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IN 1903 THE COURT in *Johnson v. Winston*[1] said:

> We cannot overlook the well-known fact that in actions of this kind it is always difficult to obtain professional testimony at all. It will not do to lay down the rule that only professional witnesses can be heard on questions of this character, and then, in spite of the fact that they are often unwilling, apply the rules of evidence with such stringency that their testimony cannot be obtained against one of their own members.

Sixty years later, in 1963, the Court in *Morgan v. Rosenberg*[2] said:

> The apparent failure of this doctor to cooperate in this proceeding is a matter of concern to this court. We are aware of the difficulty that lawyers face in procuring the testimony of some medical men in this type of action.

That the conspiracy of silence has existed for over 60 years, exists today, and creates a problem in the proper administration of justice, is so well established that it need not be debated in this note.

Avoiding the Conspiracy

There have been developments which promote the proper administration of justice in medical malpractice cases where the conspiracy of silence has operated to prevent the use of any expert witness. The application of the doctrine of *res ipsa loquitur* to malpractice cases is one such development.[3] Other

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1 68 Neb. 425, 430, 94 N. W. 607, 609 (1903).

2 370 S. W. 2d 685, 695 (Mo. App. 1963) (doctor removed appendix instead of gall bladder).

3 Salgo v. Leland Stanford, Jr. University Board of Trustees, 154 Cal. App. 2d 560, 317 P. 2d 170, 175 (1957). "But gradually the courts awoke to the so-called "conspiracy of silence." No matter how lacking in skill or how negligent the medical man might be, it was almost impossible to get other medical men to testify adversely to him in litigation based on his alleged negligence. Not only would the guilty person thereby escape from civil

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developments have been the use of the testimony of the defendant doctor to establish the expert testimony needed by the plaintiff,[4] statutes permitting the use of standard medical texts to establish a prima facie case in lieu of expert testimony,[5] and enlarging the scope of matters within laymen's knowledge.[6]

In *Michaels v. Spiers*,[7] the Court held that the jury was authorized to infer from the circumstances that the defendant doctor was negligent,

> . . . notwithstanding absence of direct expert testimony to this effect *and in the face of expert testimony to the contrary.* (Italics added.)

In *Wickoff v. James*[8] it was held that the extrajudicial admission of the defendant doctor was sufficient expert testimony to establish a prima facie case for the plaintiff. In this case the doctor emerged from the operating room and, as he was walking down the corridor, remarked to the unfortunate patient's husband, "Boy, I sure made a mess of things."

Another significant development aimed at breaking the conspiracy of silence is the enlargement of the concept of the "community" within which the expert witness is required to have a

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liability for the wrong he had done, but his professional colleagues would take no steps to insure that the same results would not again occur at his hands. This fact, plus the fact that usually the patient is by reason of anesthesia or lack of medical knowledge in no position to know what occurred that resulted in harm to him, forced the courts to attempt to equalize the situation by in some cases placing the burden on the doctor of explaining what occurred in order to overcome an inference of negligence."

Polsky, The Malpractice Dilemma: A Cure for Frustration, 30 Temp. L. Q. 359 (1957); McCoid, The Care Required of Medical Practitioners, 12 Vand. L. Rev. 549 (1959); Note, 45 Minn. L. Rev. 1019 (1961); Commart, 60 Mich. L. Rev. 1153 (1962); Note, 77 Harv. L. Rev. 333 (1963).

[4] Wickoff v. James, 159 Cal. App. 2d 664, 324 P. 2d 661 (1958); McDermott v. Manhattan Eye, Ear & Throat Hospital, 15 N. Y. 2d 20, 203 N. E. 2d 469 (1964); Walker v. Distler, 78 Idaho 38, 296 P. 2d 452 (1956); Oleksiw v. Weidener, 2 Ohio St. 2d 147 (1965); Miles v. Brainin, 224 Md. 156, 167 A. 2d 117 (1961); Stephen M. Blaes, Case Notes, Witnesses, 10 Kan. L. Rev. 483 (1962).

[5] Polsky, *supra* n. 3.

[6] Note, Civil Liability of Physicians and Surgeons for Malpractice, 35 Minn. L. Rev. 186 (1951); Friedman v. Dresel, 139 Cal. App. 2d 333, 293 P. 2d 488 (1956); Johnson v. Vaughn, 370 S. W. 2d 591 (Ky. App. 1963); Robbins v. Nathan, 189 App. Div. 827, 179 N. Y. Supp. 281 (1919); Taylor v. Milton, 353 Mich. 421, 92 N. W. 2d 57 (1958); Michaels v. Spiers, 144 S. 2d 835 (Fla. App. 1962).

[7] *Supra,* n. 6, at 839.

[8] *Supra,* n. 4, at 661

knowledge of the standard of care.[9] As stated in *Gist v. French*[10] the community

> . . . does not mean a village or section of town, but means such area as is governed by the same laws, and the people are unified by same sovereignty and customs.

Thus, expert witnesses have been permitted to testify who would otherwise have been disqualified.

The conspiracy operates, however, with a long arm. In *Julien v. Barker*[11] counsel for the plaintiff had arranged for two doctors from Spokane, Washington, to be present as expert witnesses at a trial in Coeur d'Alene, Idaho. The day before the trial both assured counsel they would be present. That same evening and the next morning they advised that they had changed their minds since they had been intimidated by suggestions and threats by officers and members of the Spokane Medical Society and by agents of medical malpractice insurance companies, and because of such intimidation they refused to testify as experts.

Assuming that the plaintiff is able to get his case to the jury, either without an expert witness or with only one,[12] perhaps from another community, the conspiracy still operates to his prejudice. The defendant will produce an entire panel of his medical luminaries to testify in his behalf.[13] The plaintiff should have some method of overcoming the obvious prejudice that this barrage of testimony creates in the minds of the jurors.

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[9] Gist v. French, 136 Cal. App. 2d 247, 288 P. 2d 1003 (1955) (overruled on other grounds), 353 P. 2d 934; Sampson v. Veenboer, 252 Mich. 660, 234 N. W. 170 (1931).

[10] *Supra,* n. 9, at 1005.

[11] 75 Idaho 413, 272 P. 2d 718 (1954).

[12] Huffman v. Lindquist, 37 Cal. 2d 465, 234 P. 2d 34 (1951), at 46: "But regardless of the merits of the plaintiff's case, physicians who are members of medical societies flock to the defense of their 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."

[13] Belli, "Ready for the Plaintiff," 30 Temp. L. Q. 408 (1957), at 415; ". . . a whole panel of their medical luminaries (state and national presidents, secretaries and sergeants-at-arms of the various medical specialty societies) to testify for them," in writing about the defendant doctors in a malpractice case, and, page 409; "I lost that first malpractice case. Why? Because I couldn't persuade a single one of this drunken doctor's colleagues to testify to the obvious in court. Worse than that. Five doctors testified in his behalf, including the head of one of our largest university hospitals,

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Reversible Error?

May the plaintiff bring before the jury the conspiracy of silence and explain how it has operated to his prejudice without risking reversible error? It is first necessary to consider the attitude of the courts within the particular jurisdiction. In a minority of states, the rule is that if there is any improper argument or "misconduct," the complaining party is entitled to reversal as a matter of law *unless* it can be shown affirmatively that no prejudice resulted.[14] In other jurisdictions, however, a cause will not be reversed unless the misconduct was willful or persistent and unless it can be shown that substantial prejudice resulted and was harmful to the complaining party.[15] "Harmful" in this regard means that the complaining party was deprived of a fair trial,[16] the jury was misled,[17] or that a miscarriage of justice resulted.[18]

In *Corkey vs. Greenberg*[19] it was stated that in order to be reversed it must appear that prejudice resulted or that a different result would have been probable except for the misconduct. In *Schmitt v. American Indemnity Co.*[20] it was held that the Supreme Court cannot *presume* that there has been injury to the complaining party because of improper argument, and the Court must find affirmative evidence of prejudicial effect, *regardless of how improper the remarks were.* (Italics added.) In this case, the Court related the determination of prejudicial effect to the amount of damages, and in the absence of excessive

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who got on the witness stand, gritted his teeth and swore that what the erring doctor had done was 'good practice'!"; Sampson v. Veenboer, *supra,* n. 9, at 171, "To prove negligence, a Dr. Louis Thexton, of Chicago, testified as an expert on behalf of plaintiff. Defendant and a number of prominent surgeons of Grand Rapids attempted to refute plaintiff's claims."

14 3 Am. Jur. 620; Entzminger v. Seigler, 186 So. Car. 194, 195 S. E. 244 (1938); Ramirez v. Acker, 134 Tex. 647, 138 S. W. 2d 1054 (1940).

15 5A, C. J. S. 856; Ferrate v. Key System Transit Lines, 165 Cal. App. 2d 391, 331 P. 2d 991 (1958); Stephens v. Mendenhall, 287 S. W. 2d 259 (Tex. Civ. App. 1956); Corkery v. Greenberg, 253 Iowa 846, 114 N. W. 2d 327 (1962); Schmitt v. American Indemnity Co., 266 Wis. 557, 64 N. W. 2d 394 (1954); Bruner v. Gordon, 309 Ky. 29, 214 S. W. 2d 997 (1948); Hoffer v. Burd, 78 N. D. 278, 49 N. W. 2d 282 (1951).

16 Hoffer v. Burd, *supra,* n. 15.

17 Stephens v. Mendenhall, *supra,* n. 15.

18 Ferrate v. Key System Transit Lines, *supra,* n. 15.

19 *Supra,* n. 15.

20 *Supra,* n. 15.

damages, and in the absence of an attack on the amount awarded, the improper remarks were not prejudicial.

It is difficult to conceive how a court could find an explanation of the conspiracy of silence to be grounds for reversible error under these latter rules, especially since the prejudice is merely an offset to that created by the adverse party.

The opposing counsel must, in most cases, raise any objection during the argument.[21] The reasoning on this point is clearly spelled out in *Ramirez v. Acker*.[22] If the argument is so prejudicial or inflammatory that any instruction from the trial court to the jury to disregard it could not cure the error, then counsel is not bound to object, and it may be considered on appeal. If, however, the argument is such that correction or instruction by the trial court to the jury to disregard the argument will cure the error and render it harmless, objection must be made at the time and failure to object waives the error.[23]

Arguing Conspiracy of Silence

The writer has not been able to find any case decided squarely on the point of whether the conspiracy of silence argument, in itself, is so prejudicial as to cause reversal. We can therefore only attempt to surmise a conclusion as to the probable result.

The nearest case on point appears to be *Gist v. French*.[24] In this case, the trial judge himself commented:

> 'The courts have recognized that where it's confined to the community the difficulty of getting other doctors to testify in a proceeding of this type [is well known]. They are reluctant to do it.'

On review, the District Court of Appeal, in commenting on this assignment of error, said:

> The court's remark carried no evil implications. It was merely an open recognition of the truth of the popular legend that doctors are reluctant to testify to the negligence or incompetency of their fellows of the same vicinity.

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[21] Gist v. French, *supra*, n. 9; McCown v. Jennings, 209 S. W. 2d 408 (Tex. Civ. App. 1948); Greathouse v. Mitchell, 249 S. W. 2d 738 (Ky. App. 1952); Horn v. Atchison, Topeka & Santa Fe Railway Co., 39 Cal. Rptr. 721, 394 P. 2d 561 (1964 U. S. Sup. Ct. app'l pending).

[22] *Supra*, n. 14.

[23] 4A C. J. S. 913.

[24] *Supra*, note 9, at 1010.

The court held that the trial judge's remark was not reversible error in that counsel did not object at the time, and therefore waived objection, and that the judge instructed the jury not to be influenced by any of the comments he had made.

Counsel for plaintiff made extensive references to the difficulty of getting doctors to testify and referred to the situation as a "close combine." The remarks were set out in the margin of the case. Counsel went further in his argument than was necessary to establish the conspiracy of silence, and it was obviously inflammatory and an appeal to prejudice. Reversal was not granted, however, for three reasons:

1) The judge has repeatedly cautioned the jury to decide the case solely upon the evidence and to ignore repartee between counsel.
2) The appellant had accused the plaintiff of not producing her current personal physician to testify, and this in turn led to the argument by plaintiff concerning the conspiracy of silence.
3) The conduct of the complaining party was just as bad or worse than that of the respondent.

Conclusions

In a situation where plaintiff has been unable to secure an expert witness[25] or the doctor currently treating the plaintiff refuses to testify,[26] or where the defendant has produced a large number of experts on his behalf,[27] counsel should attempt to explain the plaintiff's lack of experts.

If the defendant's counsel should himself comment on the lack of expert witnesses for the plaintiff, this would clearly permit counsel for plaintiff to explain the conspiracy of silence

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[25] Julien v. Barker, *supra*, n. 11; Agnew v. City of Los Angeles, 82 Cal. App. 2d 616, 186 P. 2d 450 (1947); Morrill v. Komasinski, 256 Wis. 417, 41 N. W. 2d 620 (1950); Steiginga v. Thron, 30 N. J. Super. 423, 105 A. 2d 10 (1954), at 11; "Plaintiffs sought an adjournment that Monday because on the preceding Saturday, at 5:12 P. M., Dr. James V. Ricci of 30 E. 76th Street, New York, N. Y., a professor of gynecology and obstetrics at the New York College of Medicine, who was the only expert witness retained on plaintiff's behalf, had, without warrant and without further notice, declined 'on second thought' to testify against 'a brother practitioner.' This, even though as it is said, he then reiterated the respects wherein the defendant had been negligent."

[26] Morgan v. Rosenberg, *supra*, n. 2; Gist v. French, *supra*, n. 9.

[27] Sampson v. Veenboer, *supra*, n. 9.

to the jury. The effect of misconduct or improper argument by one counsel is mitigated if it has been invoked by opposing counsel, or if it relates to a matter injected into the case by his adversary.[28] In *Gist v. French*[29] it was succinctly stated:

> The language of respondent's counsel of which appellant complains pales beside that of appellant's attorneys. They opened all valves and stoked the furnace. They invoked glamorous adjectives, accused their adversaries of villainy and charged the adverse witnesses with perjury and depravity.

Reference to the conspiracy of silence could also be defended on the "common knowledge" theory. An argument will not be improper or prejudicial because it relates to a matter outside of the record if it is a subject within the common knowledge of the jury.[30] In *Moore v. Parrish*[31] it was thus stated:

> Possibility of injury from alleged improper argument of counsel must be measured by its relation to entire case and to facts well known to jury and which are in mind of jury whether called to their attention or not.
>
> Strictly speaking, the statement referred to was out of record, *and yet it related to a subject as well known to the average juror as the ten commandments.* (Italics added.)

The fact that the reluctance is so frequently referred to by the court itself would indicate that it is a matter of common knowledge.[32] Popular magazines have carried articles on the subject.[33]

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[28] 88 C. J. S. 337; Gist v. French, *supra*, n. 9; McCown v. Jennings, *supra*, n. 21; Kellerher v. Porter, 29 Wash. 2d 650, 189 P. 2d 223 (1948); Darling II v. Charleston Community Memorial Hospital, 50 Ill. App. 2d 253, 200 N. E. 2d 149 (1964).

[29] *Supra*, n. 9, at 1013.

[30] 88 C. J. S. 355; 5A C. J. S. 856; Moore v. Parrish, 70 S. W. 2d 315 (Tex. Civ. App. 1934); Rice v. Hill, 315 Pa. 166, 172 A. 289 (1934): "Counsel during the course of their arguments cannot be permitted to assume the role of unsworn and unrestricted witnesses, though they do have the right to use well-known facts from history and literature and current events to strengthen and embellish their arguments"; Stephens v. Mendenhall, *supra*, n. 15.

[31] *Supra*, n. 30, at 315 and 318.

[32] Tadlock v. Lloyd, 65 Col. 40, 173 P. 200, 202 (1918): "The code of ethics among physicians is frequently a bar to securing positive testimony on questions such as are here involved." (Overruled 263 P. 2d 314); Butts v. Watts, 290 S. W. 2d 777, 779 (Ky. App. 1956): "But the notorious unwillingness of members of the medical profession to testify against one another may impose an insuperable handicap upon a plaintiff who cannot obtain professional proof"; Christie v. Callahan, 124 F. 2d 825, 828 (C. A., D. C. 1941):

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Practicing attorneys and legal writers advocate that the subject be brought to the jury in *voir dire* examination and in argument. In *Trial of Medical Malpractice*[34] the authors state that counsel should offer an explanation of why plaintiff has less expert testimony in support of his case than the defendant offers in defense.

In *Modern Techniques in the Preparation and Trial of a Medical Malpractice Suit*,[35] Mr. Fitz-gerald Ames, Sr. lists several questions that may be used in *voir dire* as follows:

> Would you be prejudiced against my client, or against me as his attorney, if, as a result of the reluctance of doctors to testify against each other, we are unable to produce a doctor to testify against the defendant? Would you be prejudiced against my client or me if, as a result of the reluctance of doctors in this community to testify against each other, we are required to produce a doctor from another community to testify against the defendant doctor?

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"Physicians, like lawyers, are loath to testify a fellow craftsman has been negligent, especially when he is highly reputable in professional character, as are these defendants"; Stockham v. Hall, 145 Kan. 291, 65 P. 2d 348, 349 (1937): ". . . and there is quite understandable reluctance on the part of expert witnesses to give testimony tending to reflect on the professional skill of a fellow craftsman"; Morrill v. Komasinski, *supra*, n. 25, at 622: "That plaintiff was unable to obtain medical witnesses in her behalf appears clearly: she and her counsel advised the trial court that they consulted six or seven physicians and surgeons licensed to practice in Wisconsin, and were advised that the diagnosis and treatment accorded plaintiff by defendants were faulty but that they would not appear and testify"; Reynolds v. Struble, 128 Cal. App. 716, 18 P. 2d 690, 696 (1933): "In the instant case the witnesses testifying for the defendant on the points under discussion did display a direct interest in the outcome of the case. One testified that he was unalterably opposed to malpractice cases, regardless of the facts. Almost all of them testified that they were acting without fee or charge as a professional duty, as it were, to repel the inference that might arise against physicians and surgeons as a class. It was shown that some of the medical witnesses had approached the plaintiff's witness and attempted to intimidate him or at least to dissuade him from testifying under pain of ostracism"; Bartholomew v. Butts, 232 Iowa 776, 5 N. W. 2d 7, 9 (1942): "In considering the sufficiency of the evidence in malpractice cases, other courts have commented on the natural reluctance of physicians to testify against a fellow doctor, especially one who is reputable"; Steiginga v. Thron, *supra*, n. 25, at 11: "The circumstances of the case must be looked at in the light of . . . the matter is of sufficient public concern to call for plain speaking—a shocking unethical reluctance on the part of the medical profession to accept its obligation to society and its profession in an action for malpractice."

[33] Wylie, The Doctor's Conspiracy of Silence, Redbook (March, 1952); Silverman, Medicine's Legal Nightmare, Saturday Evening Post (April 11, 1959); Shalett, Can We Trust All Our Doctors?, Ladies Home Journal (Mar., 1953); Peters, When Your Doctor Fears His Patients, Good Housekeeping (Sept., 1959).

[34] Louisell & Williams, Trial of Medical Malpractice Cases, 337 (1960).

[35] 12 Vand. L. Rev. 649, 650 (1959).

Mr. Ames recognizes, however, that counsel may not have this range of freedom in his examinations in all jurisdictions and before all judges.

He further states that in argument it should be pointed out that doctors control hospital staff memberships and thus have a perfect club to hold over fellow practitioners who might be tempted to testify in the interest of justice.[36] It should also be noted that specialists depend almost entirely on referrals from other doctors for their work, and if one should step out of line, he could suffer financially.

There is a need in most malpractice suits to impress the jury with the operation and effect of the conspiracy of silence, and in most jurisdictions, to do so would apparently not, and certainly should not, result in reversible error if done in a reasonable and temperate manner. There is an advantage to be gained if this is successful. In *An Ancient Therapy Still Applied: The Silent Medical Treatment,*[37] Mr. Belli states:

> But because of universal common knowledge of the conspiracy of the silent medical treatment, known to a jury, the malpractice plaintiff perhaps more than any other type of plaintiff has a better chance of a successful award—and a successful award is an adequate award. Modern American jurors penalize any conspiracy to withhold evidence.

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[36] *Id.* at 666.

[37] I Vill. L. Rev. 250 at 288 (1956).