

## CPLR 3101: Defendant-Doctor May Be Compelled by Plaintiff to Give Expert Testimony During an Examination Before Trial

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article will preclude the plaintiff from asserting any other rights related to the damages claimed at trial.<sup>80</sup> Subdivision (b) contains the same type of protection concerning the defendants' rights of indemnification and subrogation.<sup>81</sup>

#### ARTICLE 31 — DISCLOSURE

*CPLR 3101: Defendant-doctor may be compelled by plaintiff to give expert testimony during an examination before trial.*

Recently, the Supreme Court, Nassau County, in *Kane v. Randt*,<sup>82</sup> held that a plaintiff could compel a defendant-doctor to give expert testimony during an examination before trial in an action where a medical standard was in issue, notwithstanding the fact that the plaintiff had shown no inability or lack of intention to call another expert to testify at trial. In *Kane*, a malpractice action against two doctors, plaintiffs claimed that defendants had improperly diagnosed a tumor in the plaintiff-wife's spinal cord as multiple sclerosis. Pursuant to CPLR 3101 (a),<sup>83</sup> which provides for discovery both before and during trial, the plaintiffs sought to elicit expert testimony from the defendants during a pre-trial examination and their request was granted.

Prior to passage of the CPLR, an expert's opinion generally was inadmissible in a pre-trial disclosure proceeding.<sup>84</sup> However, in 1966, the Supreme Court, Rensselaer County, in *Kennelly v. St. Mary's Hospital*,<sup>85</sup> held that CPLR 3101 allows the admission of an expert's opinion in an examination before trial where the expert is also the defendant. The *Kennelly* holding was based upon *McDermott v. Manhattan Eye*,

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<sup>80</sup> This is to assure that article 14 is interpreted consistently with the Court of Appeals decisions concerning the joint and several liability of joint tortfeasors. 2 N.Y. SESS. LAWS [1974] 1813 (McKinney). *Meachem v. New York Cent. R.R.*, 8 N.Y.2d 293, 169 N.E.2d 913, 206 N.Y.S.2d 569 (1960); *Barrett v. Third Ave. Ry.*, 45 N.Y. 628 (1871).

<sup>81</sup> Since *Dole* is limited to affecting the laws of contribution, this subdivision provides that in those situations in which the Court of Appeals would apply indemnification or subrogation, article 14 is not to be interpreted as affecting those rights. See TWELFTH ANNUAL REPORT OF THE JUDICIAL CONFERENCE TO THE LEGISLATURE ON THE CPLR, as appearing in 2 N.Y. SESS. LAWS [1974] 1813 (McKinney).

<sup>82</sup> 77 Misc. 2d 173, 352 N.Y.S.2d 394 (Sup. Ct. Nassau County 1974).

<sup>83</sup> CPLR 3101(a) provides, in part, that "[t]here shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by: (1) a party, or the officer, director, member, agent or employee of a party . . . ."

<sup>84</sup> See *Reif v. Gebel*, 246 App. Div. 776, 284 N.Y.S. 98 (2d Dep't 1935) (plaintiff entitled to examine doctor as to the nature of injury for which he treated plaintiff, but not as to cause of injury since such questioning called for an expert opinion); *Bartlett v. Sanford*, 244 App. Div. 722, 278 N.Y.S. 578 (2d Dep't 1935); *Pfaudler Permutit, Inc. v. Stanley Steel Serv. Corp.*, 28 Misc. 2d 388, 212 N.Y.S.2d 106 (Sup. Ct. Monroe County 1961); *Murphy v. New York Cent. R.R.*, 17 Misc. 2d 1026, 188 N.Y.S.2d 247 (Sup. Ct. Erie County 1959). See generally 3A WK&M ¶ 3101.05.

<sup>85</sup> 52 Misc. 2d 352, 275 N.Y.S.2d 597 (Sup. Ct. Rensselaer County 1966).

*Ear and Throat Hospital*,<sup>86</sup> a case decided shortly after enactment of the CPLR. In *McDermott*, the Court of Appeals held that a defendant-doctor may be questioned as an expert witness by the plaintiff at a medical malpractice trial.<sup>87</sup> The *Kennelly* court concluded that "evidence formerly inadmissible at trial, now admissible under the *McDermott* holding, is therefore no longer inadmissible at an examination before trial."<sup>88</sup> To date, no appellate court has reversed the *Kennelly* decision.

The defendants in *Kane* asserted, however, that the plaintiffs could not compel them to give expert testimony unless plaintiffs showed either an inability to obtain other expert testimony or an intention not to call expert witnesses.<sup>89</sup> The court rejected this argument since it could not "discern a viable basis for strictly limiting the *McDermott* rule solely to cases where no other expert is available to the injured and suing plaintiff."<sup>90</sup> Justice Harnett pointed out that it would be unfair for the plaintiffs to commit themselves irrevocably at the pretrial stage of litigation on the matter of calling expert witnesses at trial.<sup>91</sup> Moreover, the court believed that neither defendant would suffer inconvenience or prejudice in testifying as an expert witness at an examination before trial. Two reasons were advanced by the court in support of this belief. First, as parties to the action, CPLR 3101 required both defendants to appear at the examination before trial, even if they were not required to testify as expert witnesses. Second, under *McDermott*, either or both of the defendants could be called upon to give expert testimony at trial.<sup>92</sup>

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<sup>86</sup> 15 N.Y.2d 20, 203 N.E.2d 469, 255 N.Y.S.2d 56 (1964).

<sup>87</sup> In the Court's view, a defendant-physician could be questioned as an expert witness because his testimony, including that relating to his knowledge of local medical standards, involved "as much matters of 'fact' as are the diagnosis and examination he made or the treatment upon which he settled." *Id.* at 27, 203 N.E.2d at 473, 255 N.Y.S.2d at 71. One additional reason advanced for the admission of such expert testimony was the difficulty plaintiffs often encounter in persuading physicians to testify as experts at trials where the defendant is a physician. *Id.*

<sup>88</sup> 52 Misc. 2d at 354, 275 N.Y.S.2d at 599.

<sup>89</sup> 77 Misc. 2d at 174, 352 N.Y.S.2d at 395. In advancing this argument, the defendants relied, in part, upon *Forman v. Azzara*, 23 App. Div. 2d 793, 259 N.Y.S.2d 120 (2d Dep't 1965), *aff'd*, 16 N.Y.2d 955, 212 N.E.2d 537, 265 N.Y.S.2d 103 (1966). In *Forman*, the Second Department held that the trial court's denial of the plaintiff's request to have the defendant-doctor testify as an expert at the trial, on the ground that expert testimony had already been provided by the plaintiff's physician, was "harmless error" under the circumstances. 23 App. Div. 2d at 795, 259 N.Y.S.2d at 122. Rather than limit the application of the *McDermott* rule, as the defendants in *Kane* contended, the *Forman* decision supports the *McDermott* rule since the court acknowledged that the denial of the plaintiff's request to have the defendant-physician testify at the trial was error, although not a sufficient cause for reversal.

<sup>90</sup> 77 Misc. 2d at 176, 352 N.Y.S.2d at 397.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 177, 352 N.Y.S.2d at 398.

Although there exists little precedent directly supporting the *Kane* decision,<sup>93</sup> the "increasing expansion and liberalization of the rules of disclosure"<sup>94</sup> in New York, as evidenced by the enactment of CPLR article 31,<sup>95</sup> affords substantial support for the court's conclusion. Requiring a defendant-physician to testify as an expert witness at an examination before trial may expose the defendant to searching inquiry, thereby affording the plaintiff an early tactical advantage not otherwise obtainable. However, as Justice Harnett noted, this

is the very purpose intended [by the CPLR], viz., to eliminate surprise at trial which often entails deflating one side by revealing in full the issues and facts to be presented at trial. The sporting theory of trial practice has long since been discredited in favor of complete, open and mutual disclosure of evidence to be presented, or required, at trial.<sup>96</sup>

Accordingly, limitations on pre-trial discovery which are merely formal, and which do not serve a useful purpose, should be cast aside.<sup>97</sup>

#### ARTICLE 52 — ENFORCEMENT OF MONEY JUDGMENTS

*CPLR 5222(b): Judgment creditor obtaining a restraining order held subordinate to later assignee for benefit of creditors.*

CPLR 5222(b) prohibits a person served with a restraining notice from the "sale, assignment, transfer or interference with any property in which he has an interest . . . until the judgment [against him] is satisfied or vacated."<sup>98</sup> By facilitating the collection of monetary judg-

<sup>93</sup> *Kennelly v. St. Mary's Hosp.*, 52 Misc. 2d 352, 275 N.Y.S.2d 597 (Sup. Ct. Rensselaer County 1966), involved the issue of requiring a defendant-physician to testify at an examination before trial. See text accompanying note 85 *supra*. Unfortunately, the case only represents trial court authority. By way of dictum, the court in *Charlton v. Montefiore Hosp.*, 45 Misc. 2d 153, 156 n.1, 256 N.Y.S.2d 219, 223 n.1 (Sup. Ct. Queens County 1965), stated that *McDermott* made it "obvious" that a defendant-physician could be compelled to give expert testimony at an examination before trial.

<sup>94</sup> 3A WK&M ¶ 3101.36.

<sup>95</sup> In *Rios v. Donovan*, 21 App. Div. 2d 409, 411, 250 N.Y.S.2d 818, 820 (1st Dep't 1964), the court observed that "the function of the disclosure devices [contained in CPLR article 31] is no longer limited to the perpetuation of testimony in those relatively infrequent instances when there is impending danger that it will be lost before trial." Pre-trial disclosure is designed "to advance the function of a trial [which is] to ascertain truth and to accelerate the disposition of suits." 7B MCKINNEY'S CPLR 3101, supp. commentary at 10 (1970). See also 3A WK&M ¶ 3101.01 and cases cited at footnote 1a therein.

<sup>96</sup> 77 Misc. 2d at 177, 352 N.Y.S.2d at 398.

<sup>97</sup> See *Allen v. Crowell-Collier Publishing Co.*, 21 N.Y.2d 403, 406, 235 N.E.2d 430, 431, 288 N.Y.S.2d 449, 451 (1968); 3 WK&M ¶ 3101.36.

The Legislature did not distinguish between disclosure before and during trial in enacting CPLR 3101. SIXTH REP. 294. Given this lack of legislative intention to distinguish the two phases of disclosure, the application of the *McDermott* rule to examinations before trial appears to be all the more appropriate.

<sup>98</sup> CPLR 5222(b).