

CPLR 3121(a): Physical Condition Need Not Be Placed "at Issue" by Pleadings in Order to Examine Hospital Records

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would appear to call for some qualification by the court with respect to such a pervasive holding. With respect to the contention that there is authority in the Advisory Committee's Report for *granting* the protective order, it would appear that the court in rejecting such contention reasoned to a logical conclusion. There is in fact (as the court noted)¹⁹⁹ nothing contained in the report which would support such a contention.²⁰⁰ Thus the (apparently) broad language of the statute was given a narrow interpretation because of the expressed intention of the Advisory Committee. This conflict is one which should be resolved by the legislature—whether it will choose to do so and prevent the apparent injustice which may result from the holding in the instant case is quite another matter.

CPLR 3121(a): Physical condition need not be placed "at issue" by pleadings in order to examine hospital records.

In *Fisher v. Fossett*,²⁰¹ the scope of disclosure available under CPLR 3121(a) was clarified. The section permits the service of a notice on any party to submit to a physical or mental examination, when that party's condition is *in controversy*. Defendant's car struck plaintiff's house. An official accident report which defendant had signed stated that "driver blacked out [and] struck house. . . ." Plaintiff moved for an order to compel disclosure of an examination report contained in certain hospital records pursuant to 3121(a), and defendant sought a 3122 protective order in opposition to such motion.

In denying defendant's protective order, the court held that the failure to raise *the issue* of defendant's physical condition in the pleadings would not warrant the preclusion of the right to examine hospital records. It stated that 3121(a) only requires that the party's condition be *in controversy*—not *at issue*. The court also stated that the primary question at the trial will be the defendant's physical condition and whether or not the condition would excuse what would otherwise constitute negligence.

If there *is* any difference between something being "at issue" or "in controversy" it is one which is very slight. However slight that distinction may be, the court's holding stresses a broad interpretation of CPLR 3121(a).

¹⁹⁹ *Schwartz v. Macrose Lumber & Trim Co.*, 46 Misc. 2d 202, 204, 259 N.Y.S.2d 289, 291 (Sup. Ct. Queens County 1965).

²⁰⁰ FIRST REP. 154.

²⁰¹ 45 Misc. 2d 757, 257 N.Y.S.2d 821 (Sup. Ct. Erie County 1965).