

## Compelling Authorizations to Obtain Hospital Records

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physician, but the question remains what procedure governs in such a case.

As stated above, the decision in the instant case was not governed by CPLR 3121 but by the rule of the second department governing medical examinations in personal injury actions. The decision requires the court to appoint an impartial physician whenever the party to be examined objects to the physician named by the examining party, even though the objection to the physician designated is completely arbitrary. The court based its decision on its inability to determine the professional qualifications of a physician on motion papers. However, requiring the court to select an impartial physician merely because a party arbitrarily objects to a physician named by his adversary places an unnecessary burden on the court.<sup>187</sup> It would seem that the party to be examined should at least state reasons for the objection, in which case the examining party could name another physician. The decision in the instant case is in accord with first department practice. In that department, however, the problem is simplified because of the maintenance of an impartial medical panel.<sup>188</sup>

*Compelling authorizations to obtain hospital records.*

CPLR 3121, in addition to allowing physical and mental examinations, also provides for the execution of authorizations permitting a party to obtain hospital records.<sup>189</sup> The authorizations required to be executed encompass only those hospital records relating to the injuries sustained in the accident—not any and all hospital records.<sup>190</sup> Does 3121 permit one to obtain hospital records of a decedent in a wrongful death action?

*Keays v. Vanderheden Hall, Inc.*<sup>191</sup> involved a combined wrongful death and personal injuries action. Defendant moved pursuant to CPLR 3121 for an order compelling plaintiff-administrator to furnish written authorizations permitting defendant to obtain hospital records of the decedent. Plaintiff opposed the application on the ground that CPLR 3121 authorizes the pro-

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<sup>187</sup> The decision rendered by this court has in effect been overturned by a later decision of the appellate division, second department. The appellate division held that plaintiff's objections to the physician designated by defendant must be stated specifically and at length. *Crawford v. Investors Planning Corp.*, 21 App. Div. 2d 888, 251 N.Y.S.2d 723 (2d Dep't 1964).

<sup>188</sup> N.Y. Sup. Ct. R. XI(1), pt. 1 (Bronx & N.Y. Counties 1963).

<sup>189</sup> CPLR 3121(a). The first and second departments have local rules not inconsistent with 3121, which afford greater detail. See N.Y. Sup. Ct. R. XI, pt. 1 (Bronx & N.Y. Counties 1963); N.Y. App. Div. R. II, pt. 4 (2d Dep't 1964).

<sup>190</sup> *Chester v. Zima*, 41 Misc. 2d 676, 246 N.Y.S.2d 144 (Sup. Ct. 1964). See 7B MCKINNEY'S CPLR 3121, Supp. commentary 33 (1964).

<sup>191</sup> 43 Misc. 2d 399, 251 N.Y.S.2d 41 (Sup. Ct. 1964).

duction of hospital records only in connection with a mental or physical examination of a party to an action. Since in this instance a decedent was involved, defendant could not seek a mental or physical examination. The court rejected plaintiff's argument and held that such a strict construction of CPLR 3121 would defeat the purpose and spirit of the disclosure provisions as expressed in CPLR 3101(a);<sup>192</sup> moreover, such authorizations might be obtained under CPLR 3120. Accordingly, defendant's motion for written authorizations was granted.

Though a literal reading of 3121 as to the persons to whom the section is applicable<sup>193</sup> would appear not to include a decedent in a wrongful death action, it is clear that the hospital records of a decedent are just as "material and necessary"<sup>194</sup> to the defense of a wrongful death action as they are to the defense of a personal injury action. The court's decision holding 3121 available is consonant with the liberal construction insisted upon by CPLR 104. Applying that construction provision to CPLR 3120 would require plaintiff-administrator to execute the authorizations. That section allows discovery of documents in the custody or control of an adverse party. Here the hospital records may be considered in the control of the plaintiff-administrator who would have to issue authorizations for their release.<sup>195</sup>

This decision implements the policy of the disclosure provisions of the CPLR which seek full and fair disclosure in order to afford each party a true evaluation of the merits of the case.

*New York City considered one county for taking depositions.*

CPLR 3110 designates the places for taking depositions within the state. It is designed for the convenience of the person sought to be examined without placing too great a burden on the party examining.<sup>196</sup>

In *Allen v. Brower*,<sup>197</sup> a negligence action pending in the Supreme Court of Kings County, defendant served a notice of disclosure upon plaintiff, a resident of Kings County, requiring him to appear for pre-trial examination at the office of defendant's attorneys in New York County. Plaintiff did not appear and

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<sup>192</sup> CPLR 3101(a) provides: "There shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action. . . ."

<sup>193</sup> See 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3121.09 (1964).

<sup>194</sup> CPLR 3101(a).

<sup>195</sup> Estate of Lachman, 19 Misc. 2d 540, 192 N.Y.S.2d 707 (Surr. Ct., N.Y. County 1959); Matter of Rubin, 161 Misc. 374, 292 N.Y. Supp. 305 (Surr. Ct., Kings County 1936).

<sup>196</sup> 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3110.01 (1964).

<sup>197</sup> 21 App. Div. 2d 876, 251 N.Y.S.2d 738 (2d Dep't 1964).