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Discovery of Medical Records

*Margaret Mazza**

OVER 100 YEARS AGO a medical expert was allowed to use a diagram, which he had prepared in an assault case, to show the properties of the human blood.¹ Medical evidence is employed by plaintiffs chiefly to prove the causation and extent of personal injury damages, while defendants try to prove the slightness or lack of causal connection in such claims. Many types of medical reports are kept which may be used to substantiate the allegations of either party in personal injury actions. Of primary importance are the reports of physicians and hospitals, and reports upon the voluntary or compulsory examination of the plaintiff.

By use of the Right of Discovery parties to actions may require disclosure of facts, documents, or other evidence in the exclusive knowledge or possession of the opposing party or of a third person. Today discovery procedure is usually regulated by statute, but statutory rules and provisions do not bar an independent discovery proceeding in equity, unless it is specifically prohibited by the statute.² The extent of the inquiry under a bill of discovery in equity rests largely in the discretion of the court.³ In construing statutory provisions on this subject, courts allow liberal interpretation, viewing them as remedial laws.⁴ Generally, it is held essential to the granting of discovery that the records sought be necessary to the case.⁵ A chart summarizing discovery rules appears at the end of this article.

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¹ *State v. Knight*, 43 Me. 11 (1851).

² Conrad, *Modern Trial Evidence*, § 902 (1956).

³ *Indianapolis Amusement Co. v. Metro-Goldwyn-Mayer Distributing Corp.*, 90 F. 2d 732 (7 C. C. A., 1936), cert. den. 58 S. Ct. 119, 302 U. S. 734 (1937); *Tiller v. Cincinnati Discount Co.*, 270 Ky. 685, 110 S. W. 2d 420 (1937); *Lomish v. Morris Nimelstein Sportswear Co.*, 367 Pa. 393, 80 A. 2d 805 (1951).

⁴ Conrad, *op. cit.* supra note 2, § 903.

⁵ *Johnson v. Maryland Trust Co.*, 176 Md. 557, 6 A. 2d 383 (1939); *Henry v. Donovan*, 148 Miss. 278, 114 S. 482 (1927); *Carroll v. C. I. Hayes, Inc.*, 56 R. I. 105, 184 A. 181 (1936); *Benning v. Phelps*, 249 F. 2d 47 (C. A. 2, 1957), court denied defendant's motion for report of plaintiff's physician because defendant had two medical reports, one upon voluntary examination of the plaintiff and one upon compulsory examination. Court ruled that defendant had not shown "good cause" for receiving additional reports.

Privileged Communications

Discovery as to medical records is affected basically by the rules of privileged communications. At common law communications between physician and patient are not privileged.⁶ Many states have enacted statutes effecting this privilege, but some provide that it is waived by the party bringing a personal injury action.⁷ The privilege extends to confidential information acquired while attending a person in a professional capacity—or in other words to information acquired in order to enable the physician to prescribe remedies of relief. The whole basis of the privilege is the fact that a physician cannot treat his patient adequately without a full disclosure of the facts relating to the complaint; the patient should be protected against revelation of confidential information.⁸

The rights of privileged communications, in addition to affecting physicians' records, have been held to include x-rays,⁹ hospital records,¹⁰ and nurses reports.¹¹ Privilege applies to these records insofar as they tend to disclose confidential communications learned in attending a patient. The privilege does not affect the rendition of reports required by law to be made by the physician.¹² Medical records are also not privileged against discovery if the privilege is waived by the patient.¹³ In some jurisdictions, privilege does not apply if the sanity of the patient is in question.¹⁴

Physicians' reports given to the patient's attorney have been held to be privileged because of the attorney-client relation. It was held that where medical advice is required in order to in-

⁶ *Hollenbacker v. Bryand*, 42 Del. 242, 30 A. 2d 561 (1943); *Dyer v. State*, 241 Ala. 679, 4 S. 2d 311 (1941); *Florida Power & Light Co. v. Bridgeman*, 133 Fla. 195, 182 S. 911 (1938).

⁷ These statutes are compiled and quoted in appendix of DeWitt, *Privileged Communication Between Physician and Patient* (1958).

⁸ For a complete discussion on privilege see Regan, *Doctor and Patient and the Law* (1956); DeWitt, *op. cit. supra* note 7; 8 *Wigmore on Evidence* § 2383 (1949).

⁹ *Lorde v. Guardian Life Ins. Co. of America*, 300 N. Y. S. 721, 252 App. Div. 646 (1937); *O'Donnell v. O'Donnell*, 142 Neb. 706, 7 N. W. 2d 647 (1943).

¹⁰ *Stapleton v. Chicago B. & O. Ry.*, 101 Neb. 20, 162 N. W. 644 (1917); *Massachusetts Mutual Life Ins. Co. v. Michigan Asylum*, 178 Mich. 193, 144 N. W. 538 (1913); *Toole v. Franklin Investment Co.*, 158 Wash. 696, 291 P. 1101 (1930); *Metropolitan Life Ins. Co. v. McSwain*, 149 Miss. 323, 115 S. 555 (1928).

¹¹ *Weis v. Weis*, 147 Ohio St. 416, 72 N. E. 2d 245 (1947).

¹² *E.g.*, Calif. Health & Safety Code § 1008 requires reports of violent death, contagious disease, industrial injury, ophthalmia neonatorum, death, still-birth, and birth.

¹³ *Murphy v. Mutual Life Ins. Co. of N. Y.*, 62 Idaho 362, 112 P. 2d 993 (1941).

¹⁴ Calif. Code Civil Prac. Ann. (Evid.) § 188 (1946); Hawaii Rev. Laws § 222-20 (1955).

interpret a client's condition to his attorney, the information discovered upon a private examination of the client by a physician employed by the attorney falls within the scope of the rule protecting communications between attorney and client.¹⁵ Some courts have ignored the attorney-client privilege as the basis for denying discovery and have, instead, denied discovery on the grounds that it was the plaintiff who paid the physician, and the latter is bound by the physician-patient privilege.¹⁶ Under this rule, if the defendant can show good cause and can avoid the "who paid the expert" factor, he may be allowed discovery of the report submitted by the doctor to the plaintiff's attorney.

Discovery Applied to Medical Records

Generally, a bill of discovery does not lie against a person not a party to the cause of action.¹⁷ This has been remedied in many jurisdictions either by liberal discovery statutes, by rules of civil procedure, or by regulations of specific courts. Some states¹⁸ have enacted statutes similar to the Federal Rules of Civil Procedure,¹⁹ while others require witnesses to produce documents when so ordered.²⁰ Some states have enacted a provision that, by a subpoena duces tecum, a third person may be required to produce documents held in his control or possession.²¹ Pennsylvania has a similar provision and expressly extends discovery to pre-trial examination if the petitioner has an interest in the documents demanded.²² Wisconsin has enacted a statute with a special provision for discovery in personal injury actions which requires production of x-rays, hospital records and other evidence concerning the injuries claimed.²³

One of the chief tools of discovery is the Examination Before Trial. In practically all states statutes exist which permit any party in a civil action to take depositions of persons whose evidence he may desire to use.²⁴ Some statutes expressly authorize the taking of depositions of physicians under certain circum-

¹⁵ *Ex Parte Ochse*, 38 Cal. 2d 230, 238 P. 2d 561 (1951); *San Francisco v. Superior Court*, 27 Cal. 2d 227, 231 P. 2d 26 (1951).

¹⁶ *Cox v. Pennsylvania Ry.*, 9 F. R. D. 517 (S. D. N. Y. 1949); *Sacks v. Aluminum Co. of America*, 167 F. 2d 570 (6th Cir. 1948).

¹⁷ *Wigmore*, op. cit. supra note 8, § 1859f.

¹⁸ See attached chart, below.

¹⁹ Fed. Rules Civ. Proc., Rule 34; and see discussion below.

²⁰ Idaho Code § 12-302 (1932); Miss. C. Civ. P. § 86 (1953); Mont. Rev. C. Ann. § 93-8301 (1947); Ohio Rev. Code § 2317.33 (1953); Okl. Comp. Stat. § 317, 318 (1931); Oregon Laws § 7-203 (1930); Wyo. Comp. Stat. Ann. § 3-3118 (1945).

²¹ Va. Code § 8-301 (1957); Mo. C. Civ. P. § 86 (1953).

²² Pa. Evid. § 391 (1938).

²³ Wis. Stat. § 269.57 (1953).

²⁴ E.g., N. C. Gen. Stat. Ann. § 8-71 (1943).

stances.²⁵ In New York a provision specifically authorizes the examination of doctors and nurses and requires their production of records.²⁶ In some states deposition rules are restrictive, allowing examination of all sides of all issues for parties; and a few allow only written interrogatories of the parties.²⁷

Rule 34 of the Federal Rules of Civil Procedure provides for the discovery and production of documents and other things for inspection, copying or photographing:

Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30(b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, object, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control.

The reports of the 1937-38 American Bar Association Committee on the Improvement of the Law of Evidence said that the use of discovery before trial should be much extended, and recommended that all State courts and legislatures be asked to adopt rules of discovery similar to those of the Federal Rules. This latter allow extensive discovery, and are generally liberally applied, as illustrated by the case of *Southerland v. U. S.*²⁸ in which the plaintiff sued for injuries sustained while under anesthesia in a Public Health Service Hospital in New York. The court held that the plaintiff was entitled to discovery regarding the administrators of the hospital, and allowed inspection of all pertinent records. The court also held that the government is not entitled to sovereign immunity from discovery.

In many jurisdictions hospitals are required to keep records. Discovery, therefore, can be effected under the rules applicable to public records.²⁹ These records can, in some cases, be obtained by a subpoena duces tecum.³⁰ Some courts have adopted rules to simplify and facilitate the production of hospital records. In 1954, under the approval of the Joint Docket Committee of the Cleveland and the Cuyahoga County Bar Associations and the Cleveland Hospital Council, such a rule was adopted. It provides that:

²⁵ Idaho Code § 9-906 (1946 Replacement) and Ind. Stat. Ann. § 2-1506 (1951) provide that a deposition of a physician may be taken without court order if he lives outside the county where the case will be tried and cannot be required to appear as a witness.

²⁶ N. Y. C. P. A. § 296.

²⁷ Averbach, *Handling Accident Cases* § 2.15 (1958).

²⁸ 23 F. R. D. 247 (D. C. N. Y., 1959).

²⁹ Wigmore, *op. cit. supra* note 8 § 1707.

³⁰ Belli, *Trial and Tort Trends*, 321 (1957).

Upon motion of any party, granted, without hearing if all parties consent or otherwise after hearing for good cause shown, a pre-trial judge may issue to any hospital of this county, its medical records librarian or to another appropriate agent of the hospital, an order directing the production of hospital records of x-rays and the delivery of such reproduced copies to an authorized person, which records or x-rays relate to a party in the case, and which may be pertinent to the issues of the case.³¹

Voluntary and Compulsory Examination

It is generally held that by voluntarily submitting to a physical examination, the plaintiff does not waive his right to receive a copy of the report.³² It has been ruled that the plaintiff must receive a copy of reports upon voluntary medical examination;³³ and some states so require by statute.³⁴

All but seven states have statutes giving courts the power to order plaintiffs to submit to physical examination in personal injury actions.³⁵ Generally, the granting or denying of a motion for a physical examination lies within the discretion of the court.³⁶ Courts, in making such orders, usually provide that the examined party is to receive a copy of the medical report.³⁷

Federal Civil Procedure Rule 35 provides for discretionary compulsory physical examination. The Rule also specifies that, upon request of plaintiff, it is mandatory upon defendant to give to him a copy of the report.³⁸ But by requesting the report the examined party waives any privilege he may have in that action or any other involving the same controversies. As was brought out in *Tweith v. Duluth, M. & I. R. Ry. Co.*,³⁹ compulsory examination of the plaintiff furnishes the defendant with a perfectly fair way of obtaining evidence of the physical condition of the plaintiff, and makes unnecessary resort to witnesses, where the relation of physician and patient exists.

³¹ Rules of Common Pleas Court of Cuyahoga County Ohio, Rule 12.

³² *Kelleher v. Cohoes Trucking Co.*, 25 F. Supp. 965 (D. C. N. Y., 1938); *Keil v. Himes*, 13 F. R. D. 451 (D. C. Pa., 1952).

³³ *Gooch v. Planch*, 14 Misc. (N. Y.) 2d 396 (1958); contra, in suit against municipal corporation, *Calderon v. City of N. Y.*, 15 Misc. 346 (1958) applying N. Y. Mun. L. § 50-7(3).

³⁴ N. Y. C. P. A. § 306.

³⁵ *London, Compulsory Medical Examination of Plaintiffs in Personal Injury Actions*, 31 So. Cal. L. R. (1) 69 (1957).

³⁶ *Boucher v. Krause*, 200 F. 2d 256 (C. A. 7, 1952), cert. den. 345 U. S. 997 (1953); *Hoffman v. Illinois Terminal R. R.*, 274 S. W. 2d 591 (Mo. App. 1955); *Krook v. Blomberg*, 95 N. H. 170, 59 A. 2d 482 (1948); *Bank of America National Trust & Savings Ass'n. v. Haydn*, 231 F. 2d 595 (C. A. 9, 1956); *Carter v. Baltimore & Ohio R. R.*, 152 F. 2d 129 (App. D. C. 1949); *United States v. Five Cases*, 9 F. R. D. 81 (D. C. Conn. 1949).

³⁷ *Belli*, *Modern Trials*, § 82 (1954).

³⁸ Rule applied in *Kelleher v. Cohoes*, supra note 32.

³⁹ 66 F. Supp. 427 (D. C. Minn., 1946).

Under the proposed revision of the rules for medical examination in Common Pleas Court of Cuyahoga County, Ohio, such examinations are to be made under the direction of a panel of physicians. Proposed Rule 21A provides that all reports made by the panel shall be forwarded to the pre-trial judge who ordered the examination, with sufficient copies for the counsel in the case.⁴⁰

Conclusion

In a recent case a Wisconsin court allowed the defendant to examine all medical records which concerned treatment of the plaintiff's left arm and leg before and after the accident, because the plaintiff was suing for impairment to those particular limbs. The court spoke in terms of a duty on the part of the plaintiff to furnish information as to the prior disability of these limbs.⁴¹ Whether the question is attacked by imposing a duty on the plaintiff, or by enacting liberal discovery statutes such as Rule 34 of the Federal Rules of Civil Procedure, or by adopting procedural rules in particular courts, it is evident that there is realization of a need for effectual, simple and liberal rules of discovery in personal injury actions.

⁴⁰ Daily Legal News and Cleveland Recorder, Oct. 5, 1959, p. 1 col. 6.

⁴¹ Leusink v. O'Donnell, 255 Wis. 627, 39 N. W. 2d 675 (1949); rev'd on other grounds, 257 Wis. 571, 44 N. W. 2d 525 (1950).

Rules of Discovery

	Deposition	Subpoena Duces Tecum	Similar to Fed. R. Civ. P. Rule 34
Ala.	tit 7 § 473 ^a	tit 7 § 489 ^a	
Alaska	§ 58-4-13 ^b	§ 58-3-1 ^a	
Ariz.			R. Civ. P. Rule 34
Ark.			Act 335 § 9 (1953)
Calif.	Civ. P. § 2004 ^c	Civ. P. § 1985 ^a Civ. P. § 1985.5 ^d	
Colo.			R. Civ. P. Rule 34
Conn.	§ 52-148 ^b	§ 52-197 ^c	
Del.			R. Civ. P. Rule 34
D. C.			Mun. Ct. R. § 1 Rule 34
Fla.			R. Civ. P. Rule 34
Ga.	§ 38-1201 ^c	§ 39-901 ^a	
Hawaii	§ 223-1 ^b	§ 225-4 ^c	
Idaho			R. Civ. P. Rule 34
Ill.	S. Ct. Rule 19-4 ^a	Civ. P. Act § 62 ^a	
Ind.	2-1501, ^a 2-1704 ^a	2-1644 ^c	
Iowa	R. Civ. P. 140 ^a	R. Civ. P. 126 ^a	
Kan.	60-2824 ^c	60-2807 ^a	
Ky.			R. Civ. P. Rule

La.			Rev. St. § 13.3782
Me.	117 § 11 ^a	113 § 23 ^c	
Md.			P. and P. Discovery R. 4
Mass.	231 § 25 ^b	231 § 68 ^c	
Mich.	§ 617.6 ^b	§ 617.8 ^a	
Minn.			R. Civ. P. Rule 34
Miss.	§ 1699 ^b	§ 1659 ^c	
Mo.			§ 510.030
Mont.	93-1801-3 ^b	93-8301 ^a	
Neb.			§ 37
Nev.			R. Civ. P. Rule 34
N. H.	§ 517.1 ^a		
N. J.			Sup. Ct. R. Civ. P. 4.24-1
N. M.			R. Civ. P. Rule 34
N. Y.	C. P. A. § 8-71 ^b	C. P. A. § 269 ^e	
N. C.	§ 8-71 ^b	§ 8-61 ^a	
N. D.	31-0403 ^c	§ 31-0302 ^a	
Ohio	§ 2319.05	§ 2317.33 ^a	
Okla.	tit. 12 § 433 ^b	tit. 12 § 387 ^a	
Ore.	§ 45.120 ^c	tit. 12 § 387 ^a	
Pa.			R. Civ. P. § 4009
R. I.	9-18-1 ^a	9-19-23 ^c	
S. C.	§ 26-701 ^a	§ 26-502 ^c	
S. D.			
Tenn.	§ 24-903 ^a	24-201 ^a	
Tex.			R. Civ. P. Rule 167
Utah			R. Civ. P. Rule 34
Vt.	tit. 12 § 1231 ^a	tit. 12 § 1691 ^c	
Va.	§ 8-304 ^a	§ 8-301 ^a	
Wash.			R. Civ. P. Rule 34
W. Va.	§ 5734 ^a	§ 5744 ^a	
Wis.		§ 269.57 ^f	
Wyo.			R. Civ. P. Rule 34

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- a. Applies to all witnesses or third persons.
 - b. Limits to persons unable to attend because of age, illness, traveling distance or to persons whose testimony will not be personally given at trial.
 - c. Limits to adverse parties.
 - d. Regulates production at out of court hearings.
 - e. Regulates testimony of physician and nurses and requires their production of records at deposition and trial.
 - f. Allows extensive discovery as to medical records and evidence in personal injury actions.