Washington and Lee Law Review

Volume 24 | Issue 1 Article 17

Spring 3-1-1967

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Recommended Citation

Waiver of the Physician-Patient Privilege, 24 Wash. & Lee L. Rev. 151 (1967).

Available at: https://scholarlycommons.law.wlu.edu/wlulr/vol24/iss1/17

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Otsuka v. Hite illustrates and follows this concept. In restricting the state provision for disfranchisement for conviction of an infamous crime, *Otsuka* recognized and applied the common law nature-of-the-crime test rather than the punishment test which is used to protect a fifth amendment right. Since historically the character of the crime has been a foundation for civil right disqualification, its application to the facts in *Otsuka* was appropriate. However, to define an "infamous crime" as one involving moral corruption and dishonesty is not to establish satisfactory classification of the term. It is submitted that all felonies involve an element of moral corruption. Hence there is merit in the logic of the dissent which, in the absence of a more satisfactory, workable standard, preferred to adhere to a reasonable objective standard.

B. WAYNE TUCKER

WAIVER OF THE PHYSICIAN-PATIENT PRIVILEGE

Questions involving waiver of the privilege accorded confidential communications between a physician and his patient have been a frequent source of dispute. The privilege is entirely based on statute, as it did not exist at common law.[1] The first statute conferring the privilege provided that waiver could be made only in open court.[2] Since then some jurisdictions have expressly provided in the privilege statute what acts shall constitute waiver.[3] In other jurisdictions the courts have attempted to construe the statutes so as to imply a waiver when the reason for the privilege no longer exists.[4] The case of *Mathis v. Hilderbrand*[5] represents a departure from the rules of statutory construction heretofore applied to the privilege statutes.

Hilderbrand involved an action for personal injuries to a minor child. The trial court denied defendant's motion to require plaintiff's physician to testify on pretrial deposition. The Supreme Court of Alaska reversed, holding that plaintiff had waived the privilege[6] by

an elective office. Within the common law concept as applied by the Illinois court, a public officer who has been convicted in a state or federal court of a felony which involves moral turpitude contrary to commonly accepted principles of decency and honesty has been convicted of an infamous crime. *Id.* at 175-76.

[1]Zeiner v. Zeiner, 120 Conn. 161, 179 Atl. 644, 646 (1935); Duchess of Kingston's Trial, 20 How. St. Tr. 355, 573 (Eng. 1776).

[2]8 WIGMORE, EVIDENCE § 2380, at 819 (McNaughton rev. 1961).

[3]58 AM. JUR. WITNESSES § 443 (1948).

[4]8 WIGMORE, EVIDENCE §§ 2389-90 (McNaughton rev. 1961).

[5]416 P.2d 8 (Alaska 1966).

[6]Alaska R. Civ. P. 43(h)(4) provides: "A physician or surgeon shall not, against the objection of his patient, be examined in a civil action or proceeding

commencement of the personal injury action. A finding of waiver before commencement of trial in the absence of a statutory provision to that effect appears to be without precedent.[7] The majority of the court indicated that they were "convinced that a rigid enforcement of the privilege under the facts of this case would serve no useful purpose and might result in injustice." [8]

The underlying policy of the privilege is the protection of the patient from embarrassment or fear of disclosure. It is contended that such a policy is more conducive to full and frank disclosure to the physician,[9] thereby promoting more complete medical assistance for the patient.[10] It is also submitted that the privilege benefits the physician, for by full and frank disclosure he is able to make a quicker and more accurate diagnosis.[11]

The existing law of waiver of the privilege can be divided into several distinct categories, as determined by the statute conferring the privilege: (1) states with statutes expressly providing for waiver when the patient testifies at trial;[12] (2) states with statutes expressly providing for waiver by commencement of suit where the physical or mental condition of the patient is in issue;[13] (3) states with statutes providing for waiver by order of the court;[14] (4) states with statutes containing no provisions for waiver either upon commencement of the personal injury action or by the patient's giving of testimony at

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as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient."

[7]See Boyd v. Wrisley, 228 F. Supp. 9, 10-11 (W.D. Mich. 1964); Smart v. Kansas City, 208 Mo. 162, 105 S.W. 709, 714-15 (1907); Kassow v. Robertson, 143 N.E.2d 926, 927 (C.P. Ohio 1957); Hague v. Massa, 80 S.D. 319, 123 N.W.2d 131, 134 (1963).

[8]416 P.2d at 10.

[9]Arizona & N.M. Ry. v. Clark, 235 U.S. 669, 677 (1915).

[10]Bishop Clarkson Memorial Hosp. v. Reserve Life Ins. Co., 350 F.2d 1006, 1011 (8th Cir. 1965); Edington v. Mutual Life Ins. Co., 67 N.Y. 185, 194 (1876).

[11]See Hammonds v. Aetna Cas. & Sur. Co., 243 F. Supp. 793, 801 (N.D. Ohio 1965); Nelson v. Ackermann, 249 Minn. 582, 83 N.W.2d 500, 510 (1957).

[12]N.M. STAT. ANN. § 20-1-12 (1953); N.D. REV. CODE ANN. § 31-01-06, § 31-01-07 (1960); OHIO REV. CODE ANN. § 2317.02 (Baldwin 1965); OKLA. REV. CODE ANN. ch. 12, § 385 (1960); ORE. REV. STAT. § 44.040 (Repl. 1963); S.D. CODE § 36.0101, § 36.0102 (Supp. 1960); WYO. STAT. ANN. § 1-139 (1959).

[13]ARIZ. REV. STAT. ANN. § 12-2236 (1956); CAL. CIV. PROC. CODE § 1881 (Deering 1959); HAWAII REV. LAWS § 222-20 (1955); ILL. ANN. STAT. ch. 51 § 5.1 (Smith-Hurd 1966); KAN. GEN. STAT. ANN. § 60-427 (1964); MICH. STAT. ANN. § 27A.2157 (rev. 1962); NEB. REV. STAT. § 25-1207 (reissue 1964); NEV. REV. STAT. § 48-080 (1963); PA. STAT. ANN. tit. 28, § 328 (Purdon 1958); WASH. REV. CODE § 5.60.060 (1959).

[14]N.C. GEN. STAT. § 8-53 (1953); VA. CODE ANN. § 8-289.1 (Repl. 1957).

trial.[15] In those states not recognizing the privilege there is no problem of waiver since no privilege can be asserted.[16] The law is quite clear in those jurisdictions where the statutes provide for waiver, but where the statutes do not expressly so provide, courts through judicial interpretation have often reached conflicting conclusions. The privilege favors secrecy over truth and the law on waiver in these jurisdictions indicates the varying degrees to which the privilege is deemed to be in the best interest of justice.

If the patient on direct examination testifies to a communication, this is considered to amount to a waiver as to that communication.[17] However, the law is in conflict when the patient does not reveal any of the matters discussed in the consultation, but testifies only as to his general physical or mental condition at the time of the consultation. One view is that "where the patient tenders to the jury the issue as to his physical condition, it must in fairness and justice be held that he has himself waived the obligation of secrecy. . . ." [18] However, the prevailing view is that the patient's testimony without disclosure of the privileged matter does not amount to a waiver.[19] If the privileged matter is revealed on cross-examination, it is not considered a waiver of the privilege under either view since it is not regarded as a voluntary disclosure.[20]

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[15]ALASKA R. CIV. P. 43(h)(4) (1963); ARK. STAT. ANN. § 28-607 (Repl. 1962); COLO. REV. STAT. ANN. § 154-1-7 (1964); D.C. CODE ANN. § 14-308 (1961); IDAHO CODE ANN. § 9-203 (1948); IND. ANN. STAT. § 2.1714 (Burns, Repl. 1946); IOWA CODE ANN. § 622.10 (1950); KY. REV. STAT. § 213.200 (Baldwin 1963); LA. REV. STAT. § 15:476 (1950); MINN. STAT. ANN. § 595-02 (1947); MISS. CODE ANN. § 1697 (recompiled 1956); MO. REV. STAT. § 491.060 (1959); MONT. REV. CODES ANN. § 93-701-4 (Repl. 1964); N.Y. CIV. PRAC. § 4504(a) (McKinney 1963); UTAH REV. CODE ANN. § 78-24-8 (1953); W. VA. CODE ANN. § 50-6-10 (1966) (restricted to courts not of record); WISC. STAT. § 885-21 (1965).

[16]Zeiner v. Zeiner, 120 Conn. 161, 179 Atl. 644 (1935); Hollenbacher v. Bryant, 42 Del. 242, 30 A.2d 561 (1943); Florida Power & Light Co. v. Bridgeman, 133 Fla. 195, 182 So. 911 (1938); Trammell v. Atlanta Coach Co., 51 Ga. App. 705, 181 S.E. 315 (1935); Rancourt v. Waterville Urban Renewal Authority, 223 A.2d 303 (Me. 1966); O'Brien v. State, 126 Md. 270, 94 Atl. 1034 (1915) State v. Kociolek, 23 N.J. 400, 129 A.2d 417 (1957); Caddo Grocery & Ice v. Carpenter, 285 S.W.2d 470 (Tex. Civ. App. 1955); Mohr v. Mohr, 119 W. Va. 253, 193 S.E. 121 (1937). See MASS. ANN. LAWS ch. 112, § 12 (1965); R.I. GEN. LAWS ANN. § 14-2-5 (1956); S.C. CODE ANN. §§ 32-1489, 72-307 (1962); also Tennessee and Vermont where the only statute is the Uniform Narcotic Drug Act.

[17]Nolan v. Glynn, 163 Iowa 146, 142 N.W. 1029 (1913).

[18]Hethier v. Johns, 233 N.Y. 370, 135 N.E. 603 (1922). Accord, Ansnes v. Loyal Protective Ins. Co., 133 Neb. 625, 276 N.W. 397 (1937); Capps v. Lynch, 253 N.C. 18, 116 S.E.2d 137 (1960).

[19]Pearson v. Butts, 224 Iowa 376, 276 N.W. 65 (1937); Harpman v. Devine, 133 Ohio St. 1, 10 N.E.2d 776 (1937); Hudson v. Blanchard, 294 P.2d 554 (Okla. 1956).

[20]Johnson v. Kinney, 232 Iowa 1016, 7 N.W.2d 188 (1943); see also Arizona &

It is held in some jurisdictions that the patient waives the privilege by calling the physician to testify as to the privileged matters.[21] This rule is also applied in jurisdictions whose statutes provide for waiver when the patient testifies at trial.[22] However, no waiver is implied where the questions asked the physician are for a collateral purpose such as to establish that he is an expert witness.[23]

Waiver may also be effected by contract. A stipulation in a life insurance policy application which is made part of the policy contract, by which the applicant waives the privilege is valid[24] and also binding on the beneficiary and estate of the insured.[25] But such contracts are strictly construed against the insurer who drafted them,[26] and courts will go far to obviate the effect of such contractual waiver.[27] In one jurisdiction such waiver has been held ineffective since the privilege statute provided for an express waiver in court,[28] and in another it is considered against public policy.[29]

N.M. Ry. v. Clark, 235 U.S. 669, 677 (1915) (dictum as to the voluntariness of the disclosure generally).

[21]Missouri Pac. Transp. Co. v. Moody, 199 Ark. 483, 134 S.W.2d 868 (1939); McDonnell v. Monteith, 59 N.D. 750, 231 N.W. 854 (1930). For statutory recognition of this principle see MICH. STAT. ANN. § 27A.2157 (1962). It has been held error for the judge to grant an instruction that a prejudicial inference may be drawn from the failure to call the physician. Sherman v. Ross, 99 Colo. 354, 62 P.2d 1151 (1936). Contra, Gulf Ref. Co. v. Myrick, 220 Miss. 429, 71 So. 2d 217 (1954).

[22]McDonnell v. Monteith, 59 N.D. 750, 231 N.W. 854, 859 (1930); Chicago, R.I. & P. Ry. v. Hughes, 64 Okla. 74, 166 Pac. 411, 412-13 (1917).

[23]Clawson v. Walgreen Drug Co., 108 Utah 577, 162 P.2d 759, 764 (1945).

[24]New York Life Ins. Co. v. Taylor, 147 F.2d 297, 300 (D.C. Cir. 1945); Torbensen v. Family Life Ins. Co., 163 Cal. App. 2d 401, 329 P.2d 596 (Dist. Ct. App. 1958); Trull v. Modern Woodmen of America, 12 Idaho 318, 85 Pac. 1081 (1906) New York Life Ins. Co. v. Snyder, 116 Ohio St. 693, 158 N.E. 176 (1927).

[25]Adreveno v. Mutual Reserve Fund Life Ass'n, 34 Fed. 870 (C.C.E.D. Mo. 1888); Torbensen v. Family Life Ins. Co., 163 Cal. App. 2d 401, 329 P.2d 596 (Dist. Ct. App. 1958); New York Life Ins. Co. v. Snyder, 116 Ohio St. 693, 158 N.E. 176 (1927).

[26]Turner v. Redwood Mut. Life Ass'n, 13 Cal. App. 2d 573, 57 P.2d 222 (Dist. Ct. App. 1936).

[27]Campbell v. Monumental Life Ins. Co., 31 Ohio L. Abs. 420, 34 N.E.2d 268 (Ct. App. 1940) (insurer failed to attach the application containing waiver to the policy; held not an effective waiver).

[28]Holden v. Metropolitan Life Ins. Co., 165 N.Y. 13, 58 N.E. 771 (1900). The New York statute as amended in 1963 removed the requirement that waiver must be expressed at trial. The statute no longer states what specific acts will constitute waiver. N.Y. Civ. Prac. § 4504(a) (McKinney 1963). The implication of the change is that such contractual waivers are now permitted since the former provision was deliberately designed to invalidate contractual waivers.

[29]Miller v. Pacific Mut. Life Ins. Co., 116 F. Supp. 365 (W.D. Mich. 1953), citing Wohlfeil v. Bankers Life Co., 296 Mich. 310, 296 N. W. 269, 273 (1941): The

Although the privilege is usually beneficial to the physician it may also pose a dilemma. In *Hammonds v. Aetna Cas. & Sur. Co.*,[30] a physician believing himself to be faced with an imminent malpractice suit disclosed certain privileged communications to the attorney for defendant insurance company. The court held the disclosure made the physician liable for breach of a trust.[31] The dilemma thus facing the physician is at what point in time may he consult an attorney in preparation for an imminent suit and not incur liability for disclosure if the suit is not brought. Some courts recognizing the confidential relationship between physician and patient hold that the physician's disclosure prior to the filing of the briefs will make him liable for an invasion of privacy.[32] None of the statutes recognizing the privilege have provided for this contingency.

Hilderbrand in finding waiver before commencement of trial relied on cases implying a waiver at trial without statutory authority.[33] The treatment of the privilege in suits against physicians for malpractice provides some authority in support of *Hilderbrand*.[34] In *Kriger v. Holland Furnace Co.*,[35] a personal injury action, plaintiff asserted the privilege to prohibit disclosure of information in a pretrial examination of her physicians. The court agreed that the statute protected the plaintiff in the assertion of an "absolute privilege," [36] but it did not "give her the right to . . . require the court to proceed with the trial of her action as long as she is unwilling to permit pretrial inquiry

physician-patient privilege "cannot be changed or frittered away in the manner attempted in this case." *Cf.* Creech v. Sovereign Camp, W.O.W., 211 N.C. 658, 191 S.E. 840, 842 (1937).

[30]243 F. Supp. 793 (N.D. Ohio 1965).

[31]*Id.* at 803.

[32]*Id.* at 800, distinguishing an earlier case, Hague v. Williams, 37 N.J. 328, 181 A.2d 345 (1962), on the ground that New Jersey had no public policy recognizing a confidential relationship. *Cf.* Van Allen v. Gordon, 83 Hun 379, 31 N.Y. Supp. 907 (Sup. Ct. 1894).

[33]Mauro v. Tracy, 152 Colo. 106, 380 P.2d 570 (1963), and McUne v. Fuqua, 42 Wash. 2d 65, 253 P.2d 632 (1953), held that the patient had waived the privilege by testifying to his injuries and treatment. These cases are distinguishable from *Hilderbrand* in that the respective courts found the waiver at trial and not on commencement of the action.

[34]Awtry v. United States, 27 F.R.D. 399 (S.D.N.Y. 1961) (a malpractice action in which the court permitted pretrial discovery). It has long been established that the patient waives the privilege by testifying in a malpractice suit. Becknell v. Hosier, 10 Ind. App. 5, 37 N.E. 580 (1894); Hartley v. Calbreath, 127 Mo. App. 559, 106 S.W. 570 (1908).

[35]12 App. Div. 2d 44, 208 N.Y.S.2d 285 (1960) (holding was made pursuant to Civil Practice Act requiring certification of completion of all pretrial discovery before a case is docketed for trial).

[36]*Id.* at 288

with respect to the injuries for which she seeks to recover damages." [37] As long as the plaintiff "insists on asserting that right she might not also insist that her case must be advanced for trial, when it is quite evident that such a course of action . . . will necessarily do injustice to other litigants." [38] Thus the plaintiff could assert the privilege before trial, but as long as she did, there would never be a trial. In *Hilderbrand* the court implies a waiver and in *Kriger* it permits assertion of the privilege but at the expense of trial. The result in fact is the same, the only distinction being one of semantics. Moreover, the back-door approach taken in *Kriger* is not to be applauded, for no "absolute privilege" is conferred by statute when the court refuses to enforce it.

Hilderbrand is consistent with the modern view of judicial procedure. With today's emphasis on pretrial conferences and settlements it is requisite that all material facts and issues be presented before trial. If the court had not compelled the disclosure, it would have been necessary to grant a continuance at the trial when the plaintiff offered evidence as to his physical condition. Such a result would be contrary to a policy of encouraging pretrial discovery.

At least one noted authority anticipated the *Hilderbrand* result, suggesting that it would be justified under any statute which does not provide for consent or waiver.[39] However, courts have reached the opposite conclusion by reasoning that the statutory privilege is indicative of legislative intent that such consultations be inviolate. Therefore, the statute was broadly construed in favor of the patient, and any act constituting waiver had to be set forth in the statute itself.[40] *Hilderbrand* is in accord with the better practice of not blindly adhering to the quantitative majority but of adopting reasoned rules of law followed by progressive jurisdictions. The principle of waiver upon commencement of a personal injury action is recognized by statute in ten states[41] and has been adopted by the Model Code of Evidence[42] and the Colorado Bar Association.[43] Nebraska has amended its statute to expressly deem the privilege waived upon commencement of a personal injury action instead of when the patient offers evidence of his physical or mental condition.[44]

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[37] *Id.* at 288-89.

[38] *Id.* at 290.

[39] McCORMICK, EVIDENCE § 108 at 220-21 (1954).

[40] *In re* Associated Gas & Elec. Co., 59 F. Supp. 743 (S.D.N.Y. 1944); Nelson v. Ackermann, 249 Minn. 582, 83 N.W.2d 500 (1957).

[41] *Supra* note 13.

[42] Rule 223 § 3 (1942).

[43] 12 Colo. Bar Ass'n Newsletter 8 (1965).

[44] NEB. REV. STAT. § 125-1207 (reissue 1964).

The principle of waiver upon commencement of the action seems to be supported by reason if not by judicial decision. There is little value in preserving a privilege designed to conceal truth when the patient himself has lifted the veil of secrecy. There is little value in postponing waiver until trial if waiver is bound to result.

The existing law should have sufficient flexibility so that the exercise of the privilege will not foster injustice and deceit. The most effective statutory provision would be one similar to the Virginia statute.[45] This statute recognizes the privilege but expressly provides for waiver when the physical or mental condition of the patient is in issue.[46] Flexibility is achieved by an added provision which permits the trial judge to compel disclosure in other instances in the interest of the proper administration of justice.

A statute making the invocation of the privilege discretionary with the trial judge in all other instances would be a better alternative to the law presently existing in most states. A practical and pragmatic determination could be made depending upon the facts and circumstances of each individual case. Such a statute would not bind the hands of the trial court; it would place the responsibility with the tribunal which is in the best position to assess the genuineness and merit of the claim, and the value of particular and specific evidence in a given suit. This may well have been in the minds of the majority of the court in *Hilderbrand* by their express application of waiver to the facts of the case. By so doing they have enlarged the meaning of the existing statute, while not announcing a hard rule of waiver, anticipating that circumstances in a later case might dictate a contrary result. Whether or not this was a factor in the court's determination, *Hilderbrand* represents a much needed departure from the existing law and is probably a barometer of a developing trend.

STEWART ROGER FINDER

[45]VA. CODE ANN. § 8-289.1 (Repl. 1957). "[P]rovided however, that when the physical or mental condition of the patient is at issue in such action, suit or proceeding or when a judge of a court of record, in the exercise of sound discretion, deems such disclosure necessary, disclosure may be required. . . ."

[46]DeFoe v. Duhl, 286 F.2d 205 (4th Cir. 1961).