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is diametrical to this view, especially to Catholic priests who are sworn to the "seal of confession." Condemnation of such oppression was espoused by a great opponent of privileges, Jeremy Bentham:[45]

> In the character, of penitents, the people would be pressed with the whole weight of the penal branch of the law; inhibited from the exercise of this essential and indispensable article of their religion. . . . The advantage gained by the coercion—gained in the shape of assistance to justice—would be casual, and even rare; the mischief produced by it, constant and all extensive.[46]

Throughout our heritage, the principle of free exercise of religion has been a basic tenet of the American philosophy, protecting the rights and practices of churches, clergymen and parishioners. No practice could be more inhibitive of this free exercise of religion than the compulsion to testify to a confidential communication made within the scope of religious practice.

[45] 8 WIGMORE, EVIDENCE § 2285 (rev. ed. 1961).

[46] *Ibid.*

Defendant Compelled to Testify as a Medical Expert

Plaintiff sued a hospital and several doctors for malpractice. While attempting to establish her prima facie case she sought to question one of the defendant-doctors as to the propriety of the operation which he had performed. The trial court refused to allow such testimony and dismissed the action at the close of plaintiff's case; the appellate division affirmed holding that the plaintiff could not compel the defendant-doctor to testify as an "expert." The Court of Appeals, in a unanimous decision, reversed and *held* that a defendant-physician in a malpractice action could be questioned as an expert to establish the generally accepted medical practice in the community in order to determine whether he had deviated from such a standard. *McDermott v. Manhattan Eye, Ear & Throat Hosp.*, 15 N.Y.2d 20, 203 N.E.2d 469, 255 N.Y.S.2d 65 (1964).

In order for a plaintiff to be successful in a malpractice action, it is essential for him to establish the standard of care exercised by the doctors practicing in the defendant's locale and to prove a specific deviation from that standard by the defendant. In the words of Judge Fuld in the instant case:

> The issue whether the defendant-doctor deviated from the proper and approved practice customarily adopted by physicians practicing in the community is assuredly "pertinent and relevant" to a malpractice action. Indeed, absent such proof, the plaintiff's case would have to be dismissed.[1]

Similarly, where the matters relevant to the case are not within the experience and observation of the ordinary jurymen and the facts are of such a nature as to require special knowledge or skill, the opinion of an expert is necessary.[2]

Two facts, of which the Court of Appeals took judicial notice, should be rec-

[1] McDermott v. Manhattan Eye, Ear & Throat Hosp., 15 N.Y.2d 20, 27, 203 N.E.2d 469, 473, 255 N.Y.S.2d 65, 71 (1964).

[2] Meiselman v. Crown Heights Hosp., 285 N.Y. 389, 396, 34 N.E.2d 367, 370 (1941). See also Annot., 81 A.L.R.2d 597 (1962).

ognized at this point: (1) the difficulty of securing expert testimony in a malpractice action, and (2) the added difficulty of doing so when the defendant is one of the foremost authorities in his field (as in this case).[3] Although any person—even an expert—may be subpoenaed to testify as to his knowledge of any facts relevant to the case, a disinterested party may not be compelled to testify concerning his expert opinion. The reasons given for this rule are quite sound. First, a person has a property right in any expert knowledge or skill which he possesses and he has a right not to divulge such information although he may voluntarily contract to do so.[4] Second, it has been held that to allow an expert to be compelled to testify even when he is a disinterested party may subject him to undue harassment and constant annoyance.[5]

To remedy the difficulties inherent in securing such expert testimony, the courts of several states have construed what are commonly referred to as "adverse-party-witness" statutes as being applicable to a defendant when he is an expert in his particular field.[6] An adverse-party-witness statute[7] removes the common-law disability of a party to testify as a witness.[8] However, while this type of statute permits a party to call his adversary as a witness, certain other states have refused to allow such a witness to be questioned as to his opinion when he is an expert, confining the testimony to his factual knowledge of the case.[9]

In the jurisdictions which follow this latter rule, the reasoning underlying such a result has not been consistent. New Jersey merely adheres to the property right theory stated above.[10] The Idaho view is that the adverse-party-witness statute was not intended to enable the plaintiff to establish his case by the expert testimony of the defendant, obviously implying that to do this would be unjust and akin to self-incrimination.[11] Perhaps the most cogent reason was advanced by Mr. Justice McNally writing for the appellate division in the instant case:

> In requiring the expertise of the defendant . . . relating to usual and customary medical procedures concerning the standard by which the jury is to judge the conduct of the defendants, the plaintiff invites the jury to be guided by a standard furnished by a source condemned by her.[12]

However, the Court of Appeals, in its lengthy *McDermott* opinion, rejected these arguments. It maintained that in so holding it was doing no more than conforming to the obvious purpose underlying adverse-party-witness statutes as stated in *State v. Brainin*,[13] viz., "to permit the production of all pertinent and relevant evi-

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[3] McDermott v. Manhattan Eye, Ear & Throat Hosp., *supra* note 1, at 27, 203 N.E.2d at 474, 255 N.Y.S.2d at 72.

[4] Stanton v. Rushmore, 112 N.J.L. 115, 169 Atl. 721 (1934).

[5] Buchman v. State, 59 Ind. 1, 6, 26 Am. Rep. 75 (1877).

[6] *E.g.*, State v. Brainin, 224 Md. 156, 167 A.2d 117 (1961); Lawless v. Calaway, 24 Cal. 2d 81, 147 P.2d 604 (1944); *cf.*, Snyder v. Pantaleo, 143 Conn. 290, 122 A.2d 21 (1956).

[7] See, *e.g.*, CPLR 4512.

[8] See Mauran v. Lamb, 7 Cow. 174, 178 (N.Y. Sup. Ct. 1827).

[9] Hull v. Plume, 131 N.J.L. 511, 516, 37 A.2d 53, 56 (1944); Forthofer v. Arnold, 60 Ohio App. 436, 441-42, 21 N.E.2d 869, 872 (1938); Hunder v. Rindlaub, 61 N.D. 389, 406-10, 237 N.W. 915, 922 (1931); Osborn v. Carey, 24 Idaho 158, 168, 132 Pac. 967, 970 (1913).

[10] Stanton v. Rushmore, *supra* note 4.

[11] Osborn v. Carey, *supra* note 9.

[12] McDermott v. Manhattan Eye, Ear & Throat Hosp., 16 App. Div. 2d 374, 379, 228 N.Y.S.2d 143, 148 (1st Dep't 1962).

[13] *Supra* note 6.

dence that is available from the parties to the action."[14] The Court stressed the necessity of basing its decisions on the true facts, and that this requirement overcame any possible detriment to be suffered by our traditional adversary system.[15] In distinguishing this case, a civil action, from one criminal in nature, it repudiated the reasoning of the Idaho court in *Osborn v. Carey*[16] and found that no inequity or injustice would result to the defendant by allowing the plaintiff to establish her case through the defendant's expert testimony.[17] The Court likewise distinguished *People* ex rel. *Kraushaar Bros. & Co. v. Thorpe*[18] on the simple ground that the witness therein was not an interested party and on the additional ground that the basis for that decision was to prevent constant annoyance to independent, disinterested experts, a result which would not inure in the *McDermott* case (where the expert is the defendant).

It appears that the Court has recognized the difficulty which a plaintiff in a malpractice action is confronted with in securing the testimony of an expert, and that it has sought to remedy this obvious inequity by allowing the defendant to be compelled to testify as an expert. Consequently, a plaintiff is now permitted to question a defendant-expert not only as to the facts but also as to his opinion. However, a question arises as to the extent to which such an adverse party's testimony may be impeached. It is important to realize that a party cannot ordinarily impeach his own witness.[19] Although this rule does not apply where the adverse party to the action is called as a witness,[20] where one makes the adverse party his *own* witness, he cannot thereafter impeach his character for *truth* and *veracity*, although he may dispute or

[14] *Id.* at 161, 167 A.2d at 119.

[15] McDermott v. Manhattan Eye, Ear & Throat Hosp., *supra* note 1, at 28, 203 N.E.2d at 474, 255 N.Y.S.2d at 72.

[16] Osborn v. Carey, 24 Idaho 158, 132 Pac. 967 (1913).

[17] McDermott v. Manhattan Eye, Ear & Throat Hosp., *supra* note 1, at 28, 203 N.E.2d at 474, 255 N.Y.S.2d at 72.

[18] 296 N.Y. 223, 72 N.E.2d 165 (1947). The appellate division relied heavily on this decision for the proposition that a person could not be compelled to testify and give his opinion as an expert against his will.

[19] This rule, although criticized, is recognized as well established in New York. RICHARDSON, EVIDENCE § 520 (9th ed. Prince 1964). See 5 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 4514.01 (1963) for a discussion and criticism of the old common-law rule against impeaching one's own witness. Note, however, that the CPLR has modified this rule, and a party may now impeach his own witness by showing that he made a prior inconsistent statement, provided that it had been under oath or in a writing subscribed by the witness. CPLR 4514.

[20] Koester v. Rochester Candy Works, 194 N.Y. 92, 87 N.E. 77 (1909); Hanrahan v. New York Edison Co., 238 N.Y. 194, 144 N.E. 499 (1924). See 3 WIGMORE, EVIDENCE § 916 (3d ed. 1940), wherein the author states:

"If there is any situation in which any semblance of reason disappears for the application of the rule against impeaching one's own witness, it is when the *opposing party is himself called by the first party,* and is sought to be compelled to disclose under oath that truth which he knows but is naturally unwilling to make known."

"One peculiar practical absurdity of the opposite result may be noted. Since impeachment by prior self-contradiction would be excluded, the opponent would tell his story as favorably for himself as he pleased, and no prior inconsistent statements could be used in impeachment; so that unless one took the risk of abiding by what the opponent should choose to say, it would be preferable not to call him at all; thus the main purpose of the enabling statute making him compellable to testify is defeated or encumbered." WIGMORE, *op. cit. supra* at § 916 n.1.

controvert the *specific facts* testified to.[21]

Whereas most defense attorneys will receive the *McDermott* decision with considerable apprehension, attorneys for plaintiffs will no doubt appreciate the practical and significant benefits which will result therefrom. By enabling the plaintiff to elicit *expert* testimony from the defendant, the Court has eliminated the necessity (and, of course, the difficulty) of securing the services of an *independent* expert.

It is also important to note that the drafters of the CPLR have provided for full disclosure, before trial, of all material and necessary evidence.[22] The decision will therefore permit a defendant-expert to be questioned through the use of pre-trial discovery proceedings since it stated that his expert opinion was pertinent and relevant to a malpractice action. This will no doubt result in the saving of considerable time—both to the litigants and to the court—and in the settlement of many malpractice claims out of court.

Furthermore, serious consideration must be given to the possible application of this case to other types of malpractice actions, and possibly to any civil action wherein the defendant can qualify as an expert. Despite the fact that the Court confined its holding to a defendant-expert in a malpractice action, a sound argument can be made for extending the rule because of the strong reliance which the Court placed on the Maryland court's statement of the purpose of an adverse-party-witness statute, viz., to elicit all the pertinent facts from the parties to the action.[23]

Thus, the decision in the instant case represents a significant liberalization of the strict rules pertaining to adversary proceedings which prevailed at common law. It has a two-fold effect on the law of evidence in New York when the defendant in a malpractice action qualifies as an expert. First, such a party may now be questioned concerning his expert opinion (in addition to his factual knowledge of the case), and second, plaintiff's counsel may impeach the expert-witness' testimony.[24]

The *McDermott* case may initially appear somewhat plaintiff-oriented. However, when one considers the liberal policy pertaining to civil practice in New York, at least as expressed in the CPLR, the holding in this case will appear to be completely in accord with such policy.

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[21] Cross v. Cross, 108 N.Y. 628, 15 N.E. 333 (1888); Tryon v. Willbank, 234 App. Div. 335, 255 N.Y. Supp. 27 (4th Dep't 1932).

The California, Illinois, Maryland and federal statutes make this clear by expressly providing that a party may call his adversary for interrogation "as if under cross-examination." FED. R. CIV. P. 43(b); CAL. CIV. PROC. CODE § 2055; ILL. ANN. STAT. ch. 110, § 60 (Smith-Hurd 1955); MD. ANN. CODE art. 35, § 9 (1957). Kansas and New Jersey are not as explicit and provide that the adverse party may be compelled to testify in the same manner and subject to the same rules as other witnesses. KAN. GEN. STAT. ANN. § 60-2803 (1949); N.J. REV. STAT. § 2:97-12 (1937). The New York statute, on the other hand, makes *no* mention of the type of testimony which may be elicited from the adverse party—it merely enables a party to call his adversary to testify. CPLR 4514; McDermott v. Manhattan Eye, Ear & Throat Hosp., *supra* note 1, at 26, 203 N.E.2d at 473, 255 N.Y.S.2d at 70.

[22] CPLR 3101.

[23] State v. Brainin, *supra* note 6.

[24] It must be remembered that the defendant may not be impeached for his truth and veracity, but only as to the specific facts testified to. See note 21 *supra*.