The Physician-Patient Privilege in Ohio

General

The privilege of patients not to have their communications to physicians used against them is purely a creature of statute; this form of privilege was unknown at common law. Nor is this privilege recognized in the absence of statute. This form of privilege is closely modeled after the attorney-client privilege that was universally recognized at common law. In Ohio both the physician-patient and the attorney-client privileges are set forth in the same statute, General Code Section 11494. This statute makes privileged all communications made by a patient to his physician in that relation, and the physician's advice to the patient.

Unlike the common law privileges, there seems to be no requirements that the communication be made in privacy or it will be considered that the privilege is waived. Of course the testimony of the third parties present is not privileged.[1] This will on consideration seem reasonable as the subject of the communication is more than words and may not be fully understood by the third party so as to negate the effect of the privilege. As to communications to the agents of a physician such as nurses, the earlier determinations regarded these as privileged.[2] A later determination of the Supreme Court of Ohio has held that the usual rule of statutory construction should be applied to the privilege section, to the effect that statutes in derogation of the common law shall be strictly construed and no privilege is recognized in the situation of communications to nurses.[3]

When Privilege Exists

For there to be a privilege, the communication must be made to a physician, not a veterinarian, chiropractor, or nurse;[4] and it must be within the professional relation. This relation is a consensual relation, the purpose of which is to improve or preserve the health and well-being of the patient. Though the consent of the patient is necessary, it may be implied from the facts surrounding the commencement of the relationship as the patient may well be brought to the physician in an unconscious state.[5] When, however,

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[1] Ryan v. Industrial Commission, 47 Ohio L. Abs. 561, 72 N.E. 2d 907 (C. of A. 1946).

[2] Humble v. John Hancock Life Insurance Co., 28 Ohio N. P. (N. S.) 481 (C. P. 1931).

[3] Weis v. Weis, 147 Ohio St. 417, 72 N.E. 2d 245 (1947).

[4] Weis v. Weis, *supra* note 3.

[5] Malone v. Industrial Commission, 140 Ohio St. 292, 43 N.E. 2d 266 (1942).

the employment and examination are made against the will of the patient, there is no privilege; for there is no physician-patient relationship.[6] The fact that the physician is the employee of a third person does not exempt the resulting relationship from the privileged category even when the third party is the patient's employer.[7] A communication that is not in the professional relation is not privileged;[8] such communications are often quests for advice on family or financial matters.

Voluntary communications to a doctor may not be privileged because there was not in existence a professional relationship between the doctor and the patient even though the communications would fall within an existent relationship. Thus the findings of the staff pathologist in a hospital are not privileged.[9] There is a substantial conflict over the question of whether or not there is a privileged relationship arising between the staff doctors of a hospital and a patient who enters the hospital and does not employ any physician himself but is treated by the staff as part of the hospital service.[10]

When the physician is employed for a purpose other than treatment, communications to him are not privileged. When the party is examined by order of the court, there is no privilege.[11] Nor is there one when the attorneys of a patient require him to undergo an examination in order to determine whether he has a good claim.[12] The findings of an autopsy surgeon are likewise not privileged for lack of a professional relation.

Extent Of The Privilege

The privilege extends to all communications made to the physician within the professional relation. However, the privilege does not extend so far as to cover certain communications, such as advice as to financial matters,[13] nor an admission by the patient that he was negligent in causing his injuries.[14] Information

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6 Wiler v. New York Central R. R. Co., 9 Ohio L. Abs. 403 (C. of A. 1931).

7 Malone v. Industrial Commission, 140 Ohio St. 292, 43 N.E. 2d 266 (1942).

8 *In re* Estate of Chase, 31 Ohio L. Abs. 111 (C. of A. 1940).

9 Nelson v. Western and Southern Indemnity Co., 23 Ohio L. Abs. 117 (C. of A. 1936).

10 Not privileged: Lumpkin v. Metropolitan Life Insurance Co., 75 Ohio App. 310, 62 N.E. 189 (1945); Wills v. National Life Insurance Co., 28 Ohio App. 497, 162 N.E. 822 (1928); *contra,* Lamarand v. National Life Insurance Co., 58 Ohio App. 415, 16 N.E. 2d 701 (1937).

11 Sucher v. Burger, 13 Ohio N. P. (N. S.) 161 (C. P. 1912).

12 McMillen v. Industrial Commission, 34 Ohio L. Abs. 435, 37 N.E. 2d 632 (C. of A. 1941).

13 *In re* Estate of Chase, 31 Ohio L Abs. 111 (1940).

14 Dewart v. Cincinnati Milling Machine Co., 15 Ohio L. Abs. 268 (C. of A. 1933).

as to the commission of a crime should not be privileged, and an ordinance requiring physicians to report gunshot wounds does not violate the privilege.[15]

It is communications that are protected by the statute, and the earliest cases dealing with the privilege were concerned with defining communications. It was early held that the only communications protected were the verbal communications of doctor and patient, and knowledge gained by the physician from his visual examination of the patient was not privileged.[16] However, this view was later discarded, and the exhibition of the patient's body to the physician for examination is now considered a communication.[17] The statute makes privileged the physician's advice to the patient though one early case declared that a physician may testify to the treatment he gave a patient.[18] This ruling is no longer authoritative. However, a physician employed to treat the physical ailments of a patient may testify as to his state of mental health.[19]

The privilege is one of the patient and not of the physician, and a physician cannot invoke it for his own benefit. The privilege applies in all judicial or quasi-judicial hearings, and an administrative tribunal cannot condition its hearing of a case on the waiver of the privilege by the claimant.[20] Documents made by the physician containing privileged matter are not admissible in court even if they are semi-public records.[21]

Waiver

Evidence that falls within the privilege may not be admitted unless the privilege is waived. The statute provides for waiver only by the patient by either specifically waiving the privilege or by taking the witness stand and voluntarily testifying on the same subject.[22] On this question the courts have construed the statute very strictly. They have consistently required that any waiver must be by the patient, and this has resulted in permanently sealing the lips of physicians after the death of their patients. In this question, Ohio has refused to go along with many other states

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15 Bolton v. City of Cleveland, 2 Ohio L. Abs. 599 (C. of A. 1924).

16 Metropolitan Life Insurance Co. v. Howle, 68 Ohio St. 614, 68 N.E. 4 (1903).

17 Ausdenmoore v. Holzback, 89 Ohio St. 381, 106 N.E. 41 (1914).

18 Metropolitan Life Insurance Co. v. Howle, 68 Ohio St. 614, 68 N.E. 4 (1903).

19 Heiselmann v. Franks, 48 Ohio App. 536, 194 N.E. 604 (1934); Olney v. Schurr, 21 Ohio L. Abs. 630 (C. of A. 1936).

20 State *ex rel.* Galloway v. Industrial Commission, 134 Ohio St. 496, 17 N.E. 2d 918 (1938).

21 Weis v. Weis, 147 Ohio St. 417, 72 N.E. 2d 245 (1947); Eikenbury v. McFall, 33 Ohio L. Abs. 525, 36 N.E. 2d 27 (1941).

22 Ohio Gen. Code § 11494.

and has refused to permit waiver by a widow, heir, legatee, executor or other personal representative.[23] Nor may the beneficiary of an insurance contract issued on the patient's life waive the privilege.[24]

The patient may waive by calling the physician as a witness or consenting to his being a witness against him and not objecting to his testimony. The patient may also consent by agreement to a waiver of the privilege; so a provision in an insurance policy waiving the privilege is valid.[25] The patient may also waive by taking the stand himself and voluntarily testifying on the same subject. If the patient's testimony is brought out on cross-examination, it is not voluntary.[26] The term subject is restrictively defined to limit it to the specific details of the patient's direct testimony.[27] In this regard the physician-patient privilege is more liberally applied for the benefit of the patient than is the companion attorney-client privilege.[28] In case the patient testifies on the same subject, that is a waiver to that subject; and any physicians whom he has consulted may be questioned on that same subject but not on others. If the patient waives expressly by calling that one physician, the privilege remains as to all other physicians employed by the patient. It is not necessary for the patient to waive the privilege before the doctor can testify as to the existence of the privileged relation or the length of its duration or the number of visits in connection with it.[29] There remains only one exception to the general rules of waiver, which is that, in an action for the death of a worker under the Workmen's Compensation Act, a widow may waive the privilege. This exception is not included in the privilege statute but is arrived at from interpreting the Workmen's Compensation Act.[30]

SUMMARY

Generally there are but three types of cases in which the physician-patient privilege is invoked; these are actions on policies of insurance, actions for personal injuries, and actions for Workmen's Compensation. The privilege is also occasionally raised in will con-

23 Parisky v. Pierstorff, 63 Ohio App. 503, 27 N.E. 2d 254 (1939); McKee v. New Idea, Inc., 36 Ohio L. Abs. 563, 44 N.E. 2d 697 (1942).

24 Thompson v. National Life Insurance Co., 68 Ohio App. 439, 37 N.E. 2d 621 (1941).

25 New York Life Insurance Co. v. Snyder, 116 Ohio St. 693, 158 N.E. 176 (1927).

26 Harpman v. Devine, 133 Ohio St. 1, 10 N.E. 2d 776 (1937).

27 Harpman v. Devine, 133 Ohio St. 1, 10 N.E. 2d 776 (1937); Baker v. Industrial Commission, 135 Ohio St. 491, 21 N.E. 2d 593 (1939).

28 Note, 4 OHIO ST. L. J. 103 (1938).

29 Willig v. Prudential Insurance Co., 71 Ohio App. 255, 49 N.E. 2d 421 (1942).

30 Industrial Commission v. Warnke, 131 Ohio St. 140, 2 N.E. 2d 248 (1936).

tests in attempting to show the testator's capacity. In will contests the courts apply the rule of strict construction to the statute, as a result of which the privilege is often denied. In the three more common types of actions, however, the privilege usually results in the exclusion of otherwise material and relevant evidence not for any weakness of its probative value but because of what Wigmore calls a rule of extrinsic policy. Any rule of privilege must find its basis in either the likelihood of biased and untrue testimony because of the relationship or a public policy of encouraging the privileged relationship. The privilege of a physician to remain silent unless the patient's consent to speak is given cannot be based on any inherent probability of falsehood in the testimony, for indeed that is more a matter of competency than privilege. The privilege must be found in the desirability of encouraging the relationship. It seems foolish to think that anything but the professional vanity of the physician is encouraged by this privilege, for rare indeed must be the man who will suffer his illnesses in silence rather than repair to a physician for treatment.[31]

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[31] See: 8 WIGMORE, EVIDENCE § 2380 (a) (3rd Ed. 1940) and 58 Am. Jur., Witnesses § 402.