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Physician-Patient Privilege In Ohio

Naoma Lee Stewart*

CONFIDENTIAL COMMUNICATIONS between a physician and his patient were not privileged against disclosure at common law. Outside a court of law the doctor's tongue was curbed by the strict ethical demands of his profession and his conscience;¹ but if summoned to court as a witness he could and had to disclose any information he received while attending or treating his patient, regardless of any detrimental effect such disclosure might have on either the patient or physician. This common law rule was based on the theory that the need for the disclosure of the whole truth was so essential for the proper administration of justice that it outweighed any consideration of professional confidence.²

In 1828, New York was the first state to depart from the common law rule by passing a statute which forbade a physician to disclose any information acquired in attending a patient in a professional character which was necessary to enable him to prescribe for such patient.³ Since that time this legislative privilege has been enacted in varying forms in nearly two-thirds

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¹ Pledging himself that never would he voluntarily divulge the medical confidences of his patients, Hippocrates vowed, "Whatsoever things I see or hear concerning the life of men, in my attendance on the sick or even apart therefrom, which ought not to be noised abroad, I will keep silence thereon, counting such things to be as sacred secrets." For complete Oath, see Foxe, *The Oath of Hippocrates*, 19 *Psychiatric Q.* 17 (1945). See DeWitt, *Medical Ethics and the Law: The Conflict Between Dual Allegiances*, 5 *West. Res. L. Rev.* 5 (1953).

² "At common law no privilege existed as to communications between physician and patient. . . The public interest in the disclosure of all facts relevant to a litigated issue was deemed to be superior to the policy of recognizing, for the benefit of the patient, the inviolability of confidential communications." *State v. Martin*, 182 N. C. 846, 109 S. E. 74 (1921).

³ Some statements of Buller, J., in 1792 in a case involving the application of the attorney-client privilege seem to have furnished the inspiration for the pioneer New York statute of 1828. He said: "The privilege is confined to the cases of counsel, solicitor, and attorney. . . It is indeed hard in many cases to compel a friend to disclose a confidential conversation; and I should be glad if by law such evidence could be excluded. It is a subject of just indignation where persons are anxious to reveal what has been communicated to them in a confidential manner. . . There are cases to which it is much to be lamented that the law of privilege is not extended; those in which medical persons are obliged to disclose the information which they acquire by attending in their professional characteristics." *Wilson v. Rastall*, 4 *Term Rep.* 753, 759, 100 *Eng. Rep.* 1287 (K. B. 1792).

of the states.⁴ Seventeen states still seem to follow England in preserving the common law rule that there is no legal check on the revelations of medical secrets.⁵

Throughout its history the physician-patient privilege has been the subject of controversial discussion, and in recent years these discussions have been dominated by voices of bitter disapproval and severe criticism. Judges, lawyers, textwriters, and teachers have denounced the privilege by characterizing it as everything from a "monumental hoax" to a "clever legerdemain loaned by the law to the parties to suppress the truth."⁶ Critics maintain that in the majority of reported cases the patient invoked the privilege, not to protect his privacy or to prevent the disclosure of humiliating personal facts⁷ (supposedly the purpose for the creation of the privilege), but to exclude relevant and material evidence which would reduce or defeat a verdict favorable to the patient.⁸

It is estimated that ninety percent of the litigation in which the privilege is invoked consists of actions on life, accident or health insurance policies, actions for personal injury⁹ or wrongful death, or testamentary actions where the mental capacity of the testator is the principal issue. In all of these cases, the

⁴ These statutes are compiled and quoted in 8 Wigmore, Evidence § 2330, note 5 (3rd, 1940).

⁵ These are listed in Chafee, Is Justice Served by Closing the Doctor's Mouth, 52 Yale L. J., 607 (1943).

⁶ There is a wealth of excellent discussion, all adverse, on the policy of the privilege. The best and severest criticism is contained in 8 Wigmore, supra, note 4. Other references: Chafee, supra note 5; Freedman, Medical Privilege, 32 Can. B. R. 1 (1954); Purrington, An Abused Privilege, 6 Columbia L. R. 388 (1906); Welch, Another Anomaly—The Patient's Privilege, 13 Miss. L. J. 137 (1941); Barnhart, Theory of Testimonial Competency and Privilege, 4 Ark. L. R. (1950); Morgan, Suggested Remedy for Obstructions to Expert Testimony by Rules of Evidence, 10 U. Chi. L. R. 285, 290 (1943).

⁷ "From asthma to broken ribs, from ague to tetanus, the facts of the disease are not only disclosable without shame, but are in fact often known and knowable by everyone—except the appointed investigators of truth." See 8 Wigmore, supra, note 4.

⁸ "What is there indelicate or of a nature to humiliate a patient claiming damages for defective vision or a broken leg, or any other injury displayed in evidence, in proving that the condition attributed to a recent accident was of long standing? Such a disclosure might show that the litigation was dishonest; but the physician's testimony . . . would not be in itself humiliating or disgraceful, or reveal any secret except that the injury exhibited as new was in fact old." Purrington, A Recent Case of Patient's Privilege, 9 Bench and Bar 48, 52 (1907). And see note 9, infra.

⁹ "Instead of accomplishing the purpose for which it was originally intended, the privilege has been so far corrupted today that it is used, at least in personal injury cases, for the most part for suppression of the truth." Nelson v. Ackermann, 83 N. W. 2d 500, 506 (Minn. 1957). And see note 8, supra.

testimony of the physician who attended the patient would be the best and most reliable evidence, but such testimony may be excluded at the whim of the patient who acts as his own judge in determining whether such evidence shall be admissible. In other words the statutes permit the holder of the privilege to use the testimony of his physician if the evidence will strengthen his case and to exclude it when offered by his opponent if it weakens his case. The monstrous injustice of such a situation is obvious.¹⁰ Of course, if the patient voluntarily testifies as to part of the privileged matter, he may be questioned as to all of it.

The mounting waves of protest and criticism have not been without effect. The legislatures which created the original privilege are each day amending and cancelling out the intended benefits of the statutes. Some authorities suggest that it is high time to abolish completely the physician-patient privilege,¹¹ but they also admit that this may not be possible within a reasonable length of time. As long as the privilege is allowed to exist a complete understanding of those statutes which control the introduction of evidence is essential. Although the basic policy of modern statutes creating the privilege is the same, there is a wide disparity in their contents and limitations, and each must be analyzed separately.

In Ohio, both the physician-patient and the attorney-client privilege are set forth in the same statute.¹² It provides that the attorney and physician may not testify concerning any communications by or advice to the client or patient in their professional relationship except: (1) by express consent of the client or patient; (2) by express consent of the deceased client's

¹⁰ "The whole proceeding, in the opinion of the writer, to say the least, was a perversion of justice, if not an absolute travesty. It was anything but even-handed justice. It was not a square deal, and . . . it was using as a sword against his adversary the privilege which was intended for his own protection. If this is the meaning and extent of the statute under which the privilege is claimed, the sooner the statute is repealed, the better it will be for the administration of justice." *Dahlquist v. Denver & Rio G. R. R.*, 52 Utah 438, 174 Pac. 833 (1918).

¹¹ De Witt, *Privileged Communications Between Physician and Patient*, 39 (1958); and see note 6, *supra*.

¹² "The following persons shall not testify in certain respects: (A) 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; but the attorney or physician may testify by express consent of the client or patient, or if the client or patient be deceased, by the express consent of the surviving spouse or the executor or administrator of the estate of such deceased client or patient; and if the client or patient voluntarily testifies, the attorney or physician may be compelled to testify on the same subject." Ohio Rev. Code § 2317.02 (Baldwin Cum. Issue 1956).

or patient's surviving spouse, executor, or administrator; (3) by the client or patient voluntarily testifying, and then the attorney or physician may be compelled to testify on the same subject.

By combining the two privileges confusion is immediately invited because of the two different interpretations of construction which must be placed upon the one statute. Following the general rule of statutory construction, the physician-patient privilege which is in derogation of the common law should be strictly construed, while an opposite liberal construction would be given the attorney-client privilege which existed at common law.¹³ Although the rule itself is uncomplicated, conflicts arise from the different attitudes of the courts towards the basic wisdom of the physician-patient privilege. A sympathetic court¹⁴ would tend to condone a more liberal construction of the privilege than a court which is apprehensive of the privilege's power to exclude evidence essential to the administration of justice. As a result of this conflict, in Ohio, we have decisions affecting the physician-patient and attorney-client privilege which are impossible to reconcile. For example, the Ohio Supreme Court decisions on the two privileges in *Harpman v. Devine* and *Spitzer v. Stillings* (both cases are discussed below) give the term "on the subject" a more liberal construction for the physician-patient privilege, which is in derogation of the common law and would normally require a strict statutory construction, than the interpretation given to the companion attorney-client privilege.¹⁵

¹³ In Ohio the effect of the waiver clause on the physician-patient privilege is given in the severely criticized *Harpman v. Devine*, 133 Ohio St. 1, 10 N. E. 2d 776 (1937). An opposite interpretation of the effect of the same clause on the attorney-client privilege appears in *Spitzer v. Stillings*, 109 Ohio St. 297, 142 N. E. 365 (1924).

¹⁴ Note, 51 Harv. L. R. 931 (1938) in discussing *Harpman v. Devine*, supra note 13, said, "The decision reflects a surprising judicial sympathy toward the much criticized physician-patient privilege. The offered testimony of Dr. F. might well have been held to be 'on the same subject' as the plaintiff's testimony concerning his antecedent physical condition."

¹⁵ The convincing dissenting opinion by Zimmerman in *Harpman v. Devine*, supra note 13, at J., concurred in by Weygandt, Ch. J., states: "The meaning of the phrase 'on the same subject' was definitely settled in *Spitzer v. Stillings*, Exr., 109 Ohio St. 297, 142 N. E. 365, 366 (1924). That case plainly holds such phrase refers to the subject of the controversy . . . and cannot be limited or restricted merely to the subject of the communications between client and attorney or patient and physician. . . The majority opinion (of *Harpman v. Devine*) therefore broadens the shield of Section 11494, General Code, to an unwarranted extent, and gives the phrase 'on the same subject' as used in that section, an interpretation which was expressly disapproved in *Spitzer v. Stillings*, supra." *Harpman v. Devine*, 133 Ohio St. 1, 10 N. E. 2d 776 (1937).

To add to the confusion, in 1958 a unanimous Cuyahoga County Court of Appeals decision (the *Roberto* case)¹⁶ broadened extensively the meaning of the words "on the subject," at least as to testimony by deposition where the physician-patient privilege is applicable. With a subtle judicial snub of Ohio's leading case on the physician-patient privilege, the court completely ignored the severely criticized *Harpman v. Devine*, (discussed below), and solved its problem as to the extent that the patient waives the physician-patient privilege by applying the reasoning followed in Ohio's leading case on the attorney-client privilege. These and other problems make a brief analysis of the Ohio law on the physician-patient privilege pertinent.

The Privilege—in General

Statutes making communications between physician and patient privileged are usually considered to refer to those whose business comes within the definition of "physician"¹⁷ and who are duly authorized to pursue the practice of medicine and lawfully engage in that vocation. Practically all courts agree that the statutes afford protection only to those relationships specifically named therein. Some states, such as those of New York, include a dentist and nurse, but in Ohio since only the word "physician" is used, no privilege is extended to communications between a patient and his nurse.¹⁸ However, if the nurse is the private nurse and agent of the physician and she obtains her knowledge through this relationship, she may not disclose information thus acquired.¹⁹

A licensed optometrist has been held to be a physician within the meaning of the statutory privilege.²⁰ Whether an osteopath can be included within the scope of the privilege is unsettled. Early statutes licensing osteopaths usually limited

¹⁶ *In re Roberto*, 106 Ohio App. 303, 151 N. E. 2d 37 (1958). For further discussion of this case see the section on Waiver and note 60, *infra*.

¹⁷ Ohio Rev. Code, § 4731.34. "Physician" is defined in the section on licensing, not the section on privilege.

¹⁸ The statute must be strictly construed; and since the relationship of nurse and patient is not specifically named in the statute, no privilege is extended to communications between a patient and his nurse. *Weis v. Weis*, 147 Ohio St. 416, 72 N. E. 2d 245 (1947).

¹⁹ *Humble v. John Hancock Life Ins. Co.*, 28 Ohio N. P. (N. S.) 481, *aff'd*, 31 N. E. 2d 887, *Rehear. denied* 32 N. E. 2d 425 (1931).

²⁰ *State v. Viola*, 51 Ohio L. Abs. 577, 82 N. E. 2d 306, *app. dismissed*, 148 Ohio St. 712, 76 N. E. 2d 715, *cert. denied* 334 U. S. 816, 68 Sup. Ct. 1070 (1947).

their professional activities. More recent statutes are very broad in most states, and now an osteopath appears to be entitled to practice in most of the fields of medicine and surgery. One writer suggests that there seems to be no valid reason why they should not be considered as "physicians" within the meaning and intent of the physician-patient privilege statutes.²¹ It is generally held that treatment of a sick person by a Christian Science practitioner is not the practice of medicine, and the Ohio statute defining "physician" expressly exempts a Christian Science practitioner from the operation of statutes relating to the practice of medicine.²²

The privilege belongs to the patient and not to the physician, who cannot invoke it for his own benefit.²³ Its purpose is to protect the patient and not the physician from the consequences of disclosure. The statute creating the privilege is not a rule of substantive law; it merely prescribes a rule of evidence which is applicable in any form or action.²⁴ The physician is not prohibited from revealing confidential information to anyone by virtue of the statute; it merely prohibits a physician from introducing such information into evidence in a proceeding where he is a witness under oath. The word "testify" in the statute does not limit the applicability of the privilege to the trial in court, but also includes testimony by deposition.²⁵ In Ohio, although the Workmen's Compensation Act provides that hearings conducted by the commission shall not be bound by the common law or statutory rules of evidence, it has been held that an applicant for compensation cannot be required to waive his rights under the privilege statute as a condition precedent to a consideration for his claim.²⁶

Supposedly, the purpose of this legislative privilege was to encourage and preserve confidences. It would seem to follow logically that to render a communication between a physician and patient privileged it must have been confidential. Ohio does

²¹ DeWitt, *supra* note 11, at 86.

²² *Supra*, note 17.

²³ *State v. Osborne*, 25 Ohio L. Abs. 543, 15 N. E. 2d 175 (1937).

²⁴ *John Hancock Mutual Life Ins. Co. v. Jennings*, 17 Ohio L. Abs. 583, (1934).

²⁵ *In re Loewenthal*, 101 Ohio App. 355, 134 N. E. 2d 158 (1956). Query whether the confidante of the physician could testify? Or is it hearsay? Or does the privilege prevent testimony for impeachment purposes?

²⁶ *State ex rel. Galloway v. Industrial Comm.*, 134 Ohio St. 496, 17 N. E. 2d 918 (1938).

not require confidentiality. The privilege attaches notwithstanding the presence of such third persons as interpreters, but if such person is not necessary to enable the communication between the patient and physician, then such third person may testify.²⁷ Presence of a third person not required as a mere "transmitter" is publication.

Relationship of Physician and Patient Necessary

In order that a person's communication to a physician may be privileged, there must exist between them the relation of physician and patient, which of course, arises through contract, express or implied. The consent of the patient to the relationship may be implied, as when he is brought to the physician in a semiconscious condition. It is immaterial by whom such physician is employed. The fact that the physician is the employee of a third person does not exempt the resulting relationship from the privileged category even when the third party is the patient's employer.²⁸

As a general rule, the relationship of physician and patient does not exist unless curative treatment is contemplated. Thus, no relationship was created by an examination of decedent by a physician engaged by decedent's employer where such examination did not include treatment nor advice, and clearly was not for the purpose of alleviating decedent's pain nor curing his malady.²⁹

Generally speaking, staff physicians and other physicians in the employ of a public or private hospital enter into the relationship of physician and patient with every person who enters the hospital for the purpose of care and treatment. In Ohio there is substantial conflict as to whether or not this relationship is created. A 1937 case held the testimony of an interne of a public hospital inadmissible because the relationship was established when the interne made a routine examination and took the case history of the patient on her admission to the hospital.³⁰ However, a later case held that a physician employed by a

²⁷ *Ryan v. Industrial Comm.*, 47 Ohio L. Abs. 561, 72 N. E. 2d 907 (1946).

²⁸ *Malone v. Industrial Comm.*, 140 Ohio St. 292, 43 N. E. 2d 266 (1942).

²⁹ *Suetta v. Carnegie-Illinois Steel Corp.*, 75 Ohio L. Abs. 487, 144 N. E. 2d 292 (1955).

³⁰ *Lamarand v. National Life & Acc. Ins. Co.*, 58 Ohio App. 415, 16 N. E. 2d 701 (1937).

public hospital could testify, since the patient's contractual relationship was with the hospital and not with its physician.³¹ This same distinction had been made in earlier cases.³²

The relation of physician and patient does not exist when a physician is requested by the plaintiff's attorney to examine his client for the sole purpose of aiding the attorney in his preparation of a lawsuit.³³ Nor does the relationship exist where an employer sends an employee to its physician, not to treat or cure him, but for the single purpose of enabling the employer to intelligently decide whether it can safely and properly continue him as one of its employees.³⁴

If a party in a civil action is required to submit to a physical examination by a physician selected by his adversary or appointed by the court, the relationship of physician and patient does not exist and the physician may testify to any information he gained during the course of the examination.³⁵ The same rule would apply to a criminal action. Where a physical examination of the accused is made without his objection for the purpose of proving or disproving his guilt of the crime charged, the relationship is non-existent and the results of the examination may be introduced at the trial.³⁶

Generally, a physician performing an autopsy is not precluded from testifying if he never attended or treated the deceased prior to death, since the required relationship did not exist.³⁷ There is a conflict of opinion as to whether the privilege

³¹ Lumpkin v. Metropolitan Life Ins. Co., 75 Ohio App. 310, 63 N. E. 2d 189, *aff'd*. 146 Ohio St. 25, 64 N. E. 2d 63 (1945).

³² No relation existed between patient and hospital's pathologist; Nelson v. Western & Southern Ins. Co., 23 Ohio L. Abs. 117 (1936); no relation existed where injured employee was treated by defendant's physician in its own hospital, Dewert v. Cincinnati Milling Mach. Co., 15 Ohio L. Abs. 268 (1933); No relation exists between patient in a municipal tuberculosis hospital and a physician employed by it, Wills, Adm'r. v. National Life & Acc. Ins. Co., 28 Ohio App. 497, 162 N. E. 822 (1928).

³³ McMillen v. Industrial Comm., 34 Ohio L. Abs. 435, 37 N. E. 2d 632 (1941).

³⁴ New York Central R. R. v. Wiler, 124 Ohio St. 118, 177 N. E. 205 (1931).

³⁵ State ex rel. Galloway v. Industrial Comm., *supra*, note 26; Suetta v. Carnegie-Illinois Steel Corp., *supra*, note 29.

³⁶ The question of privilege was not raised, Angeloff v. State, 91 Ohio St. 361, 110 N. E. 936 (1914).

³⁷ Travelers Ins. Co. v. Bergeron, 25 F. 2d 680, *cert. denied* 278 U. S. 638, 58 A. L. R. 1127 (1928); Cross v. Equitable Life Assur. Soc., 228 Iowa 800, 293 N. W. 464 (1940).

applies when the physician performing the autopsy also was the attending physician during the lifetime of the deceased.³⁸ Ohio has no decision on this problem.

Subject Matter of Communication

The privilege statute protects the communications and advice of the physician. Early Ohio cases held that the only communications that would be protected were the verbal communications of doctor and patient.³⁹ This view was later discarded, and it is now held that privileged communications between physician and patient may be made by exhibition of the body to the physician for examination or treatment as well as by oral or written communications between the physician and patient.⁴⁰

There are a variety of facts to which the physician may properly testify without violating the patient's right to privacy. For instance, the physician may testify to the fact of his employment by and treatment of the patient;⁴¹ the number and dates of his visits; the dates of the patient's entry and departure from a hospital; and that he recommended the taking of x-ray photographs and performed an operation on the patient.⁴²

Ohio courts have held that where the only purpose of the physician's professional attendance was for treatment of a physical ailment, the physician is competent to testify as to the patient's mental condition as he observed it during the course of his professional employment.⁴³

The privilege does not include communications not within the professional relation, such as advice on financial matters⁴⁴ nor

³⁸ "As to evidence obtained from an autopsy, we have no hesitancy in saying that such is not privileged, when not dependent upon, and when capable of being by the physician segregated from, information which he received as an attending physician." *Sprouse v. Magee*, 46 Idaho 622, 269 P. 993 (1928).

³⁹ *Metropolitan Life Ins. Co., v. Howie*, 68 Ohio St. 614, 68 N. E. 4 (1903).

⁴⁰ *In re Roberto*, 106 Ohio App. 303, 151 N. E. 2d 37 (1958); *Ausdenmoore v. Holzback*, 89 Ohio St. 381, 106 N. E. 41 (1914); *Baker v. Industrial Comm.*, 135 Ohio St. 491, 21 N. E. 2d 593 (1939).

⁴¹ *Sambles v. Metropolitan Life Ins. Co.*, 158 Ohio St. 233, 108 N. E. 2d 321 (1952); *Willig v. Prudential Ins. Co.*, 71 Ohio App. 255, 49 N. E. 2d 421 (1942); *Russell v. Penn Mutual Life Ins. Co.*, 70 Ohio App. 113, 41 N. E. 2d 251 (1941).

⁴² *Willig v. Prudential Ins. Co.*, *supra*, note 41.

⁴³ *Carson v. Beatley*, 86 Ohio App. 173, 82 N. E. 2d 745 (1948); *Meier v. Peirano*, 76 Ohio App. 9, 62 N. E. 2d 920 (1945); *Olney v. Schurr*, 21 Ohio L. Abs. 630, app. dismissed, 131 Ohio St. 398, 3 N. E. 2d 43 (1936); *Heiselmann v. Franks*, 48 Ohio App. 536, 194 N. E. 604 (1934).

⁴⁴ *In re Estate of Chase*, 31 Ohio L. Abs. 111 (1940).

an admission by the patient that he was negligent.⁴⁵ Information as to illegal acts such as the commission of a crime is not privileged and an ordinance requiring a physician to report gunshot wounds does not violate the privilege.⁴⁶

Waiver

Prior to a 1953 amendment to the Ohio statute the privilege could be waived only in two ways; by the express waiver of the patient, or by the patient voluntarily testifying. The amended statute liberalized the right of waiver by providing that after the death of the patient the privilege could be waived by the surviving spouse, executor, or administrator.⁴⁷ Prior to this revision, Ohio courts had consistently held that the personal representative of the deceased patient could not waive the privilege to permit the attending physician to testify.⁴⁸ Before the statute was amended, a widow could waive the privilege of her deceased husband only in an action brought under the Workmen's Compensation Law.⁴⁹

Ohio has held that the beneficiary of an insurance policy cannot waive the privilege.⁵⁰ The recent amendment would not seem to change the rule unless the beneficiary happened to be the surviving spouse or the executor or administrator of the estate of the deceased insured; then, of course, he would be permitted to waive the privilege.

Another method of waiver is by the patient renouncing and abandoning the protection the statute would otherwise provide for him.⁵¹ The express waiver of the patient is not essential; it may be implied from his conduct and acts. For example, where an attending physician is requested by his patient, the testator,

⁴⁵ *Dewart v. Cincinnati Milling Machine Co.*, 15 Ohio L. Abs. 268 (1933).

⁴⁶ *Bolton v. City of Cleveland*, 2 Ohio L. Abs. 599 (1924).

⁴⁷ Ohio Rev. Code § 2317.02 (Baldwin Cum. Issue 1956). See *supra*, note 12.

⁴⁸ *McKee v. New Idea, Inc.*, 36 Ohio L. Abs. 563, 44 N. E. 2d 697 (1942); *Colwell v. Dwyer*, 33 Ohio L. Abs. 455, 35 N. E. 2d 789 (1940); *Parisky v. Pierstorff*, 63 Ohio App. 503, 27 N. E. 2d 254 (1939). The same rule applies to the attorney-client privilege, *Swetland v. Miles*, 101 Ohio St. 501, 130 N. E. 22 (1920).

⁴⁹ *Industrial Comm. v. Warnke*, 131 Ohio St. 140, 2 N. E. 2d 248 (1936).

⁵⁰ *Russell v. Penn Mutual Life Ins. Co.*, 70 Ohio App. 113, 41 N. E. 2d 251 (1941); *Thompson v. National Life & Acc. Ins. Co.*, 68 Ohio App. 439, 37 N. E. 2d 621 (1941).

⁵¹ *Harpman v. Devine*, 133 Ohio St. 1, 10 N. E. 2d 776 (1937); *Industrial Comm. v. Warnke*, 131 Ohio St. 140, 2 N. E. 2d 248 (1936); *Ausdenmoore v. Holzback*, 89 Ohio St. 381, 106 N. E. 41 (1914).

to witness his will and does subscribe to the will as a witness, the patient thereby waives the restrictions on the competency of the physician and consents to the physician being called as a witness by either side to be examined and cross-examined in an action involving the validity of the will.⁵² Ohio, with the majority of states, also recognizes that the waiver of the privilege by an applicant for an insurance policy, either in the application or in the policy itself, is valid and does not violate public policy.⁵³ Of course, in these situations none of them are for treatment, and so the doctor could testify anyway.

The third method of waiving the privilege has created conflicting and inconsistent decisions in Ohio. The statute provides that if the patient voluntarily testifies, the physician may be compelled to testify on the same subject. The Supreme Court has interpreted the words "on the same subject" to mean the subject matter of the communication between the physician and patient, but when applied to the attorney-client privilege the same words mean the subject matter of the controversy.⁵⁴ With their decision in *Harpman v. Devine* and *Spitzer v. Stillings*, the Court has succeeded in liberally construing the physician-patient privilege which would normally require a strict construction, and strictly construing the attorney-client privilege which would normally require a liberal construction.

In *Harpman v. Devine*, a personal injury action, the plaintiff testified on direct examination that prior to the accident his health had been good, but following the accident he suffered from a variety of ailments; however he made no reference to any communications or treatment between himself and his physician. The defendant contended that plaintiff's complaints were the usual consequences of pernicious anemia and offered the testimony of a Dr. F. who had treated the plaintiff for pernicious anemia to prove this contention. The plaintiff objected to the doctor's testimony on the grounds of privilege. The objection was sustained and the testimony of Dr. F. was held inadmissible.

The Supreme Court held that testimony by the patient on direct examination that his general physical condition was good before an accident, without any mention of treatment by or communication to or from the physician was not a waiver of the

⁵² *Weis v. Weis*, 147 Ohio St. 416, 72 N. E. 2d 245 (1947).

⁵³ *New York Life Ins. Co. v. Snyder*, 116 Ohio St. 693, 158 N. E. 176 (1927).

⁵⁴ See *supra* note 15.

privilege without the express consent of the patient.⁵⁵ On cross examination, the plaintiff admitted receiving treatment prior to his injury. The court further held that merely answering questions as to treatment from a physician in response to questions on cross-examination was not voluntary testimony within the meaning of the statute and did not waive the privilege.⁵⁶

By contrast, in *Spitzer v. Stillings*, the Supreme Court held the privilege waived in the attorney-client relationship when the client voluntarily testified as a witness in his own behalf, although the client made no reference in his testimony to any communication with the attorney. The court held that any attorney to whom the client had made communications professionally may be compelled to testify with reference to the subject concerning which the client has testified. If the client testifies he may be cross-examined concerning communications with an attorney, in that relation, on any subject pertinent to his case testified by him in chief. The court said, "If the Legislature meant the word 'subject' to be confined to the subject of the communication between the client and attorney, it could easily have so stated, and in the absence of that limitation, it is more probable that it was intended to include the subject matter of his testimony generally."⁵⁷

Had the Supreme Court in *Harpman* followed the holding of the earlier *Spitzer* case, it would have been obliged to hold that, by the patient voluntarily testifying as to his previous state of health he had waived the privilege; then the testimony of Dr. F. on the subject matter of plaintiff's general testimony would

⁵⁵ "Defendant maintains that when plaintiff, in his direct examination which was voluntary, testified that his health before the time of the accident was good, he thereby testified on a 'subject' under the statute in such a manner as to permit the defendant to introduce testimony respecting his health during that period, including the communications, advice and treatment of plaintiff by Dr. F. It is asserted that when plaintiff testified that his health was good he thereby 'opened the door' and waived the privilege accorded him by statute. It is claimed that health is a subject that is not only a general term but necessarily includes communications and advice especially in the case at bar. While there is much force in such an argument, such an interpretation would render the statute useless and ineffective in every case where the plaintiff or patient has testified generally respecting his health." *Harpman v. Devine*, 135 Ohio St. 6, 10 N. E. 2d 776 (1937).

⁵⁶ It is well-established that testimony elicited by cross-examination of a patient as to privileged communications or information is not voluntary and therefore does not constitute a waiver of the physician-patient privilege. *Gilpin v. Aetna Life Ins. Co.*, 234 Mo. App. 566, 132 S. W. 2d 686 (1939); *Vilardi v. Vilardi*, 200 Misc. 1043, 107 N. Y. S. 163 (1951); *Baker v. Industrial Comm.*, 135 Ohio St. 491, 21 N. E. 2d 593 (1939).

⁵⁷ *Spitzer v. Stillings, Exr.*, 109 Ohio St. 297, 142 N. E. 365 (1924).

have been admissible. The majority opinion maintained in a single sentence that the two cases were distinguishable; but no attempt whatsoever was made to distinguish them. The end result of *Harpman* was to allow a plaintiff in a personal injury action to falsely testify that prior to an accident his health had been good when in truth he had suffered from pernicious anemia; and then by invoking the privilege the former attending physician was prevented from testifying to the existence of the pernicious anemia, which plaintiff's own physician-witness conceded on recross-examination could have caused every ailment and symptom of which the plaintiff complained.⁵⁸

The obviously unjust result of this decision typifies the cases which have provoked a series of vehement and scathing denunciations of the physician-patient privilege. The vigorous and reasonable dissent in *Harpman* logically concluded that "... when a patient voluntarily divulges his corporeal afflictions on the witness stand in open court to serve his own pecuniary ends, any good or sufficient reason for maintaining the silence of the physician who has attended him no longer obtains."⁵⁹

There are indications that the time is ripe in Ohio to overrule the Supreme Court holding in *Harpman*. In December of 1958, the Cuyahoga Court of Appeals broadened the meaning of the words "on the same subject" even beyond the interpretation given them by the Supreme Court in *Spitzer*. In a personal injury and negligence case against the Ohio Bell Telephone Company which is still pending, the plaintiff testified voluntarily as to her condition and treatment generally by deposition to perpetuate her testimony. When the defendants attempted to question her physician in a deposition hearing, the doctor refused to answer the questions on the ground of privilege. He was placed under technical arrest for contempt of a notary public because of his refusal to answer.

The court ruled that not only must the physician answer questions relating to the patient's condition and treatment to

⁵⁸ "The application of the rule [*Harpman v. Devine*] adopted by the court will tend to bring the administration of the law into disrepute, and will support the charge that the law often fails to serve the ends of justice." William L. Hart (later a member of the Ohio Supreme Court), *Review of Ohio Case Law for 1937*, 10 Ohio Op. 164, 176 (1938).

⁵⁹ The dissent also quoted Wigmore saying, "Certainly it is a spectacle 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 privilege." *Harpman v. Devine*, *supra* note 55.

which she had voluntarily testified in her deposition; but the physician could also be required to answer inquiries relating to his findings and diagnosis, regardless of whether or not the patient had knowledge of such findings and diagnosis.⁶⁰ In other words, the Court of Appeals evidently has held that the patient waived the privilege not only as to the subjects on which she voluntarily testified but also as to the diagnosis and findings of which she may have had no knowledge. At first consideration, it is difficult to conceive how it is possible for a person to waive something of which he had no knowledge. However, the court may have reasoned that physicians frequently have knowledge of facts which for the patient's own good they do not reveal to them, but such facts could be extremely pertinent and material in a legal action for personal injuries.

In arriving at its conclusions, the court never mentioned *Harpman*. This silent snub can scarcely be interpreted as anything except an unexpressed judicial disapproval of that criticized decision. It seems safe to conclude that the Cuyahoga Court of Appeals is sympathetic toward the principles enunciated in the dissenting opinion; namely, that once a person voluntarily puts his physical condition in issue to serve his own pecuniary ends, in the interest of justice there no longer exists any reason for silencing the attending physician. The decision indicates a tendency of the court to swing back to the strict statutory construction which originally should have been placed on the physician-patient privilege.⁶¹

Had the court arrived at a different conclusion, it would have been a perfect opportunity for the defense to appeal and attempt to overrule part of *Harpman*. In the twenty-two years since that decision, changes in the membership of the Supreme Court, plus an uninterrupted flow of criticism on the case, have indicated that this accomplishment is probably just a matter of time and opportunity. In view of these facts, attorneys for the

⁶⁰ A person who voluntarily testifies, by deposition, as to his condition and treatment generally but does not testify as to his physician's finding upon examination and the diagnosis of his condition, waives the physician-patient privilege attached thereto, whether such findings and diagnosis are within such person's knowledge or not, and such physician can be required to answer inquiries relating thereto. In re Roberto, 106 Ohio App. 303, 151 N. E. 2d 37 (1958).

⁶¹ The majority of courts now hold that, since the statute is in derogation of the common law, it must be strictly construed. *Weis v. Weis*, 147 Ohio St. 416, 72 N. E. 2d 245 (1947); *Carson v. Beatley*, 86 Ohio App. 173, 82 N. E. 2d 745 (1948); *Meier v. Peirano*, 76 Ohio App. 9, 62 N. E. 2d 920 (1945).

plaintiff would undoubtedly be hesitant to risk an appeal for fear of getting a Supreme Court ruling which might be even more to their disadvantage.

With little possibility of an immediate Supreme Court decision on the subject, many things are still left unsettled by the 1958 *Roberto* case.⁶² Whether that ruling applies only to testimony by deposition is undecided. In a 1956 decision by the same Court of Appeals, the opinion emphasized that their ruling applied to testimony by deposition and not testimony at the trial.⁶³ This distinction was not made in the *Roberto* case. There would seem to be no logical reason for having two separate rules of law on the physician-patient privilege; one for testimony by deposition and one for testimony at the trial. Perhaps the court meant that if the plaintiff who perpetuated her testimony by deposition did not use the deposition, but appeared personally at the trial, the extent of the waiver would be determined by the testimony at the trial and not the testimony in the deposition.

Until some of these problems are clarified by further judicial decisions, Ohio's position regarding to what extent the patient waives the physician-patient privilege remains unsettled and subject to varying interpretations within the state. It is to be hoped that some of these problems will be solved, either by amendment to the statute or decisive judicial decisions, in the very near future.

⁶² *Supra*, notes 16, 40, 62.

⁶³ *In re Loewenthal*, 101 Ohio App. 355, 134 N. E. 2d 158 (1956). Plaintiff, in a personal injury action, for the purpose of perpetuating his testimony, gave his deposition on direct examination. Thereafter, defendant subpoenaed the petitioner, who was plaintiff's physician, for the purpose of questioning him by way of deposition regarding plaintiff's injuries. On objection by plaintiff's counsel, the petitioner refused to testify and was held in contempt. On appeal it was held that plaintiff by testifying in his own behalf had waived the privilege and therefore the physician must testify by way of deposition. The physician had refused to answer any questions. The issue was whether or not the physician could be compelled to testify by way of deposition in a case where the patient had voluntarily testified by deposition solely for her own benefit and for the purpose of perpetuating her own testimony. The court limited its decision to the precise question involved and did not decide what effect such waiver might have on the trial proceedings.