Washington Law Review

Volume 6 | Number 2

5-1-1931

Waiver of Patient's Privileges

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WAIVER OF PATIENT'S PRIVILEGES

It is the purpose here to discuss the circumstances under which a patient is deemed to have waived the privilege veiling communications made to his physician, paying more particular attention to the law on that subject as it now exists in this state, in an attempt to arrive at the every-day and practical effect of the claim of privilege upon the ascertainment of truth in the court room.

The privilege did not exist at common law as it did in cases of communications between attorney and client. It seems first to have been placed upon the statute books of this country in the State of New York in 1831.[1] Since that time, by legislative enactment in varying forms in the different states, the rule has become almost universal. Some of the statutes expressly provide for waiver, and others, as in this state,[2] make no mention thereof.

In an early New York case[3] the privilege was held to be justified for the following reasons.

> "It is a just and useful enactment introduced to give protection to those who are in charge of physicians from the secrets disclosed to enable them properly to prescribe for diseases of the patient. To open the door for disclosure of secrets revealed on the sick bed or when consulting a physician would destroy confidence between the physician and the patient, and it is easy to see might tend very much to prevent the advantages and benefits which follow from this confidential relationship."

Our statute was enacted by the territorial legislature in the year 1854. In none of the states is the statute of recent origin and usually antedates by decades the present era where the time, if not the calendars, of our trial courts is substantially devoted to the determination of causes involving in one way or another an issue on personal injuries. The canons of medical ethics prevent disclosure of

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[1] N. Y. Rev. St. 1828, II, 406 (Part 3, ch. 7, Art. 9, Sec. 73).

[2] Rem. Comp. Stat. Sec. 1214. The following persons shall not be examined as witnesses: 4. A regular physician or surgon shall not, without the consent of his patient, be examined in a civil action as to any information acquired in attending such patient, which was necessary to enable him to prescribe for the patient.

[3] *Edington v. Insurance Company*, 67 N. Y. 185, 194 (1876)

patient's confidences outside of the court room. Can it be said that the carrying of that privilege into the court room, where the patient voluntarily elects to bare his injuries to a court and jury, is indispensible to or even justified by the fostering of freedom between patient and physician?

An injured person's inherent desire to be cured of his injuries or ailments will ordinarily so far outweigh any scheme to misrepresent those injuries, by withholding full disclosure to the physician, as to render non-disclosure of the facts to the physician, present, in only a negligible number of cases. We think it may be fairly said that in all instances where the injuries are bona fide a full disclosure is made to the physician without any thought on the part of the patient that the same is induced by the statutory privilege. And yet so jealous have the courts generally been of the patient's rights that in one case[4] it was held that the exhibition of the plaintiff suffering from a very rare disease before a society of physicians, and the publications of the account of the disease in a medical jour nal even with the consent of the patient did not amount to a waiver of the privilege.

The privilege finds its most frequent application in the following sorts of litigation Personal injury actions where patient is himself the plaintiff, actions by personal representatives or beneficiaries under death by wrongful act statutes, will contests, actions by beneficiaries or personal representatives on accident, health and life policies.

In this state, at least, the use of the privilege as a sword of offense or a vehicle for misrepresentation is hampered to a great extent in litigation of the class first referred to by the statute[5] providing for the appointment by the court from time to time of a physician to examine the injured party for the purpose of qualifying himself to testify concerning those injuries. No such opportunity for discovery of the truth by the adverse party exists in litigation of the other sorts referred to.

While our statute on privilege excludes the testimony "without the consent" of the patient, it is usually held that the consent need not be evidenced by an affirmative act on the part of the patient, but that the privilege may be waived by the patient's failure to claim it during the trial. The reason for the rule excludes any idea that it was enacted for the benefit of the physician, though some

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Scher v. Metropolitan Street Railroad Company, 75 N. Y. S. 625, 71 App. Div. 28 (1902)

[5] Rem. Comp. Stat., Secs. 1230-1.

of the cases seem to have lost sight of this and sustained the claim on the physician's objection.

The circumstances under which a majority of the courts have held the privilege to be waived may be grouped as follows.

I. Before trial.
   (a) By contract, such as express stipulation for waiver contained in insurance policy application or in body of policy,
   (b) By conduct
      (1) Voluntary submission to physician for examination,
      (2) Taking of deposition of physician,
      (3) Waiver at former trial,
      (4) Requesting physician to attest will,
      (5) Submitting to examination and treatment in presence of third parties not attending or assisting the physician.

II. At the trial.
   (a) Failure to claim privilege,
   (b) Calling physician who was in consultation with other physicians concerning whose testimony the privilege is claimed,
   (c) Plaintiff's voluntary testimony on direct examination as to examination, treatment and conclusions of physician concerning whose testimony the privilege is claimed,
   (d) Calling non-professional witness to testify as to same facts sought to be elicited from physician concerning whose testimony privilege is claimed.

Before Trial

The courts are frequently requested to pass upon the validity of a stipulation in an application for a policy of health and accident insurance or life insurance, waiving in advance all provisions of law forbidding any physician or other person who has attended or examined the patient from discussing any knowledge or information acquired thereby The applications are usually made a part of the policies by their own terms, or else some such stipulation is embodied in the policy itself. Is such a stipulation against public policy? The question has been before at least twelve of the state courts and, with the exceptions hereinafter noted, the answer has been in the nega-

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[6] *Trull v. Modern Woodmen*, 12 Ida. 318, 85 Pac. 1081, 10 Ann. Cas. 53 (1906) *Metropolitan L. Ins Co. v. Willis*, 37 Ind. App. 48, 76 N. E. 550

tive.[6] The reasons for a waiver under such circumstances given by the Supreme Court of Ohio in *New York Life Insurance Company v. Snyder*[7] are typical of those found in the decisions just referred to

> "To hold otherwise would be to open wide the doors of both fraud and suicide with respect to the procuring of life insurance policies, and it would jeopardize the soundness and safety of life insurance in general. No sound reason appears why a policy of insurance, attended by an agreement, and waiver such as in this case, should not be enforced when the evidence sustains the claim that the policy was procured by false and fraudulent statements, knowingly made, to induce the issue of the policy, when neither the insurance company nor its agent knew of the falsity of the statements made by the insured. To enter a judgment in favor of the insured, after excluding the evidence of physicians with respect to his physical condition at the time of the taking out of the policy, is not in furtherance of justice. Surely the insurance company has a clear right to say to an applicant for insurance, 'We will not issue a policy of insurance to you unless you give the company full and complete authority to acquire any information which any physician may now possess or may hereafter possess concerning the state of your health at the time of taking out the policy' "

The rule in New York, due to a statutory provision expressly declaring that a paper executed by a party prior to the trial providing for such waiver is insufficient as a waiver, is different.[8] And in Michigan the waiver is held invalid by reason of the stringent prohibitory terms of the Michigan statute.[9]

It must here be noted, however, that the practical effect of denying the waiver in the ordinary contest over a policy of health and accident insurance, or life insurance, is not as apt to obstruct the truth as in the ordinary case where the privilege is claimed, because

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(1906) *Pride v. Interstate Business Men's Accident Assoc.*, 207 Ia. 167, 216 N.W 62, 62 A. L. R. 31 (1927) *Metropolitan L. Ins Co. v. Brubaker* 78 Kan. 146, 96 Pac. 62, 18 L. R. A. (ns) 362; 130 Am. St. Rep. 356, 16 Ann. Cas. 267 (1908) *Sovereign Camp, W W., v. Farmer* 116 Miss. 626, 77 So. 655 (1917) *Cromeenes v. Sovereign Camp, W W.*, 205 Mo. App. 416, 224 S. W 15 (1920) *Bryant v. Modern Woodmen*, 86 Neb. 372, 126 N. W 621, 21 Ann. Cas. 365, 27 L. R. A. (ns) 326 (1910) *National Annuity Assoc. v. McCall*, 103 Ark. 201, 146 S. W 125, 48 L. R. A. (ns) 418 (1912) *Fuller v. Knights of Pythias*, 129 N. C. 318, 40 S. E. 65, 85 Am. St. Rep. 744 (1901) *Maine v. Maryland Casualty Co.*, 172 Wis. 350, 178 N. W 749, 15 A. L. R. 1536 (1920) The federal rule is the same, 34 Fed. 870, 11 Fed. 281.

[7] 116 Oh. St. 693, 158 N. E. 176, 54 A. L. R. 406 (1927).

[8] *Holden v. Metropolitan Life Ins. Co.*, 165 N. Y. 13, 58 N. E. 771 (1900).

[9] *Gilcrist v. Mystic Workers*, 196 Mich. 247, 163 N. W 10 (1917)

the companies writing these policies have their own physicians make an examination before the policy is issued, and thus should be in a position to fairly show assured's condition at the time the policy was issued. Ordinarily the insurer is in a position not only to make a full examination of the insured, but to discuss the matter with the physicians who have previously attended the applicant, and a majority of the companies recognize this by inserting in the policies an incontestable clause having as its effect the requirement that the insurer make his investigation within a short period or not at all. This is, however, of little solace in those cases where the assured has misrepresented his previous history, or where only a cursory examination has been made by the medical examiner. This observation does not apply to those cases where the assured's physical condition after the issuance of the policy or the cause of his death or accident is in issue. But the courts have in litigation of this sort been unwilling to go further than to hold that the privilege might be waived by express stipulation. So where the beneficiary of the policy, or the personal representative of the deceased, forwards to the insurer as part of the proofs of death the physician's certificate as to the cause thereof, that does not constitute a waiver of the provision of the statute prohibiting the physician from disclosing information acquired by him in his professional capacity [10] Information contained in these certificates when forwarded by the beneficiary to the insurer in compliance with the terms of the policy, and as part of the proofs of death, is, however, admissible as an admission against the interest of the beneficiary [11] But there would seem to be no sound reason why the submission of a doctor's certificate as to cause of death, with proofs of loss, should not waive the privilege as to all information therein contained. The assured is assumed to have contracted with knowledge that eventually this information must be disclosed to the insurer in that manner and the waiver is thereby implied as strongly as if it were written in the policy

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[10] *Fidelity and Casualty Co. v. Meyer*, 106 Ark. 91, 152 S. W 995 (1912) *Krapp v. Metropolitan L. Ins. Co.*, 143 Mich. 369; 106 N. W 1107 (1916) *Salts v. Prudential Ins. Co.*, 140 Mo. App. 142, 120 S. W 714 (1909) *Frazier v. Metropolitan L. Ins Co.*, 161 Mo. App. 709, 141 S. W 936 (1911) *Hicks v. Metropolitan L. Ins. Co.*, 196 Mo. App. 162, 190 S. W 661 (1916) *Redmond v. Industrial Ben. Assoc.*, 78 Hun. 104, 44 N. E. 769 (1894) *Klein v. Prudential Ins. Co.*, 221 N. Y. 449, 117 N. E. 942 (1917) *Becker v. Metropolitan L. Ins. Co.*, 43 Misc. 99, 90 N. Y. Supp. 1007 (1904).

[11] *Aetna Life Ins. Co. v. Ward*, 140 U. S. 76, 35 L. Ed. 371, 11 Sup. Ct. Rep. 720 (1891) *Modern Woodmen v. Davis*, 184 Ill. 236, 56 N. E. 300 (1900) *Coscarella v. Metropolitan Life Ins. Co.*, 175 Mo. App. 130, 157 S. W 873 (1913).

Frequently it happens that the plaintiff in a personal injury action consents to his examination prior to trial by a physician of his adversary's choosing. This voluntary submission to a physician for examination happens in those cases where the plaintiff has nothing to conceal. Strictly this situation does not involve a waiver of the privelege because the information gained by the examiner is not for the purpose of treating the patient, but for the purpose of qualifying him to testify [12]

It would seem that the application by a plaintiff prior to trial for a commission to take the deposition of plaintiff's attending physician, and the actual taking of that deposition, either on oral or written interrogatories, would consitute a waiver of any right to claim the privilege later as to the testimony so disclosed. The only case found on that point so holds.[13]

Where the privilege is waived by the patient at a former trial involving the same facts, it would seem to be clear on principle that it could not again be claimed at the second trial. The first disclosure obviates any reason for further secrecy However, the authorities seem to be equally divided, or nearly so, upon this question. Supporting the view that a waiver at one time is a waiver for all time are decisions from the appellate courts of Missouri, New York, and Massachusetts.[14] Those decisions expressing a contrary view come from the courts of Iowa and Michigan.[15]

Apparently all the cases hold that the testator's request to his physician to attest his will is a waiver of secrecy and confidence as to that matter, including the mental condition of the testator at the time of the will's execution. The point has been expressly passed on in this state.[16] The matter has its analogy in the attestation of wills by attorneys, which has become such a frequent occurrence that it never occurs to the practitioner that there is any question of privilege or waiver thereof concerned in his testimony upon the proof of a will.[17]

Where the communications are openly made to the physician in

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[12] *McGuire v. Chicago, etc., R. Co.*, 178 S. W (Mo.) 79 (1915) *Casson v. Schoenfeld*, 166 Wisc. 401, 166 N. W 23 (1918)

[13] *Clifford v. Denver & R. G. R. Co.*, 188 N. Y. 349, 80 N. E. 1094 (1907).

[14] *Elliott v. Kansas City*, 96 S. W (Mo.) 1025 (1906) *McKinney v. Grand Street, etc., R. Co.*, 104 N. Y. 352, 10 N. E. 544 (1887) *Green v. Crapo*, 181 Mass. 55, 62 N. E. 956 (1902)

[15] *Burgess v. Simms Drug Co.*, 114 Ia. 275, 86 N. W 307 (1901) *Briesenmester v. Supreme Lodge K. of P.*, 81 Mich. 525, 45 N. W 977 (1890).

[16] *Points v. Nier* 91 Wash. 20, 157 Pac. 44 (1916).

[17] 4 Jones' Commentaries on the Law of Evidence (1914 Ed.) Sec. 756.

the presence of third parties under circumstances creating no injunction of secrecy, the rule is not applicable.[18] This applies, of course, to those cases where the third parties are not present in the capacity of assistant to the attending physician, or in some other professional capacity, such as nurse.

At the Trial

Although the statutes in a good many states, including Washington, prohibit the physician testifying without the "consent" of the patient, the almost universal rule is that consent is implied from the patient's failure to object to physician's testimony at the trial. This has been so decided in this state,[19] and has been adhered to in a large number of other jurisdictions[20] with but few exceptions.[21]

The majority view is that the patient's waiver of the privilege regarding confidential communications as to one physician waives it at to the remainder of the physicians who attended such patient in consultation together. The reason for this has been stated to be "as to all witnesses of the transaction it is fully open to investigation if opened at all by the party having a right to keep it closed. A patient cannot elect which witnesses shall be heard and which shall not, for if one's investigation legitimately begins it continues to the end. A patient may enforce secrecy if he chooses, but where he himself removes the obligation he cannot avail himself of the statute to exclude witnesses to the occurrence."[22] This rule is adhered to also in New York,[23] Wisconsin,[24] and Missouri.[25]

Where the testimony of physicians not in consultation, but attending the patient at different times, is involved, the rule is oppo-

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[18] *Gleason v. Jones*, 79 Okla. 191, 192 Pac. 303 (1920) *Baumbann v. Steingester* 213 N. Y. 328, 107 N. E. 578 (1915) *Scott v. Aultman*, 211 Ill. 612, 71 N. E. 1112 (1904) *Ruiz v. Dow*, 113 Cal. 490, 45 Pac. 867 (1896) *Mobile & M. R. Co. v. Yeats*, 67 Ala. 164 (1880) *Hills v. State*, 61 Neb. 589, 85 N. W 836 (1901).

[19] *Williams v. Spokane Falls & N. R. Co.*, 42 Wash. 597, 600, 84 Pac. 1129 (1906) *State v. Frye*, 45 Wash. 645, 647, 89 Pac. 170 (1907).

[20] *Lassak v. Croker Estate Co.*, 119 Cal. 442, 51 Pac. 688 (1897) *Briesenmeister v. Supreme Lodge K. P.*, 81 Mich. 525, 45 N. W 977 (1890) *May v. Northern P R. Co.*, 32 Mont. 522, 81 Pac. 328 (1905) Patten v. United Life & Acci. Ins. Assoc., 133 N. Y. 450, 31 N. E. 342 (1892) *Hoyt v. Hoyt*, 112 N. Y. 493, 20 N. E. 402 (1889) *Johnson v. Johnson*, 14 Wend. 637 (1835) *Deutschmann v. Third Ave. R. Co.*, 87 App. Div. 503, 84 N. Y. Supp. 887 (1903).

[21] *Penn. R. Co. v. Durkee*, 78 C. C. A. 107, 147 Fed. 99 (1906)

[22] *Lane v. Boycourt*, 128 Ind. 420, 27 N. E. 1111 (1891).

[23] *Capron v. Douglas*, 193 N. Y. 11, 85 N. E. 827 (1908).

[24] *Cretney v. Woodmen Acci. Co.*, 196 Wis. 29, 219 N. W 488 (1928).

[25] *Epstein v. Penn. R. Co.*, 250 Mo. 1, 156 S. W 699 (1913).

site. In such a case it is the majority rule that the calling of a physician by the patient to testify as to what he saw and did, and the conclusions he arrived at on one occasion, does not waive the privilege as to a physician who perhaps saw and did the same things and came to the same conclusion three or four days later. The ground of the distinction has been placed upon the willingness of the patient to waive the objection as to a particular physician in whom he reposes confidence, and his unwillingness to waive his objection as to another who treated him at a different time for the trouble complained of.[26] This logic seems to be adopted by the courts of Arkansas,[27] California,[28] Idaho,[29] Indiana,[30] Iowa[31] and Michigan.[32] On the other hand the courts of New York,[33] Missouri[34] and Kansas[35] have adopted the far more logical and appealing rule that a waiver as to the testimony of one physician is a waiver as to the testimony of all, even though the treatment is at different times. In *McPherson v. Harvey, supra,* it is stated.

> "When the patient for the purpose of gain or advantage discloses the nature and secret of his malady he renounces his statutory privilege and opens the door to a full judicial inquiry into the subject matter of his own importation into the case, and where several physicians have treated the patient for the same trouble, it can make no difference that their treatment was at different dates."

Plaintiff's Voluntary Testimony on Direct Examination as to Examination, Treatment and Conclusions of Physicians Whose Testimony Is Sought to Be Excluded.

Where the patient on direct examination voluntarily assumes to describe his condition and to detail the examination and treatment given him by his physician, then there is no further need to close

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[26] *Jacobs v. Cedar Rapids,* 181 Ia. 407, 164 N. W 891 (1917) *Missouri & N. A. R. Co. v. Daniels,* 97 Ark. 352, 136 S. W 651 (1911)

[27] *Missouri & N. A. R. Co. v. Daniels,* 98 Ark. 352, 136 S. W 651 (1911).

[28] *Hirschberg v. Southern P Co.,* 180 Cal. 774, 183 Pac. 141 (1919).

[29] *Jones v. Caldwell,* 20 Ida. 5, 116 Pac. 110 (1911).

[30] *Travelers Ins. Co. v. Fletcher American Nat. Bank,* 85 Ind. App. 563, 150 N. E. 825 (1925) superseding former opinion in 148 N. E. 501.

[31] *Jacobs v. Cedar Rapids,* 181 Ia. 407, 164 N. W 891 (1917).

[32] *Slater v. Sorge,* 166 Mich. 173, 131 N. W 565 (1911)

[33] *Capron v. Douglas,* 193 N. Y. 11, 85 N. E. 827 (1908) *Hethier v. Johns,* 233 N. Y. 370, 135 N. E. 603 (1922)

[34] *McPherson v. Harvey,* 183 S. W (Mo.) 653 (1916) *Michaels v. Harvey,* 179 S. W (Mo.) 735 (1915) *State v. Long,* 257 Mo. 199, 165 S. W 748 (1914).

[35] *Chaffee v. Kauffman,* 113 Kan. 254, 214 Pac. 618 (1923)

the physician's lips. If the patient goes into detail regarding the nature of his injuries, testifying as to what the physician did while in attendance, or relates what he communicated to the physician, the privilege is waived,[36] but the courts are not inclined to extend the rule. The testimony must be voluntary and not that given on cross-examination.[37]

The rule has its further restrictions in that there is no waiver where the plaintiff merely testifies generally as to his condition in attempting to detail the physician's treatment, without reference to what the attending physician may have said or done.[38] It seems that unless the defense is so fortunate as to be confronted with a plaintiff who, on direct examination, is taken through a detailed statement of his injuries, physician's treatment, and probably the physician's directions to the patient, then there is no waiver.

It has been said that the rule is different in malpractice cases, and that the bringing of the action itself constitutes a waiver.[39] The weight of authority is, however, that malpractice cases, like other cases involving personal injuries, do not of necessity involve the waiver of the privilege, and that it is only deemed waived upon a voluntary detailed disclosure by plaintiff.[40] It would seem extremely unfair by a claim of privilege in malpractice case to prevent the defendant from testifying in his own behalf, and as a matter of practice this never occurs, because the plaintiff, in order to recover, must open the door to that testimony either by himself or through witnesses, in detailing the acts of negligence.

Where a non-professional witness is present at the time of the examination of the patient, and his treatment by the physician, and is called by the plaintiff to testify as to what was there said and done, the privilege as to those physicians present at least is waived.[41]

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[36] *Epstein v. Penn. R. Co.*, 250 Mo. 1, 156 S. W 699 (1913) *Woods v. Lisbon*, 150 Ia. 433 ,130 N. W 372 (1911) *Treanor v. Manhattan R. Co.*, 16 N. Y. Supp. 536 (1891).

[37] *Packard v. Coberly*, 147 Wash. 345, 265 Pac. 1082 (1828) *Burgess v. Simms Drug Co.*, 114 Ia. 275, 86 N. W 307 (1901) *May v. Northern Pac. R. Co.*, 32 Mont. 522, 81 Pac. 328 (1905).

[38] *Noelle v. Hoquiam Lumber & Shingle Co.*, 47 Wash. 519, 92 Pac. 372 (1908) *Williams v. Johnson*, 112 Ind. 273, 13 N. E. 872 (1887) *McAllister v. St. Paul City R. Co.*, 105 Minn. 1, 116 N. W 917 (1908) *Green v. Nebag-Main*, 113 Wis. 508, 89 N. W 520 (1902).

[39] *Beckwell v. Hosier*, 10 Ind. App. 5, 37 N. E. 580 (1894) 4 Wigmore on Evidence (2d. Ed.) Sec. 2389, p. 3359.

[40] *Packard v. Coberly*, 147 Wash. 345, 265 Pac. 1082 (1928) *Capron v. Douglas*, 193 N. Y. 11, 85 N. E. 827 (1908)

[41] *Woods v. Lisbon*, 150 Ia. 433, 130 N. W 372 (1911) *Reed v. Rex Fuel Co.*, — Ia. —, 141 N. W 1056 (1913).

THE WASHINGTON CASES

The majority of the questions we have been considering have never been before the Supreme Court of this state.

Williams v. Spokane Falls & N R. Co.[42] held that a patient in a personal injury suit waives the privilege attached to the statements of his physician where he permits him to testify without objection.

Noelle v. Hoquiam Lumber & Shingle Co.[43] is an illustration of the majority rule that a delineation by the patient of the nature of his injuries without in addition thereto giving testimony as to what the physician did for him, is insufficient to show a waiver. The attending physician died prior to trial, and defendant sought to elicit from his two consultants testimony as to the extent of plaintiff's injuries. The court said

> "It is perhaps true, as argued by appellant, that the injured party and the attending physician may be the only persons who have knowledge of the extent of an injury and that if the physician may not testify thereto great injustice may be done. This, of course, argues against the policy of the statute which rests with the legislature and not with the courts, and would yield the provisions of the statute entirely"

There is a strong and very appealing dissent to this decision by Justice Root, concurred in by the Chief Justice.

In *Blackwell v Seattle*,[44] a physician was called on behalf of defendant who testified he had treated plaintiff and was then asked to describe her condition, upon which counsel for plaintiff stated that he had a right to object to the testimony on the ground that the relations between the witness and the plaintiff were confidential, but that if the physician desired to violate that confidence the plaintiff *would not object* on that ground. The physician thereupon declined to testify The Supreme Court sustained the trial court's ruling in excluding the evidence on the ground that the patient had not consented to the physician's testimony The court in this case was under a misapprehension as to the reason for the rule and the effect was to permit the physician to claim the benefit of a ruling which was not enacted for his benefit, and to permit the plaintiff to masquerade before the jury in the guise of one willing to make a full and complete disclosure.

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[42] 42 Wash. 597, 600, 84 Pac. 1129 (1906)
[43] 47 Wash. 519, 92 Pac. 372 (1907).
[44] 97 Wash. 679, 682, 167 Pac. 53 (1917).

In *In re Vaughn's Estate*[45] it seems to be intimated that the physician as well as the patient may claim the privilege. This, of course, is not warranted by the statute, and should not be confused with another statute,[46] providing that a regular physician may be protected from testifying as to information received from any defendant by virtue of his profession. This latter section applies specifically to criminal cases, while the statute with which we are here dealing is by its own terms applicable alone to civil cases, and would have no bearing upon a criminal action but for that portion of our code[47] making the rules of evidence in civil actions applicable to those in criminal prosecutions.

State v. Miller[48] is illustrative of the protections sometimes thrown about a patient in the use of his privilege. The defendant was charged with a statutory crime upon the person of a minor girl. The state sought to introduce the testimony of a physician who had previously attended the defendant, to the effect that at the time of the offense he was afflicted with a loathsome disease. This was on the theory that the defendant had waived the privilege by his own voluntary disclosures to others that he was afflicted with that disease near the time of the alleged commission of the offense. The court said.

> "We think a patient's consent to his physician testifying cannot be shown solely by the testimony of witnesses concerning the patient's previous admissions or disclosures. No decision has come to our attention holding that such is the law It seems to us that the consent *must be evidenced to the trial court* by some word or act of the patient at the time of the trial, so that the court can conclusively know, without depending upon the veracity of third persons as witnesses, that the defendant has waived the privilege accorded to him by the statute."

While some of this language may not be strictly necessary to a decision on the point there presented, it seems clear from our previous discussion that the cases do not go to the extent of holding that the waiver "must be evidenced to the trial court by some word or act of the patient at the time of the trial." This is recognized by our Supreme Court in a case involving the privilege attendant upon the relation of attorney and client, where it was held that the rule

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[45] 137 Wash. 512, 517, 242 Pac. 1094 (1926)
[46] Rem. Comp. Stat. Sec 2147.
[47] Rem. Comp. Stat. Sec. 2152.
[48] *State v. Miller*, 105 Wash. 745, 178 Pac. 459 (1919).

has no application to conversations at which a third party is present.[49]This case holds that testimony of a plaintiff-patient elicited on cross-examination is not voluntary, and is therefore not a waiver, and while alluding to it does not decide the question of whether the privilege may be waived by the personal representative of the deceased, though it seems to have been held by the Supreme Court in another case[50] that the privilege may be not waived.

As closely related to the subject under discussion it may be stated that our Supreme Court has held that the privilege extends to X-rays taken by plaintiff's physician,[51] and that no adverse comment may be made upon the patient's claim of privilege by the adverse party [52]

Conclusion

Can any sound reason, other than the statutory prohibition, be urged for permitting a plaintiff or his representative, who has voluntarily presented to the court as a basis for damage a set of facts involving his physical condition, and which must of necessity, before recovery can be had, be thoroughly detailed to the court, to claim as confidential disclosures, the very matters which form the basis of his recovery? There is no shame attached to an injured person's condition or its treatment by one's physician which public policy demand be kept secret. Our ills are commonly the property of not only the immediate family but our friends. Can it be said that freedom of disclosure between patient and physician is fostered by attaching to that relationship an imaginary secrecy which does not in fact exist? The objections to the rule have been best stated by Professor Wigmore

> "By any other conclusion the law practically permits the plaintiff to make a claim somewhere as follows 'One month ago I was by the defendant's negligence severely injured in the spine and am consequently unable to walk, I tender witnesses A, B and C, who will openly prove the severe nature of my injury But stay! Witness D, a physician, is now, I perceive, called by the opponent to prove that my injury is not so severe as I claim, I object to his testimony because it is extremely repugnant to me

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[49] *State v. Falsetta*, 43 Wash. 159, 162, 86 Pac. 168 (1906).
[50] *Points v. Nier* 91 Wash. 20, 157 Pac. 44 (1916)
[51] *Hansen v. Sandvik*, 128 Wash. 60, 62, 222 Pac. 225 (1924)
[52] *Lane v. Spokane Falls & N. R. Co.*, 21 Wash. 119, 127, 57 Pac. 367 (1899) *Strafford v. N. P R. Co.*, 95 Wash. 450, 454, 164 Pac. 71 (1917)

> that my neighbors should learn of my injury, and I can keep it forever secret if the court will forbid his testimony' If the utter absurdity of this statement (which is virtually that of every such claimant) could be heightened by anything, it would be by the circumstances (frequently observable) that the dreaded disclosure, which the privilege prevents, is the fact that the plaintiff has suffered no injury at all. In actions for personal injury, the permission to claim the privilege is a burlesque upon logic and justice. In actions upon insurance policies, where fraudulent misrepresentations as to health are in issue, the insured's initial conduct in volunteering a supposedly full avowal of his state of health has put him in the position of abandoning any desire to be secretive towards the insurer on that subject, and of giving the insurer in fairness the right to ascertain the truth, and a waiver should be predicated by the nature of the action.''[53]

It is submitted that, as suggested by Professor Wigmore in another place,[54] the bringing of an action in which an essential part of the issue is the existence of a physical ailment, should of itself constitute the patient's consent to the physician's testimony Were the question a new one this could be accomplished by judicial construction, for it is getting no further afield to say that the privilege is waived where the patient discloses the privileged matter in his testimony than in his complaint. But the rule has apparently become too well established judicially now to admit of any change other, perhaps, than a statutory one.

DE WOLFE EMORY.*

[53] 4 Wigmore on Evidence (2d Ed.), Sec. 2389, p. 3359.
[54] 4 Wigmore on Evidence (2d Ed.) p. 3558.
*Of Seattle Bar.