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Physical Examinations

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PHYSICAL EXAMINATIONS

Under Rule 35, Wyoming Rules of Civil Procedure, whenever the physical or mental condition of a party is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician. This corresponds with Federal Rule 35. But in addition, Wyoming Rule 35 provides that a court may order a blood examination when blood relationship is in controversy, and further provides that the court may order any of the above examinations for an agent or a person in the custody or under the legal control of a party. The Wyoming rule will allow, for example, a physical examination of a minor where his parent or guardian sues to recover for injuries to the minor, or a blood examination of an infant in a paternity action.[1] The authorization for examination of an agent will cure such a case as *Kell v. Denver Tramway Corp.*,[2] decided under the Colorado equivalent of Federal Rule 35 (a), where the plaintiff was denied an examination of the vision of the defendant's bus driver though the driver was claimed to be color blind. Where examination is sought of an agent or of a person in the custody or under the legal control of a party, notice of the motion to compel such examination must be served on the person sought to be examined as well as on all parties to the action. The rule also makes clear, by implication, that examination under the rule may be had in other than personal injury actions, contrary to what was said in *Wadlow v. Humberd*.[3] In the *Wadlow* case the defendant wanted to prove the truth of his statements in a libel action by having the plaintiff submit to a physical examination and was overruled.

Federal Rule 35 was originally adopted over vigorous objection that it would produce fishing expeditions but it has served as an effective barrier to exaggerated or fraudulent claims of physical injury.

The question still arises as to the scope of the examination and how far the court should go in ordering a party to submit to a physical examination. The prevailing view, even in the absence of an express statute or procedural rule, is that the trial court has the power to require the plaintiff to undergo a physical examination although the defendant's right is not considered absolute.[4] The matter is wholly within the discretion of the trial court so long as the exercise of such discretion is free from palpable abuse.[5] Many jurisdictions vest broad discretion in trial courts and many of the cases deal principally with what amounts to abuse of discretion.

Authorized physical examinations have included every kind of phy-

1. Report of Proposed Amendments to the Rules of Civil Procedure for the U.S. District Courts, Rule 35 (1955).
2. Civ. No. A-81214, Div. 4, Denver County (1953).
3. 27 F.Supp. 210 (W.D.Mo. 1939).
4. 2 Barron & Holtzoff, Federal Practice and Procedure § 793 (1950).
5. Bucher v. Krause, 200 F.2d 576 (7th Cir. 1952); Beach v. Beach, 114 F.2d 479 (D.C. Cir. 1940).

sical examination or test necessary to ascertain the physical condition of the one examined. These include X-rays, cardiographs, or any physical or microscopic examination of the person, blood, urine, kidneys, heart, lungs, alimentary tract or other element or function of the body.[6]

In ordering physical examinations courts have consistently given due regard to the party's health and have not ordered examinations which from the risk of uncertainty would likely be detrimental to the health or safety of a party. By the same token, examinations have seldom been ordered unless it clearly appears that a condition exists that can definitely be ascertained by such an examination and cannot satisfactorily be determined without it.[7] Thus a Wisconsin court refused to require a woman to submit to an examination which required the introduction of a catheter into the bladder, when it was shown that such an examination might result in the collapse of the bladder.[8] And in *Klien v. Yellow Cab Co.*[9] the plaintiff objected to a cystoscopic examination involving the genital organs on the ground that it would be too painful. The defendant asserted that it would be difficult to meet the issues as to the nature and extent of the injuries without the information the examination would reveal. The court ordered the plaintiff to submit all reports of examinations by his doctors, hospital records, and summaries of the anticipated testimony of his doctors. As an alternative the plaintiff could stipulate that no medical evidence would be introduced by him based upon the same type of examination. Though the court did not so indicate, the submission of reports of examinations and of hospital records was probably authorized under rule 34 dealing with the discovery and production of documents for inspection, copying, or photographing.[10] In *Shasser v. Prudential Ins. Co.*[11] the plaintiff had submitted to previous examinations and it appeared from his motion that he would be unable to leave his home without endangering his life. The court denied the defendant's motion for a physical examination in the absence of a showing by affidavit that such examination was necessary and would not endanger the plaintiff.

Though most courts have not hesitated to order physical examinations when it was necessary to furnish bodily components such as blood, urine, viscera or other bodily secretions, it is questionable whether spinal fluid could be included in such an examination. A spinal tap is considered a minor operation and often results in considerable pain and other uncomfortable after effects. A patient submitting to a spinal tap must remain quiet for twenty-four hours following the operation and in the case of minors an operative permit is required.[12] This situtation arose in

6. Meyers v. Travelers Ins. Co., 353 Pa. 625, 46 A.2d 224 (1946); Depfer v. Walker, 123 Fla. 862, 169 So. 660 (1935); Cleveland C.C. & St.L. Ry. v. Huddleston, 151 Ind. 540, 46 N.E. 678 (1897).
7. Parmenter v. Troup, 98 Neb. 333, 152 N.W. 748 (1915).
8. O'Brien v. City of La Crosse, 99 Wis. 421, 75 N.W. 81 (1898).
9. 7 F.R.D. 169 (N.D.Ohio 1944).
10. Wyo. Rules of Civil Procedure, Rule 34.
11. 1 F.R.D. 125 (W.D.Ky. 1939).
12. Interview with Superintendent, Ivinson Memorial Hospital, Laramie, Wyoming.

a recent Colorado case where it was held that the power of a court to order a plaintiff to submit to a physical examination did not extend so far as to require him to furnish samples of spinal fluid to be used for chemical analysis. The plaintiff was not required to submit to a spinal puncture.[13]

Ordering the use of general anesthetics rendering the patient unconscious during at least a portion of a physical examination has been generally disapproved.[14] However, the use of drugs which produce no serious discomfort or deleterious consequences has been allowed on numerous occasions.[15]

The rule is now firmly established that the trial court has power to compel a plaintiff to submit to the taking of X-ray photographs. When the X-ray was in its early stages of development courts were reluctant to order a plaintiff to submit to such an examination.[16] Later the courts developed a lienient attitude in ordering X-rays and allowed photographs to be taken without regard to number or to the skill of the technician taking the X-ray.[17] Recent decisions, however, have taken cognizance of the danger of repeated exposure to radiation, but have not lost sight of the valuable evidence X-rays can produce.[18] The modern approach allows X-rays, but only when taken with proper precautions by well trained technicians with modern facilities.

No court is considered authorized to order an examination which would positively injure, or from the risk, uncertainty, or experimental nature of the process would be likely to be deterimental to the health of an individual.[19] Courts do recognize that a physical examination will involve some degree of pain and discomfort, but unless the examination will cause serious pain or endanger the life or health of a party the order should not be refused;[20] but courts should not go beyond the necessities of the case in exercising their discretionary power. A physical examination should not be ordered merely to obtain cumulative evidence. When sufficient evidence of the nature, character, extent, and permanency of the alleged injuries or illness has been introduced the court may properly decline to issue an order for the physical examination of a party.[21]

The purpose of rule 35 is to eliminate fraudulent claims and give an honest basis for damages. If the court believes the examination would involve serious pain or threaten the safety of the plaintiff's life or health

13. Riss & Co. v. Galloway, 108 Colo. 93, 114 P.2d 550 (1941).
14. Gilbreath v. Prairie Oil & Gas Co., 128 Kan. 618, 278 Pac. 707 (1929); Atchison T. & S.F. Ry. v. Palmore, 68 Kan. 545, 75 Pac. 509 (1883).
15. Beach v. Beach, 114 F.2d 479 (D.C .Cir. 1940); Depfer v. Walker, 123 Fla. 862, 169 So. 660 (1935); Cleveland C.C. & St.L. Ry. v. Huddleston, 151 Ind. 540, 46 N.E. 678 (1897).
16. Wittenberg v. Onsgard, 78 Minn. 342, 81 N.W. 14 (1899).
17. Henslin v. Wheaton, 91 Minn. 219, 97 N.W. 882 (1904).
18. Meyers v. Travelers Ins. Co., 353 Pa. 625, 46 A.2d 224 (1946).
19. Klien v. Yellow Cab Co., 7 F.R.D. 169 (N.D.Ohio 1944).
20. Greenhow v. Whitehead's Inc., 67 Idaho 262, 175 P.2d 1007 (1946); Williams v. Chattanooga Iron Works, 131 Tenn. 683, 176 S.W. 1031 (1915).
21. Shasser v. Prudential Ins. Co., 1 F.R.D. 125 (W.D.Ky. 1939); Parmenter v. Troup, 98 Neb. 333, 152 N.W. 748 (1915).

it may well overrule the motion. However, the plaintiff is not limited to rule 35 in determining the defendant's physical condition; hospital and laboratory reports and records are available to him under rule 34 dealing with discovery of records and documents.

If the plaintiff constantly refuses to submit to a physical examination, contending that such an examination would be too painful or dangerous and the court feels that the refusal is but a calculated suppression of evidence, the court may order an examination of a party with reasonable restrictions, upon penalty of dismissal or other sanctions outlined in Wyoming Rule 37 (b) (iii). In this respect Wyoming Rule 37 is broader in scope than the federal rule to conform to the wider application of rule 35 (a). The sanctions heretofore applicable for failure to submit to a mental or physical examination apply also to a failure to submit to a blood test. These same penalties apply to a party who fails to produce his agent or a person under his custody or legal control unless he shows that he is in good faith unable to produce such a person.[22]

It is the duty of the courts, and it is the purpose of the Wyoming Rules of Civil Procedure to bestow upon litigants full and exact justice. This cannot be done until the court obtains the truth touching all matters in issue, so far as the same can be obtained. Rule 35 is in complete harmony with the spirit and purpose of the new procedure to bring to light all of the available evidence without regard to the traditional superstition that any party has a proprietary right to conceal his physical condition from the court. Within the limits outlined here it should serve its purpose well.

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THE TWO DISMISSAL RULE

Rule 41 (a) of the Wyoming Rules of Civil Procedure was adopted from and is substantially the same as Federal Rule 41 (a). For this reason, the interpretation by the federal courts of the federal rule is used as a basis for this note interpreting the new Wyoming rule.

As the federal rule limits dismissals in some instances, so also does Wyoming now limit them. One limitation is stated as an exception and comprises the last sentence of Rule 40 (a) (1).[1] This exception has been responsible for frequent reference to 41 (a) as the "two dismissal rule." After stating that a dismissal is without prejudice unless the notice or stipulation shows otherwise, the exception sets forth that once a plain-

22 Wyo. Rules of Civil Procedure, Rule 37.

1. Wyo. Rules of Civil Procedure, Rule 41 (a) (1): Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, *except* that a notice of dismissal operates as an adjudication on the merits when filed by a plaintiff who has once dismissed in any court an action in which service was obtained based on or including the same claim.