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The Physician-Patient Privilege

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THE PHYSICIAN-PATIENT PRIVILEGE.—Except for the adoption of the privilege in justice of the peace courts,¹ the common law rule prevails that there are no privileged communications between a physician and patient.² There is no case where the matter of physician's privilege has come squarely before our court. In one case by way of dictum, the court affirms the common law view in the courts of record.³ The following discussion may perhaps illustrate the wisdom of our view by indicating some of the ramifications that have occurred in the states that have enacted privilege statutes.

The first inroad on the common law occurred in New York in 1828, when by legislative act, a privilege was created.⁴ In general it allowed information obtained by the physician in his professional treatment of a patient to be privileged. With modifications this privilege has been adopted in about two-thirds of the states.⁵ In an effort to curb the abuses resulting from this privilege many legislatures had added qualifications to the basic privilege, to such an extent that if all the qualifications from the various statutes were combined, the net result wouldprobably approximate the common law rule.⁶ For this reason this note is not designed to give an analysis of the various privilege statutes, but is rather a consideration of a general privilege statute.

Most of the statutes speak in terms of "physician" or "physician and surgeon" thus excluding unlicensed physicians,⁷ chiropractors,⁸ druggists,⁹ dentists,¹⁰ veterinary surgeons,¹¹ orthopedists.¹²

The privilege is based on the conception that society will be better served if the communications of a patient to his physician are treated as confidential resulting in increasing the patient's confidence and trust in his physician when he realizes that his disclosures will not be made public. In turn the physician benefits by acquir-

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¹ W. Va. Code c. 50, art. 6, § 10 (Michie 1955).
² 8 Wigmore, Evidence § 2380 (3d ed. 1940): "Duchess of Kingston's Trial, 20 How. St. Tr. 573. . . . L. C. J. Mansfield. . . . If a surgeon was voluntarily to reveal these secrets, to be sure, he would be guilty of a breach of honor and of great indiscretion; but to give that information in a court of justice, which by the law of the land he is bound to do, will never be imputed to him as any indiscretion whatever." See, generally, 8 Wigmore, Evidence n. 3.
⁴ 8 Wigmore, Evidence 803 n. 4.
⁵ Id. at n. 5.
⁸ S. H. Kress & Co. v. Sharp, 156 Miss. 693, 126 So. 650 (1930).
¹² William Laurie Co. v. McCullough, 174 Ind. 477, 90 N.E. 1014 (1910).
ing all of the facts and being able to effectuate his treatment more rapidly. In order that the privilege may operate, there must be professional treatment by the physician, and, though not favored by all courts, a physician-patient relation, i.e., a voluntary consulting of the physician.

So where the patient consults a physician merely for the purpose of examination and not for treatment, the reason for the privilege does not exist. Any communications made are not privileged. This type of situation frequently occurs where a third party employs a physician to examine the patient, as in the case of a life insurance company before issuing a policy, or an employer before hiring an employee, or a lawyer to have his client examined in preparation for trial. The privilege has been allowed where the patient was examined with a view toward a curative treatment which in fact never occurred because of physical impossibility.

The same is true in criminal cases where, by direction of officers, the accused is examined by a physician. Information so acquired is not privileged. However, there is a conflict of authority in the situation where the accused is not only examined but given treatment. Some courts conclude that the ensuing treatment, though involuntary on the part of the patient, is sufficient to allow the privilege to exist. They perhaps fail to realize that an unwilling patient is apt to place little trust in an appointed physician and hence the privilege should not exist.

Whether the privilege exists after the patient's death is a problem that has frequently come before the courts. A majority have founded their decision on the idea that the privilege is designed to protect the patient from having his secrets divulged.

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15 Arnold v. Maryville, 110 Mo. App. 254, 85 S.W. 107 (1905) (examination at request of patient in order to qualify physician to testify in action for injuries).
18 City and County of San Francisco v. Superior Court, 37 Cal. 2d 227, 231 P.2d 26 (1951).
19 Bassil v. Ford Motor Co., 278 Mich. 173, 270 N.W. 258 (1936) (consultation by husband and wife because of lack of children; physician examined husband and found him to be sterile).
20 State v. Dean, 69 Utah 268, 254 Pac. 142 (1927) (at request of sheriff, physician examined rape suspect).
22 See note 11 supra; see note 21 supra, dissenting opinion.
by his physician, and it ought to exist after his death to protect his memory and loved ones from embarrassing disclosures. They extend the privilege to the patient’s successor in interest.\textsuperscript{23} So where the beneficiary or assignee attempts to recover on the patient’s insurance policy, and the company attempts to introduce communications between the insured and his physician, the courts have allowed the beneficiary to evoke the privilege and exclude the testimony.\textsuperscript{24} In the reverse of this situation, where the beneficiary introduces testimony from the patient’s physician, the courts have ruled that the insurance company, being adverse to the patient’s interest, does not have the benefit of the privilege.\textsuperscript{25}

In the case of will contests, where both parties are claiming under the patient, the courts have allowed either party to waive the privilege without the consent of the other;\textsuperscript{26} a result which accords with the rule allowing the construction of wills in the light of all the facts. The same rule seems to apply to cases where the validity of a deed is attacked by the heirs of the grantor-patient.\textsuperscript{27} Some courts have expressly rejected the majority view by reasoning that the privilege is personal to the patient; and hence it can only be waived by him.\textsuperscript{28}

An interesting attempt to extend the privilege has occurred in criminal cases where the one, against whom the physician's testimony is offered, seeks to claim the privilege. Thus the accused in a murder case may seek to exclude the testimony of a physician concerning information he received while treating the victim. The courts, with one exception,\textsuperscript{29} refuse to extend the privilege.\textsuperscript{30}

Statements contained in hospital records are protected by some courts under the privileged communication statute.\textsuperscript{31} The prevailing view is that the privilege does not extend to information

\textsuperscript{24}Actma Life Ins. Co. v. McDoo, 106 F.2d 618 (8th Cir. 1939).
\textsuperscript{25}Olson v. Court of Honor, 100 Minn. 117, 110 N.W. 374, 8 L.R.A. (N.S.) 521, 117 Am. St. Rep. 676, 10 Ann. Cas. 622 (1907).
\textsuperscript{26}Gorman v. Hickey, 145 Kan. 51, 64 P.2d 587 (1937) (contesting heirs could waive, though executor was opposed to waive); Marker v. McCue, 50 Idaho 462, 297 Pac. 401 (1931) (executor could waive).
\textsuperscript{27}Flack v. Brewster, 107 Kan. 63, 140 Pac. 616 (1920).
\textsuperscript{28}Harrison v. Sutter St. Ry., 116 Cal. 156, 47 Pac. 1019 (1897).
\textsuperscript{29}Some New York courts may allow the privilege where the victim is a party to the crime and survives. People v. Murphy, 101 N.Y. 126, 4 N.E. 326 (1886) (woman consented to criminal abortion and survived).
\textsuperscript{30}Cabe v. State, 182 Ark. 49, 30 S.W.2d 855 (1930); State v. Thomas, 1 Wn.2d 298, 95 P.2d 1036 (1939).
\textsuperscript{31}Metropolitan Life Ins. Co. v. McSwain, 149 Miss. 455, 115 So. 555 (1928); Annot., 75 A.L.R. 393 (1931), 120 A.L.R. 1140 (1939).
obtained in performing an autopsy.\textsuperscript{32} This result has been justified on two grounds: first, the object of the privilege, to encourage patients to disclose freely all relevant facts to the physician, is not violated; and secondly, the physician-patient relation does not exist where the patient is dead.

Analogous problems have arisen where the physician is called to treat an unconscious person who later dies; or where he is called to treat a suicidal person against his will. In both of these situations, the courts have held that the information obtained was privileged.\textsuperscript{33} Although in view of the lack of a physician-patient relation the wisdom of the result may be questioned.

The courts are in conflict as to whether the physician may testify as to facts acquired through ordinary observation as distinguished from professional treatment. Perhaps a majority of the courts hold that a physician may not testify concerning a patient’s state of intoxication at the time of treatment.\textsuperscript{34} The wisdom of this rule has been questioned in auto accident cases where the patient’s liability may hinge on this fact.\textsuperscript{35} However, where the facts observed or information obtained is distinct from the professional relation with the patient, the courts have allowed the physician to disclose them.\textsuperscript{36}

A more difficult question arises in accident cases where the patient, in describing his symptoms, makes references as to how the accident occurred. The courts are not in harmony as to whether such information is privileged.\textsuperscript{37} A related problem occurs in the field of psychotherapy. Here, by the very nature of the treatment, the psychiatrist must have access not only to facts as to the patient’s physical condition, but, to a much greater extent, to his entire


\textsuperscript{33} Palmer v. Order of United Commercial Travelers, 187 Minn. 272, 245 N.W. 146 (1932) (unconscious person found in garage with car running, physician who tried to revive him could not testify as to carbon monoxide poisoning), Meyer v. Knights of Pythias, 178 N.Y. 63, 70 N.E. 111 (1904) (patient who had swallowed poison).

\textsuperscript{34} Freeburg v. State, 92 Neb. 346, 138 N.W. 143 (1912); Annot., 79 A.L.R. 1127, 1131 (1931).

\textsuperscript{35} Perry v. Hannagan, 257 Mich. 120, 241 N.W. 252 (1932).

\textsuperscript{36} Myers v. State, 192 Ind. 542, 137 N.E. 547 (1922) (physician calling on husband heard him threaten his wife’s life—such information was not privileged in prosecution of wife for murder of husband); Jennings v. Supreme Council, 81 App. Div. 76, 81 N.Y. Supp. 90 (1903) (physician attending one member of family could testify as to health of other members).

\textsuperscript{37} Raymond v. Burlington, C.R. & N. Ry., 65 Iowa 152, 21 N.W. 495 (1884); see also, Chafee, Is Justice Served or Obstructed by Closing the Doctor’s Mouth on the Witness Stand?, 52 Yale L.J. 601, 614 (1942), for a defense of this position. Contra, Green v. Metropolitan St. Ry., 63 N.E. 958 (1902).
mental and subconscious state thus throwing the cloak of the privilege over practically all communications between the patient and physician, if the reason for the rule is to be applied.38 Such non-confidential matters between the patient and physician as the dates of professional visits and to whom he rendered the bill are not within the privilege.39

There is a lack of uniformity among the courts on the question of whether nurses or other attendants to physicians present during the consultation come within the privilege. Some courts have refused to extend the privilege to them, by reasoning that the privilege statute is in derogation of the common law and must be strictly construed. Since it does not specify nurses, they are not within the privilege.40 While other courts, reasoning on agency principles, include them within the privilege if they are assisting or acting under the direction of the physician.41

Where third persons are present, other than nurses, some courts have declared that the confidential relation does not exist between the physician and patient. Therefore both the physician and third person may testify.42 Perhaps it may be said that a patient may have no qualms in disclosing his secrets in front of a trusted friend or relative, but would shrink from doing so in front of a physician if he thought it was non-privileged. Other courts, construing the statute literally, allow the third party to testify, but withhold the testimony of the physician unless he has the consent of the patient.43 This approach has the dubious merit of upholding the letter of the privilege, but depriving it of its effect.

It has been generally held that the bringing of a suit for personal injuries will not waive the privilege.44 One of the purposes for the privilege, i.e., protecting the patient from public disclosures of his infirmities, no longer exists. A numerical majority of the courts seem to hold that a patient voluntarily testifying on direct examination, respecting his consultation with a physician and revealing only the general nature of his mental and physical con-

40 Weis v. Weis, 147 Ohio St. 416, 72 N.E.2d 245 (1947); Annot., 169 A.L.R. 668, 673 (1947).
41 Mississippi Power & Light Co. v. Jordan, 164 Miss. 174, 143 So. 188 (1932).
42 State v. Knight, 204 Iowa 819, 216 N.W. 104 (1927); Annot., 96 A.L.R. 1420 (1935).
44 Smart v. Kansas City, 208 Mo. 162, 105 S.W. 709 (1907).
dition at that time, does not thereby waive the privilege.\textsuperscript{45} Such a rule may, in the words of a leading commentator, offer license to perjury.\textsuperscript{46} However, where the patient on direct examination testifies in detail as to his injuries, the physician's treatment and his communications with the physician the privilege is waived.\textsuperscript{47}

Where on cross-examination the patient answers questions in regard to communications made to his physician, the majority of courts hold that the privilege is not waived.\textsuperscript{48} The reason given is that such statements are not voluntary. The counter argument that a failure to assert the privilege should be a complete waiver has merit. The patient, in order to waive the privilege by an expression of willingness, must show that the expression is voluntary, and that he is aware of his privilege.\textsuperscript{49}

The rule seems to be that, while the calling of one physician is a waiver as to him,\textsuperscript{50} it is not a waiver in regard to other physicians who have been consulted by the patient at other times.\textsuperscript{51} The absurdity of this result has been well expressed by Lamm, J., dissenting in \textit{State v. Long}:

"A litigant should not be allowed to pick and choose in binding and loosing; he may bind or he may loose. If he binds, well and good; but if he looses as to one of his physicians, the seal of secrecy is gone—the spell of its charm is broken as to all . . . He may choose a serviceable and mellow one out of a number of physicians to fasten liability on the defendant, and then, presto! change! exclude the testimony of those not so serviceable, to whom he has voluntarily given the same information and the same means of getting at a conclusion on the matters already uncovered by professional testimony to the jury. There is no reason in such condition of things, and where reason ends the law ends."\textsuperscript{52}

Where several physicians attend in consultation, the better rule, and the one favored by most of the courts, is that a waiver as to one of the physicians is a waiver as to all.\textsuperscript{53} Where the patient

\textsuperscript{45} Cohodes v. Menominee & M. Light & Traction Co., 149 Wis. 308, 135 N.W. 879 (1912); Annot., 114 A.L.R. 798 (1939).

\textsuperscript{46} S. WiCROM, EVIDENCE § 2389 (3).

\textsuperscript{47} EpEsTIN v. Pennsylvania Ry., 250 Mo. 1, 156 S.W. 699 (1913).

\textsuperscript{48} HarPman v. Devine, 133 Ohio St. 1, 10 N.E.2d 776 (1937).

\textsuperscript{49} Coca Cola Bottling Works v. Simpson, 158 Miss. 390, 150 So. 479 (1930); Annot., 72 A.L.R. 148 (1931).

\textsuperscript{50} Wheelock v. Godfrey, 100 Cal. 578, 35 Pac. 317 (1893).

\textsuperscript{51} Hirschberg v. Southern Pac. Ry., 180 Cal. 774, 183 Pac. 141 (1919). The reason for the rule is that a patient may have particular confidence in one doctor and will waive as to him, but will not have the same confidence in another. Annot., 62 A.L.R. 675, 680 (1929).

\textsuperscript{52} 303 Mo. 162, 165 S.W. 709 (1907).

waives the privilege during the trial such waiver ought to extend
to testimony of the same nature by the same physician at a succeed-
ing trial; but all courts do not so hold. There are two lines of
authority as to whether the successors in interest of the patient
can waive his privilege after his death. The majority of the courts
allow them to waive on the ground that they have the right to
protect the interest which they claim under him. The other
courts do not allow them to waive on the ground that the privilege
was personal to the patient and ended at his death. The represen-
tative of an insane person or a minor may waive the privilege.

Much has been said concerning the privilege; and most of the
commentators are critical of it. The reason for the rule is it
fosters confidence in the patient toward his physician by protecting
his disclosures, thus promoting the treatment of his ailments. The
privilege involves favoring secrecy over truth, which runs counter
to the demands of justice, and should not be sustained unless over-
come by strong social policy. The proposition that a patient's
frankness with his physician is dependent on whether his disclosures
are privileged is not applicable to many types of cases. When a
person's health is jeopardized, it is doubtful that he will generally
be evasive with his physician merely because of fear of public dis-
closure. The category of socially stigmatized diseases has been
vastly reduced as medical knowledge has increased. The idea that
a patient would suffer from public disclosure is today greatly
minimized. The cases show too frequently the harm of the privi-
lege. The patient is neither protected nor justice served by in-
voking the privilege. Too often the privilege is invoked only to
perpetuate a one-sided picture of the patient's health by preventing
testimony from what is generally the best source of knowledge, the
physician who treated him. One of the best solutions to the prob-
lem exists in North Carolina, where the statute allows the presiding
judge to compel testimony when it is needed for the proper ad-
ministration of justice.

T. B. M.

54 Elliott v. Kansas City, 198 Mo. 593, 96 S.W. 1023 (1906). Contra, Maryland Casualty Co. v. Maloney, 119 Ark. 434, 178 S.W. 387 (1915); see 8 Wigmore, Evidence § 2389 n. 8, for conflicting cases.
55 See notes 20, 23 and 24 supra.
56 See note 25 supra.
57 8 Wigmore, Evidence § 2391.
58 McCormick, Evidence c. 11, § 108 (1954); 8 Wigmore, Evidence § 2380;
Curd, Privilege Communications Between the Doctor and His Patient—An Anomaly of the Law, 44 W. Va. L.Q. 165 (1938); Chafee, Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?, 52 Yale L.J. 607 (1942).