THE DOCTOR'S DILEMMA

When is a communication between a physician and his patient privileged? The purpose of this paper is to trace the issue of medical privilege in the Common Law dealing with communications breached in court. The statutory law will be examined as well as its influence on the case law. Finally, there will be a consideration of the physician's dilemma in view of existing and proposed legislation.

Wigmore on Evidence states that in order for a communication to be privileged and thus free from exposure in open court, it must fulfill four conditions:

1) The communication must originate in a confidence that it will not be disclosed.

2) The element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties.

3) The relation must be one which in the opinion of the community should be sedulously fostered.

4) The injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation.[1]

These rules were cited with approval by the Canadian court in *R. v. Prentice & Wright.*[2] Does a communication between a doctor and his patient fall within those rules? Although some authorities have agreed that it does, the case law is quite clear. It does not.

The first recorded case to deal with the question of medical privilege was *R.v. Elizabeth, Duchess of Kingston.*[3] The accused's surgeon was called to the stand to give evidence which would have proved her guilty of bigamy. The surgeion balked at doing so on the grounds that this evidence was based on information that had come before him in a confidential trust in his profession. Lord Mansfield speaking on behalf of the court stated:

> "If a surgeon was voluntarily to reveal these secrets, to be sure he would be guilty of a breach of honour, and of great indiscretion; but to give that information in a court of justice, which by the law of the land he is bound to do, will never be imputed to him as any indiscretion whatsoever."[4]

Subsequent cases reinforced the view that the claim of privilege is limited solely to the legal profession and certainly does not extend to doctors.[5] This view was stated most succinctly by Sir George Jessel, M.R. in *Wheeler* v. *Le Marchant:*[6]

> "The communication made to a medical man whose advice is sought by a patient with respect to the probable origin of the disease as to which he is consulted and which must necessarily be made in order to enable the medical man to advise or to prescribe for the patient are not protected . . . therefore it must not be supposed that there is any principle which says that every confidential communication which it is necessary to make in order to carry on the ordinary business of life is protected. The protection is of a very limited character, and in this country is restricted to the obtaining of assistance of lawyers as regards the conduct of litigation or the right of property."

Doctors are still under a duty not to divulge confidences given to them by patients outside of a courtroom and yet the cases state that in a courtroom the privilege does not exist. As a result, some doctors took the

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1 Wigmore on Evidence (3 ed.) Volume 8 p. 531.

2 (1914) 7 WWR 271; 7 Alta. L.R. 479; 23 C.C.C. 436; 20 DLR 791 (Alta. C.A.)

3. (1776) 20 Howell's State Tr. 355

4 Ibid p 574.

5 See **Broad** v **Pitt** (1828) 3 C. & P. 518; Mood & M. 233 **Garner** v. **Garner** (1920) 30 T.L.R. 196

6 (1881). L.R. 17 Ch D 75.

position that no matter what the circumstances, they would not reveal information about their patients until they took the stand. This situation arose in the case of *C. v. C.*[7] where a doctor refused to provide a medical report with regard to a patient's having contracted a venereal disease even though the patient had requested it stating that he would only give his evidence in court. Lewis, J. stated:

> "It is, of course of the greatest importance from every point of view that proper secrecy should be observed in connection with venereal disease clinics, and that nothing should be done to diminish their efficiency or to infringe the confidential relationship existing between doctor and patient. But, in my opinion, those considerations do not justify a doctor in refusing to divulge confidential information to a patient or to any named person or persons when asked by the patient to do so."

In Canada the question of a privilege had arisen on several occasions. One of the more recent is the case of *Regina v. Burgess*[8] where a psychiatrist who had been treating the accused was called to give evidence of his confession to a rape. Quoting *Regina v. Potrin*[9] Cashman, C. Ct. J. stated:

> "In criminal cases, according to the common law, the doctrine of privilege does not apply to expert witnesses, whether they be doctors or other non-legal advisers, nor does it apply to the information which they have received from an accused in the course of preparing expert testimony for the court, where such information relates to circumstances (*res gestae*) surrounding the committing of an offence with which their client has been charged. This rule, to which I know of no exceptions, is succinctly set out in Kenny's Outlines of Criminal Law, 18th ed., in the chapter dealing with 'Professional privilege', at p. 498, no. 588, in the following terms: 'There is no similar privilege for confidences entrusted to a medical or even to a clerical adviser'."[10]

Certain jurisdictions have enacted statutes granting physicians the privilege denied them in the Common Law. About half of the United States as well as the State of Victoria, Australia and New Zealand have privilege laws with one common factor, the privilege belongs to the patient and not the doctor. The decision as to whether or not the physician can take the stand belongs to the patient alone.

In the State of Israel and in the Province of Quebec, there are privilege statutes, but with a different approach, the decision to testify is that of the doctor. Section 60(2) of the Quebec Medical Act states: "No physician may be compelled to disclose what has been revealed to him in his professional character."

Although the statute leaves the decision in the doctor's hands alone, subsequent case law has held that a patient can compel his doctor to give evidence about his medical affairs.[11] Recent medical opinion has criticized this approach as there may be certain information or conclusions within the doctor's knowledge of which the patient is not aware which may cause more harm when revealed than the injustice which would have resulted from the doctor not testifying at all.

The only cross Canada statutory privilege is that awarded to a doctor by the Divorce Act[12] when he is appointed by the Court to assist in the reconciliation of a marriage. There is currently in Manitoba a movement afoot by psychiatrists for statutory privilege for their field of medicine alone. Psychiatry, they argue, is the most confidential of all medical fields and

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7 [1946] 1 All E.R. 562

8 [1974] 4 WWR 310 (B.C. Co. Ct.)

9 (1971), 16 C.R.N.S. 233 (Que. C.A.)

10 **Regina v. Burgess** p. 312

11 See **Rheault v. Metro Life Insurance Co.** (1939) 45 R.L.N.S. 446 **Gagne v. Alliance Nationale** (1946) 13 B.R. 13

12 R.S.C. 1970 Cap. D-8 s. 21(1)

most closely conforms to Wigmore's four tests. The psychiatrist must gain the confidence of his patient before any meaningful therapy can begin. The problem is that most medical practitioners during the course of treatments of their patients practice psychiatry to some small extent. Thus the overlapping of the medical fields makes it difficult for legislators to pass a restricted form of medical privilege.

If we are to have a medical privilege statute, it should be general to cover all physicians and following in the path of the Quebec Medical Act have the decision of exercising the privilege up to the doctor. Only the doctor is in a proper position to assess the harm to the patient which would result from his testimony. Of course, the only other person in the court to make that decision is the judge. However, for that decision to be made a form of *voir dire* would have to be held, be the trial civil or criminal. As the patient as a party to the action is entitled to be present throughout all stages of the hearing, he would inevitably hear the doctor's assessment of him which may be the very reason why the doctor did not wish to testify. Therefore, if a medical privilege statute were to be passed, in order to achieve the desired result, the decision to testify must be left entirely to the doctor.

In order to insure that the doctor has carefully considered the matter, the proposal statute should place some duty on the solicitor calling the physician as his witness to make known to him the ends which will be achieved by his testimony. The physician then can balance that result with the harm which may occur by his testimony. The physician's decision would then be based on whichever result in his mind is more important. There is however one drawback to this approach, lack of judicial control.

So we have the doctor's dilemma. No matter what approach is taken to the issue of medical privilege, a problem arises. The law today compells him to testify while preventing his protection of the patient. A proposed limited statutory privilege fails in being able to draw the lines as to who is covered. A proposed general statutory privilege fails on lack of judicial control while existing privileges are subject to patient control. As a just result to a litigated case is the ideal to which a court strives, it would appear that unless these problems can be satisfactorily covered with legislation the common law approach is the one of choice.

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