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Notes and Comments

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Compulsory Physical Examination of Plaintiff in Personal Injury Cases

Whether or not a plaintiff in a personal injury action can be compelled to submit to a physical examination upon defendant's motion, so as to demonstrate the nature and scope of the injuries, if any, is a much controverted issue before the bench and bar of Illinois. As neither the Civil Practice Act nor the Rules of the Supreme Court make any specific provision for this type of discovery to aid the defendant, any discussion of the problem necessarily resolves itself into an investigation as to whether or not common-law courts possessed that power as an inherent part of their jurisdiction so that it may be said to inure in our constitutional nisi prius courts.

Some of the earlier American cases which deny the right to such examination state that it was contrary to the procedure at common law,[1] but these declarations are of dubious value. Careful investigation shows that compulsory physical examination was recognized at common law, for, in cases involving the determination of heirship where posthumous issue was anticipated, the writ *De Ventre Inspiciendo*[2] might issue.[3] In the ecclesiastical courts, where annulment of marriage was sought on the ground of impotency, examination of the parties by medical experts was the common practice.[4] Moreover, the early records abound with illustrations of maimed and wounded victims exhibiting their injuries to grand and petit juries.[5] Scarcely a criminal case was tried in which the defendant was not compelled to rise so that he might be identified by the witnesses, a compulsory form of inspection of his person which even his efforts at disguise would not prevent.[6] It is not surprising,

[1] Parker v. Enslow, 102 Ill. 272 (1882); Union Pacific Ry. Co. v. Botsford, 141 U. S. 250, 11 S. Ct. 1000, 35 L. Ed. 734 (1891); Camden & Suburban Ry. Co. v. Stetson, 177 U. S. 172, 20 S. Ct. 617, 44 L. Ed. 721 (1900).

[2] Bouvier, 8th Ed., defines such writ as: "A writ to inspect the body where a woman feigns to be pregnant, to see whether she is with child."

[3] See, for example, Lady Willoughby's Case, Moore (K.B.) 523, 72 Eng. Rep. 733 (1596); Theaker's Case, Cro. Jac. 686, 79 Eng. Rep. 595 (1624). For an illustration of its use in the United States, see State v. Arden, 1 Bay (S. Car.) 487 (1795).

[4] See, for example, N—r v. M—e, 2 Rob. Ecc. 625, 163 Eng. Rep. 1435 (1853).

[5] Illustrations may be found in Select Pleas of the Crown (A.D. 1200-1225), 1 Selden Society, p. 2, case 4; p. 5, case 11; and p. 11, case 27. The value of such examinations is disclosed by ibid., p. 9, case 23, where an appeal for housebreaking and maiming collapsed because it appeared the wound was of more recent date than that alleged in the charge.

[6] See Trial of Capt. Thomas Vaughan, 13 Howell's State Trials 485 (1696), in which defendant was compelled to remove a wig so that the natural color of his hair could be ascertained. For a collection of cases dealing with the physical examination of the defendant in a criminal case, see People v. Corder, 244 Mich. 274, 221 N. W. 309 (1928).

therefore, to find at least one prominent authority stating that compulsory physical examination was recognized at common law.[7]

Other jurisdictions, beside Illinois, have been confronted with this same problem and have achieved variant results. It is particularly interesting and enlightening to note the manner in which the Federal courts have dealt with the issue. Prior to the passage of the Federal statute which authorized the United States Supreme Court to adopt rules of procedure,[8] it was held that no power existed in the Federal courts to compel a person suing for personal injuries to submit to a medical examination. The majority opinion in *Union Pacific Railway Company* v. *Botsford*,[9] long the leading case on the subject, states: "The order moved for, subjecting the plaintiff's person to examination by a surgeon, without her consent and in advance of trial, was not according to the common law, to common usage or to the statutes of the United States."[10] Though the right to the inviolability of the person seemed to influence the majority, the assumption that there was no common-law authority for such practice must also have carried some weight.[11] Mr. Justice Brewer, however, wrote a vigorous dissent in which he said: "The end of litigation is justice. Knowledge of the truth is essential thereto."[12]

The Botsford case continued to be the rule of the federal courts until the adoption of the Federal Rules of Civil Procedure. Pursuant to congressional authority given in 1933, the United States Supreme Court adopted Rule 35 which empowers the court to order such an examination.[13] Since then, there has been little doubt that the federal courts have the power, in a proper case, to order a party plaintiff to submit to such a physical examination and they have not hesitated to use it. The case of *Beach* v. *Beach*,[14] and the more recent case of *Sibbach* v. *Wilson & Company, Inc.*,[15] serve to illustrate the use that may be made of such power. Though the Botsford case indicated that the plaintiff's right to be free from involuntary examination was a sub-

7 Wigmore, Evidence, 3rd Ed., § 2220.

8 28 U. S. C. A. § 723c.

9 141 U. S. 250, 11 S. Ct. 1000, 35 L. Ed. 734 (1891).

10 141 U. S. 250 at 257, 11 S. Ct. 1000 at 1003, 35 L. Ed. 734 at 740.

11 The court cited an Illinois case, Parker v. Enslow, 102 Ill. 272 (1882), which case contains statements to that effect and may have had some influence upon the decision.

12 141 U. S. 250 at 258, 11 S. Ct. 1000 at 1003, 35 L. Ed. 734 at 740.

13 Rule 35 provides: "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." 28 U. S. C. A. following 723c.

14 114 F. (2d) 479 (1940), noted in 19 CHICAGO-KENT LAW REVIEW 198.

15 312 U. S. 1, 61 S. Ct. 422, 85 L. Ed. 479 (1941), reversing 108 F. (2d) 415 (1939).

stantial one,[16] the rationale of the Sibbach case necessarily treats the problem as one of procedural cognizance, for the only authority given to the United States Supreme Court was to adopt rules of "procedure." It would follow, therefore, that any court possessing rule-making power could deal with the problem without the aid of legislation.

Despite the earlier Federal rule, the great weight of authority throughout the states supports the proposition that courts have the inherent power to order a reasonable physical examination of a plaintiff in a personal injury action.[17] One of the earliest cases adhering to such view is *Schroeder* v. *Chicago, Rock Island & Pacific Railway Company*,[18] in which the Iowa court held that it had such power in the interest of exact justice. The court there stated: "Whoever is a party to an action in a court. . .has a right to demand therein the administration of exact justice. This right can only be secured and fully respected by obtaining the exact and full truth touching all matters in issue in the action. If truth be hidden, injustice will be done. The right of the suitor, then, to demand the whole truth is unquestioned; it is the correlative of the right to exact justice. It is true, indeed, that on account of the imperfections incident to human nature perfect truth may not always be attained, and it is well understood that exact justice cannot, because of the inability of courts to obtain truth in entire fullness, be always administered. We are often compelled to accept approximate justice as the best that courts can do in the administration of the law. But while the law is satisfied with approximate justice where exact justice cannot be attained, the court should recognize no rules which stop at the first when the second is in reach."[19] The arguments advanced by the Iowa court are certainly cogent when compared to those advanced by the courts adhering to the minority view.

The Illinois case law on the subject, of paramount importance to us, rests primarily upon the decision in *Parker v. Enslow*,[20] which denied that a court of this state has the power to make and enforce an order for a physical examination. The court there said: "Complaint is also made that the court refused to compel appellee to submit his eyes to the examination of a physician in the presence of the jury. There was no error in this. The court had no power to make or enforce such an order."[21] Though no explanation was given, it should be noted that the

[16] Being matter of substance, legislation would be necessary to remove it.

[17] See cases listed in 17 Am. Jur., Discovery, § 55; 18 C. J., Discovery, § 100; 25 C. J. S., Damages, § 174; 108 A. L. R. 142. Contra: Parker v. Enslow, 102 Ill. 272 (1882); Joliet St. Ry. Co. v. Caul, 143 Ill. 177, 32 N.E. 389 (1892); Union Pacific Ry. Co. v. Botsford, 141 U. S. 250, 11 S. Ct. 1000, 35 L. Ed. 734 (1891); Camden & Suburban Ry. Co. v. Stetson, 177 U. S. 172, 20 S. Ct. 617, 44 L. Ed. 721 (1900); Stack v. N. Y., N. H. & H. R. Co., 177 Mass. 155, 58 N. E. 686, 52 L. R. A. 328 (1900); McQuigan v. Delaware, L. & W. R. Co., 129 N. Y. 50, 29 N. E. 235, 14 L. R. A. 466 (1891).

[18] 47 Iowa 375 (1877).

[19] 47 Iowa 375 at 379.

[20] 102 Ill. 272 (1882).

[21] 102 Ill. 272 at 279.

requested examination was to be made *in the presence of the jury.* The court might well have held this to be improper, without resorting to the broader ground that the court had no power to grant the motion. In any event, the ruling therein was followed in subsequent cases.[22] As a necessary corollary to such rule, it has been regarded as improper for defendant's counsel, on cross-examination, to ask plaintiff if he or she would be willing to submit to a physical examination.[23] It has likewise been held that it is prejudicial error for plaintiff's attorney to argue to the jury that defendant could have had the plaintiff examined had he seen fit, for such statements clearly constitute a misstatement of the law.[24] In arriving at this last holding, the court used rather strong language indicating that legislation would be required before examination was possible. It there said: "There is no law under which the court could direct or control such an examination, and, until the people of this State, acting through their representatives in the General Assembly, determine that the administration of justice requires that such authority be vested in the courts, defendants in personal injury actions will not be permitted to do indirectly what they cannot do directly."[25]

The most recent pronouncement on this subject by the Supreme Court of Illinois was made in the case of *Chicago, Rock Island & Pacific Railway Company* v. *Benson,*[26] in which case, during the trial and out of the presence of the jury, defendant's counsel moved to have plaintiff examined by a doctor in the presence of plaintiff's doctors and under the direction of the court. The motion was denied and error was predicated on such ruling. On this point the court said: "While it would seem that there might be some good reasons advanced for a contrary rule. . .it was the settled law of this State that the plaintiff in an action of this kind could not be required to submit to a physical examination as to his injuries. . . To this rule we now adhere."[27] No matter what common-law authority our courts may have possessed on this point, the tenor of these decisions indicates they do not now possess it. It should be remembered, however, that although it appears unlikely that the Illinois Supreme Court will alter its views, still all of the Illinois decisions on the subject were rendered prior to the passage of the Illinois Civil Practice Act.

There is no statute in Illinois which expressly grants the power to order a compulsory physical examination, but is there any statute which authorizes such by implication? In this regard it might be noted that

[22] St. Louis Bridge Co. v. Miller, 138 Ill. 465, 28 N. E. 1091 (1891); Joliet St. Ry. Co. v. Caul, 143 Ill. 177, 32 N. E. 389 (1892); Peoria, Decatur & Evansville Ry. Co. v. Rice, 144 Ill. 227, 33 N. E. 951 (1893); People v. Scott, 326 Ill. 327, 157 N. E. 247 (1927).

[23] City of Chicago v. McNally, 227 Ill. 14, 81 N. E. 23 (1907).

[24] Mattice v. Klawans, 312 Ill. 299, 143 N. E. 866 (1924).

[25] 312 Ill. 299 at 307, 143 N. E. 866 at 869.

[26] 352 Ill. 195, 185 N. E. 244 (1933).

[27] 352 Ill. 195 at 201, 185 N. E. 244 at 247.

Section 2 of the Illinois Civil Practice Act confers upon the Supreme Court the power to make rules "supplementary to but not inconsistent with the provisions of this Act."[28] If one is willing to accept the premise of the Sibbach case that such a matter is but one of procedure, the authority of Section 2 would seem to be broad enough to warrant the Supreme Court promulgating a rule on the subject. This is particularly true when Section 4 of the Illinois Civil Practice Act[29] is also taken into consideration. The most persuasive argument advanced against such reasoning is the fact that a negative vote on the whole Act was feared unless the provision for compulsory physical examination was dropped from the tentative draft thereof prior to its submission to the legislature. Subsequent amendments made to the discovery provisions of the Act might indicate a legislative purpose not to confer power over this subject on the courts,[30] so that any rule it might make would be open to the charge that it was "inconsistent with" and not "supplementary to" the provisions of the statute.

But the underlying philosophy of the Civil Practice Act, however, might well warrant adoption of such a rule, for when exercised under proper court supervision, it is as proper a method of ascertaining the truth as are the provisions for the production of documents, the taking of pre-trial discovery from the parties, and the like, all of which are designed to aid a party to get the true facts prior to trial.

When a plaintiff submits his cause to the court, he consents to all reasonable rules of the particular tribunal. If he chooses to sue in the courts of the United States, he must, now, under the rules thereof, submit to physical examination or face the dismissal of his suit. If he is an injured employee seeking compensation, he must, by reason of the provisions of the Workmen's Compensation Act, undergo a physical examination.[31] The claim that such examination invades his right of inviolability of person is answered by the words of an Iowa court which once said: "As to indignity to which an examination would have subjected him. . .it is probably more imaginary than real."[32] If, as Mr. Justice Brewer said, the end of litigation is justice, then knowledge of the full truth is essential.

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28 Ill. Rev. Stat. 1941, Ch. 110, § 126.

29 Ill. Rev. Stat. 1941, Ch. 110, § 128.

30 The revisions and additions made in 1941, see Laws 1941, II, 465-6, Ill. Rev. Stat. 1941, Ch. 110, §§ 181-2a, were all made subject to such rules as might be adopted to make the revisions effective. The Supreme Court exercised the power, see Rules 15, 16 and 23A in 378 Ill. 10-2.

31 Ill. Rev. Stat. 1941, Ch. 48, § 149.

32 Schroeder v. Chicago, Rock Island & Pacific Ry. Co., 47 Iowa 375 at 382 (1877).