matter of right,[17] a man who is forced to testify is not likely to be as favorable as one who agrees to do so, especially when the reason he does not appear voluntarily is that his medical association has actively condemned the plaintiff's claim. The medical profession is seriously and perhaps justifiably concerned about the present

principle has been recognized in California in Hanlon Dry Dock & S. Co. v. So. Pac. Co., 92 Cal. App. 230, 268 P. 385 (1928), approved in Commercial Union Assurance Co. v. Pacific Gas and Electric Co., 220 Cal. 515, 31 P. (2d) 793 (1934).

[10] Even absent such an admission, it would appear that as a rule expert testimony is available to a malpractice claimant. The large number of malpractice actions before the courts (see note 6 supra), virtually all involving expert testimony (see note 4 supra), coupled with the fact that the medical association felt it necessary here to take affirmative steps to preclude expert testimony from being given, attest to its availability in the normal course of events.

[11] See, generally, PROSSER, TORTS, 2d ed., §107 (1955) ("Interference with Prospective Advantage").

[12] E.g., Martell v. White, 185 Mass. 255, 69 N.E. 1085 (1904).

[13] E.g., Pratt v. British Medical Association, [1919] 1 K.B. 244.

[14] The presence or absence of justification in the traditional commercial boycott case, e.g., Martell v. White, note 12 supra, is usually determined by balancing the injury to the individual's freedom to carry on his trade against the interest of the association in engaging in free competition. In the principal case, the interests to be balanced are those of the association in insulating one of its members from legal liability as opposed to those of the plaintiff in obtaining the most favorable hearing of her claim that the law will allow, a balance clearly in the plaintiff's favor.

[15] It is by analogy to the commercial boycott cases that the element of concert becomes relevant. See note 8 supra. As Dean Prosser puts it, ". . . the individual is limited in the damage he can do by his own capacity for economic pressure or persuasion. A combination has far greater potentialities of coercion, not only of others but also *of its own reluctant members*. . . ." PROSSER, TORTS, 2d ed., §107, p. 755 (1955) (emphasis added). See also Wyman, "The Law as to Boycott," 15 GREEN BAG 208 (1903).

[16] PROSSER, TORTS, 2d ed., 236 (1955).

[17] See note 7 supra.

state of the law in the medical malpractice area.[18] But its efforts to correct the situation should be within the law, perhaps in seeking remedial legislation. In the principal case, the county medical association, a somewhat less than impartial tribunal, tried the plaintiff's case against one of its members, found in favor of the member, and then used its unique position of power over every potential witness to insure that its decision would not be upset in a court of law. Surely no profession should be able to stand above the law by being permitted to determine for itself the professional liability of its members. Such, however, appears to be the result of the principal case.

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[18] For an extensive popular treatment of the reasons for the medical profession's concern, see Silverman, "Medicine's Legal Nightmare," SAT. EVE. POST, April 11 (p. 13), April 18 (p. 31) and April 25 (p. 36), 1959.