Medical Malpractice Cases and the Reluctant Expert

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THE PROBLEM

To label the reluctance of physicians to offer expert testimony on behalf of a plaintiff in a medical malpractice action a "conspiracy of silence" may be to attach a stigma to a natural and understandable human reaction. It may well be that most lawyers would be equally loath to testify against a fellow practitioner in a legal malpractice action. In either case, the unwillingness to testify probably can be attributed to one or a combination of the following factors: recognition of the possibility of error in the performance of a demanding profession, personal acquaintance with the defendant, realization—stark though often unspoken—that "there but for the grace of God am I," and a natural reluctance to assume a Judas role. It is not the purpose of this article, or the inclination of the author, to be critical of the individual physician who is reluctant to so testify. The physician's primary function is to treat the ill, and his professional milieu is composed of his office, the sick-room, or the operating room. To him, the courtroom is an alien environment, one likely to be considered hostile, and his presence there interrupts the performance of his primary function. This interruption becomes a serious personal embarrassment when the purpose of the courtroom proceeding is to determine the potential negligence of a professional colleague. It is not at all difficult to understand or even sympathize with these reactions.

Yet such understanding and sympathy do nothing to ameliorate the plight of a plaintiff crippled, deformed, or blinded by the negligent conduct of a physician. To provide meaningful redress to the victim of medical incompetence a successful malpractice action must be had, or the real possibility of such an action must exist to bring about an appropriate settlement. Such
an action or the likelihood of such an action usually requires the availability of expert medical testimony on behalf of the plaintiff. Absent that requisite testimony, the innocent victim is without relief. To any personal injury practitioner, probably to any lawyer, and very likely to most law students, it is axiomatic that "One great obstacle facing the lawyer in malpractice cases is the problem of obtaining expert testimony."2 Something so generally recognized by the profession should be apparent also to the courts. Yet as late as 1933, a Justice of the Supreme Court of Rhode Island wrote:

Counsel for plaintiff... makes the startling statement—which he states is based on his experience in attempting to obtain expert medical testimony to support the charge of negligence on the part of a defendant—that "there is no possible way for anyone who suffers injury at the hands of a negligent physician to recover his just damages."... We are not convinced, notwithstanding the experience of plaintiff's counsel, that the ethical standards of the medical profession countenance a course so subversive of justice and so opposed to the duty which the profession owes the public.... We cannot believe that there are not in this state many well-qualified physicians who would be willing to assist by their testimony a person who was a victim of malpractice.2

But such judicial naivete is the exception rather than the rule; most judges are aware of the dilemma of the plaintiff in a malpractice action and this awareness has been manifested in judicial opinions:

The law of malpractice is clearly defined in most jurisdictions as it is here. Before the plaintiff-patient can recover, he must show that his injury has resulted from his doctor's failure to exercise that degree of care and skill exercised by a doctor practicing the same specialty in his locality. In mounting such proof, the plaintiff must prove by testimony from the defendant's own professional colleagues what the degree of care and skill in the area is and that the defendant failed to exercise such care and skill. The human instinct for self-preservation being what it is, there is often disclosed in the trial of these cases what has been referred to as the conspiracy of silence—the refusal on the part of members of the profession to testify against one of their own for fear that one day they, too, may be defendants in a malpractice case.3

And, again—more forcefully stated:

It is a matter of common knowledge that members of any county medical society are extremely loath to testify against each other in a malpractice case.... Anyone familiar with cases of this character knows that the so-called ethical practi-
tioner will not testify on behalf of a plaintiff regardless of the merits of his case. This is largely due to the pressure exerted by medical societies and public liability insurance companies which issue policies of liability insurance to physicians covering malpractice claims... [R]egardless of the merits of the plaintiff's case, physicians who are members of medical societies flock to the defense of the fellow member charged with malpractice and the plaintiff is relegated, for his expert testimony, to the occasional lone wolf or heroic soul who for the sake of truth and justice has the courage to run the risk of ostracism by his fellow practitioners and the cancellation of his public liability insurance policy.  

This judicial recognition had lead to judicial innovation. Courts have attempted to eliminate the requirement of expert testimony in appropriate cases. "Occasionally expert testimony is not required where an injury results to a part of the anatomy not being treated or operated upon and is of such character as to warrant the inference of want of care from the testimony of laymen or in light of the knowledge and experience of the jurors themselves."  

When laymen are competent to determine whether the doctor has been negligent, the plaintiff need not prove that the defendant departed from standard practices. If, for example, the evidence shows that a surgeon bandaged an arm too tightly, causing atrophy of muscles and nerves, or that a patient was badly burned with a hot water bottle, or that the defendant used clairvoyant diagnosis, the courts do not require the plaintiff to show that the methods used are eschewed by other reputable doctors. . . .  

Whether the judicial technique employed be labeled res ipsa loquitur or "the newer doctrines of 'common knowledge,' 'ulterior act,' 'mechanical instrument,' or 'informed consent,'" it seems fair to say that courts have eliminated the need for expert testimony in a growing number of cases. Where once such testimony was required in the "overlooked sponge" cases, many courts now are willing to permit these cases to go to the jury without expert testimony on behalf of the plaintiff.  

 Apparently, as the mystique of the operating room has been pierced—at least to the extent that judges now know that sponge nurses exist and can (and should) count, that surgeons can (and should) supervise the count, and that surgical sponges can (and perhaps should) be attached to threads with a brightly colored object at the end of the thread remaining outside the incision—the courts have be-

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4 Huffman v. Lindquist, 37 Cal. 2d 465, 483, 234 P.2d 34, 45 (1951).
5 Ayers v. Parry, 192 F.2d 181, 184 (3d Cir. 1951).
6 Morris, Custom and Negligence, 42 COLuM. L. REv. 1147, 1165 (1942).
7 Note, Handling the Unique Problems of Medical Malpractice Actions, 10 S.D.L. REv. 197, 143 (1969).
come satisfied that laymen can comprehend these more mundane and mechanical aspects of surgical practices. But one should not conclude that elimination of the requirement of expert testimony has become the rule. It remains the exception, and an exception to be applied "only in a restricted class of malpractice cases"—those "where negligence on the part of a doctor is demonstrated by facts which can be evaluated by resort to common knowledge..."\(^9\) A single example should serve to demonstrate just how restricted the class of cases is. A lady named Grace Brown entered the office of the doctor, a specialist in oral surgery, to have an impacted molar removed. After a short wait a general anesthetic, sodium pentothal, was administered. The operation to remove the impacted molar involved chipping the jawbone using a hammer and chisel. After the operation the doctor did not realize he had broken the jawbone, in spite of the fact that it was a compound fracture, that is, the broken bone was showing through the tissue. His attention to the fracture was called by his nurse.

When the defendant was asked on cross-examination, "What broke her jaw, Doctor?" he answered, "We don't know. I am of the opinion that there must have been a muscle contraction and that muscle contraction broke the jaw. Just the same as a baseball player will break his arm, throwing the ball." When asked whether he saw "any muscle contraction while [he was] working on Mrs. Brown's mouth," the doctor answered, "No. No, I did not." When asked, "Doctor, at any time that you used this mallet on this chisel, is it possible that you struck that chisel too hard and that it would fracture the jawbone?" he answered, "Well, I think if you used a great deal of force, but I think a man who has experience will adjust the amount of force to meet the situation." The doctor further testified that in his experience he had handled between fifty and sixty thousand patients and that a great many of them involved the removal of impacted teeth. When asked on how many occasions he had fractured a patient's jaw, he stated, "Oh, I guess two or three times."\(^10\)

In a per curiam opinion, the court affirmed the trial court's action directing "a verdict for defendant at the close of plaintiff's case, on the issues of specific negligence and res ipsa loquitur."\(^11\) Mrs. Brown had "offered no evidence of specific negligence, or evidence that defendant did not exercise\(^9\) Huffman v. Lindquist, supra note 4, at 477, 234 P.2d at 40.


\(^11\) The defendant's testimony, elicited on cross-examination, indicated two possible causes of the fractured mandible: (1) a muscle contraction, or (2) excessive force in bringing the mallet into contact with the chisel. The first cause would not have supported a verdict for the plaintiff; the second would. The defendant's testimony, that he observed no such muscle contraction, and the almost incredible analogy of the baseball player breaking his arm throwing a ball would seem to have justified submission to the jury, and a jury determination that excessive force rather than a muscle contraction caused the fracture.

that degree of care and skill ordinarily exercised by the profession in his own or similar localities." In other words, the plaintiff offered no expert medical testimony. The reason? Plaintiff's counsel was unable to secure an expert willing to offer opinion testimony.

Comforting as it may be to know that one may recover in a malpractice action even without expert medical testimony if he is made the unwilling host to a surgical sponge, burned by a hot water bottle, or harmed by a clairvoyant diagnosis, the fact remains that in an overwhelming majority of malpractice actions expert testimony is the sine qua non of plaintiff's case. Judicial innovation hasn't changed that fact; it hasn't overcome that "One great obstacle facing the lawyer in malpractice cases..." It seems a fair conclusion that "A careful appraisal shows that the common law imagination has not been able to cope with the challenges of the malpractice action."

SCREENING PANELS

If judicial innovation is incapable of solving the problem, what other means exist? Well, one mode of solution is an arrangement, either formal or informal, between local medical societies and bar associations. One such arrangement, and one frequently alluded to, is the "... Pima County Screening Plan. Since its adoption in Pima County, Arizona, it has been considered or tried in Idaho, New Mexico, Virginia and in one county in Iowa, New York, Nevada and Pennsylvania." Those among the readers who may be plaintiffs' personal injury lawyers and, therefore, sensitive to and offended by the connotation of the word "Screening" in the plan's title, are counseled toward patience; the "best" is yet to come. Under the Pima County Plan, a lawyer undertaking a medical malpractice claim presents his case to a panel composed of nine physicians and lawyers. The potential defendant also may present his side of the case to the panel, and each side has the opportunity of cross-examining the other's witnesses. The degree of formality

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13 Id. at 660-61.
14 Telephone Conversation With Earl H. Davis, Washington D.C., counsel for the plaintiff.
15 Morris, supra note 6.
16 Supra note 1.
17 77 Harv. L. Rev. 533, 549 (1963).
18 Note, supra note 7, at 149.
19 Sadusk, Obtaining Expert Advice in Professional Liability Cases, 20 J. Mo. Bar. 200, 201 (1964). The number of panelists may vary in the various jurisdictions where the plan is utilized.
20 In Virginia, "a plan was evolved for the screening of malpractice cases" in 1961. Virginia Bar News, Dec. 1965, p. 1. However, until late in 1965, the potential defendant could bar the potential plaintiff's access to the panel by the simple device of refusing to consent to utilization of the panel. In October 1965, "after a few dedicated physicians had done a great deal of ground work, the Medical Society approved [an] amendment so that now a claimant can bring his case before the Panel whether or not the physician agrees." Id. at 2.
of the presentation may vary from panel to panel and case to case, but it is probably a fair guess that the proceedings would be about as formal as one would expect, considering the number and composition of the panelists and the panel.\textsuperscript{20} To the extent that “formality” suggests unduly restrictive practices which make it difficult to ascertain facts, the lack of formality may be beneficial. However, absence of that formality which focuses attention upon the relevant and which tends to induce responsive answers even to uncomfortably pertinent questions would be unfortunate. In addition to, in fact, before, hearing the witnesses, the panel inspects applicable medical records.\textsuperscript{21} Then, after completion of the entire process, the panel decides whether or not “there is any substantial evidence of a substantial injury arising out of malpractice.”\textsuperscript{22} If the panel does find substantial evidence of a substantial injury so caused, its members are to attempt to effect a settlement or, that failing, provide the plaintiff expert medical testimony for trial.\textsuperscript{23} If the panel does not make the requisite affirmative findings, counsel for the plaintiff is expected to drop the case—but, of course, “he is under no legal obligation to do so.”\textsuperscript{24} “The plan is entirely voluntary. . . .”\textsuperscript{25}

Any personal injury lawyer or, for that matter, any lawyer who has ever tried a case is likely to experience certain reactions to this arrangement. First, assuming an affirmative panel finding, plaintiff’s counsel will be required to “try” his case twice: once for the panel and once for the court and jury. No lawyer is likely to be particularly delighted with the prospect of such duplicative effort. Moreover, the first time around—the “panel trial”—plaintiff’s counsel will have to present his case without benefit of expert medical testimony, since the purpose of the panel proceeding is to determine whether or not plaintiff is “entitled” to expert testimony. Presumably, if plaintiff’s counsel had a willing and available expert witness, he wouldn’t have boarded the merry-go-round in the first place. Consequently, he must persuade the panel to make the requisite findings in order to secure the expert witness whose testimony will be essential, legally and practically, in persuading a court and jury, and he must so persuade the panel without the testimony of that essential witness, and persuade it sufficiently to evoke a finding of substantial evidence of a substantial injury arising out of the potential defendant’s malpractice, probably more than would be necessary to avoid a nonsuit at trial. In court, it probably would be deemed legally sufficient if plaintiff introduced appropriate credible evidence of an injury

\textsuperscript{20} “The procedure is essentially informal.” Sadusk, \textit{supra} note 18, at 201.
\textsuperscript{21} \textit{Ibid}.
\textsuperscript{22} \textit{Note, supra} note 7, at 149.
\textsuperscript{23} \textit{Ibid}.
\textsuperscript{24} \textit{Id.} at 150.
\textsuperscript{25} \textit{Id.} at 149.
caused by defendant's professional negligence. So plaintiff's counsel's burden of persuasion before the panel is a difficult one, and one which must be satisfied without the most essential and pertinent evidence on the point: expert medical testimony. Of course, the presence of physicians on the panel should serve to obviate the need of an expert witness. Presumably, the physician-panelists will not require expert testimony to comprehend the medical problems involved. Unfortunately, though, the patient may find it rather difficult to describe the professional diagnosis, treatment, or technique with sufficient clarity even for the medical panelists. And the judge of the adequacy of the performance of the task, the physician-lawyer panel, may not be the most sympathetic fact-finding body imaginable.

Without intending to impute any improper motive to the physician-members of the panel, it is suggested that their presence on the panel would not ease plaintiff's task of persuasion. Assuming the highest degree of ethical and objective conscious consideration of the case on the part of the physicians (and this is the only appropriate assumption), it is submitted that the likelihood of subconscious identity with the potential defendant is so significant as to militate substantially against an unbiased determination by the physician-panelists. To make the point somewhat dramatically, the following question is suggested: Would the physician-panelists make appropriate jurors in a medical malpractice case?

These reactions to the Pima County Plan are admittedly intuitive in nature, and, to some extent, "practical" rather than doctrinal. The author has no data supporting the reactions and no tangible evidence of the degree or effect of panelists' empathy with potential defendants. The Plan may be too new to provide meaningful data, and tangible evidence of a subconscious empathy may be simply impossible to secure. But the intuitive nature of the reactions should not serve as a basis for dismissing them out of hand, nor should the practical aspects of the arrangement be overlooked in determining its theoretical value. Often, a lawyer's intuitive response to a factual situation and his awareness of the limits imposed by practicality comprise valuable professional assets, and frequently this kind of response and awareness point toward ponderables approaching conclusions. The reactions to the Pima County Plan suggest a couple of these ponderables: Why do plaintiffs' lawyers submit to such a "voluntary" plan? And why are physicians permitted the insulating protection of the interprofessional panel?

The first one is easy. Submission is the price counsel must pay for the op-

Sadusk, supra note 18, at 201: "It is perhaps still too early to know what the final outcome will be, but Professor Lesher's report in Arizona Medicine some time ago would lead me to believe the plan will be successful." Dr. Sadusk, at the time his paper was presented, was Chairman of the Committee on Medicolegal Problems, American Medical Association.
The lawyer who fails to utilize the plan will find himself sitting on a potential malpractice action without available expert testimony—not a very restful or comfortable position.

The second is a little more difficult. Of course, the medical profession is demanding, physically, mentally, and emotionally. Its members require postgraduate education and in-the-profession experience (an internship). Its specialists require additional education and experience. Its practice requires frequent decision making, in some cases erratic hours, and appropriate manual dexterity. In short, it is a complex profession. So what? Building a sixty-story skyscraper is complex too; but the contractor who undertakes the job isn’t given the benefit of an insulating panel to protect him from potential causes of action arising out of his alleged negligent performance. Should such an action arise, the plaintiff will encounter no great difficulty in securing appropriate experts willing to testify as to defendant’s negligence, if, in fact, such negligence occurred. If the defendant’s negligence resulted in injury or death to one person or dozens of people, he will still not enjoy a partial mantle of immunity through the device of an interprofessional panel; the appropriate experts will remain willing to testify. Is there some subtle, yet significant, distinction between a physician and a contractor which would justify the insulation afforded the former?

It should be conceded immediately that the “recipient” of the contractor’s services is an inanimate structure, whereas the physician’s services are directed to that complex of biological and psychological processes known as a human being. To be sure, steel, stone, and glass are more likely to be obedient to inexorable laws of chemistry and physics than is that complicated organism, man. The patient’s reaction to diagnosis, treatment, or prognosis will be peculiar to him, and different patients will react differently. The differences may be caused by physical or psychic conditions, and these conditions may not always be reasonably predictable by the physician. However, to the extent that an unfortunate medical result can be attributed to a condition not reasonably predictable by the physician—or the unfortunate result could not reasonably have been avoided by him—the unforeseen result is not very likely to give rise to a malpractice action. Even more certainly, such an idiosyncratic result will not bring about a judicial determination of liability. But isn’t the patient-physician relationship a distinguishing factor? After all, a contractor’s work, if properly done, will bring about a satisfactory result, regardless of his personal relationships with the architect, subcontractors, suppliers, and the client. However, without an appropriate patient-physician relationship the doctor’s healing art is diminished, regardless of his professional competence; and allegations of professional negligence against one physician tend to affect adversely the relationships be-
between many physicians and patients. In other words, so the argument goes, a single legal assertion of medical incompetence destroys the image of the healer, so inherent a part of successful medical practice. Nonsense. If anything has the potential of destroying that image it is a general realization by the public that the medical profession has created for itself a special immunity from liability for professional incompetence through the screening device of an interprofessional panel. It seems fair to assume that just as patients generally are likely to become aware of allegations of negligence set forth in a complaint against one named physician, so, too, are they likely to discover the balustrade of immunity the medical profession has attempted to construct. Even if general knowledge of the latter should be disseminated more slowly (because, for example, of the absence of that newspaper coverage which might exist in connection with a judicial proceeding), it will become known eventually. The fact that it arises out of an organized scheme formulated by the profession generally is likely to have a greater adverse effect on the physician's image than allegations of negligence aimed at a specific physician.

As to the specific physician, the malpractice action defendant, it has been suggested that the mere allegation of professional negligence in a legal complaint may do irreparable damage to his professional standing and practice. A corollary to this suggestion is that for that reason the physician is uniquely susceptible to groundless claims of professional incompetence. A couple of responses occur to these contentions. First, the suggested high incidence of such false claims being handled by lawyers imputes to members of the legal profession a lack of ethics, morality, and personal integrity, that is undeserved. It may also impute to them an unsound economic approach in determining which cases to undertake and which to refuse, but this imputation is not so serious as the first. Second, it is not necessarily true that physicians are peculiarly appealing targets for negligence actions. If an allegation of negligence is directed at a building contractor, asserting negligence in construction and consequent personal injuries or deaths, the contractor may find his occupational standing adversely affected and future building contracts difficult to come by. Imagine the occupational and economic jeopardy that would arise from an allegation that a contractor's negligence resulted in the collapse of an office building with resulting injuries and deaths. In fact, it may be fair to say that allegations of professional or occupational negligence aimed at anyone will adversely affect his professional or occupational standing and his billfold. The doctor is not unique in this respect.

It may be suggested that the physician requires the protection of a screening panel so that he may exercise his professional judgment in determining whether or not to employ a relatively new medical or surgical technique.
If fettered by potential malpractice actions, the physician may be unwilling to utilize advanced professional methods, thus depriving his patients of the advantage of medical progress. Consequently, the screening panel is a necessary device to assure the patient-public that it will benefit from the time, money, and energy devoted to medical research.

It may be helpful in analyzing this suggestion, first, to compare once more the circumstances of the physician and the contractor, and then to examine the physician's potential dilemma wholly on its own merits.

The building contractor, too, might be reluctant to employ new building techniques if the use could result in liability. And, again, the public would be deprived of the advantages of new construction methods. Yet, the contractor does not enjoy the protective wall erected around the physician; with no screening panel, the contractor must exercise his judgment in determining whether or not to use an available new technique in the performance of a particular contract and, assuming it is used, utilize the appropriate degree of skill and care in its use. If either his judgment or his skill is found wanting, and injury results thereby, he may be liable. In determining the soundness of the contractor's judgment and the propriety of his performance, counsel for an injured plaintiff will encounter no significant difficulty in obtaining appropriate expert assistance. If an action and trial ensue, the expert will appear and testify for the plaintiff. Why should not the same be true in connection with the judgment and performance of a physician?

The assertion that malpractice actions will discourage the utilization of the fruit of medical research is self-defeating even absent the physician-contractor comparison. It may be fair to assume that before a new medical or surgical technique is employed generally it will have been tested thoroughly. Laboratory testing, animal testing, and selective testing on humans (fully advised, of course, of the experimental nature of the technique), are the usual prerequisites to general medical or surgical usage. The results of these tests and evaluations of the novel technique will be available to the practitioner. Some medical consensus of the efficacy, safety, and general acceptability of the technique will evolve. None would deny that a practitioner has access to such materials. Hopefully, none would deny that a practitioner contemplating the use of a relatively new technique has a duty to familiarize himself with the available materials. Assuming all of this, what are the possible eventualities? Well, the practitioner might decide that the new technique is not an improvement and eschew its use. If so, a potential finding of negligence presumably would rest upon his failure to use it. If the non-use can be justified by a reputable, recognized school of medical opinion, a finding of negligence is extremely unlikely, if, indeed, even possible. (And, here, the physician hasn’t been deterred from the use of a novel technique by fear
of litigation; rather, his professional judgment has decided against use of the new for wholly professional reasons.)

On the other hand, the practitioner might decide to employ the new technique. If so, a potential finding of negligence could rest upon (1) poor judgment in so doing, or (2) poor performance in utilizing the technique. In the former case, if use of the technique can be justified by a reputable, recognized school of medical opinion, a finding of negligence would be improper. In the latter case, a finding of negligence would be proper only upon the adduction of expert testimony that the practitioner's method or manner of utilizing the technique was not an acceptable one. Who, then, among the medical practitioners would suffer liability as the consequence of using or failing to use a new technique? It would be that one who made the decision to use or not use without appropriate consideration and contemplation of existing medical materials and opinion, or that one who utilized the technique in a medically unacceptable manner. Which of these should be given the protection of a screening panel, the one who didn't do his homework, or if he did, ignored its lesson, or the one who may have done some homework but failed to prepare himself to put it to practical use, or, at best, had a "bad day"? Well, of course, neither should enjoy any special immunity from liability for the consequences of his professional negligence. And, the lack of such special immunity (in the guise of a screening panel) isn't likely to deprive patients of the appropriate use of advanced medical techniques.

If the physician is not unique in that he is engaged in a complex occupation (and it is submitted he is not), if he is not peculiarly susceptible to false claims of occupational negligence (and it is submitted he is not), if public awareness of medical malpractice actions will not have a greater adverse effect upon the physician-patient relationship than will public awareness of the profession's effort to afford itself the protection of a screening panel (and it is submitted that it will not), and if the absence of such a screening panel will not preclude society from the timely enjoyment of medical advances (and it is submitted that it will not), what is the justification for the screening panel? There isn't any. Its "justification," using that word in the sense of explaining its existence, lies in the reason lawyers submit to such a "voluntary" plan: it provides the only opportunity to secure medical testimony for the plaintiff in a malpractice action. It exists because a sufficient number of physicians wish it to exist; it subsists because a sufficient number of lawyers suffer its existence as something preferable to nothing. And that, really, is the theoretical or doctrinal objection to the screening plan. Its existence is unjustified. It exists simply because physicians don't like to be sued in malpractice actions. Unlike other potential defendants who probably don't like to be sued, physicians have the ability, which they have utilized by their re-
fusal to testify voluntarily, to frustrate such actions—or, at least, "screen" them.

**Books and Treatises**

Is there a satisfactory alternative to the screening plan and its interprofessional panel? Massachusetts and Nevada by students and Alabama by judicial opinion permit the plaintiff to use books or treatises in lieu of expert medical testimony in a malpractice case. The Massachusetts statute, after which the Nevada statute was modeled, provides:

A statement of fact or opinion on a subject of science or art contained in a published treatise, periodical, book or pamphlet shall, in the discretion of the court, and if the court finds that it is relevant and that the writer of such statement is recognized in his profession or calling as an expert on the subject, be admissible in actions of contract or tort for malpractice, error or mistake against physicians, surgeons, dentists, optometrists, hospitals and sanitaria, as evidence tending to prove said fact or as opinion evidence; provided, however, that the party intending to offer as evidence any such statement shall, not less than three days before the trial of the action, give the adverse party notice of such intention, stating the name of the writer of the statement and the title of the treatise, periodical, book or pamphlet in which it is contained.

It will be noted that the statute requires that the proffered treatise be written by a recognized expert. The normal manner of so qualifying an author is by the testimony of another qualified expert. But the statute's raison d'etre is plaintiff's inability to secure an expert witness in a malpractice action. To suppose that a physician unwilling to testify for plaintiff in a medical malpractice case would be willing to lend his expert assistance and testimony for the limited purpose of qualifying the author of a medical book seems unrealistic. "[I]t is likely that the doctor would be reluctant to testify. His testimony would be used to qualify an author whose book would be used against a fellow practitioner." Of course, plaintiff can call defendant as for cross-examination for the purpose of qualifying the author, but a possible response from defendant would be, "I'm afraid I'm not familiar with the book or its author." The possibility is sufficiently great to make this a rather undesirable method of qualifying the author. Trial counsel naturally is reluctant to have an essential element of his case depend upon testimony of an adverse party; where a book is to be used instead of an expert for the pur-

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28 Staudenheimer v. Williams, 29 Ala. 558 (1857).
30 45 Minn. L. Rev. 1019, 1030 (1961).
pose of establishing professional negligence, the qualification of the author is essential.

After eliminating an independent expert and the defendant as likely witnesses to qualify the author, counsel is likely to think of utilizing biographical information in the book itself, the Directory of Medical Specialists, and Who’s Who. But each of these methods of qualification was attempted, unsuccessfully, in a malpractice action in which plaintiff sought to utilize the Massachusetts statute. That leaves qualification by stipulation, and it would be a rare defendant’s lawyer who would stipulate to the qualification of the author of a medical book, knowing that such action might be the only means available to the plaintiff in avoiding a nonsuit. So, mechanically, the use of books and treatises in place of expert testimony poses serious problems.

Even assuming that the mechanical problems of qualification can be solved, there remains a grave shortcoming to such use of learned treatises. The plaintiff “lucky” enough to avoid a nonsuit by the use of a medical book will find his book-evidence controverted by the testimony of the defendant and those physicians who, “regardless of the merits of the plaintiff’s case, . . . [will] flock to the defense of their fellow member charged with malpractice.” One suspects that it would be a rare jury which would give greater credibility to a statement read from a book than to the live testimony of a parade of expert medical witnesses. This suspicion is fortified by the fact that the jury may not be wholly aware of the reason the plaintiff relied on a medical book and “failed” to offer expert medical testimony on his own behalf. An explanation that such expert testimony was not available, to the extent the court would permit such explanation, probably would do little to improve the plaintiff’s case in the eyes of the jury. Moreover, even the

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Reddington v. Clayman, 334 Mass. 244, 134 N.E.2d 920 (1956). The court’s refusal to accept biographical material in the book, itself, probably can be justified by a recognition of a publisher’s natural desire to present his author in the most favorable light possible. Refusal to accept material from Who’s Who (the English edition) might be explained on two grounds: (1) such material is usually provided by the person listed; and (2) any verification would not be done by persons competent to determine the professional qualifications of the physician listed. It is somewhat more difficult to justify the court’s refusal to accept information from the Directory of Medical Specialists.

“The Directory . . . is the authorized publication of 19 official specialty boards certifying physicians in medical specialties.” DIRECTORY OF MEDICAL SPECIALISTS 7 (12th ed. 1965). “Only Diplomates are included in this Directory. The secretary of each American board serves on the Advisory Committee to the Board of Editors of the Directory and the names to be included are supplied by them. The biographic data are furnished by the Diplomates themselves, and certification is verified by the specialty boards.” Ibid. at 8.

“The searching investigation and the rigid examinations of each individual certified by the specialty boards give an authoritative stamp of approval to his status as a qualified specialist.” Ibid.

Huffman v. Lindquist, supra note 4.
most literate medical treatise is likely to contain words and phrases not entirely clear to the jury. Who is to explain their meaning for the plaintiff?

After the defendant and his expert witnesses have duly impressed the jury with their professional competence, in part by their appropriate use of some select medical esoterica, they will be only too glad to respond to defense counsel's request, "Doctor, would you be kind enough to explain that in terms we can all understand?"

All factors considered, it would be difficult to persuade many plaintiffs' lawyers that "The Massachusetts and Nevada statutes are probably the best way to overcome the conspiracy of silence among doctors." More readily believable is the conclusion that "there is considerable evidence that the [Massachusetts] statute has afforded little, if any, real help to Massachusetts malpractice plaintiffs. The defendant is usually able to keep the plaintiff's books out; and when the plaintiff does succeed in getting books in, they are of relatively little assistance to him.... Malpractice plaintiffs still labor under a severe evidentiary handicap; worthy actions fail, many others are never brought. That miscarriage of justice which the legislature sought...to remedy continues...essentially unabated."

**Compulsory Appointment of Medical Experts by Legislation**

The legislatures of Rhode Island, Indiana, and California have enacted statutes which appear to be suited to securing compulsory testimony of a medical expert on behalf of a plaintiff in a malpractice action. These lawmakers take a position contrary to rule 59 of the Uniform Rules of Evidence which provides for "consent" on the part of the appointed expert. (It is suggested that the Commissioners on Uniform State Laws and the American Law Institute re-evaluate their position in light of the malpractice problem, perhaps referring to the wording of one of these statutes or reverting to section 1 of the Model Expert Testimony Act, all of which do not require consent.)

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8 Supra note 30, at 1048.
10 R.I. GEN. LAWS ANN., § 9-17-19 (1956); Ind. ANN. STAT. § 2-1722 (1946); CAL. CIV. PROC. CODE, § 1871, repealed by Stat. 1965 ch. 299, § 59, operative Jan. 1, 1967, to be replaced by §§ 728, 730-33 of California's new EVIDENCE CODE.
11 The Rules of Evidence were approved by the National Conference of Commissioners on Uniform State Laws and the American Bar Association in 1953. They have been adopted by statute in Kansas, KAN. STAT. ANN. §§ 60-401-70 (1963), the Panama Canal Zone, 5 C.Z.C. §§ 2731-996 (1962), and the Virgin Islands, 5 V.I.C. §§ 771-956 (1957).
12 "An expert witness shall not be appointed unless he consents to act...", *Uniform Rule of Evidence* 59.
13 Whenever in civil or criminal proceedings, issues arise upon which the court deems expert evidence as desirable, the court on its own motion, or on the request of either the
The Rhode Island Justice whose credulity was strained by "the startling statement" of plaintiff’s counsel that he was unable "to obtain expert medical testimony to support the charge of negligence on the part of a defendant," conceded that "plaintiff’s counsel might have had recourse to the Rhode Island statute, General laws 1923..." which reads:

Any justice of the superior court may, in any cause, civil or criminal, on motion of any party therein, appoint one or more disinterested skilled persons, whether they be residents or nonresidents, to serve as expert witnesses therein; provided, that the reasonable fees of such experts, according to the character of the service to be performed, as fixed by such justice, shall be paid by the party moving for such appointment...; and the amount so paid shall form part of the costs in the cause...

The California and Indiana statutes are similar in substance to that of Rhode Island, except that Indiana’s act provides that the "expert...may be compelled to...testify...without payment or tender of compensation other than the per diem and mileage allowed by law to witnesses, under the same rules and regulations by which he can be compelled to appear and testify to his knowledge of facts relevant to the same issue." It seems rather clear that each of the statutes would be applicable to a potential medical expert in a malpractice action.

Since the element of consent is not required, an appropriate first step in considering these statutes is to determine whether or not they are unconstitutional. Two constitutional provisions come to mind: the due process clause and the prohibition of involuntary servitude. There is very little, if any, current clear authority either way as to either of the clauses. In the California Code of Civil Procedure following the statute providing for com-

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state or the defendant in a criminal proceeding, or of any party in a civil proceeding, may appoint one or more experts, not exceeding three on each issue to testify at the trial.

**MODEL EXPERT TESTIMONY ACT**

This act was approved by the National Conference of Commissioners on Uniform State Laws and the American Bar Association in 1937 as a Uniform Act, and was redesignated as a Model Act in 1943. The authority of the act is considerably weakened by the fact that South Dakota alone adopted the act by State Supreme Court rule, Order No. 5 (1942), and that the Commissioners altered their position by requiring "consent" in the 1942 Uniform Rules of Evidence, without comment on the change.


*Ibid.* (One can hardly avoid wondering why the Justice thought the legislature felt compelled to enact the statute.)


IND. ANN. STAT., § 2-1722 (1946).

"... nor shall any State deprive any person of life, liberty, or property, without due process of law...." U.S. CONST. amend. XIV, § 1.

"Neither slavery nor involuntary servitude... shall exist within the United States..." U.S. CONST. amend. XIII, § 1.
Medical Malpractice Cases

pulsory expert testimony the following appears: "The statute is constitutional. Hastings Estate. . .".45

Unfortunately, the Hastings46 case is somewhat less than determinative of the constitutionality of a statute providing for compulsory expert testimony in a malpractice action. Hastings was a suit commenced to establish heirship to a decedent in which the court appointed a disinterested expert to offer testimony concerning the validity of certain documents. On appeal from an adverse decision, the petitioner seeking to prove heirship contended that the statute authorizing the appointment of the expert was unconstitutional. Without discussing the specific constitutional provisions allegedly violated, the court dismissed petitioner's contention out of hand, noting that (1) use of the statute had been approved earlier in a homicide case, and (2) by failing to object to the appointment or qualifications of the witness at trial, petitioner had waived any objection to the appointment. Citation of the earlier criminal case by the court does little to determine the constitutional propriety of a statute authorizing compulsory expert testimony in a civil action.47 The constitutional issues in a criminal action differ markedly from those in a malpractice action, even though the due process clause may be involved in both. Presumably, in a malpractice action the appointed expert would challenge the constitutionality of a statute compelling him to lend his professional services to a client he did not choose to work for. In a criminal action, it is usually the accused who challenges the validity of the appointment of the expert.

For example, in Jessner v. State,48 the court utilized a statute providing for the appointment of an expert in criminal proceedings. The medical expert appointed examined the accused for the purpose of determining his competency to stand trial and his competency at the time of the alleged commission of the criminal act. The expert found the accused to be competent, and he was convicted. On appeal the defendant asserted that use of the court-appointed expert resulted in an illegal search and seizure, self-incrimination, and denial of a jury trial. Each of these assertions except the last (about which, more shortly) would be inapposite in a case involving the compulsory testimony of a medical expert in a malpractice action. And, incidentally, each of the assertions was found wanting.

In People v. Dickerson,49 the Supreme Court of Michigan found that a statute empowering a court in a homicide case to appoint a disinterested ex-

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45 Supra note 35, Notes of Decisions, A. 1.
46 In re Hastings, 206 Cal. 524, 274 Pac. 973 (1929).
48 202 Wis. 184, 231 N.W. 634 (1930).
pert did violate the due process clause in that it made it impossible for the accused to know in advance of trial all those who would testify against him, to examine their character, and to prepare a proper defense. Moreover, the court held that notice to the jury that an expert had been appointed by the court would result in the jury's giving undue weight to the testimony of the court-appointed expert to the detriment of the testimony offered by other expert witnesses, thus precluding an effective jury determination.

So it seems that there is a split of judicial authority as to the constitutionality of statutes authorizing court-appointed experts in criminal proceedings, and many of the constitutional issues involved in those proceedings would be irrelevant to a determination of the validity of compulsory medical testimony in malpractice actions. However, the problem of jury knowledge of the appointment of an expert does have relevancy; it probably is fair to say that a jury would tend to extend greater credibility to an expert appointed by the court than to those selected by the interested parties. Consequently, if compulsory expert testimony through court appointment is found not to be otherwise unconstitutional, appropriate care should be taken to present the appointed expert (for the plaintiff) just as any other expert witness for the party would be presented. Contrary to rule 61 of the Uniform Rules of Evidence and section 8 of the Model Expert Testimony Act,\(^5\) there would seem to be no need to advise the jury of a court appointment; in fact, in most cases the "appointment" would be nothing more than the compulsion necessary to secure an expert desired by the plaintiff.

It is that compulsion which lies at the heart of constitutional objections to statutes authorizing a court to appoint a medical expert in malpractice actions. It is settled beyond dispute that a court may compel one in possession of relevant facts to testify in a civil action. It seems to be equally settled that a physician who has treated a patient can be compelled to testify as to the personal knowledge (and, probably, professional opinion) secured as the result of such treatment. The difficult question is: May a physician be compelled to make preliminary preparations or perform professional services or listen to testimony for the purpose of qualifying himself to give expert testimony and then to offer such testimony?

Probably the most accurate description of the case authority on the point is that it is inconsistent, inconclusive, and passe. If a sample is desired, this one is offered:

It is quite generally agreed that in the absence of statutory authorization one cannot be required to make preliminary preparations or perform professional

\(^5\)E.g., "The fact of the appointment of an expert witness by the judge may be revealed to the trier of the facts as relevant to the credibility of such witness and the weight of his testimony." \textit{Uniform Rule of Evidence} 61.
services, or to listen to testimony, for the purpose of qualifying himself to give a professional opinion or otherwise testify as an expert, or, at least, as held or stated in some cases, he may not be required to do so without the payment or tender of extra compensation therefor.\(^1\)

It is difficult to imagine a sentence of comparable length quite so full-bellied with negative pregnant. Suppose statutory authority exists? Suppose the statute does not authorize extra compensation? Suppose no statute exists but extra compensation is tendered? And, just to strive toward the essence of the problem, what is the real significance of "statutory authorization"?

Although the Model Expert Testimony Act, section 5, and the Uniform Rules of Evidence, rule 59, infer that an appointee may be compelled to prepare for trial, there is a lack of lucid and current judicial authority on this matter of critical importance. This void invites independent thought directed toward arriving at some sensible and satisfactory conclusions which may commend themselves to the courts.

The necessity for "payment or tender of extra compensation," i.e., compensation in excess of that paid a lay witness, smacks of due process. After all, one who utilizes his professional skill and services for the benefit of another ought to be paid. To require one to work for a litigant without compensation certainly results in a deprivation of a thing of value—expert services—without due process. Moreover, if plaintiff in a malpractice action were able to secure a willing expert witness, the plaintiff and the expert unquestionably would agree to the payment of a reasonable fee to the expert for his services. There seems to be no justification for depriving the expert of his fee simply because he is "compelled" to render his services for the plaintiff. One could argue that deprivation of a fee in the event of court appointment might encourage experts to offer their services willingly to malpractice plaintiffs, thereby assuring themselves of an appropriate fee, but such an argument seems inadequate to compel one to work for another without payment. This conclusion suggests that the Indiana statute, providing that the "expert...may be compelled to...testify...without payment or tender of compensation other than the per diem and mileage allowed by law to witnesses," would be violative of due process if applied to an expert compelled to testify (and to make adequate preparation therefor) in a malpractice action. Both the California and Rhode Island statutes expressly provide for the payment of reasonable expert fees, while both rule 60 of the Uniform Rules of Evidence and section 10 of the Model Expert Testimony Act contain provisions for compensation to be determined by the judge.

The due process clause, in addition to protecting property (in this case

\(^1\) Annot., 77 A.L.R.2d 1189 (1961).
the physician's services) prohibits a state from depriving one of his liberty without due process of law. Does a statute authorizing a court to appoint an expert to serve a malpractice action plaintiff against the will and contrary to the desire of the expert violate that portion of the clause? If the question were put, may one be compelled to work for another contrary to the worker's will, the almost compulsive answer would be no. Especially so in this country where such involuntary service is "utterly incompatible with our institutions, and the fundamental law of the land." Clearly, the liberty to select one's employer, protected by the due process clause, is intimately related to the constitutional prohibition of involuntary servitude. So intimate is the relationship that it may be appropriate to examine the two provisions of the fundamental law together.

The historical background and chronology of the two provisions intimate rather strongly that they were aimed at eliminating the abridgment of liberty suffered by the slaves. Of course, the due process clause has been given much wider application. But insofar as the liberty of selecting one's employer is concerned, the due process clause almost perforce refers one back to the thirteenth amendment. That amendment was intended to terminate slavery as it had theretofore existed. Then why the conjunctive phrase, "Neither slavery nor involuntary servitude, except as a punishment for crime...."? A couple of responses come to mind. First, slavery as it had existed comprehended a property right in the slave owned by the master. The amendment intended to eliminate that property right and involuntary servitude tantamount to slavery but without the property right; in other words, it was intended to eliminate the substance as well as the form of the evil of slavery. Second, it is conceivable that the drafters contemplated a form of service different from slavery in that wages, however low, might be paid and the servant be permitted to come to and leave his place of employment, but in which the servant would be required to remain in the master's employ. The conjunctive phrasing may have been aimed at that evil, again the substance if not the pure form of slavery.

It seems rather clear that the compulsory rendering of professional services by an expert witness in a malpractice action is distinguishable from the substance and the form of slavery which pre-existed the thirteenth amendment. It should be noted, however, that a court, in affirming the vacating of an injunction, stated that "When a court of equity intervenes to compel the employee to specifically perform a contract for personal service, his service becomes involuntary, and his position becomes one of involuntary servitude, a condition utterly incompatible with our institutions, and the funda-

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However, the facts of the case should be noted too. Plaintiff, a corporation engaged in the manufacture and sale of ladies' corsets, sought to enjoin defendant, who had contracted to demonstrate and sell plaintiff's product, from demonstrating and selling other apparently similar corsets. Much of the court's opinion emphasized the difficulty in determining whether or not one compelled to perform a contract for personal service was performing properly, a difficulty long recognized by equity courts. Consequently, while the court in *Crosby* stated that compulsory performance of a contract for personal service would constitute involuntary servitude contrary to the fundamental law of the land, it is submitted that the decision does not resolve the question of the constitutional validity or invalidity of a statute authorizing compulsory expert testimony in a malpractice action.

First, while the differences between a reluctant medical expert and a corset demonstrator-saleswoman may not be so great as those between the expert and a slave, significant differences do exist. The period of employment contracted for by the corsetier was two years. The professional services rendered by an expert in a malpractice action probably would consist of a history-taking, examination, consultation with counsel, and an appearance in court if the action were not settled. The actual time required of the expert under court compulsion would be considerably less than that involved in *Crosby*; consequently, the likelihood of regular or even sporadic court intervention or supervision would be considerably less. Moreover, one would like to believe that a court-appointed physician would be more likely to comply with the conditions of his appointment than a corset demonstrator-saleswoman. The sense of professional responsibility of the former (though perhaps not sufficient to overcome the natural causes of reluctance to testify in *limine*), should be greater than the latter. On a more mundane level, the physician is more intimately rooted to his locale and practice than a traveling corset demonstrator, therefore, probably more sensitive to a local court order. And on the lowest level, the physician may be considerably more sensitive to adverse publicity arising from non-compliance with a court order than the corset saleswoman.

These factors tend to suggest that court supervision of an appointed expert in a malpractice case would not entail the extent or degree of difficulty inherent in judicial supervision of a non-professional defendant in an equity suit, and that such court appointment probably would not be violative of the thirteenth amendment. One constitutional authority has suggested that the amendment probably doesn't apply even to the non-professional defendant in an equity proceeding:

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54 *Gossard Co. v. Crosley*, *supra* note 52, at 170, 109 N.W. at 488-89.
The author is not convinced that the draftsmen of the Thirteenth Amendment intended to prevent an equity court from holding an artist or artisan with distinctive talents to his contract, although obviously state judicial activity can be as evil as legislative impositions of servitude when imposed upon industrial or agricultural workers in general.\footnote{Antieau, Commentaries on the Constitution of the United States 210 (1960).}

One final point should be made concerning the constitutionality of statutes authorizing court appointment of experts in malpractice actions. The plaintiff's need for such expert testimony arises from a judicially created standard by which the conduct of the defendant physician is to be judged. The courts have seen fit to fashion a professional standard rather than the reasonably prudent man standard generally utilized in negligence cases. To say that a statute authorizing a court to give a malpractice plaintiff the opportunity of securing the requisite testimony to establish the professional standard (an opportunity demonstrably lacking absent judicial intervention) is violative of the Constitution, would be to place the court (and the plaintiff) in an impossible posture; the court would lack the ability to compel compliance with its own requirement, despite the plaintiff's keen desire to comply. Such a result suggests the ineptitude of concluding that authorizing statutes are unconstitutional.

Compulsory Appointment of Medical Experts by Judicial Order

The preceding result suggests, too, a further question: Should a court be deemed to have the power to appoint an expert in a malpractice case even absent specific statutory authority? The question is one of some importance. Even assuming the constitutional validity of such authorizing statutes, the task of securing an expert for the plaintiff remains unaided in the many states lacking such statutes. One could suggest that the "organized bar" should initiate or, where already initiated, increase appropriate lobbying activities to have such a statute enacted. It seems fair to assume that the medical profession (and perhaps liability carriers) would initiate or increase appropriate lobbying activities to prevent enactment. Whatever the relative strengths of the opposing forces, and whatever the effect of the "ultimate wisdom," the one certainty is that, if anything were done legislatively, it would be a long time coming. To the lawyer in practice, confronted with clients in need of assistance now, the ultimate wisdom which suggests the inherent soundness of his position merely aggravates a raw spot long deprived of the protective blister of patience. To him and to the legal profession, the critical question is, what can be done now. This is merely a restate-
ment of the earlier question of the necessity for authorizing statutes. What is the legal magic of such statutes?

Each court of general jurisdiction is empowered by statute to subpoena witnesses. What, then, is the efficacy of a statute specifically authorizing a court to appoint an expert witness? A couple of purposes suggest themselves. In some states, there may be no provision for extra compensation for an expert witness; in order to provide that appropriate compensation which fairness (and perhaps the Constitution) dictate, the statute authorizing the appointment may be the vehicle used to authorize payment of expert witness fees. As to such compensation, no problem usually exists in a potential malpractice action. Plaintiff is willing to pay appropriate compensation; there is simply no expert willing to testify. The appointment function of the court is all that is required. Once the court designates an expert to serve the plaintiff, i.e., to familiarize himself with the case, examine the plaintiff if necessary, prepare to testify, and, absent settlement, testify, it seems fair to assume that plaintiff and the expert will be able to reach an appropriate financial arrangement. If not, the appointing court could take appropriate action: rescind the appointment, if failure to make the arrangement is the fault of the plaintiff, or utilize its contempt power if the fault is that of the expert, presumably as an indirect means to avoid testifying, or itself set a reasonable amount to be paid the appointed expert. The second purpose of statutes specifically authorizing the appointment of experts may go to a more basic issue: an uncertainty as to the existence of inherent court power to appoint and, in effect, to subpoena an unwilling expert witness.

The New York Court of Appeals, upon examining some of the cases, found two lines of cases in the United States,

1) Those states holding that a court could not compel expert testimony at all;
2) Those states where a court could compel expert opinions, but even those states, the New York court observed, limit the opinions to those experts are able to give without a study of the facts or other preparation.

If that is the prevailing law, a court has no inherent power to appoint an appropriate expert for a plaintiff in a malpractice action. But not all courts would agree with that statement of the law. The Supreme Court of North Carolina wrote:

It has been the immemorial custom for the trial judge to examine witnesses who are tendered by either side whenever he sees fit to do so, and the calling of

a witness on his own motion differs from this practice in degree and not in kind. This practice, in the case of ordinary witnesses, has been approved in some instances. (Citations omitted.) This practice is especially allowable in the matter of expert witnesses who were originally regarded as amici curiae and were called by the court. 3 Chamberlayne on Evidence, §§ 2376, 2552.

In a subsequent one-volume condensation of Chamberlayne’s original five-volume work, the following language appears:

In those cases where an expert is not merely called upon to testify . . . but is asked to perform some special act, aside and apart from that obligation, as for instance a physician . . . to examine facts of the case or attend court during an entire trial for the purpose of hearing all of the testimony so as to qualify him to pass an opinion, . . . no good reason can be suggested why he should either be compelled to do so or be asked to without compensation for the services rendered.

In another class of cases where one who is an expert is called upon to testify, not merely to facts within his knowledge, but also to express an opinion based upon facts presented to him, there is some authority in favor of the view that he should not be compelled to do so without extra compensation. . . . The weight of authority, however, favors the view that courts possess the power to summon experts to testify without any increase over the fees paid to other witnesses.

Reading these two consecutive paragraphs, the conclusion would seem to be that: (1) there is no reason for compelling an unwilling expert to prepare for trial; but (2) an expert can be compelled to testify, even as to his expert opinion concerning facts presented to him. Or, in other words, the court has inherent power to compel expert testimony from an unprepared expert. The writer is prepared to “suggest” a “good reason” for compelling an expert to make pre-trial preparations for testifying in a malpractice action: absent such compulsion plaintiff’s case will fail regardless of its merits. The writer would like to hear some “good reason” why a court can be said to possess inherent power to compel the opinion testimony of only an unprepared expert. What is the justification for limiting a court’s power to hear only the extempor opinions of an expert, when all (certainly, the expert) would agree that an opinion based on adequate preparation is much more likely to be accurate and comprehensive? Perhaps it is a reluctance to compel preparation without compensation. But the concern here is with a case in which plaintiff is ready, willing, able—and eager—to compensate a physician for his preparation to offer expert testimony.

State v. Horne, 171 N.C. 787, 88 S.E. 433 (1916). The court reversed defendant’s murder conviction because of the undue commendation given to the court’s expert by the court in charging the jury.

Chamberlayne, Trial Evidence § 226 (Tompkins ed. 1936).
Imagine the situation which would exist were the courts conceded to have inherent power to compel only unprepared expert testimony. In a malpractice case, the purported negligence of the defendant almost invariably will require plaintiff to secure subsequent medical attention. The physician rendering that attention will take a history from the patient, then treat him professionally. At trial, plaintiff, through the intervention of the court, will be able to compel the appearance of the treating physician. The doctor will be compelled to testify as to all those facts which he has discovered during the course of treatment. In addition, he will be required to offer an expert opinion as to the cause of the condition he has been treating. Then, upon being asked the critical question as to the accepted manner of treatment in that, or a similar locale, of the condition first treated by the defendant, the expert witness will have these alternatives available to him: (1) profess ignorance of the acceptable professional standard; or (2) express an opinion as to that standard. If he chooses the first alternative, he will be casting some doubt on his own professional knowledge and, consequently, diminishing the credibility the jury will accord him; moreover, he will be "hurting" himself professionally. If he selects the second alternative, he will have to anticipate questions on cross-examination going to the manner in which he determined the appropriate professional standard. Absent any preparation, he will have to admit that he did not consult any medical texts, professional journals, or any other literature or appropriate source. He will be compelled to admit that his "professional standard" is nothing more than an expression of what he would have done had he been in defendant's place. Such a "standard" might not be adequate to make out a legally sufficient case for plaintiff. Undoubtedly its expression would have an adverse effect upon the credibility and professional competence of the expert. One wonders how many physicians would enjoy selecting either of the alternatives available to the unprepared expert. Assuming that a court has inherent power to compel unprepared expert testimony, lawyers could confront physicians with that Hobson's choice. Why don't they?

First, self-interest—and by that is meant the self-interest a lawyer has in his client's cause. To compel such unsatisfactory expert testimony would be to accomplish little or nothing for the plaintiff. Moreover, counsel will be aware of the possibility that a physician put in such an uncomfortable position may retaliate by offering a professional standard wholly in keeping with defendant's conduct. In that case, the expert can depend on no embarrassing cross-examination, and counsel for the plaintiff probably would be required to impeach his own expert and to leave himself with a legally insufficient case. Second, it seems incontrovertible that trial counsel would prefer working with an expert willing to prepare for trial; at least "willing" in the sense
that he will prepare if a court so directs. While the physician may be less than delighted with his appointment, he may realize that appropriate pre-trial cooperation with counsel will make his court experience less painful. Certainly counsel will realize that fact. In short, it seems infinitely more desirable to have a court compel the testimony of a prepared expert than an unprepared expert, more desirable to the plaintiff, the expert, and the court and jury.

Why haven't courts been doing this? Much of the explanation may lie in the traditional backward looking posture of judges and lawyers. It hasn't been done—or, at least, counsel cannot find case authority for doing it—so it must be inappropriate. In a profession in which stare decisis plays such a significant role, this posture isn't surprising. The most innovative and imaginative lawyer feels a psychological lift at finding case authority for a relatively novel approach. Certainly most judges, including those willing to mold the law to meet current exigencies, feel more comfortable in their roles as molders of law (and less concerned about reversal) when some authority can be displayed as an insignia of legitimacy. But significant changes in law, by definition, lack hoary precedents. This lack should not be treated as a sinister baton of bastardy. Rather, it should serve as an invitation to judges and lawyers to examine the problem and attempt to resolve it reasonably.

**Suppositions**

In this article certain suppositions have been made and certain conclusions drawn. These include:

1) In most medical malpractice actions expert testimony on behalf of the plaintiff is a requisite to a successful case.

2) The requirement of expert testimony in these actions is the result of a judicially created standard of care and judicial decisions determining how that standard must be demonstrated.

3) Generally, a medical malpractice plaintiff will find it impossible to secure an expert willing to testify regardless of the merits of the case.

4) Interprofessional panels as a potential means of securing expert testimony are unsatisfactory practically and conceptually.

5) Use of learned treatises in lieu of expert testimony is mechanically high restrictive and practicably unsatisfactory.

6) Statutes authorizing court appointment of medical experts in malpractice cases and providing for compensation for such experts are not unconstitutional.

7) Even absent statutes, courts have an inherent right to appoint expert witnesses and to provide for their compensation.
8) This inherent power can be utilized most effectively and most reason-
bly by requiring experts so appointed to prepare adequately for testifying.

It is submitted, then, that lawyers should begin seeking to have such ap-
pointments made and courts should begin granting such requests. Only in
that way will a medical malpractice plaintiff have the opportunity of having
his case heard and decided on its merits.

**Subsequent Considerations**

Assuming these suggestions are adopted (admittedly presumptuous on
the part of the author), there will remain two very important practical con-
siderations.

The first of these has to do with the manner in which the appointed expert's
testimony is offered in court, a point already alluded to. Ordinarily, a court-
appointed expert is identified as such and his direct testimony elicited by the
court with counsel on either side having the right to cross-examine. It is sug-
gested that such a mode of presentation be avoided. Even absent any unduly
warm commendations offered by the court concerning the testimony of the
court-appointed witness, it seems likely that the jury, upon discovering that
the witness was appointed by the court, may tend to give him undue cred-
ibility and his testimony undue weight. After all, the laying on of hands will
have been by the only person in court both learned in the law and disinter-
rested in the outcome. There is likely to be some halo effect enjoyed by the
witness because of identity with the judge, that gowned personification of
justice towering over the entire proceedings. That would be unfair to the
defendant and unrealistic. After all, in the context here considered, the ap-
pointed expert is simply an expert appearing for the plaintiff—under judi-
cial compulsion. He should be treated as an expert offered by the plaintiff,
with direct examination by the plaintiff and cross-examination by the de-
defendant. The fact of judicial appointment should not be admissible, certain-
ly not by plaintiff and probably not by defendant. Despite a personal reluc-
tance to "keep things" from the jury, the author feels that the jury will be
given a more accurate depiction of the situation if the fact of appointment
is withheld and the appointee is treated as what he is—a witness for the
plaintiff. The second practical consideration, and one of major importance,
has to do with the practicability of plaintiff's counsel working with and rely-
ing upon an unwilling expert witness who has become involved only because
of judicial compulsion. Will such an expert be cooperative, in the appro-

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*State v. Horne, supra note 58.

*Supra note 50.
priate sense of that word, or will he retaliate so as to discourage future court appointments? Will he lend plaintiff's case the necessary expert testimony, assuming the facts merit it, or will he destroy plaintiff's case regardless of the merits? The questions are not easy ones.

In attempting to answer them, it might be well to review some of the reasons which make physicians reluctant to testify on behalf of plaintiffs in malpractice cases. Personal friendship or acquaintance with the defendant probably can be eliminated by appropriate discretion in the selection of the expert. But the other factors remain: recognition of the possibility of error in a demanding profession, the realization that the expert may some day be in the defendant's position, the reluctance to place the "kiss of death" on a professional colleague, and fear of retaliation by medical societies and professional liability carriers. The first three factors are inherent, personal feelings not brought about by external agencies. If they are to be overcome, at least to the extent of securing a helpful expert, they must be met by factors likely to evoke contrary feelings on the part of the expert. It would seem that appropriate stimuli to evoke contrary responses to the first two factors would be a growing familiarity with the plaintiff and his condition and a greater appreciation of the degree and extent of the professional incompetence of the defendant. Fortunately, these stimuli will be an integral part of the expert's preparation for trial. As he has contact with the plaintiff and the condition caused by the defendant's conduct, his reaction, as a physician, may become one of professional (and personal) sympathy for the victim of professional negligence. A growing awareness of the consequences of that negligence should lead to a greater comprehension of the extent of the neglect. Moreover, as a competent professional, he may well experience a marked distaste for a botched effort by a professional colleague. As these feelings grow, the expert's sympathy for and identity with the defendant may diminish. As "error in a demanding profession" is displaced by "downright incompetence," the expert may come to find it more difficult to imagine that he could have been guilty of such conduct. Indeed, he may come to exhibit the no longer surprising "phenomenon" that one's most severe critics are indeed his professional peers. Certainly, the court-appointed expert who, through adequate pre-trial preparation becomes thoroughly familiar with the plaintiff and his condition and the defendant and his conduct, should be better equipped to reach this level of sophistication than the physician-members of an interprofessional screening panel.

Diminution of sympathy for and empathy with the defendant on the part of the expert should tend to diminish his feelings of assuming a Judas role. It is one thing to persecute a colleague because of self-doubt; it is quite an-
other thing to state truthfully that a colleague has failed to meet an appropriate professional standard. In addition, the very existence of a court order compelling the expert to testify should further diminish his feelings of playing the part of a Judas. After all, he isn't in court because of a personal desire to be there; he is there because the court has compelled his presence. Psychologically this court compulsion should serve to alleviate some of the expert's reluctance to appear, since he and his professional colleagues will know that he is not there by choice but by compulsion.

As for potential retaliation by medical societies or professional liability carriers, it is suggested that the court compulsion responsible for the expert's appearance in court would reduce substantially the likelihood of such retaliation. Members of the medical societies, aware of the compulsion responsible for the expert's appearance in court (and aware, too, that they may be subjected to such compulsion), may be extremely hesitant to ostracize the expert witness or in any other way impose professional sanctions upon him. The liability carriers, enjoying the benefit of legal counsel, probably would be extremely reluctant to refuse to renew insurance coverage for the expert witness following his appearance in court. Such conduct on the part of the insurance carrier very likely would, and, undoubtedly should, result in appropriate judicial action aimed at those responsible for obstructing the appropriate functions of the court and of justice. A court willing to compel an expert witness to testify in a medical malpractice case should be prepared to take appropriate steps to assure that the witness' compliance with the court order does not result in professional or economic damage to the witness.

**CONCLUSION**

Logic, common sense, and justice suggest that lawyers representing plaintiffs in medical malpractice actions should seek court appointment of experts, and that the courts should grant such requests. Perhaps, over a period of time, such judicial action may become commonplace. When it does, physicians, aware of the likelihood of court appointment, may decide to testify for a plaintiff in a malpractice action even absent judicial compulsion. Just as lawyers frequently accede to requests from opposing counsel when such requests are appropriate—and can be converted into judicial mandates—so, too, may physicians one day recognize the practicality of acceding to requests to serve as experts for plaintiffs in malpractice actions once they are made aware of the convertibility of the request into a court order. The author is not so naïve as to believe that this change in attitude on the part of physicians will come about immediately. However, if it is to come about at
all, lawyers must be willing to seek appropriate court orders compelling expert testimony in malpractice actions, and courts must be willing to consider such requests reasonably. Until the bench and the bar are willing to undertake this task, the "One great obstacle facing the lawyer in malpractice cases [will continue to be] the problem of obtaining expert testimony." 62

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