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Evidence—Patient Physician Privilege—Waiver of Privilege to One Physician as Waiver to Other Physician—Waiver by Patient's Own Testimony

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one-half share of the community property after his death, leaving the wife one-half of the proceeds as her share of the community property. This is the California rule. *Beemer v. Roher,* 137 Cal. App. 293, 30 P.2d 547 (1934). Senate Bill No. 176 in the 1953 session of the Washington Legislature provided this solution as an amendment to RCW 26.16.030 [RRS §6891]. The bill passed the Senate but died in the House Judiciary Committee as the session ended. LEG. REC. No. 8, 33rd Sess. 25 (1953).

RCW 26.16.030 [RRS §6891] provides that a husband may devise by will one-half of the personal community property. Allowing the spouse to designate a beneficiary that will take one-half of the insurance payments would seem to be the most just workable and logically consistent solution to present unsettled state of Washington law.

DALE RIVELAND

Evidence—Patient Physician Privilege—Waiver of Privilege to One Physician as Waiver to other Physician — Waiver by Patient's own Tesitmony. *P* sought recovery for injuries arising out of an automobile accident. During trial *P* introduced three physicians who testified that *P* had suffered disability in his right arm involving weakness, numbness, and difficulty of movement.*P* himself took the stand and testified that the injuries described by his doctors resulted from the accident and that, prior to the accident, he had not consulted a doctor for "years." The jury returned a verdict for *P* for $21,000. The trial court granted *D* a new trial on the issue of damages because of newly discovered evidence consisting of another physician who would testify that during the four years preceeding the accident he treated the *P* a total of twenty times for such ailments as contusions, rheumatic condition, and neuritis all in the right shoulder. *Held*: Waiver of privileges as to one physician is a waiver to all other physicians; order for new trial affirmed. *McUne v. Fuqua,* 142 Wash. Dec. 60, 253 P.2d 632 (1953).

The problem presented by this case is the extent of the patient-physician privilege under RCW 5.60.060 (4) [RRS 1214 (4)] in civil actions involving as a material issue the physical condition of a party to the action. The statute as presently construed by the Washington court presents a blanket prohibition unless by some action express or implied the court finds that there is a waiver. *Williams v. Spokane Falls & Northern Ry. Co.,* 42 Wash. 597, 84 Pac. 1129 (1906); In re *Quick's Estate,* 161 Wash. 537, 297 Pac. 198 (1931). The holding of the principal case adopts what is probably the numerical minority position as to the extent of a waiver in a case involving the testimony of physicians who acquired their information independently of one another, not in consultation nor at the same time. In following the minority position the Washington Court has clearly arrived at the better reasoned rule. If the patient wishes to keep his secret from the ears of his neighbors he should not have brought in the first doctor. The first testimony presumably having brought out the complete medical history of the patient as regards the injuries in controversy the patient should have nothing to fear from the testimony of the second physician.

The facts of the principal case are distinguishable from the case of In re *Quick's Estate, supra,* because the *Quick* opinion does not disclose whether or not the two doctors attended the patient in consultation. If so, the testimony would almost universally be admissible.

The language used by the court in the principal case is much broader than the actual holding. Quoting from the case of *Roeser v. Pease,* 37 Okla. 222, 228; 131 Pac. 534, 537 (1913) the court said. ". . . If she [plaintiff] can go upon the witness stand and

testify that she had not suffered from these afflictions prior to the accident, and then prevent the only available impeaching testimony from being disclosed, by a claim of privilege, it would seem that a mockery is being made of justice, and we do not think our statute contemplates such a condition " This expression, if it represents the new attitude of the court toward the statute, calls for a re-appraisal of the case of *Neolle v. Hoquiam Lumber & Shingle Co.*, 47 Wash. 519, 92 Pac.372 (1907). *Cf. Wesseler v. Great Northern R. Co.*, 90 Wash. 234, 157 Pac. 461 (1916). In the *Noelle* case the court held that where the *P* takes the stand and describes his injuries as to their cause and extent, he does not waive the privilege as to any physician who attnded him for such alleged injuries. The danger in this type of situation is that a naked fraud may be perpetrated under the guise of legality. As was forcefully stated by Judge Root in the dissenting opinion in the *Neolle* case, the secrets of the sick room having been voluntarily exposed by the *P*, the reason for the privilege no longer obtains. Invoking the privilege at this stage of the proceedings is to use the privilege "as a sword instead of as a shield." Professor Wigmore has this comment to make: "Certainly it is a spectacle fit to increase the layman's traditional contempt for the chicanery of the law when a plaintiff describes at length to the jury and a crowded court room the details of his supposed ailment, and then neatly suppresses the available proof of his falsities by wielding a weapon nominally termed a privilege." 8 WIGMORE, EVIDENCE § 2389 3rd ed. (1940). The language of the principal case indicates that the Washington court is beginning to take cognizance of the realities of the situation.

The patient-physician privilege, if not strictly confined, results in an unwarranted obstruction to the attainment of substantial justice. *P* comes into court seeking to recover damages for personal injuries, yet the amount of damages that can properly be awarded is dependent upon *P's* physical condition both prior and subsequent to the accident.

Some jurisdictions, notably New York, have approached a satisfactory solution. Examples are *Heither v. Johns*, 233 N.Y. 370, 135 N.E. 603 (1922), holding testimony of plaintiff alone as to his physical condition and past medical treatment may waive the privilege and *Apter v. Home Life Insurance Co.*, 266 N.Y. 333, 194 N.E. 846 (1935), holding that in action on a policy of disability insurance, defendant may call plaintiff's physician to testify as to whether the disease originated or became evident prior to issuance of policy.

A more realistic solution is the method that has been tried and proved in California of amending the statute itself. Cal. Code Civ. Proc. Ann., §1881 (Deering 1948). See *Ballard v. Pacific Greyhound Lines* 28 Cal.2d 357, 170 P.2d 465 (1946).

If the Washington statute could be similarly amended it would be a long overdue legislative advancement. Such an amendment could be to the effect that where any person brings an action to recover damages for personal injuries or brings any civil action where his or her physical condition is materially in issue, such action shall be deemed to constitute a consent by the person bringing such action that any physician who has prescribed for, treated or examined said person and whose testimony is material shall be competent to testify.

JAMES F MCATEER

Evidence—Cross Examination of Defendant's Character Witnesses—Scope. *D* was convicted of second degree burglary. During the cross examination of three character witnesses for the defense, the prosecuting attorney asked, over the objections of the defense, the following questions: "Did you know that in 1941 *D* had his operator's