

April 1957

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Recommended Citation

H. R. Winton Jr., *Judicial Power to Compel Submission to Physical Examination*, 35 Chi.-Kent L. Rev. 116 (1957).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol35/iss2/2>

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NOTES AND COMMENTS

JUDICIAL POWER TO COMPEL SUBMISSION TO PHYSICAL EXAMINATION

Recognition by the Illinois Supreme Court, through the medium of the holding in the case of *People ex rel. Noren v. Dempsey*,¹ of the existence of power on the part of a trial court to order the plaintiff in a personal injury action to submit to a physical examination at the instance of the defendant should serve to plug a major loophole in Illinois discovery practice.² The case in question, an original proceeding in mandamus³ to compel a trial judge to expunge an order that had required a plaintiff in a civil suit pending before him to submit to an examination to determine the extent of his injuries arising from an automobile accident, not only produced a holding supporting the order so entered but also led to a specific overruling of all prior Illinois cases to the contrary. Further effort to secure legislation on the point would now seem to be unnecessary. Nevertheless, there is occasion to consider whether some codification of the point in the form of a court rule on the subject might not be desirable.

In the case mentioned, the Supreme Court, speaking unanimously through an opinion drafted by Justice Schaefer, pointed out that the doctrine of want of power to order a physical examination, first asserted in *Parker v. Enslow*,⁴ rested upon a holding unsupported by citation to authority; that such a power had existed at common law;⁵ and that courts of other jurisdictions had recognized the presence of this power as being one inherent in a trial court.⁶ Only two possible explanations to support the earlier view were said to exist. One of these, the now outmoded "inviolability of person" theory, had been expressed by a majority of the judges of the United States Supreme Court in the case of *Union Pacific Railway Company v. Botsford*,⁷ but was found to be inappropriate in the

¹ 10 Ill. (2d) 288, 139 N. E. (2d) 780 (1957).

² See Esling, "Compulsory Physical Examination of Plaintiff in Personal Injury Cases," 21 CHICAGO-KENT LAW REVIEW 181 (1943), and O'Connor and Rosch, "Does Illinois Need a Compulsory Examination Law," 42 Ill. B. J. 160 (1953).

³ Ill. Const. 1870, Art. VI, § 2.

⁴ 102 Ill. 272 (1882).

⁵ Wigmore, Evidence, 2d Ed., Vol. 4, § 2220, p. 723.

⁶ *Cook v. Miller*, 103 Conn. 267, 130 A. 571 (1925); *Brown v. Hutzler Bros. Co.*, 152 Md. 39, 136 A. 30, 51 A. L. R. 177 (1927); *S. S. Kresge Co. v. Trester*, 123 Ohio St. 383, 175 N. E. 611 (1931); *Cohen v. Philadelphia Rapid Transit Co.*, 250 Pa. 15, 95 A. 315 (1915).

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

face of a basic principle in the law of evidence that "what is relevant is admissible."⁸ The second, to the effect that the matter of requiring an examination was one for the legislature not the courts,⁹ was said not only to ignore common law precedents which authorized such examinations where necessary but struck more nearly against the inherent power of a court to regulate matters relating to judicial procedure.¹⁰

Whatever the federal doctrine may one time have been, it is clear that federal trial courts now possess the power to require the plaintiff to submit to a physical examination under an express rule on the point,¹¹ which rule was upheld and enforced in the case of *Sibbach v. Wilson & Company, Inc.*¹² While the last-mentioned case dealt specifically with the problem as it related to a federal court, the holding therein would indicate that any state court vested with rule-making power in relation to procedural matters could impose a similar requirement, even in the absence of special statutory authority.¹³ The step taken by the Illinois Supreme Court in overruling the Parker case is, then, both a sound one and buttressed by reason.

Aided, in all probability, by the achievement accomplished by federal courts, the Illinois Supreme Court, in the course of the opinion aforementioned, summarized the conditions it would require to be observed in order to call the power as to examinations into operation. In that connection, it noted that the petition for the entry of the order in question before it had alleged (1) that the litigant was without information as to the nature and extent of the plaintiff's injuries; (2) that he had no means of getting that information except by an independent physical examination; and (3) that the information was necessary to enable him to prepare for trial. In addition it was noted (4) that there was no suggestion by the plaintiff that the physical examination would involve any unusual hazard; (5) no objection had been made as to the competence of the examining physician, or as to the unreasonableness of the time and place fixed for the examination; and (6) the petitioner had stated that

⁸ See 10 Ill. (2d) 288 at 293, 139 N. E. (2d) 780 at 783.

⁹ *People ex rel. Wayman v. Steward*, 249 Ill. 311, 94 N. E. 511, 33 L. R. A. (N. S.) 259 (1911).

¹⁰ *People v. Callopy*, 358 Ill. 11, 192 N. E. 634 (1934). Legislative interference with that power would be unconstitutional according to *Agran v. Checker Taxi Co.*, 412 Ill. 145, 105 N. E. (2d) 713 (1952).

¹¹ 28 U. S. C. A., Fed. Rules of Civ. Pro., Rules 17 to 51, but particularly Rule 35(a).

¹² 312 U. S. 1, 61 S. Ct. 422, 85 L. Ed. 479 (1941).

¹³ See note in 19 CHICAGO-KENT LAW REVIEW 198.

all incidental expenses would be borne by him.¹⁴ These requirements are substantially similar to those existing in most of the states which recognize this power,¹⁵ but it should be emphasized that the exercise of the power, where it exists, is not a matter of absolute right in favor of the defendant, being more nearly one within the discretion of the trial court and subject to review only in case of a clear showing of an abuse of discretion.¹⁶

Concerning the extent of the examination that can be so made, it is well settled that no court would have authority to compel a plaintiff to submit to an examination that might endanger his health so, while x-ray examination¹⁷ and blood-testing¹⁸ has been permitted, requests have been denied, as being too hazardous, in cases where the plaintiff was asked to undergo an electrical test¹⁹ or to submit to an excision of cells from a growth, amounting to an operation, even though the operation could well lessen the effect of the injury.²⁰

In line with the other conditions noted by the Illinois Supreme Court, it has been held that the person to be examined may base an objection upon the character and professional standing of the examining physician, but may not merely advance a personal dislike.²¹ It would, however, be appropriate for a female plaintiff to insist upon being examined by a physician of the same sex.²² There must be a timely request for the examination,²³ the time and place of which must be reasonable, and the expense must be paid by the party making the request.²⁴ Whether more than one examination may be granted depends upon the particular circumstances of each case, but the prevailing view is that a failure to make or complete an examination when a full opportunity existed to do so, or a failure to show the presence of some new development, will cause the

¹⁴ The statement of the requirements appears in 10 Ill. (2d) 288 at 294, 139 N. E. (2d) 780 at 784. The court commented on the fact that the order was silent as to the "expenses" to be borne by the petitioner but assumed they would include reimbursement of the plaintiff for "any wages" he might lose by complying with the order.

¹⁵ See cases collected in an annotation in 51 A. L. R. 183.

¹⁶ *S. S. Kresge Co. v. Trester*, 123 Ohio St. 383, 175 N. E. 611 (1931).

¹⁷ See cases collected in an annotation in 108 A. L. R. 142, particularly p. 145.

¹⁸ *Hayt v. Bresster & Gordon Co., Inc.*, 199 App. Div. 68, 191 N. Y. S. 176 (1892).

¹⁹ *Sterns Coal & Lumber Co. v. Williams*, 177 Ky. 698, 198 S. W. 54 (1917).

²⁰ *Andrus v. Fomfara*, 3 N. J. Misc. 261, 127 A. 788 (1925).

²¹ *Black v. Biogier*, 139 Misc. 100, 248 N. Y. S. 555 (1931).

²² In *Bloom v. Brooklyn & Queens Transit Corp.*, 151 Misc. 136, 272 N. Y. S. 511 (1934), an order was vacated which directed a male physician to examine a female infant.

²³ *O'Brien v. Sullivan*, 107 Neb. 512, 186 N. W. 532 (1922).

²⁴ *Boggs v. Gosser*,—Mo. App.—, 55 S. W. (2d) 722, 108 A. L. R. 142 (1932).

right to be forfeited, particularly so where to grant the request would delay the trial.²⁵

While existing precedent elsewhere may be said to have covered most of the problems apt to arise in this connection, there is one point not touched upon by the Illinois Supreme Court at the time it decided the Dempsey case. The opinion notes that the order granted therein required that the plaintiff be given a copy of the report and findings of the examining physician,²⁶ but it is possible that this may have been based on an agreement between the parties who directed their principal attention to the fundamental question concerning the presence or absence of a judicial power to enter an order on the point. There is occasion to doubt whether, if questioned, this particular provision in the order would have stood up under a direct attack. In the recent Ohio case of *Schroeder v. Cincinnati Street Railway Company*,²⁷ for example, the injured plaintiff, following upon an order for a physical examination, requested that the physician be required to file a copy of his report with the clerk of the court. Although the court found that the examination was necessary to enable the defendant to prepare its defense, the court said there was no compelling reason why this report should be recorded so it denied the plaintiff access thereto. A somewhat similar result was recently attained in the New York case of *Swiatlowski v. Kasprzyk*,²⁸ except that, in New York, the power to compel a plaintiff to submit to an examination rests upon a statute.²⁹ A majority of the court there felt that it would be unfair to require the defendant to furnish the plaintiff or the plaintiff's attorney with a copy of the medical report without requiring that the plaintiff also furnish the defendant with copies of medical reports previously obtained by him. That holding was said to be justified on two grounds, to-wit: (1) the sole purpose of the examination was to remedy the defendant's lack of knowledge as to the nature and extent of the injuries, and (2) no language could be found in the pertinent statute which could be said to require that the information obtained should be shared with the plaintiff.

This specific point has been covered, for the federal courts, under Federal Rule 35(b) (1). It declares that the person examined may request a copy of the report of the examining physician, including his findings and conclusions, but after such request and delivery of this report, the party causing the examination shall be entitled, upon request, to receive

²⁵ See annotation in 108 A. L. R. 142 at p. 150.

²⁶ 10 Ill. (2d) 288 at 290, 139 N. E. (2d) 780 at 781.

²⁷ 139 N. E. (2d) 129 (Ohio Com. Pleas, 1957).

²⁸ 3 App. Div. (2d) 261, 160 N. Y. S. (2d) 362 (1957).

²⁹ New York Civ. Prac. Act, § 306.

from the party examined a like report of any examination previously or thereafter made. If the party examined refuses to deliver any such report, the court may on motion, require delivery on such terms as are just and, if the examining physician refuses or fails to comply, the court may exclude his testimony at the trial. There is reason to believe, therefore, if a trial is to be based on a full disclosure of all relevant evidence, that the adoption of a similar rule in Illinois would be both appropriate and desirable.

Similarly left unsettled for the moment, at least in Illinois, is the nature of the action to be taken in the event the plaintiff should refuse to obey the order of the court directing him to submit to a physical examination. Several courses of action might be available but only in the federal courts can it be said that procedures to cope with this problem have been established.³⁰ Such a plaintiff there may be held in contempt;³¹ the physical condition of the party in question may be taken as established, for the purpose of suit, in accordance with the claim of the party requesting the examination; the disobedient party may be denied the right to introduce evidence as to his actual physical condition; further proceedings in the case may be stayed until the order is obeyed; the action may be dismissed without prejudice; or it might be possible to render a judgment as by default against the recalcitrant party. In the absence of a specific rule on the subject, however, an Illinois court may have difficulty finding support for any of these sanctions, particularly in a case where the plaintiff is a non-resident of the state.³²

To agitate further for the adoption of legislation in this state covering these points would seem not only to be unnecessary but could well lead to the same type of impasse which grew out of the effort to rectify the unfortunate consequences stemming from an involuntary nonsuit produced by oversight on the part of the plaintiff's attorney.³³ Since the Illinois Supreme Court has seen fit to assert that there is a judicial power presently operating in the area under consideration, for which assertion it is entitled to receive congratulation, it should now codify that power in the form of a comprehensive court rule, preferably one modelled on the

³⁰ See, in that connection, Fed. Rules Civ. Pro., Rule 37(b)(2).

³¹ *Sibbach v. Wilson & Company, Inc.*, 312 U. S. 1, 61 S. Ct. 422, 85 L. Ed. 479 (1940).

³² See, for example, the case of *People ex. rel. Prince v. Graber*, 397 Ill. 522, 74 N. E. (2d) 865 (1947), which denied to a trial court the power to dismiss a suit because a non-resident plaintiff had refused to come into the jurisdiction to submit to pre-trial interrogation.

³³ *Agran v. Checker Taxi Co.*, 412 Ill. 145, 105 N. E. (2d) 713 (1952), noted in 30 CHICAGO-KENT LAW REVIEW 383, which declared Ill. Rev. Stat. 1951, Vol. 2, Ch. 110, § 174a, unconstitutional as an infringement upon the power of the judicial department.

federal provisions but extending to a defendant who offers a counter-claim.³⁴ With the enactment of such a rule, it is conceivable that a greater volume of out-of-court settlements without the necessity for trial would be possible and, in those cases where trial might still be required, the issues could be narrowed with the facts being impartially presented for speedy decision.³⁵

H. R. WINTON, JR.

THE LEGAL ASPECTS OF MUNICIPAL FLUORIDATION OF WATER

It has been some eleven years since artificial fluoridation of water was first utilized in any municipality in this country¹ but the extent of the progress made in the use of this method for combatting tooth decay may be seen in the fact that, according to a recent report, there are now 1,437 communities with a combined population of more than thirty million people using artificially fluoridated water.² During the ensuing years there has been a goodly amount of scientific and political as well as legal argument both for and against fluoridation. The scientific history of the subject has been well documented³ and the general press has covered the political developments. It is the purpose of this note, therefore, to discuss the legal problems which have been raised, to point out how they have been resolved elsewhere, and to consider how such legal problems might be treated by an Illinois court.

Opinions have been published passing upon the legality of fluoridation programs in seven jurisdictions to date with the United States Supreme Court denying certiorari in four instances,⁴ and at least one other case

³⁴ See, in that connection, the case of *Beach v. Beach*, 114 F. (2d) 479 (1940).

³⁵ If more should be needed, particularly in relation to the matter of obtaining impartial medical testimony, attention should be given to an experiment developed in New York and described in Marlen and Wright, *Impartial Medical Testimony* (The Macmillan Co., New York, 1956).

¹ The first pilot study of a national research program was set up in 1945 at Grand Rapids, Michigan, according to Heustis, "Working Together To Save Teeth in Michigan," 32 *Today's Health* 13 (1954).

² *Newsweek*, March 18, 1957, p. 112.

³ The sources are collected in Report No. 140, entitled "Fluoridation of Municipal Water Supply—A Review of the Scientific and Legal Aspects," Charles S. Rhyne and Eugene F. Mullin, Jr., issued by the National Institute of Municipal Law Officers, Washington, D. C., 1952. See also note in 23 *Geo. Wash. L. Rev.* 343.

⁴ *DeAryan v. Butler*, 119 Cal. App. (2d) 674, 260 P. (2d) 98 (1953), cert. den. 374 U. S. 1012, 74 S. Ct. 863, 98 L. Ed. 1135 (1954); *Chapman v. City of Shreveport*, 225 La. 859, 74 So. (2d) 142 (1954), app. dis. 348 U. S. 892, 75 S. Ct. 216, 99 L. Ed. 701 (1954); *Kraus v. City of Cleveland*, 163 Ohio St. 559, 127 N. E. (2d) 609 (1955), app. dis. 351 U. S. 935, 76 S. Ct. 833, 100 L. Ed. 1463 (1956); *Dowell v. City of Tulsa*,—Okla.—, 273 P. (2d) 859 (1954), cert. den. 348 U. S. 912, 75 S. Ct. 292, 99 L. Ed. 715 (1955); *Baer v. City of Bend*, 206 Ore. 221, 292 P. (2d) 134 (1956);