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# Extrajudicial Truthful Disclosure of Medical Confidences: A Physician's Civil Liability

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# NOTE

## EXTRAJUDICIAL TRUTHFUL DISCLOSURE OF MEDICAL CONFIDENCES: A PHYSICIAN'S CIVIL LIABILITY

"[A] physician can, in a gossip session in the locker room at the Country Club, tell all present that John Doe, a married man, has contracted some loathsome disease. John Doe has no remedy."[1]

☐ True ☐ False

### INTRODUCTION

THE answer to the question, of course, is easy if the physician told a damaging lie. But what if he told the absolute truth? The real difficulty would arise if one were asked to explain, in 25 words or less, or in a concise appellate brief, the legal — not the moral — basis for one's answer. In attempting such an explanation one would encounter some firmly entrenched legal myths and considerable confusion concerning the question of the physician's liability or non-liability in a civil action.

This note examines a physician's civil liability for extrajudicial truthful disclosure of medical confidences. Is the physician liable? If so, under what theory of law? Is there a common law liability, or is a statute necessary? If a statute is necessary, precisely what type is required? What is, or should be the function of the statute? Does it create a statutory right to a civil action, or does it serve some lesser purpose?

The following analysis of the American cases indicates that primarily during the last decade there has developed a coherent body of American judicial opinions which would hold a physician pecuniarily liable, in a civil action, for extrajudicial truthful disclosure of professional secrets or medical confidences, absent an overriding duty to society or third parties to make such disclosure.

In order to avoid hopeless entanglement in irrelevant bodies of law, it is necessary to limit the analysis severely. First, the scope of the analysis is limited to extrajudicial disclosures. There is an entirely separate body of law, mostly statutory, dealing with testi-

[1] Lipscomb, *Privileged Communications Statute — Sword and Shield,* 16 MISS. L.J. 181, 182 (1944).

mony by physicians during judicial proceedings. Second, the discussion is restricted to truthful disclosures. The law of libel and slander, which concerns itself with falsehoods, is only tangentially relevant. Third, cases on invasion of privacy by publication in newspapers, magazines, professional journals and other media have been excluded from consideration. The physician's duty not to disclose professional confidences *to anyone* is not the *sole* controlling question in such cases, and this basic issue is much too easily obscured by the other issues inherent in invasion of privacy litigation. Fourth, the discussion is limited to situations where a patient-physician relationship exists between the plaintiff and defendant. Thus, a case is beyond the scope of the analysis if the court did not consider the plaintiff to have been a patient of the defendant physician,[2] or if the disclosures were made by servants or officials of medical institutions, acting in some administrative capacity, rather than by a person acting truly in the capacity of a physician.[3] In essence, then, this note is limited to cases in which a doctor, out of court, tells a third party the truth about his patient.

## I. THE SPECULATIVE PERIOD: 1920 TO CIRCA 1960

Prior to 1920 no American court seems to have been confronted with the issue of a physician's liability for extrajudicial truthful disclosure of medical confidences. *Smith v. Driscoll,*[4] decided in 1917, is often cited because of its eloquent dictum that a patient has a cause of action for extrajudicial disclosure of medical confidences. However, in that case the disclosure was actually made during a judicial proceeding. The first case in point[5] was *Simonsen v. Swenson,*[6] decided in 1920. The next reported decision on this issue did not occur until *Berry v. Moench*[7] in 1958, followed by *Clark v. Geraci*[8] in 1960. For the forty intervening years, the dialogue on the question of a physician's liability for extrajudicial truthful disclosure of medical confidences was left to the legal scholars. A sampling of the writings of these gentlemen, some of them giants in their field, gives an illuminating insight into the atti-

[2] Hammer v. Polski, 36 Misc. 2d 482 (N.Y. Sup. Ct. Special Term, N.Y. County, 1962).

[3] Tooley v. Provident Life & Acc. Ins. Co., 154 So. 2d 617 (La. Ct. App. 1963); Munzer v. Blaisdell, 183 Misc. 773, 49 N.Y.S.2d 915 (1944), *aff'd,* 269 App. Div. 970, 58 N.Y.S.2d 359 (1945).

[4] 94 Wash. 441, 162 P. 572 (1917).

[5] Chafee, *Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?,* 52 YALE L.J. 607, 617 (1943).

[6] 104 Neb. 224, 177 N.W. 831 (1920).

[7] 8 Utah 2d 191, 331 P.2d 814 (1958).

[8] 29 Misc. 2d 791, 208 N.Y.S.2d 564 (Sup. Ct. 1960).

tudes which prevailed for some forty years before all but one of the cases in point were decided. Also, it is only reasonable to assume that some of the thoughts and theories of the scholars influenced at least the arguments of counsel in later litigation if not, directly, the decisions of the courts.

Earlier skepticism regarding the ability of a patient to maintain a successful action against his physician for disclosure of medical confidences slowly gave way to guarded and moderate optimism. In 1943, Chafee was quite pessimistic when he said: "While the law has been so solicitous about the doctor's duty to keep silent on the witness-stand, it has done little to protect the patient's medical secrets from disclosure to the world in general."[9] Nine years later, Guttmacher and Weihofen still saw little hope for the patient's protection under existing law: "In the main, the patient's confidences are protected against disclosure outside the courtroom primarily by the code of professional ethics rather than by the law."[10]

In 1953, DeWitt saw a legal basis for civil liability in the statutes which govern the licensing of physicians, where the statute provides for revocation of the license for unprofessional conduct such as willful betrayal of a medical confidence.[11] DeWitt reasoned: "Statutes of this type impose a *positive duty* upon the physician not to voluntarily disclose the confidences of the patients; accordingly, a breach of this duty may under certain circumstances afford redress in a civil action . . . ."[12] However, six years later he still felt obliged to make the over-all assessment that "[t]here are today [1959] few medical confidences that can really be kept secret except, of course, in a court of law where justice cries out for the facts."[13] This statement was probably not intended as a reappraisal of his earlier views concerning the significance of statutes which govern the licensing of physicians. Professor DeWitt was writing on a statute of an entirely different type, the physician-patient privilege statute, under which the patient can have his physician's testimony excluded during a trial.[14] He had earlier in the article made the point that such statutes do not control a physician's extrajudicial behavior,[15] and in

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[9] Chafee, *supra* note 5, at 616.

[10] M. GUTTMACHER & H. WEIHOFEN, PSYCHIATRY AND THE LAW 276 (1952).

[11] DeWitt, *Medical Ethics and the Law: The Conflict Between Dual Allegiances*, 5 W. RES. L. REV. 5 (1953).

[12] *Id.* at 21.

[13] DeWitt, *Privileged Communications Between Physician and Patient*, 10 W. RES. L. REV. 488, 500 (1959).

[14] For a discussion of the relevance of the two types of statutes, see the text accompanying notes 64-73 *infra*.

[15] DeWitt, *supra* note 13, at 491.

the last sentence of the article he advocates that the physician-patient privilege during trials be abolished.[16]

While Dr. Louis J. Regan's work, *Doctor and Patient and the Law,* published in 1956, merely indicated a possibility of physicians being liable for extrajudicial disclosures,[17] Shartel and Plant, writing in 1959, were cautiously optimistic — from the patient's point of view. After discussing the impact of various types of statutes, they concluded:

> As regards the liability of a physician for damages resulting from the disclosure of information about a patient, there is not too much direct authority. But in view of all the ways, above mentioned, in which disclosure is condemned, barred, and penalized, we think it is almost certain that the courts will recognize the physician's liability when occasion arises.[18]

By 1962, Stetler and Moritz were in a position to make an assessment on the basis of case law:

> The belief that the law offers the patient no protection against unauthorized disclosures has created confusion concerning a physician's civil liability for such disclosures. Although only a few cases have been found which directly deal with this issue, they indicate that a wrongful disclosure may give rise to a civil action for damages directly caused by the violation of confidence.[19]

As can be expected, however, there were those who disagreed with the above views,[20] and it is not intended to convey the idea that there was, in 1962, or that there is now unanimity on the question of a physician's liability for extrajudicial truthful disclosure of medical confidences. Quite to the contrary, one purpose of the preceding discussion has been to show that, around the beginning of this decade, it was not at all settled law in the United States that a physician was liable for damages arising out of a betrayal of a professional secret. The second purpose was to point out the relative preoccupation with statutes as a basis for liability. This trend started with the first, and for a long time the only case in point, *Simonsen v. Swenson*,[21] decided in 1920. Nebraska happened to have a statute[22] which the court viewed as permitting the revocation of a physician's license if he betrayed a professional secret.[23] The court thought that breach of the positive duty imposed by such a statute would give rise to a

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[16] *Id.* at 500.

[17] L. REGAN, DOCTOR AND PATIENT AND THE LAW 104 (3d ed. 1956).

[18] B. SHARTEL & M. PLANT, THE LAW OF MEDICAL PRACTICE 49 (1959).

[19] C. STETLER & A. MORITZ, DOCTOR AND PATIENT AND THE LAW 271 (4th ed. 1962).

[20] *See* Baldwin, *Confidentiality Between Physician and Patient,* 22 MD. L. REV. 181 (1962).

[21] 104 Neb. 224, 177 N.W. 831 (1920).

[22] NEB. REV. STAT. ch. 71, § 148 (1943).

[23] 104 Neb. at 227, 177 N.W. at 832.

civil action for damages.[24] The scholars, apparently, thought this to be a reasonable and tenable rationale upon which to predicate a physician's liability in a civil action.[25]

## II. The Case Law

### A. *History and Resume*

There are only seven American cases directly in point on the question of a physician's civil liability to his patient for extrajudicial truthful disclosure of medical confidences. The cases are set out below in chronological order.

1. *Simonsen v. Swenson,* Nebraska, 1920[26]

The physician advised a hotel manager that the patient had a communicable disease. The court found that under the facts the physician was privileged to make the disclosure because of an overriding duty to society to prevent the spread of infectious disease.[27]

2. *Berry v. Moench,* Utah, 1958[28]

The physician provided to another physician, a friend of the plaintiff's bride's family, derogatory information obtained while treating the plaintiff. The case was remanded to determine whether the facts existed which would make the disclosure privileged because of an overriding duty to a third party.[29]

3. *Clark v. Geraci,* New York, 1960[30]

Upon request of the patient, the physician certified that the patient's absences from work were due to illness. Later, and over the objections of the patient, the physician admitted to the employer that the patient's illness was due to alcoholism. The disclosure was held to have been privileged because of an overriding duty to a third party, to whom a partial disclosure had previously been made at the request of the patient.[31]

4. *Hague v. Williams,* New Jersey, 1962[32]

The defendant physician disclosed to life insurer that plaintiff's deceased child had heart disease. The disclosure was held to have

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[24] *Id.*

[25] *See* DeWitt, *supra* note 11, at 21.

[26] 104 Neb. 224, 177 N.W. 831 (1920).

[27] *Id.* at 228, 177 N.W. at 832.

[28] 8 Utah 2d 191, 331 P.2d 814 (1958).

[29] *Id.* at 201, 331 P.2d at 820.

[30] 29 Misc. 2d 791, 208 N.Y.S.2d 564 (Sup. Ct. 1960).

[31] *Id.* at 794, 208 N.Y.S.2d at 568.

[32] 37 N.J. 328, 181 A.2d 345 (1962).

been privileged, because of a supervening interest of society in disclosure after a patient's physical condition is made an element of a claim.[33]

5. *Hammonds v. Aetna Cas. & Sur. Co.,* Ohio, 1965[34]

The physician disclosed confidential medical information to a hospital's accident insurer. The court held Ohio's public policy to impose a duty upon the physician to maintain professional confidences and found no overriding duty to a third party under which such disclosure would be privileged. Judgment for plaintiff-patient.

6. *Quarles v. Sutherland,* Tennessee, 1965[35]

The physician provided medical reports to a store against which the patient was about to bring a personal injury action. After an accident in the store, the plaintiff was taken to the defendant physician, who did not inform her that he was the store's regular physician. The court held there was no basis at law for a cause of action against the physician under the circumstances of this case.

7. *Curry v. Corn,* New York, 1966[36]

The physician revealed to the plaintiff's husband information obtained while treating the plaintiff. The plaintiff alleged that the physician knew that her husband would use the information in a pending matrimonial action. The disclosure was held to have been privileged, on the theory that a husband has a right to information regarding illness of his wife which might affect the marital relationship.

Of the seven cases considered, all but two, *Berry v. Moench* and *Hammonds v. Aetna,* were won by the defendant doctors. In only one case, *Curry v. Corn,* did the court not reach the basic issue of a physician's liability for disclosing medical confidences.[37] In the other six cases the courts felt compelled to pass on the question of a physician's civil liability for such breach of a confidence.

In five of the six cases in which the question was reached, the courts conceded to the patient the basic right to recover damages in a civil action from a physician who makes an extrajudicial truthful disclosure of a medical confidence.[38] The courts found, however,

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[33] *Id.* at 336, 181 A.2d 349.

[34] 243 F. Supp. 793 (N.D. Ohio 1965). *See* 11 VILL. REV. 662 (1966).

[35] 215 Tenn. 651, 389 S.W.2d 249 (1965). *See* 79 HARV. L. REV. 1723 (1966); 32 TENN. L. REV. 652 (1965).

[36] 35 U.S.L.W. 2011 (N.Y. Sup. Ct. June 21, 1966).

[37] *Id.*

[38] Hammonds v. Aetna Cas. & Sur. Co., 243 F. Supp. 793 (N.D. Ohio 1965); Simonsen v. Swenson, 104 Neb. 224, 177 N.W. 831 (1920); Hague v. Williams, 37 N.J. 328, 181 A.2d 345 (1962); Clark v. Geraci, 29 Misc. 2d 791, 208 N.Y.S.2d 564 (Sup. Ct. 1960); Berry v. Moench, 8 Utah 2d 191, 331 P.2d 814 (1958).

that in three of the above cases the physicians were privileged to make the particular disclosures because of a duty to third parties or to society which overrode the duty to the patient to keep silent.[39]

Of the six courts which reached the question, only one, the court in *Quarles v. Sutherland*,[40] denied that the patient had any enforceable rights as to extrajudicial truthful disclosure of medical confidences.[41] And even in that case it was conceded by the court that there might be a possibility of an action on the contract, where there is a full contractual physician-patient relationship with compensation.[42] The court seemed to think that the defendant was not contractually bound because, as the facts appeared to the court, the plaintiff-patient did not attempt to compensate the physician.[43]

In summary, five out of six American courts which have addressed themselves to the issue agree that, in the absence of a privilege based on an overriding duty to third parties or society, a physician is pecuniarily liable to his patient in a civil action for damages arising out of an extrajudicial truthful disclosure of medical confidences.

B. *The Basis for a Physician's Liability*

While the courts are generally agreed on the basic question whether or not a physician is liable for a breach of professional confidence, there is considerable divergence of opinion concerning exactly what constitutes the legal foundation for a physician's civil liability for extrajudicial truthful disclosure of medical confidences. This subject will be discussed in three categories: (1) common law, (2) statutes, and (3) the ethical standards of the medical profession.

1. The Myth of the Duchess of Kingston: Is There a Common Law Basis for Liability?

Four of the seven cases under consideration either declare or intimate that there was no liability for extrajudicial truthful disclosures under the common law.[44] This notion seems to stem from a ruling on a point of evidence made in 1776 in the House of Lords,

[39] Simonsen v. Swenson, 104 Neb. 224, 228, 177 N.W. 831, 832 (1920); Hague v. Williams, 37 N.J. 328, 336, 181 A.2d 345, 349 (1962); Clark v. Geraci, 29 Misc. 2d 791, 794-95, 208 N.Y.S.2d 564, 568-69 (Sup. Ct. 1960).

[40] 215 Tenn. 651, 389 S.W.2d 249 (1965).

[41] *Id.* at 657, 389 S.W.2d at 251.

[42] *Id.* at 657-58, 389 S.W.2d at 252.

[43] *Id.*

[44] Hammonds v. Aetna Cas. & Sur. Co., 243 F. Supp. 793, 796 (N.D. Ohio 1965); Simonsen v. Swenson, 104 Neb. 224, 226, 177 N.W. 831, 832 (1920); Clark v. Geraci, 29 Misc. 2d 791, 792, 208 N.Y.S.2d 564, 567 (Sup. Ct. 1960); Quarles v. Sutherland, 215 Tenn. 651, 657, 389 S.W.2d 249, 251 (1965).

during the trial of the Duchess of Kingston for bigamy.[45] Doctor Caesar Hawkins was asked on the witness stand whether he knew of any marriage between the defendant and the Earl of Bristol. Dr. Hawkins attempted to invoke the physician-patient privilege. He said:

> I do not know how far anything that has come before me in a confidential trust in my profession should be disclosed, consistent with my professional honour.[46]

Lord Mansfield then made the following ruling, in which all the other lords acquiesced:

> [A] surgeon has no privilege, where it is a material question, in a civil or criminal cause, to know whether parties were married, or whether a child was born, to say that his introduction to the parties was in the course of his profession, and in that way he came to the knowledge of it. I take it for granted, that if Mr. Hawkins understands that, it is a satisfaction to him, and a clear justification to all the world.[47]

So far, Lord Mansfield had simply ruled that, during a trial, a physician must answer questions even though his answers might reveal information obtained by the physician while treating a patient. In *Quarles v. Sutherland* this ruling was correctly cited for the proposition that there was no physician-patient privilege, as to testimony during trials, under the common law.[48] Lord Mansfield, however, did not stop there, he continued:

> *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 whatever.[49]

Thereupon, the question was repeated, and Dr. Hawkins answered it.[50]

In this second part, Lord Mansfield clearly limited his ruling to the question of evidence during trials. If Lord Mansfield's ruling were to be accepted as an indication of a physician's liability for disclosing professional secrets under the common law, it would have to be accepted as dictum to the effect that the common law recognized the duty of the physician not to make voluntary extrajudicial disclosures of confidential information obtained in the practice of his profession. Nevertheless, in *Quarles v. Sutherland*, the court deduced, from Lord Mansfield's ruling, a common law rule to the effect that

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[45] Trial of the Duchess of Kingston, 20 How. State Trials 355, 573 (1776), *reprinted in* Notable British Trial Series (Melville ed. 1927).

[46] *Id.* at 572.

[47] *Id.* at 573.

[48] 215 Tenn. at 656, 389 S.W.2d at 251.

[49] 20 How. State Trials at 573 (emphasis added).

[50] *Id.* at 574-76.

physicians were not liable for extrajudicial disclosures of confidential information obtained while treating their patients.[51] The court seems to have simply disregarded the second part of Lord Mansfield's ruling, although it is quoted in the opinion.[52] The court also seems to have overlooked, in its own reasoning, the distinction between a rule of evidence and substantive law, although it admonished the plaintiff for attempting to base a cause of action on a rule of evidence.[53]

There is no record of any case at English common law which decided the issue of a physician's liability for disclosing professional confidences.[54] There are, however, two Scottish cases where the courts held such actions maintainable.[55]

In summary, while there are no cases at English common law which either expressly allow or deny the patient a cause of action for extrajudicial truthful disclosure of medical confidences, there is Lord Mansfield's dictum which condemns such disclosures; and there are two Scottish cases where the actions for such disclosures were held to be maintainable.

2. Statutory Bases for Liability

There are two types of statutes which have had an impact upon the physician's liability for extrajudicial disclosure of professional confidences:

(a) Privilege statutes, which generally provide that, unless the patient consents, a physician may not give evidence during trials concerning information obtained while treating the patient.

(b) Licensing statutes or regulations, which define professional standards prerequisite to obtaining and retaining a license to practice medicine, and which classify betrayal of professional secrets as indicating unworthiness to retain a license to practice medicine.

In six of the seven cases under discussion the courts considered the question of how a privilege statute affects the civil liability of a physician for extrajudicial disclosure of professional confidences. In *Quarles v. Sutherland* the absence of such a statute was held to prevent a non-paying patient from maintaining an action.[56] In New Jersey, which did not have a privilege statute, the *Hague v. Williams* court thought the existence or absence of a privilege statute to be

[51] 215 Tenn. at 657, 389 S.W.2d at 251.

[52] *Id.* at 655-56, 389 S.W.2d at 251.

[53] *Id.* at 657, 389 S.W.2d at 252.

[54] Note, *Professional Secrecy*, 174 L.T. 187, 188 (1932).

[55] A.B. v. C.D., 14 Sess. Cas. 177 (Scot. 1851), *discussed in* DeWitt, *supra* note 11, at 20, *and in* Note, *Professional Secrecy*, 174 L.T. 187 (1932); A.B. v. C.D., 7 Fraser's Rep. 5th Ser. 72 (Scot. 1904).

[56] 215 Tenn. at 656, 389 S.W.2d at 251.

only an indication of the general public policy and thinking in regard to extrajudicial disclosures of professional confidences.[57] In both *Berry v. Moench*[58] and *Hammonds v. Aetna*[59] the courts held privilege statutes to be a positive expression of their states' public policy regarding a physician's duty to maintain professional confidences, the violation of which would provide a patient with a cause of action. In *Curry v. Corn* the court admitted it was inclined to view the privilege statute as governing merely the reception of evidence, and not as creating a cause of action against the physician. The court did not feel obliged, however, to take a position on the question.[60] In the first American case on the question, *Simonsen v. Swenson,* the court held the Nebraska privilege statute to be only a rule of evidence and, as such, not relevant to the issue of a physician's pecuniary liability for extrajudicial disclosure of professional confidences.[61]

While it is clear that privilege statutes only enunciate a rule of evidence, such statutes are, after all, a public recognition of the special nature of the doctor-patient relationship. When, as a matter of public policy, this relationship is so assiduously protected that a doctor is prohibited from testifying in court concerning information obtained during the course of treating a patient, it does not seem inconsistent to argue that the same public policy implies further restrictions upon the doctor's right to reveal confidences from his patient. What may not be revealed in court should not be permitted as the subject of casual conversation in the locker room at the Country Club.

The impact of a licensing statute was considered by the courts in three cases. Tennessee has a licensing statute;[62] however, the *Quarles v. Sutherland* court did not rely upon this statute in its decision.[63] In *Simonsen v. Swenson* the court stated that the Nebraska licensing statute imposed a positive duty upon the physician not to disclose professional confidences, and that a breach of such duty would give rise to a civil action for damages.[64] The *Hammonds v. Aetna* court held the Ohio licensing statute, like the privilege statute, to be a positive expression of that state's public policy regarding a physician's liability.[65] In *Clark v. Geraci* the court viewed New York licensing regulations as an expression of a standard upon which

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[57] 37 N.J. at 333, 181 A.2d at 348.
[58] 8 Utah 2d at 196, 331 P.2d at 817.
[59] 243 F. Supp. at 797.
[60] 35 U.S.L.W. at 2011.
[61] 104 Neb. at 227, 177 N.W. at 832.
[62] TENN. CODE ANN. § 63-618,-619 (1965).
[63] 215 Tenn. at 656, 389 S.W.2d at 251.
[64] 104 Neb. at 227, 177 N.W. at 832.
[65] 243 F. Supp. at 800-01.

a patient has a right to rely, and as implying a duty of secrecy.[66] Treating licensing statutes as one of the expressions of a standard of public policy upon which patients have a right to rely appears to be a sound theory.

3. Medical Standards of Ethics as a Basis for Liability

In determining a physician's liability for extrajudicial disclosure of professional confidences, three courts took into consideration the published ethical standards of the medical profession itself. These standards are embodied in a portion of the Oath of Hippocrates: "Whatever in connection with my professional practice or not in connection with it I see or hear in the life of men which ought not to be spoken abroad I will not divulge as recommending that all such should be kept secret."[67] The relevant portion of the Principles of Medical Ethics (1957) of the A.M.A. states: "A physician may not reveal the Confidences entrusted to him in the course of medical attendance, or the deficiencies he may observe in the character of patients, unless he is required to do so by law or unless it becomes necessary in order to protect the welfare of the individual or of the community."[68]

In *Hammonds v. Aetna* the medical profession's promulgated standards were held to amount to an implied promise of secrecy on the part of the doctors, which public policy demanded they obey.[69] The *Hague v. Williams* court stated that the ethical concepts propounded by the medical profession express an "inherent legal obligation which a physician owes to his patient,"[70] and viewed these ethical concepts, by themselves, as a basis for liability. In *Clark v. Geraci* the court viewed the Oath of Hippocrates as an indication or expression of a standard upon which a patient has a right to rely.[71] There seems little to criticize in the view expressed in these three cases that the medical profession should be bound by the ethical standards which it so publicly expounds.

## III. Types of Action for Breach of Medical Confidence

While comments, articles and medicolegal texts have proposed several theories,[72] the courts themselves have not extensively dis-

[66] 29 Misc. 2d at 792-93, 208 N.Y.S.2d at 567.

[67] *Quoted at* Hammonds v. Aetna Cas. & Sur. Co., 243 F. Supp. 793, 797 (N.D. Ohio 1965).

[68] *Quoted at* Hague v. Williams, 37 N.J. 328, 332, 181 A.2d 345, 347 (1962).

[69] 243 F. Supp. at 796.

[70] 37 N.J. at 335, 181 A.2d at 348.

[71] 29 Misc. 2d at 792, 208 N.Y.S.2d at 567.

[72] *See* B. Shartel & M. Plant, The Law of Medical Practice 49 (1959); 79 Harv. L. Rev. 1723 (1966); 11 Vill. L. Rev. 662 (1966).

cussed the precise type of action which a patient should bring if he has been injured by his physician's disclosure of professional confidences. The courts in *Simonsen v. Swenson*[73] and *Hague v. Williams*[74] simply speak of a breach of the duty to keep confidences secret, and in *Curry v. Corn* the matter is not discussed at all.[75] *Berry v. Moench* is an action for libel in which the court held that where a patient-doctor relationship is involved, truth would not constitute a defense.[76] Actions in tort or contract were suggested by the court in *Hammonds v. Aetna.*[77] The *Quarles v. Sutherland* court conceded the possibility of an action on the contract, but only in the case of a full contractual physician-patient relationship with compensation paid by the patient.[78] In *Clark v. Geraci* the court thought that the patient should be able to maintain an action for malpractice.[79]

An action based upon an unwarranted disclosure of medical confidences has a number of elements in common with the ordinary malpractice suit. Such a disclosure involves a deviation from the standard of the particular school of medicine which the physician follows,[80] and from the standard of physicians in good standing within the community.[81] The basis of the action is also a breach of a professional duty.[82] The usual malpractice suit, however, is based upon a duty to exercise reasonable care as judged by standards of skill and knowledge commonly possessed by the medical profession. It should be apparent that questions of knowledge and skill have no relevance to a physician's duty of secrecy and should not be raised in an action based upon a disclosure of professional confidences.

## IV. DAMAGES

In each of the seven cases discussed the plaintiff patients were clearly injured by their physician's disclosure of medical confidences. There is little discussion in these cases, however, of the measure of damages by which such injury is to be compensated. In *Simonsen v. Swenson* it was held that a physician's breach of the duty of secrecy "would give rise to a civil action for the damages naturally flowing

[73] 104 Neb. at 227, 177 N.W. at 832.

[74] 37 N.J. at 335-36, 181 A.2d at 348-49.

[75] 35 U.S.L.W. 2011 (N.Y. Sup. Ct. June 21, 1966).

[76] 8 Utah 2d at 196, 331 P.2d at 816-17.

[77] 243 F. Supp. at 801-02.

[78] 215 Tenn. at 657, 389 S.W.2d at 252.

[79] 29 Misc. 2d at 793, 208 N.Y.S.2d at 568. *Contra,* Hammer v. Polski, 36 Misc. 2d 482 (N.Y. Sup. Ct. Special Term, N.Y. County, 1962) (dictum) (disclosure during judicial proceeding, physician-patient relationship did not exist).

[80] *See* cases cited at 41 AM. JUR. *Physicians & Surgeons* § 85 n. 9 (1942).

[81] *See* cases cited at 41 AM. JUR. *Physicians & Surgeons* § 82 (1942).

[82] *Id.* § 78.

from such wrong."[83] *The Hammonds v. Aetna* court expressed approval of an "action for damages directly caused by the violation of confidence."[84] In *Berry v. Moench* it was the court's opinion that "an action would lie for any injury suffered,"[85] and it was indicated that the patient should be protected from disclosures which might be "embarrassing and harmful to him."[86]

It remains to be seen if any court will in the future allow an action for breach of a medical confidence resulting in no actual injury to the patient. There is no readily apparent reason for doing so. The patient's rights can be adequately protected by compensating him for any personal, social, or economic damages resulting from the disclosure. There is no reason for the courts to assume control of the ethical standards of the American Medical Association in cases involving a minor deviation from accepted medical standards and no actual injury to a patient.

## V. Defenses

Of the seven cases under discussion, five were won by the defendant physicians interposing one or more of three distinct types of defense:

(1) That there simply is no cause of action, or legal remedy, for extrajudicial disclosure of professional confidences. This was held to be a sufficient defense in only one case, *Quarles v. Sutherland,* and was limited to a non-paying patient.[87] In *Curry v. Corn*[88] the question was not ruled upon, and the other five cases expressly reject this defense.

(2) That the patient completely waived his rights regarding disclosure of professional confidences when he requested the physician to make a partial disclosure of confidential information. This defense was interposed in only one case, *Clark v. Geraci,* and was held to be a good and sufficient defense against a malpractice action.[89]

(3) That the physician was privileged to make the particular disclosure because of a duty to third parties, which was greater than the duty to the patient to remain silent. This defense was allowed in *Simonsen v. Swenson* where the purpose of the communication was

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[83] 104 Neb. at 227, 177 N.W. at 832.

[84] 243 F. Supp. at 802.

[85] 8 Utah 2d at 193, 331 P.2d at 817.

[86] *Id.*

[87] 215 Tenn. at 657, 389 S.W.2d at 250.

[88] 35 U.S.L.W. 2011 (N.Y. Sup. Ct. June 21, 1966).

[89] 29 Misc. 2d at 794, 208 N.Y.S.2d at 568.

to prevent the spread of contagious disease.[90] In *Clark v. Geraci* the court found a duty on the part of the physician to make a full disclosure where a partial disclosure made at the request of the patient would result in a fraud.[91] *Hague v. Williams* recognizes an overriding duty to make a disclosure to a third party where the patient's physical condition has become the element of a claim.[92] The duty to make a disclosure to a third party when the patient's physical condition is made an element of a claim is expressly rejected in *Hammonds v. Aetna.*[93] In *Curry v. Corn* the court found the physician to have a duty to inform a husband of an illness on the part of his wife which might affect the marital relationship.[94] In *Berry v. Moench* the court describes a physician's conditional privilege to make extrajudicial disclosures in the following terms: "Where life, safety, well-being or other important interest is in jeopardy, one having information which could protect against the hazard, may have a conditional privilege to reveal information for such purpose[s] . . . ."[95] Thus, in six of the seven cases under discussion, the courts expressly recognized an overriding duty to a third party as a good and sufficient defense in an action based upon an extrajudicial disclosure of confidential information by a physician.

The defense of privilege to make a communication because of an overriding duty to a third party is part of the more fully developed law of slander and libel.[96] The courts have not hesitated, however, to apply this defense in these actions for truthful disclosures of medical confidences where no libel or slander was involved. With respect to the defense of privilege, a physician who tells the truth should be entitled to, at least, the same protection as one who tells a falsehood.

## CONCLUSION

It is concluded that patients now have a judicially recognized right, and physicians have a corresponding judicially recognized duty, under which the physician must not make extrajudicial disclosures of information obtained while treating the patient, unless the physician is privileged to make the disclosure because of an overriding duty to society or third parties. The violation of such right,

[90] 104 Neb. at 226, 177 N.W. at 832.

[91] 29 Misc. 2d at 793, 208 N.Y.S.2d at 567.

[92] 37 N.J. at 336, 181 A.2d at 349.

[93] 243 F. Supp. at 801.

[94] 35 U.S.L.W. at 2011.

[95] 8 Utah 2d at 197, 331 P.2d at 817-18.

[96] For full discussion in regard to the privilege of statements made by physicians, see Annot., 73 A.L.R.2d 325 (1960) (commenting on Berry v. Moench); Baldwin, *supra* note 20; and DeWitt, *supra* note 11, at 25-27.

and the breach of such duty, give rise to a civil action for damages. The patient, however, may waive his rights concerning professional secrets by requesting the physician to make a partial disclosure, if it appears later that such partial disclosure would operate as a fraud.

The majority, and better reasoned view bases the patient's cause of action on a violation of professional standards to which a physician has a duty to adhere, and upon which a patient is entitled to rely. This duty on the part of the physician may be inferred either from the public policy statements in privilege and licensing statutes or from the professional standards of conduct promulgated by the medical profession itself.

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