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Torts—Monopoly—Medical Services

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Were the *Klein* and *Self* cases argued to the Washington court, together with the substantial reasons supporting them, it is possible that Washington too would abrogate interspousal tort immunity.[35]

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Monopoly—Medical Services. Washington has been recognized as one of the leading state jurisdictions in which a private organization or party may acquire relief from monopolistic practices of voluntary medical associations.[1] A recent case seems to broaden the available grounds upon which such associations may be subjected to liability.[2] The case also appears to provide some guides for the interpretation of the recently enacted Consumer Protection Act.[3]

Dr. Hubbard, a licensed physician in Spokane County brought an action for damages and injunctive relief upon the cancellation of his contract by the defendant Medical Service Corporation of Spokane County (hereinafter referred to as the corporation) and his automatic termination of membership in defendant Medical Service Bureau of Spokane County (hereinafter referred to as the bureau). The plaintiff alleged that the operation of the corporation and bureau constituted a monopoly in violation of the WASH. CONST. art. 12, § 22. Finding that the corporation's operation was not a monopoly the trial court refused to award damages. It did, however, restrain the defendants from enforcing certain policies concerning payment for X-rays and from prohibiting industrial plant doctors from accepting plant employees as private patients.

On appeal by Dr. Hubbard and cross appeal by the corporation and bureau, the supreme court upheld the trial court's findings concerning monopoly and the propriety of cancelling the contract between the defendant and the corporation. The court nevertheless dissolved the injunction concerning the above-mentioned policies, on the ground that the plaintiff had no identifiable legal interest in determining the bureau's policy in these matters.[4] The court then found that the refusal

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[34] Jacob, supra note 24, at 42 (1931).

[35] Alaska does not have the community property problem, but the Alaska court recently relied upon *Self* and *Klein* in a decision of first impression refusing to establish the immunity, Cramer v. Cramer, 379 P.2d 95 (Alaska 1963).

[1] See Editorial Note, *Expulsion and Exclusion From Hospital Practice and Organized Medical Societies,* 15 RUTGERS L. REV. 327, 347 (1961).

[2] Hubbard v. The Medical Serv. Corp., 59 Wn.2d 449, 367 P.2d 1003 (1962).

[3] Consumer Protection Act, Wash. Sess. Laws 1961, ch. 216.

[4] Here the court cites with approval Porter v. King County Medical Soc'y, 186 Wash. 410, 58 P.2d 367 (1936). The *Porter* case would appear to be easily avoided

of the bureau to allow its doctors to refer nonsubscriber patients to Dr. Hubbard amounted to an illegal boycott in restraint of trade, and as such was enjoinable.[5] The court further enjoined enforcing any policy or regulation which would prevent the referral of a subscriber patient to Dr. Hubbard where the bureau doctor believed that referral would be more beneficial to the patient than any service that could be secured through a member of the bureau.[6]

The voluntary medical society has long enjoyed relative freedom to adopt restrictive practices upon the contention that they are necessary to ensure high standards within the medical profession.[7] The first judicial interference under antitrust law came in cases where the associations directed some overt form of action against member doctors because of their affiliation with group-practice prepayment plans.[8] Apparently the courts felt compelled to intervene where the American Medical Association and its affiliates were attempting to destroy competition in the prepaid medical area.[9] Still, the federal law has offered little relief because of the difficulty of showing the existence of interstate commerce.[10] Where applicable, federal law has provided relief even where no competitor in the prepaid medical area was involved.[11]

The leading state case in the area is probably *Group Health v. King County Medical Soc'y*,[12] in which the Washington Constitution[13] was invoked to enjoin the King County Medical Society from restrictive practices taken against the plaintiff competitor in the prepaid medical services area. The states as a whole, fearing that the public would suffer from a lessening of the control exerted by the voluntary medical associations, have not been quick to follow the lead of *Group Health*. This might be warranted except for the fact that few, if any, courts

by a mere allegation in the pleadings that the complainant is being injured by the enforcement of regulations and policies which are contrary to public policy as not in pursuit of the association's legitimate interests. For a discussion of the *Porter* case and its ramifications see Group Health v. King County Medical Soc'y, 39 Wn.2d 586, 658, 237 P.2d 737, 776 (1951). For the reasons stated above it would appear the case's significance will fade with future litigation.

[5] Hubbard v. The Medical Serv. Corp., 59 Wn.2d 449, 457, 367 P.2d 1003, 1007 (1962).

[6] *Ibid.*

[7] Comment, *The American Medical Association: Power, Purpose, and Politics in Organized Medicine*, 63 YALE L. J. 938 (1954).

[8] Pratt v. British Medical Ass'n, [1919] 1 K.B. 244, 9 B.R.C. 982.

[9] Comment, *Medical Societies and Medical Service Plans—From the Law of Association to the Law of Antitrust*, 22 U. CHI. L. REV. 694, 704 (1955).

[10] United States v. Oregon State Medical Soc'y, 343 U.S. 326 (1952); Spears Free Clinic & Hosp. v. Cleere, 197 F.2d 125 (10th Cir. 1952).

[11] American Medical Ass'n v. United States, 317 U.S. 519 (1943).

[12] 39 Wn.2d 586, 237 P.2d 737 (1951).

[13] WASH. CONST. art. 12, § 22.

concern themselves with the motives behind these restrictive practices. Rather, they merely accept the judgment of the associations.[14]

A few states have gone further than to merely recite that voluntary associations have a right to police their own members. Their courts have required a showing of justification for the coercive measures exerted. In a recent New Jersey case a doctor licensed by the state to practice medicine and surgery was denied active membership in the county medical society because of his failure to study for four years in a medical school approved by the AMA as required by the society's by-laws. This denial in fact precluded him from practicing in two local hospitals. The court found that the requirement was arbitrary and unreasonable, since the society possessed a virtual monopoly over the use of hospitals, and the exclusion precluded the doctor from continuing his practice.[15] A similar case is *Ware v. Benedict*,[16] where the plaintiff, a duly licensed physician in the state of Arkansas, was denied admission to practice in certain county hospitals because he was not a member of the county medical society as required by the hospital's by-laws. The society had systematically excluded him for fifteen years although he had applied for membership twelve times during that period. The court negated the requirement by ordering that the plaintiff be allowed to practice in the hospital.[17] A recent California case which cited *Group Health*[18] with approval provided a good summation of the policy of these courts:

> We are not here required to hold, nor do we suggest that doctors who join together in good faith with honest intention, to uphold and advance the good ethics of their profession and the cause of good health in general, can properly be interferred with. . . . What we do hold is that the law affords redress to any victim of a combination which has for its purpose and does act with malicious intent through coercive and oppressive methods; to prevent the proper use by qualified persons of hospital facilities; [and] to restrict legitimate consultation between doctors. . . .[19]

The *Hubbard*[20] case reiterates the policy of *Group Health* and

[14] Rockmore v. Fein, 198 Misc. 1068, 99 N.Y.S.2d 409 (Sup. Ct. 1950); Levin v. Sinai Hosp., 186 Md. 174, 46 A.2d 298 (Ct. App. 1946).
[15] Falcone v. Middlesex County Medical Soc'y, 34 N.J. 582, 170 A.2d 791 (1961); Editorial Note, *Expulsion and Exclusion From Hospital Practice and Organized Medical Societies*, 15 RUTGERS L. REV. § 327 (1961).
[16] 225 Ark. 185, 280 S.W.2d 234 (1955).
[17] *Ibid.*
[18] 39 Wn.2d 586, 237 P.2d 737 (1951).
[19] Willis v. Santa Ana Community Hosp. Ass'n, 20 Cal. Rptr. 466, 471 (1962).
[20] 59 Wn.2d 449, 367 P.2d 1003 (1962).

perhaps carries it further. The county medical society was not a party to the action. Instead the court was concerned with the regulations and policies of the bureau, an unincorporated association of doctors organized to cooperate with the corporation in securing to those who contracted with the corporation the medical services offered. Had identical policies of a county medical society been in question it appears that the court would have come to the same conclusions. Strongly reinforcing this argument is the length to which the court went in order to state its disapproval of the practices of the bureau. While refusing to set aside the findings of the trial court that no monopoly was shown and that the contract of the plaintiff was rightfully terminated, the court went beyond the requested relief when it enjoined the enforcement of a regulation which did not literally prohibit the referral of nonsubscriber patients to non-member doctors, but which was merely interpreted by the court to do so.[21] The court further clearly condemned any contract which would place the obligation of the doctor to his patient below that of his loyalty to any association.[22]

In support of its holding the court relies upon the *Group Health* case and upon the cases leading to that decision.[23] With the *Hubbard* case the court more closely approaches the federal law. The difficulty of showing a monopoly under the constitution is avoided by the holding,[24] and the court clears the way for a closer scrutiny of the restrictive practices of the medical association.

The failure of the court to discuss specifically any justification or lack of it for the group boycott imposed by the bureau, and the court's flat statement that a group boycott is illegal, leads to speculation as to the breadth of the holding in the *Hubbard* case. Some restraints of trade have been held to be unlawful per se under the Sherman Act. That is, they cannot be justified by a showing that they

[21] *Id.* at 457. The rule prohibited a member doctor from associating professionally with, or referring subscribers to a doctor who is not a member of the bureau.

[22] The court cited *Group Health,* and stated "[T]he *member* doctor has a higher obligation than loyalty to the bureau; public policy will not permit him to contract away his obligation to his patient...." *Id.* at 458.

[23] United States v. American Medical Ass'n, 110 F.2d 703 (D.C. Cir. 1940); Pratt v. British Medical Ass'n, [1919] 1 K.B. 244, 9 B.R.C. 982. The one Washington case cited, St. Germain v. Bakery & Confectionery Workers' Union No, 9, 97 Wash. 282, 166 Pac. 665 (1917), although stating the rule that boycotts are unlawful, was concerned with unlawful picketing and cannot be said to support the rationale underlying the *Hubbard* decision.

[24] To establish a violation of the constitutional provision, three elements must be proved: (1) a combination or contract; (2) dealing with a product or commodity; (3) the purpose of which is to fix prices, limit production or regulate transportation. See Group Health v. King County Medical Soc'y, 39 Wn.2d 586, 237 P.2d 737 (1951).

will ultimately benefit the public, *e.g.*, through eventually improved competition. Thus, attempts to show such justification are disallowed by the courts. The group boycott is one of these restraints.[25] Does the Washington court imply that a group boycott by an association of physicians is also illegal per se? If so, it is suggested that the court goes too far. In a particular instance the boycott of an unqualified individual or group might be entirely justified in terms of the public good, despite its conflict with antitrust policy. In such a case, the policy underlying antitrust law should be subordinated to the historical and established policy of allowing the medical profession to set and maintain high standards for the protection of the public from the unqualified practitioner.

It would seem that this is not the position of the court and if, in this particular instance, it did not examine the bureau's actions to determine if they could be justified, it was because the court felt the bureau here represented was not the proper party to police the medical profession. The proper party would appear to be the AMA or the county medical association.

The most reasonable explanation for the court's holding in addition to its declared policy concerning medical associations, assumes that the court was aware of recent legislation passed in Washington.[26] The Consumer Protection Act which became law in 1961 was not available to the plaintiff because this action was initiated prior to its passage. However, the court may have rested its decision squarely upon the policy underlying that act. Section 3 of the act provides: "Every contract, combination in the form of trust or otherwise or conspiracy in restraint of trade or commerce is hereby declared unlawful."[27] This sentence is identical with section one of the Sherman Act,[28] and, as has been stated earlier, restrictive practices of medical societies can come into conflict with this act.[29] It seems reasonable to conclude that the court has declared its approval of the new legislation and its intent to be guided by the federal law in future interpretation.[30] If one accepts the proposition that the court was aware of the Consumer Protection Act, the *Hubbard* case has far reaching implications in the entire field of antitrust law in Washington. The stringent provisions

[25] Kor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).
[26] Consumer Protection Act, Wash. Sess. Laws 1961, ch. 216.
[27] *Id.* § 3.
[28] 15 U.S.C. § 1 (1955).
[29] Cases cited note 11 *supra.*
[30] Indeed, § 20 of the act specifically provides that the courts are to be "guided by the interpretation given by the federal courts to the various federal statutes . . . ."

of the act should provide an effective vehicle for litigation against restraints heretofore beyond the reach of the relatively limited provisions of the constitution.[31]

With respect to medical associations, several difficulties which have plagued the federal courts have hopefully been set at rest by the wording of the Washington act. Section 1, subsection 2 defines "trade and commerce" as including services. It would seem that services can be further interpreted to include the practice of medicine. This is the view of the common law[32] and of the Washington Constitution.[33] Although the point is nowhere discussed, the *Hubbard* case clearly assumes a similar position. With respect to internal control of a voluntary association over its own members and their actions so far as they concern the association's objectives, the Consumer Protection Act provides:

> Nothing contained in this act shall be construed . . . to forbid or restrain individual members of such organizations from *lawfully* carrying out the *legitimate* objects thereof. (Emphasis added)[34]

The *Hubbard* case takes an identical position in condemning only such conduct as would place the loyalty of the doctor to his patient in a subordinate position to that of his loyalty to the bureau.

The *Hubbard* case appears in its effect to follow closely the provisions of the Consumer Protection Act. The case cannot be said to do either more or less than to condemn those practices which the legislature has sought to restrict. The indications are that the court, when confronted with a medical association case predicated directly on the act, will follow the position set out in the *Hubbard* case.[35]

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[31] See Dewell & Gittinger, *The Washington Antitrust Laws,* 36 WASH. L. REV. 239 (1961).

[32] See United States v. American Medical Ass'n, 110 F.2d 703, 711 (1940).

[33] WASH. CONST. art. 12, § 22, as interpreted in Group Health v. King County Medical Ass'n, 39 Wn.2d 586, 638, 237 P.2d 737 (1951). On the question of whether the practice of medicine is a trade under the Sherman Act, the court of Appeals in United States v. American Medical Ass'n, 110 F.2d 703 (1940) held under section 3 of the act that such practice did constitute a trade. The United States Supreme Court after granting certiorari did not rule on the question, but affirmed on other grounds. See American Medical Ass'n v. United States, 317 U.S. 519 (1943). The court again refused to answer the question with reference to any profession in United States v. National Ass'n of Real Estate Bds., 339 U.S. 485, 492 (1950).

[34] Consumer Protection Act, Wash. Sess. Laws 1961, ch. 216, § 7.

[35] There is, as of the date of this writing, at least one suit under the Consumer Protection Act in the process of litigation concerning a medical association. That case is Washington Osteopathic Medical Soc'y v. King County Medical Serv. Corp., No. 589134 (Sup. Ct. King Co., Wash. Aug. 24, 1962). The case culminates a long struggle between the organizations and should provide a notable decision.