Nebraska Law Review

Volume 34 | Issue 3 Article 7

1955

Discovery and the Physician-Patient Privilege

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DISCOVERY AND THE PHYSICIAN-PATIENT PRIVILEGE

In 1951, Nebraska adopted the principal parts of Rules 26 to 37 of the Federal Rules of Civil Procedure pertaining to depositions and discovery. These sections became Sections 25-1267.02 to

25-1267.44 of the Nebraska statutes.[1] Section 25-1267.02 provides that the deponent may be examined regarding any matter *not privileged* which is relevant to the subject matter involved in the pending action. Also Sections 25-1267.38 and 25-1267.39, relating to written interrogatories and discovery of documents, are limited to discovery of matter not privileged.

Section 25-1206[2] provides that, "No . . . physician, surgeon . . . shall be allowed in giving testimony to disclose any confidential communications, properly entrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice of discipline."

The purpose of this note is to examine the possibilities of obtaining a privileged communication to a physician before the trial of an action for personal injuries.

I. The Physician-Patient Privilege

There was no physician-patient privilege at common law.[3] Nebraska and thirty other states have enacted statutes extending a privilege to confidential communications made to physicians.[4] The policy behind these statutes is to encourage the patient to discuss more freely his ailments with a doctor while knowing that

[1] Neb. Rev. Stat. (Cum. Supp. 1953).

[2] Neb. Rev. Stat. (Reissue 1948).

[3] O'Brien v. General Accident, Fire and Life Assurance Corp., 42 F.2d 48 (8th Cir. 1930); Friesen v. Reimer, 124 Neb. 620, 247 N.W. 561 (1933); Koskovich v. Rodestock, 107 Neb. 116, 185 N.W. 343 (1921); Thrasher v. State, 92 Neb. 110, 138 N.W. 120 (1912).

[4] Ariz. Code Ann. § 23-103 (1939); Ark. Stat. § 72-628 (1947); Cal. Code Civ. Proc. Ann. (Evid.) § 1881 (1946); Colo. Rev. Stat. 153-1-7(4) (1953); Idaho Code Ann. § 9-203 (1947); Ind. Ann. Stat. § 2-1714 (Burns 1933); Iowa Code Ann. § 622-10 (1946); Kan. Gen. Stat. § 60-2805 (1949); Ky. Rev. Stat. § 213-200 (1953); Mich. Stat. Ann. § 27.911 (1938); Minn. Stat. Ann. § 595.02 (West 1945); Miss. Code Ann. § 1697 (1942); Mo. Ann. Stat. § 491.060 (Vernon 1949); Mont. Rev. Codes Ann. § 93-701-4 (1947); Neb. Rev. Stat. § 25-1206 (Reissue 1948); Nev. Comp. Laws § 89-74 (1929); N.M. Stat. Ann. § 20-112 (1941); N.Y. Civ. Prac. Act § 352; N.C. Gen Stat. § 8-53 (1953); N.D. Rev. Code § 31-0106 (1943); Ohio Gen. Code § 2317.05 (1953); Okla. Stat. Ann. tit. 12, § 385 (1938); Ore. Rev. Stat. § 44.040 (1953); Pa. Stat. Ann. tit. 28 § 328 (1938); R.I. Gen. Laws § 273-45 (1938); S.D. Code § 36.0101 (1939); Utah Code Ann. § 78-24-8 (1953); Wash. Rev. Code § 5.60.60 (1953); W. Va. Code Ann. § 4992 (1949); Wis. Stat. § 325.21 (1947); Wyo. Comp. Stat. Ann. § 3-2602 (1945); South Carolina has the privilege by case decision. See Cole's Next of Kin v. Anderson, 191 S.C. 458, 4 S.E.2d 908 (1939).

such information will not be divulged to his humiliation or disgrace.[5]

Since the Nebraska physician-patient privilege extends only to *confidential communications* which are necessary and proper to enable the physician to discharge the functions of his office, an examination of what medical testimony is encompassed by that term is necessary.

The Nebraska courts have not restricted the word "communications" to oral statements made by the patient to the doctor. In *O'Donnell v. O'Donnell*[6] the court held a hospital chart made by a doctor while a patient was under his care for an operation was a confidential communication. In *Stapleton v. Chicago B. & Q. Ry.*,[7] an X-ray made of the patient's injured foot for the purpose of ascertaining the extent of the injuries was held to be a confidental communication. The court's syllabus stated:

> When a party submits to an examination, or inspection by a physician, for the purpose of learning the state of his health or the physical condition of any part of his anatomy, the knowledge thus acquired by the physician is privileged, and the physician is not permitted to testify to the condition he found, over objection based upon the statute.

In *Bryant v. Modern Woodmen of America*,[8] it was held that the physician's statements to the patient are privileged if based on facts disclosed by the patient which are confidential communications.

Thus, it is seen that very important medical evidence concerning the physical condition of a plaintiff in a personal injury action is subject to the physician-patient privilege in Nebraska. Whether the defendant may examine this evidence before the trial by utilizing the discovery statutes has not been decided by the Nebraska Supreme Court.

II. Purposes Of The Discovery Statutes

Moore's Federal Practice[9] points out the following benefits of a liberal discovery procedure: (1) it is of great assistance in ascertaining the truth and preventing perjury; (2) it is an effective means of detecting and exposing false, fraudulent, and

5 Ansnes v. Loyal Protective Ins. Co., 133 Neb. 665, 276 N.W. 397 (1937).

6 142 Neb. 706, 7 N.W.2d 647 (1943).

7 101 Neb. 201, 162 N.W. 644 (1917).

8 86 Neb. 372, 125 N.W. 621 (1910).

9 4 Moore's Federal Practice 1014 (2d ed. 1950).

sham claims and defenses; (3) it makes available in a simple, convenient, and often inexpensive way facts which otherwise could not have been proved, except with great difficulty and sometimes not at all; (4) it educates the parties in advance of trial as to the real value of their claims and defenses, thereby encouraging settlements out of court; (5) it expedites the disposal of litigation, saves the time of the courts, and clears the docket of many cases by settlements and dismissals which otherwise would have to be tried; (6) it safeguards against surprise at the trial, prevents delay and narrows and simplifies the issues to be tried, thereby expediting the trial; and (7) it facilitates both the preparation and the trial of cases.

III. Discovery Before Trial By Judicial Methods

Once the physician-patient privilege has been waived by the patient, discovery will be permitted.[10] Because of the 1925 amendment to Section 25-1207[11] by which the patient waives his privilege if he offers evidence with reference to his "... physical or mental condition, or the alleged cause thereof ...." the privilege will be waived in every trial for personal injury. In view of this it is illogical to prevent defendant's discovery before trial of important medical evidence in a personal injury action by the unfortunate application of the physician-patient privilege designed for an entirely different purpose. The purposes of the discovery statutes are seriously hampered if the defendant is denied discovery of evidence which would be admitted at the trial.

In the absence of *express* waiver of the physician-patient privilege by the plaintiff in a personal injury action, there are judicial methods by which a defendant can obtain the medical evidence before the trial. Assume that *A* has brought an action in Nebraska against *B* for personal injuries received in an automobile accident as a result of *B's* negligence. *B* wishes to take the deposition of *A's* physician, *C*, under Section 25-1267.02[12] con-

[10] Munzer v. Swedish American Line, 35 F. Supp. 493 (S.D.N.Y. 1940); McKeever v. Teachers' Retirement Board, 99 N.Y.S.2d 884 (Sup. ct. 1950); Leusink v. O'Donnell, 255 Wis. 627, 39 N.W.2d 675 (1949); rev'd on other grounds, 257 Wis. 571, 44 N.W.2d 525 (1950); see also In re Ericson's Will, 200 N.Y. Misc. 1005, 106 N.Y.S.2d 203 (Surr. Ct. 1951) where the court allowed examination of privileged hospital records after waiver by personal representative of deceased.

[11] Neb. Rev. Stat. § 25-1207 (Reissue 1948).

[12] Neb. Rev. Stat. § 25-1267.01 (Cum. Supp. 1953) provides, "Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery...."

cerning *C's* treatment of *A* for a previous injury to *A's* back. He also wishes to examine medical records, including X-rays, made by *C* concerning that treatment under Section 25-1267.39.[13] *A* resists recovery on the grounds that the matter which *B* is seeking to discover is privileged as a confidential communication to a physician under Section 25-1206.

A. IMPLIED WAIVER OF THE PHYSICIAN-PATIENT PRIVILEGE

(1) Doctrine of Implied Waiver in Other Jurisdictions

B can argue that *A* has impliedly waived the physician-patient privilege by bringing an action for personal injuries. In *Leusink v. O'Donnell*,[14] a Wisconsin case, the plaintiff brought an action to recover for damages sustained in an automobile accident. Pursuant to a Wisconsin statute,[15] the defendant insurance company applied to the court for an order authorizing inspection of certain hospital and medical reports. The plaintiff contended that the records were privileged. The Wisconsin statute,[16] providing for the physician-patient privilege, provided, "No physician or surgeon shall be permitted to disclose any information he may have acquired in attending any patient in a professional character, necessary to enable him to serve such patient except only . . . (4) with the express consent of the patient."

The court allowed the defendant to examine all medical records which concerned treatment of plaintiff's left arm and leg before and after the accident because the plaintiff was suing for impairment to those particular limbs. The court spoke in terms of a duty on the part of the plaintiff to furnish information as to the prior disability of his left arm and leg. The same result could have been reached by holding that the plaintiff impliedly waived his privilege by suing for injuries to his person.

B can also submit an interrogatory to *A* under Section 25-

[13] Neb. Rev. Stat. § 25-1267.39 (Cum. Supp. 1953) provides, "Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of section 25-1267.22, the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by section 25-1267.02 and which are in his possession, custody, or control. . . ."

[14] 255 Wis. 627, 39 N.W.2d 675 (1949), rev'd on other grounds, 257 Wis. 571, 44 N.W.2d 525 (1950).

[15] Wis. Stat. § 269.57 (1947).

[16] Wis. Stat. § 325.21 (1947).

1267.37[17] asking him if he had ever injured his back prior to the accident. If *A* answers in the affirmative, *B* can argue that this impliedly waives the physician-patient privilege.

In *Munzer v. Swedish American Line*,[18] the plaintiff brought an action against the defendant for alleged wrongful acts of the defendant's agents occurring on board the defendant's ship. The plaintiff claimed that she became violently ill and suffered a mental and physical collapse, thereby becoming mentally unbalanced. Defendant attempted to obtain hospital records of a mental hospital where plaintiff had been treated prior to the alleged incident by a subpoena duces tecum and also attempted to examine the superintendents of those hospitals for the purpose of discovery. Plaintiff resisted discovery by claiming that the testimony sought to be adduced and the records sought to be examined were privileged and at no time had she expressly waived the privilege.

In determining whether there was a privilege, the federal court applied the law of New York. The court held that the hospital records made by physicians attending a patient in a professional capacity were privileged. Section 354 of the New York Civil Practice Act,[19] relating to waiver of the physician-patient privilege provided, "The waivers herein provided for must be made in open court, on the trial of the action or proceeding, and a paper executed by a party prior to the trial providing for such waiver shall be insufficient as such a waiver." However, the court held that the plaintiff had impliedly waived her privilege by stating that she had been insane and had been treated in mental hospitals prior to the alleged accident in answer to an interrogatory served on her under Rule 33 of the Federal Rules of Civil Procedure. Therefore, discovery was permitted. Sections 25-1267.37 and 25-1267.38 of the Nebraska statutes were adopted from Rule 33 of the Federal Rules.

(2) Doctrine of Implied Waiver in Nebraska

There are no Nebraska cases recognizing an implied waiver of the physician-patient privilege. However, in *Brown v. Brown*[20] the Nebraska court held that a testator impliedly waived the at-

[17] Neb. Rev. Stat. § 25-1267.37 (Cum. Supp. 1953) provides, "Any party may serve upon any adverse party written interrogatories to be answered by the party served...." Section 25-1267.38 provides, "Interrogatories may relate to any matters, not privileged...."

[18] 35 F. Supp. 493 (S.D.N.Y. 1940).

[19] N.Y. Civ. Prac. Act § 354.

[20] 77 Neb. 125, 108 N.W. 180 (1906).

torney-client privilege when he requested his attorney to sign as an attesting witness to his will. Since the testator knew that an attesting witness would have to testify as to his competency and that the testimony of the attorney would be necessary for proof of the testator's competency, the court reasoned that there had been an implied waiver of the privilege.

The implied waiver in the *Brown* case seems similar to an implied waiver of the physician-patient privilege. In the previous example *A* could make a full disclosure to his physician of his physical condition at the time of treatment of his injuries without fear of disclosure by *C*, his physician. The policy of the privilege is fulfilled at this point. Similarly, the testator in the *Brown* case would have had his communications with the attorney privileged if he had not asked the attorney to sign as an attesting witness. However, if *A* later decides to sue *B* for his injuries, *A* realizes, because of Section 25-1207,[21] he will waive the privilege and *B* will be entitled to introduce any evidence of *A's* physical or mental condition. Likewise, in the *Brown* case the testator realized that if he asked the attorney to sign as an attesting witness, the privilege would be waived. *A*, like the testator in the *Brown* case, is given a choice: (1) not suing and thus preserving his communication to *C* inviolate; or (2) suing and waiving the privilege.

The moment *A* files his petition there should be a waiver of the privilege. If *A* will not be granted a privilege at the trial, then there is no reason why he should have a privilege when *B* attempts to determine pre-trial information through the use of a deposition.

B. PHYSICAL AND MENTAL EXAMINATION

In the example, B could invoke Section 25-1267.40[22] which provides, "In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made."

This section was adopted from Rule 35 of the Federal Rules of Civil Procedure. Under the federal rules, *A* can obtain a copy

[21] See note 11 supra.
[22] Neb. Rev. Stat. (Cum. Supp. 1953).

of this examination from the doctor who examined him. But Rule 35(b)(2) provides:

> By requesting and obtaining a report of the examination so ordered or by taking a deposition of the examiner, the party examined [*A* in the example] waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

So if *A* demands a copy of the medical report from the physician who examined him, he is deemed to have waived the privilege as to the testimony of other physicians who will later examine him or who have examined him in the past.

But the Nebraska legislature did not adopt Rule 35(b)(2). *A* will probably be entitled to obtain the Section 25-1267.40 report by the use of the other discovery provisions. But even if *A* does demand and receive the Section 25-1267.40 medical report, he does not waive the privilege as to past and future medical examinations. Of course *B* will always be entitled to the Section 25-1267.40 report. But he will not be entitled any other medical examination reports of *A*, even though *A* has made a demand and received the Section 25-1267.40 medical report, because these other medical reports are shielded by *A's* privilege.[23]

By employing Section 25-1267.40, *B* can discover *A's* physical condition before the trial. However, this procedure is ineffective for two reasons: (1) it is impossible to ascertain *A's* physical condition prior to the accident and immediately after the accident, and (2) time elapsing between the time of the accident and the time of the physical examination vitiates its value. Therefore, the use of Section 25-1267.40 does not solve *B's* difficulties.

C. PHYSICIAN-PATIENT PRIVILEGE IN THE FEDERAL COURTS

If *B* could remove the action filed against him to a federal court on grounds of diversity of citizenship, he could argue that the court is not bound by state laws on privilege and its waiver. There is a split in the federal courts on the question of whether the physician-patient privilege is a matter of substantive or procedural law. In *Miller v. Pacific Mutual Life Insurance Company*,[24] the court held in a diversity action that the physician-patient privilege and waiver of the privilege were questions of substantive law and had to be determined by the law of Michigan.

[23] See note 31 infra.

[24] 116 F. Supp. 365 (W.D. Mich. 1953).

This case illustrates the view that the privilege is more akin to state than to federal interests and therefore federal courts should apply state law.[25] However, other federal courts, following Moore's view[26] that the privilege is a procedural question, have held that questions of the privilege are not controlled by the rule of *Erie Railroad Company v. Tompkins*.[27] Therefore, if the federal court adopts Moore's view that the privilege is a procedural question, *B* can ask the court to interpret the privilege, and to hold that the privilege is impliedly waived by *A* bringing an action for personal injuries.

D. PHYSICIAN AS AN EXPERT WITNESS: ATTORNEY-CLIENT PRIVILEGE

In the example, assume that *A's* attorney asked a physician, *D*, an expert in a specialized field of medicine, to examine *A* for the sole purpose of helping *A's* attorney in the preparation of his case, and that *D* submitted a report of his finding and his opinions based on those findings to *A's* attorney. *B* wishes to obtain this report under Section 25-1267.39 of the Nebraska statutes.[28] This section forces *A* to produce documents for *B's* inspection, copying, or photographing. But *B* may be confronted with a situation where the court will deny him discovery of *D's* report on grounds *other than the physician-patient privilege.*

In *San Francisco v. Superior Court*,[29] the defendant sued for a writ of mandamus to force the court to order a physician to answer certain questions germane to the action. The information sought was acquired by the plaintiff's physician who examined the plaintiff for the purpose of aiding plaintiff's attorneys in the preparation of their case. The court denied the defendant's writ of mandamus on the grounds that the doctor's testimony was subject to the attorney-client privilege in that the doctor acted as the attorney's agent to whom the client made communications. There was no physician-patient privilege in this case because Section 1881[30] of the California Code provides for waiver of the privi-

25 Pugh, Rule 43(a) and the Communication Privileged Under State Law: An Analysis of Confusion, 7 Vand. L. Rev. 556 (1954).

26 Scourtes v. Albrect Grocery, 15 F.R.D. 55 (N.D. Ohio 1953); Humphries v. Pennsylvania Ry., 14 F.R.D. 177 (N.D. Ohio 1953); Panella v. Baltimore & O. Ry., 14 F.R.D. 196 (N.D. Ohio 1951).

27 304 U.S. 64 (1938).

28 See note 13 supra.

29 37 Cal.2d 227, 231 P.2d 26 (1951).

30 Cal. Code Civ. Proc. Ann. (Evid.) § 1881 (1946) provides, "... provided further, that where any person brings an action to recover damages for personal injuries, such action shall be deemed to constitute consent

lege "... where any person brings an action to recover damages for personal injuries...." Also the communications were made by the plaintiff to the physician for the purposes of examination, not treatment so there would be no privilege. Section 1881 of the California Code states further, "a licensed physician or surgeon can not... be examined in a civil action, as to any information acquired in attending the patient, which was necessary to prescribe or act for the patient...."

Granting that a communication made by a client to a bona fide agent of any attorney for the purpose of obtaining legal advice is privileged, it seems an undue extension of the attorney-client privilege to consider the physician in this case as the agent of the attorney. It appears more like a back-handed method of preventing discovery from an adverse party's expert. Most of the courts have ignored the attorney-client privilege as the basis for denying discovery, and have instead denied discovery on the grounds that it was the plaintiff who paid the expert, not the defendant.[31] Therefore, if *B* shows good cause, and can avoid the "who paid the expert" factor, he may be allowed discovery of the report submitted by *D* to *A's* attorney.

IV. Legislative Action Permitting Discovery Before Trial

In order to insure the fulfillment of the policy of the discovery statutes, legislation should be enacted which would definitely permit a defendant in a personal injury action to discover the plaintiff's medical evidence before the trial. This result may be accomplished in three ways: (1) amend the statutes on privilege to include a waiver of the physician-patient privilege when an action for personal injuries is commenced or (2) amend the discovery statutes to permit discovery of matter subject to the physician-patient privilege in personal injury actions or (3) abolish the physician-patient privilege.

by the person bringing such action that any physician who has prescribed for or treated said person and whose testimony is material in said action shall testify...."

[31] Sachs v. Aluminum Co. of American, 167 F.2d 570 (6th Cir. 1948), affirming Cold Metal Process Co. v. Aluminum Co. of America, 7 F.R.D. 425 (N.D. Ohio 1947); Cox v. Pennsylvania Ry., 9 F.R.D. 517 (S.D.N.Y. 1949); Taine, Discovery of Trial Preparations in the Federal Courts, 50 Col. L.R. 1026 (1950); 4 Moore's Federal Practice 1152 (2d ed. 1950).

A. AMENDING THE PRIVILEGE STATUTES

California,[32] one of the jurisdictions having the physician-patient-privilege, has a statute providing for a waiver when an action for personal injuries is brought. In states, "... where any person brings an action to recover damages for personal injuries, such action shall be deemed to constitute consent by the person bringing such action that any physician who has prescribed for or treated said person and whose testimony is material in said action shall testify...." The Model Code of Evidence[33] in Rule 223(3) has eliminated the privilege in actions for personal injuries. It states, "There is no privilege under Rule 221 [providing for a physician-patient privilege] in an action in which the condition of the patient is an element or factor of the claim or defense of the patient or any party claiming through or under the patient...." Pennsylvania's privilege statute[34] provides for an exception "... in civil cases, brought by such patient, for damages on account of personal injuries."

B. AMENDING THE STATUTES ON DISCOVERY

It would seem more wise to amend the discovery statutes and provide for pre-trial discovery than to amend the privilege statute and extend the waiver doctrine. The problem involved is more germane to discovery than waiver. Waiver is a fiction which the law invented to express a policy that a plaintiff bringing a personal injury action should not be allowed to withhold medical evidence of his physical condition which is essential to the defendant's case. By adopting the theory of waiver to allow discovery before a trial, the legislature would be unnecessarily extending this fiction into the field of discovery. Therefore, the problem should be attacked directly by amending the discovery statutes.

C. ABOLISHMENT OF THE PHYSICIAN-PATIENT PRIVILEGE

It is obvious that if there were no physician-patient privilege, discovery before trial of matter presently subject to the privilege

32 See note 30 supra.

33 Model Code of Evidence, Rule 223(3) (1942).

34 Pa. Stat. Ann. tit. 28, § 328 (1938) provides, "No person authorized to practice physics or surgery shall be allowed in any civil case, to disclose any information which he acquired in attending the patient in a professional capacity, and which was necessary to enable him to act in that capacity, which shall tend to blacken the character of the patient, without consent of said patient, except in civil cases, brought by such patient, for damages on account of personal injuries."

would be permissible. There are sixteen states[35] which do not have the privilege—sixteen states which do not seem to be suffering from its absence. This fact would seem to cast some doubt on the necessity for the privilege.

Conclusion

A literal interpretation of the Nebraska law on the physician-patient-privilege and waiver of that privilege would appear to hamper seriously the efficacy of those provisions in personal injury actions. However, Wisconsin and New York have invoked the doctrine of implied waiver to permit discovery of privileged matter by the defendant before the trial of the action. California and Pennsylvania have express statutory provisions in their privilege statutes allowing discovery before the trial. Until legislative action completely erases all doubt on the question of whether discovery of matter subject to the privilege will be allowed before the trial of a personal injury action, courts should permit discovery through invocation of the "implied waiver" of the physician-patient privilege.

William H. Hein, '55

[35] Alabama. Connecticut, Delaware, Florida, Georgia, Illinois, Louisiana, Maine, Maryland, Masschusetts, New Hampshire, New Jersey, Tennessee, Texas, Virginia, and Vermont. South Carolina has the privilege by case decision. See note 4 supra.