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heritance should be accorded to the adopted child and the entire adopting family as though the child were the natural child of his adopters.

ROBERT R. AUGSBURGER

Physician-Patient Privilege as Affected by Mode of Gaining Information

WHILE TREATING decedent over a period of fifteen years for various physical ailments, a doctor learned that she was suffering from senile dementia. Nothing appearing to the contrary, the court assumed that the doctor did not treat decedent for mental infirmities and that knowledge of her mental deficiency did not aid him in his treatment of her other ailments. Over objection, the doctor was allowed to testify in a will contest that decedent suffered from senile dementia. *Held*, in *Carson v. Beatley*.¹ Such information is not privileged, because the physician had been attending the patient for a physical illness not connected with or related to the mental ailment.²

In the principal case, the court classified the Ohio cases on the physician-patient privilege into three groups:

1. Cases in which the information was related to a physical or mental condition for which the doctor was treating the patient, and was learned by the physician by examination of or by other confidential communication from the patient during a professional visit.³ In Ohio such information is privileged.⁴

¹ 82 N.E.2d 745 (Ohio Ct. App. 1948).

² This note will make no attempt to discuss the question of who may waive the physician-patient privilege; nor will it consider whether or not the privilege should apply in a case involving testamentary capacity. It should be noted, however, that most cases involving the operation of the privilege in insanity cases are those in which the question of testamentary capacity is drawn into issue in a will contest. For an example of a case permitting waiver, see *Fraser v. Jennison*, 42 Mich. 206, 225, 3 N.W. 882, 891 (1879). Wigmore doubts that the privilege should apply in insanity cases. 8 WIGMORE, EVIDENCE § 2384 (3d ed. 1940).

³ It is possible to imagine information which although not learned during a professional visit is still privileged. For example, a patient might write to his doctor giving him information which he had neglected to mention at the time of the visit.

⁴ *McKee v. New Idea, Inc.*, 44 N.E.2d 697 (Ohio Ct. App. 1942); *Russel v.*

2. Cases in which the doctor acquired the information by observation, rather than by examination of the patient. The Ohio cases hold that such information is not privileged, even if learned during a professional visit.⁵
3. Cases in which the doctor learns of a mental condition while treating a physical ailment not connected with or related to any mental ailment—as in the *Carson* case. In the Ohio cases dealing with this situation, the courts have held that such information is not privileged.⁶

At least three situations similar to that involved in the cases in the last group can be imagined. They are:

1. While treating a patient for a physical condition, the doctor discovers another and unrelated physical condition.
2. While treating a patient for a mental condition, the doctor discovers an unrelated physical condition.
3. While treating a patient for a mental condition, the doctor discovers another and unrelated mental condition.

In the *Carson* case the court carefully limits its discussion to the situation wherein the doctor discovers a mental condition unrelated to the physical condition for which he was treating the patient.⁷ But if the rule of the *Carson* case is sound, it should apply equally to the three analogous situations.

So far as can be determined, therefore, from existing case law, information to be privileged in Ohio must not only be learned during a professional visit but must meet two additional requirements:

Penn Mutual Life Ins. Co., 70 Ohio App. 113, 41 N.E.2d 251 (1941); *Baker v. Industrial Comm'n*, 135 Ohio St. 491, 21 N.E.2d 593 (1939); *Prudential Ins. Co. v. Heaton*, 20 Ohio L. Abs. 454 (Ct. App. 1934); *Industrial Comm'n v. Strassel*, 11 Ohio App. 234 (1919) (holding that a narrative about the cause of an accident is privileged); *Ausdenmoore v. Holzback*, 89 Ohio St. 381, 106 N.E. 41 (1914); *Brotherhood of Railway Trainmen v. Daly*, 11 Ohio C.C. (N.S.) 464 (1908).

⁵ *Heiselmann v. Franks*, 48 Ohio App. 536, 194 N.E. 604 (1934), see Note, 2 Ohio Op. 389 (1935); *Metropolitan Life Ins. Co. v. Howle*, 68 Ohio St. 614, 68 N.E. 4 (1903); cf. *Bahl v. Bial*, 90 Ohio St. 129, 106 N.E. 766 (1914) (cited for this holding in *Olney v. Schurr*, 21 Ohio L. Abs. 630 (Ct. App. 1936), but distinguishable on the ground of waiver).

⁶ *Carson v. Beatley*, 82 N.E.2d 745 (Ohio Ct. App. 1948); *Meier v. Peirano*, 76 Ohio App. 9, 62 N.E.2d 920 (1945); *Olney v. Schurr*, 21 Ohio L. Abs. 630 (Ct. App. 1936). Although the *Olney* case was placed in this group by the court in the *Carson* case, the case may just as logically be cited in the second group.

⁷ The language in *Meier v. Peirano*, *supra* note 6, however, is broad enough to include the three analogous situations.

1. It must relate to the ailment for which the patient sought or was given treatment.
2. It must not come as a result of "observation."

INFORMATION LEARNED BY EXAMINATION BUT NOT RELATED TO THE CONDITION FOR WHICH THE PATIENT SOUGHT OR WAS GIVEN TREATMENT

Statutes creating a physician-patient privilege usually provide that information acquired by the doctor is privileged if the "information was necessary to enable him to prescribe as a physician or do any act" for the patient as a surgeon.⁸ The cases have generally construed such statutes as making information confidentially acquired privileged if it is ordinarily necessary or useful in treating the condition for which the patient sought or is being given treatment,⁹ or if it is relevant to that condition; or if it is learned by examination, regardless of whether it is useful in treatment or related to the condition being treated.¹⁰

No cases have been found in which the patient told the physician in confidence about a condition which he thought might be related to the condition for which he sought or was given treatment, but which the physician ruled out as being wholly unrelated. It would seem however that such information should be privileged.

Thus despite the use of the word "necessary" in the statutes, it is ordinarily recognized that something less than "necessary" was meant by the legislatures. It seems safe to say that the legislatures were attempting only to limit the operation of the privilege to facts communicated in confidence to a doctor as a doctor.

The Ohio statute merely provides that "a communication made . . . *in that* [physician-patient] *relation*"¹¹ is privileged.¹²

⁸ ARK. STAT. ANN., tit. 28, § 607 (1947). The statutes of the several states are collected in 8 WIGMORE, EVIDENCE § 2380 (3d ed. 1940). "The privilege is intended (and by most statutes is declared) to protect only those communications which are necessary for obtaining the benefits of the professional relation, in other words, for enabling the physician to prescribe remedies or relief." 8 *id.* § 2383.

⁹ The word "treatment" is used in this note in such a sense as to include advice, prescription, diagnosis or such other service as a doctor customarily provides.

¹⁰ See cases cited notes 15, 19, 20, and 34 *infra*.

¹¹ Italics supplied.

¹² OHIO GEN. CODE § 11494: "The following persons shall not testify in certain respects: 1. An attorney concerning a communication made to him by his client in that relation, or his advice to his client; or a physician, concerning a communication made to him by his patient in that relation, or his advice to his patient . . ." That the word "communication" is not limited to verbal communications, see *Ausdenmoore v. Holzback*, 89 Ohio St. 381, 382, 106

In *Meier v. Peirano*,¹³ which the *Carson* case follows, the court recognized that the statute seeks to protect communications "made to the doctor *in his professional capacity* . . ." Nevertheless the court said that the information is learned within the professional capacity only when it has "a relationship to an examination, diagnosis, or treatment of the *particular malady or maladies which brought about the relationship*."¹⁴ Thus, although recognizing in general terms that the Ohio legislature meant to protect approximately the same information as did the legislatures of states in which the statutes read "necessary for treatment," the Ohio court restricts the privilege more narrowly than the courts of such states, even though the words "in that relation" are susceptible to a much broader interpretation.

The requirement that the information be "necessary for treatment" in order to be privileged has posed a difficult problem, for those courts which continue to talk as though the requirement were a literal one, in cases in which the doctor by examining the patient discovers a condition unrelated to that for which the patient sought or is given treatment. Some of these courts¹⁵ have attempted to find necessity by *inferring* it in any situation in which the information so acquired might be relevant. Thus, in a tuberculosis case, knowledge of mental soundness was held to be necessary for treatment, though nothing appeared in the record to show affirmatively that it was necessary.¹⁶ The basic reason underlying such a holding is the difficulty in determining in many cases whether or not the mental condition of the patient has influenced the course of a doctor's treatment. The doctor may well have allowed for the mental quirks and irregularities of the patient

N.E. 41 (1914): "We hold that a communication by the patient to the physician may be, not only by word of mouth, but also by exhibiting the body or any part thereof to the physician for his opinion, examination, or diagnosis, and that that sort of communication is quite as clearly within the statutes as a communication by word of mouth." See also 8 WIGMORE, EVIDENCE § 2384 (3d ed. 1940).

¹³ 76 Ohio App. 9, 12, 62 N.E.2d 920, 922 (1945). At the conclusion of its discussion the court refers to 8 WIGMORE, EVIDENCE § 2380 *et seq.* (3d ed. 1940) for a general discussion of the privilege.

¹⁴ Italics supplied.

¹⁵ *In re Budan's Estate*, 156 Cal. 230, 104 Pac. 442 (1909); *In re Nelson's Estate*, 132 Cal. 182, 64 Pac. 294 (1901); *In re Redfield's Estate*, 116 Cal. 637, 48 Pac. 794 (1897); *E. C. Jones v. City of Caldwell*, 23 Idaho 467, 130 Pac. 995 (1913); *Long v. Garey Inv. Co.*, 110 N.W. 26 (Iowa 1906); *Battis v. Chicago, R.I. & P. Ry.*, 124 Iowa 623, 100 N.W. 543 (1904); *Renihan v. Dennin*, 103 N.Y. 573, 9 N.E. 320 (1886).

¹⁶ *In re Redfield's Estate*, 116 Cal. 637, 48 Pac. 794 (1897).

without consciously recognizing that he has made such an allowance. Perhaps these courts have been influenced to some degree by the psychosomatic theories of medicine. Leaders in the field of medicine are coming to recognize that the human being is a unity which cannot be comparted;¹⁷ that it is not possible in most situations to segregate one symptom, or one condition, but that the entire being must be considered.

It is frequently possible to justify in another way an inference by the court that information is literally necessary for treatment even though the information acquired by examining the patient is unrelated to a condition for which the patient sought or is given treatment. Often when a patient consults a physician he expects to be treated not only for the infirmity which the patient recognizes, but for all ailments and disabilities which the doctor discovers, or may discover by reasonable examination. To comply with this expectation it is necessary that the doctor constantly search to find all that is wrong with the patient. Although this may be a valid argument for holding that information so discovered is privileged in the hands of the family doctor or general practitioner, it is doubtful whether it would apply in the case of the specialist. The case of the diagnostician would present a most interesting problem.

Most courts, however, have not interpreted the words "necessary for treatment" literally. Often, while admitting that the condition discovered by the doctor was one which had no bearing upon the treatment expected or received, they have held nevertheless that information about such a condition is privileged.¹⁸ Many of these courts have failed to express adequately the reasons for this conclusion. The courts of Utah, for example, have said merely that the reason all information learned by examination should be privileged is that the physician-patient privilege statute should be liberally construed.¹⁹

The most persuasive argument in favor of extending the privilege to include all conditions discovered as a result of the physician's examining the patient is that the examination is ordinarily necessary or useful for treatment, and the discovery of conditions unrelated to that for which the patient sought or was being given treatment is a normal consequence of the examina-

¹⁷ For a recent work on psychosomatic theory written in terms a layman can understand see DUNBAR, *MIND AND BODY* (1949).

¹⁸ See cases collected in Note, L.R.A. 1918E 974.

¹⁹ *In re Alstine's Estate*, 26 Utah 193, 72 Pac. 942 (1903).

tion.²⁰ To hold that such information is not within the privilege robs the privilege statutes of their spirit.²¹ The purpose of the statutes is to encourage a patient to submit himself to examination without fear that the conditions so discovered will become the subject of testimony in a courtroom. To allow the doctor to testify about the conditions he has learned by examination is destructive of the confidence that the statute intended to instill.²² Furthermore, it is unfair to place the physician in the position of one who should discover all relevant material, but who is hesitant to probe lest he uncover a secret about which his patient would not wish him to testify.²³ It is the more unfair in that if he fails to search deeply enough he may lay himself open to a malpractice suit by the patient.²⁴

It therefore appears that even in information is of no use whatever in the doctor's handling of the case, and even in those rare instances when the physician by contract is limited to the treatment of a single condition, the better rule is that information is privileged if learned by an examination which was made by the doctor during his professional attendance upon the patient. *Carson v. Beatley* answers this by a claim that the physician-patient privilege statute should be strictly construed.²⁵ Such an answer is as inadequate as is the argument of the Utah court that such statutes should be liberally construed.

INFORMATION LEARNED BY "OBSERVATION"

It is of course requisite to the application of the privilege that a doctor-patient relationship exist.²⁶ If the doctor gains information before the relationship comes into being, or after it has terminated, such information is not privileged, however it may have been learned. Thus if a doctor were to observe at a party that

²⁰ *Fritcher v. Kelly*, 34 Idaho 471, 201 Pac. 1037 (1921); *Klein v. Prudential Ins. Co.*, 221 N.Y. 449, 117 N.E. 942 (1917); *Nelson v. Village of Oneida*, 156 N.Y. 219, 50 N.E. 802 (1898).

²¹ *Fritcher v. Kelly*, *supra* note 20; *In re Darragh's Estate*, 15 N. Y. St. Rep. 452 (Surr. Ct. 1887).

²² Professor Wigmore criticizes the physician-patient privilege on the ground that the information given the doctor is rarely intended to be confidential. 8 WIGMORE, EVIDENCE § 2380a (3d ed. 1940).

²³ The "honor of the profession" is the most valid reason for the privilege, according to Wigmore. 8 WIGMORE, EVIDENCE § 2380a (3d ed. 1940).

²⁴ See *Stephens v. Williams*, 226 Ala. 534, 147 So. 608 (1933), and examples given in REGAN, MEDICAL MALPRACTICE 15-18 (1945).

²⁵ Citing *Weis v. Weis*, 147 Ohio St. 416, 72 N.E.2d 245 (1947).

²⁶ 3 JONES, EVIDENCE § 760d (4th ed. 1938).

one of the guests who had formerly been his patient, but was no longer under his care, was suffering from senile dementia, such information would not be privileged.²⁷

But even where the relationship exists, in order for information which a doctor learns to be privileged, the information must have been confidential.²⁸ If, for example, a patient approaches his physician at a party, and in the presence of other guests openly discloses his ailment, and requests the physician's advice, the disclosure is not privileged.²⁹ Under such circumstances the patient obviously did not intend the information to be confidential.

Once it is established that a doctor-patient relationship existed, then it becomes vital to know in what manner the doctor gained his information.

The courts have distinguished between information learned by what they have called casual, general or mere observation and information learned by examination. The difference between the two may best be illustrated by saying that when the physician meets a patient he is playing a dual role. In his first character he is a human being in a room with another human being. In this role he sees and experiences the things that he would see or experience if he visited a friend on a purely social call. Information learned in this way is learned by observation. In his second character, he is a physician attending a patient. To him, in this role, the patient makes available further information, which is confidential between doctor and patient, in order to obtain treatment. Information learned in this way is acquired by examination. Although the line between these two ways of obtaining information appears to be clear-cut, they gradually blend into each other, and in many situations it is difficult to determine by which of them the information is gained. As the two approach each other the precise circumstances under which the information was learned may well become the critical factor. For example, a court will probably be more inclined to say that information learned in the physician's office during a professional visit was learned by examination, than information which was learned at a party or social affair. The best test would seem to be that if

²⁷ *Bower v. Bower*, 142 Ind. 194, 41 N.E. 523 (1895) (doctor approached ex-patient on the road to collect his bill).

²⁸ 8 WIGMORE, EVIDENCE § 2381 (3d ed. 1940). In all privileges "the fundamental assumption has been that communications, in order to deserve protection, must be confidential in their origin."

²⁹ *Ibid.*

the patient could not or did not bother to conceal his condition from other persons who were or might be casually present, the information was learned by observation and not by examination.

The question of whether information is privileged generally arises in cases in which the doctor did not meet the patient except at the doctor's office, or the patient's home, and only then for the purpose of treating the patient. In such a situation, most of the information which is acquired by the physician is ordinarily obtained by examination. Yet, it is possible that the condition of the patient is so manifest that any person sitting in the doctor's anteroom, or visiting the patient in his home, would recognize it. If, for example, a patient is obviously pregnant, or clearly insane, the doctor's knowledge of this does not come as a result of professional confidence, but as a consequence of what may aptly be called "mere observation".³⁰

The Indiana courts have held that facts observed in the place of treatment are privileged because the doctor was able to learn of the facts only because the parties met as doctor and patient.³¹ They further support their position by saying that the privilege statute should be liberally construed.³² The gist of the Indiana position is that since the meeting between physician and patient is essential for treatment, the facts learned at the meeting are privileged, whether learned by examination or observation. This reasoning wholly overlooks the contention that information learned entirely by observation is not properly confidential. Carried to its logical conclusion, it could prevent a doctor from testifying about facts clearly visible, which the patient made no attempt to hide from the world as a whole. Indiana has held, for example, that the physician may not testify that his patient was obviously intoxicated.³³ If this is secret information intended to be confiden-

³⁰ The examples set forth are used as obvious examples of information learned by observation. It is not meant to imply that in order for information learned at the place of treatment to be considered as having been learned by observation, the condition must be unavoidably obvious and manifest. But, as before pointed out, in a close case it is likely that a court will tend to find that information learned in the place of treatment was learned by examination.

³¹ *Towles v. McCurdy*, 163 Ind. 12, 71 N.E. 129 (1904); *Gurley v. Park*, 135 Ind. 440, 35 N.E. 279 (1893); *Morris v. Morris*, 119 Ind. 341, 21 N.E. 918 (1889).

³² *Towles v. McCurdy*, 163 Ind. 12, 14, 71 N.E. 129, 130 (1904): "The construction given the statute . . . has been much broader than the language of the act."⁷

³³ *Chicago, L. S. & S.B. Ry. v. Walas*, 192 Ind. 369, 135 N.E. 150 (1922); *New York, C. & St. L. R.R. v. Shields*, 185 Ind. 704, 112 N.E. 762 (1916). That

tial between the doctor and his patient, it is indeed difficult to imagine any information which would not be confidential.

The better reasoned cases, as, for example, those of New York, have drawn the line between symptoms observed, and symptoms learned by examination.³⁴ Symptoms observed are held not to be privileged,³⁵ while symptoms learned through examination are privileged.³⁶ As long as the information did not come as a result of examination, the patient has no right to throw the veil of secrecy around it.³⁷ On the other hand, facts learned by examination are learned because of the confidence of the patient in his physician.³⁸ The patient has bared himself to the professional scrutiny of the doctor alone and therefore the information meets the requirement of being a confidential communication.

The Indiana rule has one advantage over the New York rule in that it is practically self-executing. If the doctor learned of the symptom during the course of a professional visit, the information is privileged, whether learned by observation or examination. The New York distinction makes it necessary that the judge in a close case determine the manner in which the doctor learned the facts.³⁹ Yet the mere fact that a rule of law may be easily applied is not of itself enough to justify it. In many situations a

the Indiana courts do not mean to dispose of the requirement of confidence, see *Towles v. McCurdy*, 163 Ind. 12, 71 N.E. 129 (1904).

³⁴ *In re Black's Estate*, 132 Cal. 392, 64 Pac. 695 (1901); *In re Redfield's Estate*, 116 Cal. 637, 48 Pac. 794 (1897); *In re Asery's Estate*, 76 N.Y.S.2d 790 (Surr. Ct. 1948); *Westphal v. State*, 79 N.Y.S.2d 634 (Ct. Cl. 1948); *In re Strong's Estate*, 6 N.Y.S.2d 300 (Surr. Ct. 1938); *Klein v. Prudential Ins. Co.*, 221 N.Y. 449, 117 N.E. 942 (1917); *In re Preston's Will*, 113 App. Div. 732, 99 N.Y. Supp. 312 (2d Dep't 1906); *Nelson v. Village of Oneida*, 156 N.Y. 219, 50 N.E. 802 (1898); *In re Loewenstine's Estate*, 2 Misc. 323, 21 N.Y. Supp. 931 (C.P. 1893); *Brigham v. Gott* 20 N.Y. St. Rep. 420, 3 N.Y. Supp. 518 (Sup. Ct. 1889); *In re Williams' Estate*, 186 Wis. 160, 202 N.W. 314 (1925).

³⁵ *Klein v. Prudential Ins. Co.*, 221 N.Y. 449, 117 N.E. 942 (1917).

³⁶ *Nelson v. Village of Oneida*, 156 N.Y. 219, 50 N.E. 802 (1898).

³⁷ The Ohio Supreme Court, in *Metropolitan Life Ins. Co. v. Howle*, 68 Ohio St. 614, 68 N.E. 4 (1903), observed that such facts are not communications to the physician by the patient, but are learned by the doctor independently of the relationship. Apparently what the court meant was that such information is not the type of communication covered by the statute because not confidential. See note 12 *supra*.

³⁸ *Klein v. Prudential Ins. Co.*, 221 N.Y. 449, 117 N.E. 942 (1917); *In re Preston's Will*, 113 App. Div. 732, 99 N.Y. Supp. 312 (2d Dep't 1906); *Nelson v. Village of Oneida*, 156 N.Y. 219, 50 N.E. 802 (1898).

³⁹ This rule is analogous to the rule in the attorney-client privilege. 8 WIGMORE, EVIDENCE § 2306 (3d ed. 1940) (the privilege attaches to information gained through the professional relationship but not to information gained by mere observation).