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Insurance Law—Medical Malpractice Insurance—Cancellation of Policy to Deter Doctors from Providing Expert Testimony—*L'Orange v. Medical Protective Co*

Edward P. Doherty

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CASE NOTES

Insurance Law—Medical Malpractice Insurance—Cancellation of Policy to Deter Doctors from Providing Expert Testimony—*L'Orange v. Medical Protective Co.*¹—Plaintiff-dentist sued his professional liability insurance company for breach of contract. The plaintiff had carried a professional liability insurance policy renewable yearly with the defendant for over 25 years. In 1965 the insurance company cancelled the policy after the plaintiff testified pursuant to a subpoena on behalf of a plaintiff in a malpractice case against another dentist who also had been insured by the defendant. In his complaint the plaintiff alleged that his insurance had been cancelled to punish him for having testified, to deter him from testifying should the case come up for retrial, and to dissuade other doctors insured by the defendant from testifying in malpractice cases. The District Court for the Northern District of Ohio sustained a motion to dismiss for failure to state a claim upon which relief could be granted.² The court, although readily acknowledging that cancellation to deter or punish a witness' testimony would "constitute a corruption of the judicial process . . .,"³ refused to hold that such a cancellation would be invalid. Rather, the court reasoned that "under Ohio law, a cancellation clause giving the insured an unconditional right to cancel is valid, regardless of the motive or reason for cancellation."⁴

In overruling the lower court's dismissal, the Court of Appeals for the Sixth Circuit HELD: utilization of a contractual right of cancellation to intimidate a witness in a lawsuit contravenes public policy and constitutes a breach of contract. The court emphasized that although an insurance contract is voluntary and is subject to the conditions imposed upon it by the parties, if it conflicts with public policy, the contract is illegal and void.⁵ The court looked to the Supreme Court of Ohio to determine the public policy of the state, and concluded that

the test of whether an insurance contract is void as against public policy under Ohio law is whether "it is injurious to the public or contravenes some established interest of society."⁶

In defining public policy, the court reasoned that the state constitution, applicable statutes and court decisions must be examined.

In *L'Orange*, the court did not have to speculate concerning the

¹ 394 F.2d 57. (6th Cir. 1968).

² *L'Orange v. Medical Protective Co.*, Civil No. C-65-549 (N.D. Ohio April 15, 1967).

³ 394 F.2d at 60.

⁴ *Id.*

⁵ 394 F.2d at 59-60.

⁶ *Id.* at 60. The court relied on *Porter v. Trustees of Cincinnati So. Ry.*, 96 Ohio S. 29, 33-34, 117 N.E. 20, 21 (1917), and *Pittsburgh, C., C. & St. L. Ry. v. Kinney*, 95 Ohio St. 64, 68, 115 N.E. 505, 507 (1916).

public interests of Ohio relative to the intimidation of a witness in a malpractice case. The policy of that state had been clearly articulated both by the courts and the legislature. In *Sullivan v. Wilkoff*⁷ a contract under which a material witness to a case agreed not to assist a party in the preparation of his case was held to be against public policy and void. The contract was held to be an "agreement on the part of the . . . [witness] to obstruct, impede, and interfere with the administration of public justice."⁸ In the same sense, the Ohio Penal Code prohibits the intimidation of a witness:

No person . . . shall . . . by threats . . . attempt to influence, intimidate, or impede . . . [a] witness . . . in the discharge of his duty . . .⁹

These statements of public policy induced the court to hold that the cancellation of the plaintiff's insurance for the reasons alleged in the complaint was injurious to the public good and thus violative of the interests of society. The court reasoned that cancellation tends to stifle malpractice litigation with the result that a "plaintiff who has been wronged by another member of the [medical] profession" will be unable to find protection in the courts.¹⁰ Thus it was held that cancellation constituted a breach of contract.

In order to establish liability in a medical malpractice action, a plaintiff has traditionally been required to prove that the defendant-doctor did not possess the ordinary training and skill possessed by physicians and surgeons of good standing in the same or similar communities.¹¹ Adopting the rationale that the scientific nature of the issues involved in a malpractice case renders an ordinary jury incapable of determining a proper standard of care, the courts have usually required expert testimony by doctors to establish negligence.¹² Because of this requirement, if the plaintiff is unable to secure expert testimony, the standard of care will not be established, and a non-suit will result.¹³

Judicial and statutory innovations regarding the appearance of expert witnesses in malpractice cases have not effectively aided plaintiffs. Most jurisdictions require a treating physician to testify in behalf of a patient in a legal proceeding concerned with the disease or injury for which the treatment was rendered.¹⁴ In addition, the "adverse wit-

⁷ 63 Ohio App. 269, 26 N.E.2d 460 (1939).

⁸ *Id.* at 273, 26 N.E.2d at 462.

⁹ Ohio Rev. Code Ann. § 2917.07 (1964).

¹⁰ 394 F.2d at 62.

¹¹ See, e.g., *Loudon v. Scott*, 58 Mont. 645, 194 P. 188 (1920); *Sim v. Weeks*, 7 Cal. App. 2d 28, 45 P.2d 350 (Dist. Ct. App. 1935).

¹² See, e.g., *Adkins v. Ropp*, 105 Ind. App. 331, 335, 14 N.E.2d 727, 729 (1938).

¹³ Note, *Overcoming the "Conspiracy of Silence": Statutory and Common-Law Innovations*, 45 Minn. L. Rev. 1019 (1961).

¹⁴ See, e.g., *Hammonds v. Aetna Cas. & Sur. Co.*, 243 F. Supp. 793, 799 (N.D. Ohio 1965); *Alexander v. Knight*, 25 Pa. D. & C.2d 649, 655 (Phila. C.P. 1961), *aff'd mem.*, 197 Pa. Super. 79, 117 A.2d 142 (1962).

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ness rule" is generally construed to allow the plaintiff to utilize the defendant-doctor as an expert witness to testify as to the proper standard of care.¹⁵ This practice is utilized if no other expert testimony as to the standard of care is available. The problem with this tactic is, of course, that the defendant-doctor would present the standard with which he complied as the proper standard of care. Although a non-treating physician can generally be subpoenaed to appear as an expert witness,¹⁶ most attorneys agree that unless the witness voluntarily consents to testify, it is best not to force the giving of testimony because the risk of damaging testimony is too great.¹⁷

An attorney has noted an example of this problem in a malpractice suit where the plaintiff alleged excessive use of anesthesia in the delivery of her baby. The plaintiff's witness, the author of one of the definitive works on obstetrics which clearly supported the plaintiff's position, "blandly told the jury he was rewriting this part of the book [the part dealing with anesthesia] which had been published only two years earlier."¹⁸

Many commentators have stated that doctor-witnesses can readily alter their position on a given issue to support a particular side in an adversary proceeding.¹⁹ Thus, the use of an expert witness unsympathetic to the plaintiff's cause and involuntarily ordered to testify would generally be detrimental to the plaintiff's case. It is understandable, then, that plaintiffs seldom resort to the subpoena power of the courts to assist in obtaining expert testimony.

In its Canons of Ethics, the American Medical Association states that a "physician should expose, without fear or favor, incompetent or corrupt, dishonest or unethical conduct on the part of members of the profession . . ." ²⁰ Despite this mandate, most doctors are reluctant to testify against fellow practitioners in medical malpractice actions, a fact which has been recognized by judges,²¹ legislators²²

¹⁵ See generally Spence, *The Adverse Witness Rule: A Cure for a Conspiracy*, 23 *Miami L. Rev.* 1 (1968).

¹⁶ See *L'Orange v. Medical Protective Co.*, 394 F.2d 57, 59 (6th Cir. 1968).

¹⁷ Zashin, *The Physician as a Witness*, 16 *Clev.-Mar. L. Rev.* 494, 496 (1967).

¹⁸ Kelner, *The Conspiracy of Silence*, *Trial*, Feb.-Mar., 1970, at 20.

¹⁹ See, e.g., Belli, *An Ancient Therapy Still Applied: The Silent Medical Treatment*, 1 *Vill. L. Rev.* 250 (1956). The author notes:

I've seen, not once but many times, heads of national medical societies . . . [and] chairmen of hospital boards grit their teeth, . . . [and] distastefully spit out their rehearsed piece of perjury and embarrassedly bolt from the courtroom.

Id. at 254.

²⁰ American Medical Association, *Principles of Medical Ethics* ch. III, art. I, § 4, reprinted in 167 *A.M.A.J.* 20 (spec. ed. 1958).

²¹ See, e.g., *Steinginga v. Thron*, 30 N.J. Super. 423, 425-26, 105 A.2d 10, 11 (App. Div. 1954), where the court described the failure of doctors to testify as

a shocking unethical reluctance on the part of the medical profession to accept its obligations to society and its profession in an action for malpractice. . . . A charge of malpractice is a serious and emburdening charge upon a professional man, but it is not answered by an attempt to throttle justice.

²² See, e.g., *Mass. Gen. Laws Ann.* ch. 233, § 79C (Supp. 1970), which allows the

plaintiffs' attorneys,²³ and has been the subject of much law review discussion.

This reluctance may result from the fact that doctors often feel that a jury is ill-equipped to comprehend and fairly judge complex medical issues, and that in fact in many cases defendants are found negligent when no negligence occurs.²⁴ Doctors may also feel that the rigors of cross-examination and the adversary system of the courts will expose them to inferences of incompetence.²⁵ In addition, they possess a high degree of sympathy for a colleague confronted with a malpractice action.²⁶ This sympathy, combined with the apprehension that someday they might find themselves in a similar situation, also discourages doctors from testifying in malpractice cases.²⁷

Although these reasons make it difficult to obtain witnesses, in many situations doctors also have been discouraged from giving expert testimony against other doctors, both by medical associations and professional liability insurance companies. While a doctor's natural aversion to testifying is understandable, deliberate coercion to prevent testimony must be considered both unethical and undesirable.

Of the many reasons which are offered for the inability of plaintiffs in malpractice cases to secure expert testimony, it has been suggested that the most persuasive has been the threat of insurance cancellation. Doctors consider coverage a necessity, and its cancellation would severely restrict their willingness to practice.²⁸ One noted malpractice attorney has observed that

the real villain . . . is not the law, anymore than it is the individual doctor. The real conspirators are the insurance companies. Insurance companies wield the whip that keeps the medical men silent and in line.²⁹

As early as 1938, the Committee on Improvements in the Law of Evidence noted the role of the insurance companies in keeping expert witnesses from testifying:

[T]he plaintiff is seriously handicapped in obtaining competent testimony from other practitioners. . . . More than that, we are informed that in certain forms of contract of insurance, obtainable by a medical practitioner to cover his liability for malpractice, a clause appears avoiding the con-

use of medical treatises in malpractice cases without corroborative testimony by their authors.

²³ See Belli, *supra* note 19.

²⁴ See Note, *supra* note 13, at 1020.

²⁵ Note, *Malpractice and Medical Testimony*, 77 Harv. L. Rev. 333, 336-37 (1963).

²⁶ Belli, *supra* note 19, at 255.

²⁷ Comment, *Torts—Malpractice—Medicolegal Relations—Expert Testimony*, 2 Vill. L. Rev. 95, 102 (1956).

²⁸ See Note, *supra* note 25, at 337.

²⁹ Belli, *supra* note 19, at 253.

tract if the insured takes the stand against another practitioner.³⁰

While no evidence exists to substantiate the existence of such a clause in recent malpractice insurance contracts,³¹ this absence has not prevented insurance companies from making and carrying out a threat to cancel a testifying doctor's policy.

It has been generally held that an insurance policy is a voluntary contract, and that the parties thereto may arrange for any method of cancellation they desire.³² As a result, most courts have held that policy provisions which allow cancellation by either party are enforceable, provided the terms for such cancellation have been met.³³ Many cases outside the field of medicine have held that the motive behind the exercise of the right of cancellation is irrelevant.³⁴ Thus, almost all insurance companies include clauses in their physician's professional liability policies which allow cancellation after only ten days notice on the part of the company.³⁵

The possibility of cancellation is increased by the activities of many medical associations. Some medical associations may "threaten expulsion from the society, which may cause ineligibility for admission to the local hospital staff, difficulty in obtaining bed space, higher insurance rates, and loss of other advantages of membership."³⁶ These associations, whose concerted action could and should protect the physician, often act in concert with the insurance companies. In fact, a medical association may threaten to report the doctor's intent to

³⁰ Report of the Committee on Improvements in the Law of Evidence (1938), reprinted in A. Vanderbilt, *Minimum Standards of Judicial Administration* 558, 579 (1949).

³¹ Polsky, *The Malpractice Dilemma: A Cure for Frustration*, 30 *Temp. L.Q.* 359, 361 n.6 (1957).

³² See J. Appleman, *Insurance Law and Practice* § 5011, at 596-99 (1962), and cases cited therein.

³³ See, e.g., *Riddick v. State Capital Ins. Co.*, 271 F.2d 641 (4th Cir. 1959). See also J. Appleman, *supra* note 32, at 598-99.

³⁴ See, e.g., *Pacific Mut. Life Ins. Co. v. Strange*, 226 Ala. 98, 100, 145 So. 425, 426 (1932).

³⁵ Hirsh, *Insuring Against Medical Profession Liability*, 12 *Vand. L. Rev.* 667, 669 (1959):

[T]he insured [doctor] may cancel the policy at any time whereas ten days written notice of intent to cancel is required on the part of the company. Some policies require thirty days notice of cancellation on the part of the company and a few group policies may be cancelled only at the end of the policy year.

³⁶ Note, *supra* note 25, at 337; see *Agnew v. Parks*, 172 Cal. App. 2d 756, 343 P.2d 118 (Dist. Ct. App. 1959). See also *Kenny v. Superior Ct.*, 63 Cal. Rptr. 84, 90 (Ct. App. 1967), where the court noted:

We are aware of the possible abuses of the so-called "medical committee" system. Obviously, it is not in the interests of justice to countenance any attempt by defendant or his counsel in a malpractice action to "corner" the supply of "top-drawer" medical experts silencing them as potential plaintiff's witnesses by placing them on a committee to be consulted by the defense in every claim against a doctor for malpractice.

testify to his insurer and thereby cause the threat of or actual cancellation.³⁷

L'Orange is the only reported American case which addresses itself to the cancellation of malpractice insurance as a deterrent to the insured's providing expert testimony. The question remains, however, whether this decision will provide a viable solution to the unconscionable practice of some insurers. In *L'Orange* the court found that the complaint sufficiently alleged an actionable breach of contract and contemplated a remedy at law. Thus, if the plaintiff on remand is able to prove the allegations of his complaint, he would be entitled to damages dependent upon the degree of injury sustained as a result of the breach.

In his complaint the plaintiff alleged that, since professional liability insurance coverage is highly specialized, "and not readily obtainable," he experienced delay in securing a replacement policy.³⁸ As a result of this delay, he was forced to practice without insurance and "his professional reputation in his community" was thereby damaged.³⁹ Plaintiff further alleged that this "caused him to suffer mental anguish, anxiety, humiliation, physical pain and suffering."⁴⁰ He also asserted that he was able to secure a replacement policy only at an increased premium for the same coverage.⁴¹

Apart from the increased insurance cost, none of the alleged instances of damage are easily proven. For example, in order for the plaintiff to establish that he suffered both bodily harm and emotional distress as a result of the cancellation, the expert testimony of a physician would be required. This, of course, results in a recurrence of the problem of securing expert testimony. In addition, damage to the plaintiff's "professional reputation" is not susceptible of absolute measurement and is speculative at best. Thus, the plaintiff's ability to recover damages is sharply limited by the difficulty of establishing the degree of injury.

The decision in *L'Orange*, however, does eliminate some of the damages which result from insurance cancellation. If, for example, the plaintiff had been found liable of malpractice after the wrongful cancellation, but before the term of the policy had run, he would be entitled to damages in an amount up to the limit of the policy. Thus, a doctor whose liability insurance has been cancelled to punish him or to deter him from testifying need not fear financial ruin or the necessity of suspending his practice. In essence, he will be able to proceed as if the cancellation had never occurred. Nevertheless, it is essential that physicians recognize that the use of cancellation by

³⁷ *Agnew v. Parks*, 172 Cal. App. 2d 756, 761, 343 P.2d 118, 121 (Dist. Ct. App. 1959).

³⁸ 394 F.2d at 64.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

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insurance companies to impede expert testimony does constitute a breach of contract.

The rationale of *L'Orange* is based upon fundamental principles of contract law and should be applicable to other jurisdictions as an effective means of protecting doctors. It is doubtful, however, that *L'Orange* will prove to be effective in inducing doctors to testify in malpractice actions against other physicians. Although the possibility of being confronted with a substantial monetary judgment may in some cases deter insurance companies from threatening cancellation, the desire to limit expert testimony in malpractice cases will probably continue to motivate insurers to threaten cancellation. Moreover, it is highly improbable that a doctor would willingly undergo a cancellation to testify on behalf of a plaintiff. The very fact that *L'Orange* is the only case on point may indicate that doctor-witnesses do accede to threats of cancellation by their insurers rather than defy the companies and subject themselves to expensive and time consuming litigation.

Since these problems persist despite *L'Orange*, the issue arises as to whether the case provides a basis for a legal or equitable action by a plaintiff-patient against the insurance company of a potential doctor-witness. In *Agnew v. Parks*⁴² this type of direct attack was undertaken. There, the plaintiff alleged a conspiracy by the Los Angeles County Medical Association to obstruct the orderly prosecution of a civil action by threatening doctors, from whom plaintiff had sought testimony as expert medical witnesses, with expulsion from membership in the association and with cancellation of their public liability insurance. The court sustained a demurrer to the plaintiff's claim on the theory that since a doctor is under no obligation to testify as an expert witness, and since his refusal in itself would not be tortious, the attempt of the association to persuade him to act in a perfectly legal manner could in no way be actionable.⁴³

The decision in *Agnew* has been severely criticized and should not be considered conclusive in denying relief to this class of plaintiffs.⁴⁴ In fact, it has been argued that preventing witnesses from testifying in malpractice actions constitutes an actionable tort for unjustifiable interference with prospective advantage.⁴⁵

The tort of interference with prospective advantage generally involves interfering with future contract relations, particularly the hiring of employees and the possibility of attracting customers.⁴⁶ In these situations, courts rely on a wide background of business experience and records for determining relatively accurate estimates of damages flowing from the interference. Once removed from the busi-

⁴² 172 Cal. App. 2d 756, 343 P.2d 118 (Dist. Ct. App. 1959).

⁴³ *Id.* at 764-65, 343 P.2d at 123.

⁴⁴ See Note, *supra* note 25, at 341.

⁴⁵ See 58 Mich. L. Rev. 802 (1960).

⁴⁶ See W. Prosser, *Law of Torts* § 124, at 974-75 (3d ed. 1964).

ness world, however, "courts have been disturbed by a feeling that they were embarking on uncharted seas, and recovery has been denied."⁴⁷ This refusal stems from the courts' inability to determine with a high degree of accuracy the advantage claimed to have been lost by the plaintiff. It is doubtful, therefore, whether a plaintiff in a malpractice case would be successful bringing an action for interference with prospective advantage against an insurance company which had dissuaded a doctor from testifying. To award damages the court would have to assume that the plaintiff would have been successful in the malpractice action if the expert testimony had been available. Plaintiffs succeed in roughly 50 percent of malpractice cases, although in some jurisdictions this figure has been as low as ten percent.⁴⁸ Moreover, the amount of recovery, because of such factors as pain and suffering, and the impairment of bodily functions, is not subject to accurate estimation. In a majority of jurisdictions therefore, an aggrieved plaintiff usually will be unable to utilize the theory of interference with prospective advantage to obtain damages after cancellation or the threat of cancellation has prohibited the procurement of expert testimony.

In most jurisdictions, however, the plaintiff may possibly eliminate the threat of cancellation as an effective weapon for deterring testimony by the use of an injunction. As *L'Orange* has indicated, the cancellation of an insurance contract to deter the giving of testimony not only constitutes a breach of contract, it is also violative of the common law and the statutes of those states which specifically prohibit the intimidation of witnesses. In most jurisdictions, therefore, any threat of cancellation is illegal if the threat is intended to keep an insured from testifying. Moreover, if the threats are not enjoined, the plaintiff would undoubtedly encounter a non-suit, an injury which cannot subsequently be remedied without a new trial. This irreparable damage, the illegality of the act to be enjoined, and the absence of any injury to the insurance company would justify the granting of injunctive relief. Not only would this serve to eliminate the possibility of serious injustice to the plaintiff-patient, it would also tend to prevent what has been characterized as the stifling of the malpractice litigation process.⁴⁹

Obtaining an injunction, however, would be predicated upon the third-party plaintiff's ability to prove that a threat had been made, and that it could be reasonably expected to deter the giving of testimony. To secure such evidence, the plaintiff must rely upon the willingness of a doctor to testify, and this may be difficult in light of the general unwillingness of physicians to defy their insurers in any type of adversary proceeding. Consequently, injunctive relief may not be

⁴⁷ *Id.* at 975.

⁴⁸ Ribicoff, *Medical Malpractice: the Patient v. the Physician*, Trial, Feb.-Mar., 1970, at 13.

⁴⁹ 394 F.2d at 62.

available as an effective means of eliminating or reducing the use of threats of cancellation to prevent testimony in a malpractice action.

Thus, the decision in *L'Orange* may be considered significant only in the sense that it provides relief for a doctor whose malpractice insurance has been cancelled because of his willingness to testify. The case may also deter an insurance company's unrestrained use of cancellation, and may be useful in the obtaining of an injunction. It does not, however, provide a clear and effective means of eliminating such attempts to suppress evidence on the part of insurance companies.

The scope of this problem and the apparent inability of the courts to devise adequate solutions indicate the need for either administrative or legislative action. Although malpractice insurance companies must have some discretion in cancelling the policies of competent physicians,⁶⁰ certain basic measures should be adopted to prevent insurance companies from threatening potential doctor-witnesses. The use of broad provisions allowing the insurer to cancel at any time during the term of the policy must be modified. This could be accomplished either by specifying grounds for cancellation, or by including a provision stating that cancellation or the threat of cancellation to prevent the insured doctor from testifying shall be deemed a breach of the contract on the part of the insurer; liquidated damages for the breach also should be stipulated. Premiums should be regulated so that the threat of rate increases will not be substituted for the threat of cancellation. A practicing physician should be able to buy adequate liability insurance at a reasonable rate, and insurance companies are entitled to reasonable profits, but discriminatory rate increases to prevent testimony should be eliminated.

The increase in malpractice litigation, arising out of the ever-expanding demand for medical services, and the difficulty experienced by plaintiffs in securing expert testimony demand thorough investigation of malpractice insurance practices. The enactment of comprehensive regulatory legislation would help to insure the continued vitality of medical practice and the integrity of the judicial process in malpractice suits.

EDWARD P. DOHERTY

Municipal Bonds and Tax Levies—Referendum—Application of the "One Person, One Vote" Principle—*Lance v. Board of Educ.*¹
 At a special election called by the Board of Education of Roane County, West Virginia, more than 51 percent of those voting approved proposals calling for the issuance of municipal bonds and the levy of additional taxes to finance school repairs and other neces-

⁶⁰ See Sanders, *Money Well Spent*, Trial, Feb.-Mar., 1970, at 16, where the author stated: "One insurance executive stated recently that nationally 22 companies have withdrawn from writing medical malpractice insurance because of excessive losses."

¹ — W. Va. —, 170 S.E.2d 783 (1969).