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Witnesses -- Privileged Communications between Physician and Patient -- Waiver Clauses in Insurance Applications

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dition of the victim should have put the engineer upon notice that the deceased was not sensitive of his peril.

The holding in the principal case should be contrasted with that in *Smith v. Salisbury and Spencer Railway Co.*[12] where the deceased was sitting upon the tracks with his elbows upon his knees and his head between his hands when struck. There was no evidence of sickness or intoxication. The court ruled that the case should go to the jury to determine if the motorman could have avoided the accident by exercising due care even though the plaintiff was negligent.

In the principal case the deceased was in the same position as in the *Smith* case. The victim was not sick or intoxicated in either case and in both was perceived by the engineer; yet the principal case held that a nonsuit should have been granted; the *Smith* case, that it was proper for the case to go to the jury.

In a majority of the North Carolina cases where the victim is actually perceived on the tracks, it seems that the court views the facts not from the standpoint of the engineer in the cabin of his locomotive, but bases the decision on whether or not the deceased was actually ill or intoxicated at the time of the accident. Since these facts are not revealed until after the accident these decisions defeat the purpose of the last clear chance doctrine except in cases where the deceased was actually ill or helpless. In spite of their holdings the court emphasizes the *apparent* condition of the injured party. If this *apparent* condition of the victim is to be the test rather than his *actual* condition, the court should have affirmed an application of the last clear chance doctrine in the principal case.

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Witnesses—Privileged Communications between Physician and Patient—Waiver Clauses in Insurance Applications.

Plaintiff, as beneficiary, sued defendant insurer on a life insurance policy issued to her deceased husband. The application for the policy contained a clause[1] waiving the statutory privilege against disclosure of communications between physician and patient.[2] In view of the

[12] 162 N. C. 30, 36, 77 S. E. 966, 968 (1913). In this opinion the court said, "If a person be seen upon the track, who is *apparently* capable of taking care of himself, the motorman may assume that he will leave the track before the car overtakes him, but he cannot act upon that presumption with respect to a person who is *apparently* insensible of his danger from sleepiness, drunkenness, or any other like cause." (italics ours).

[1] ". . . And further waive for myself and beneficiaries the privileges and benefits of any and all laws which are now in force or may hereafter be enacted in regard to disqualifying any physician or nurse from testifying concerning any information obtained by him or her in a professional capacity; and I expressly authorize such physician or nurse to make such disclosures."

[2] N. C. CODE ANN. (Michie, 1935) §1798.

fact that defendant did not rely upon the clause, the court disregarded it in determining the admissibility of a physician's testimony.[3]

While the decision in the instant case is beyond criticism, it nevertheless suggests the general problem as to how, when, and by whom this privilege may be waived, and, more particularly, the increasingly important question as to the legal effect of the waiver clauses contained in many applications for insurance.

That this purely statutory privilege[4] may be waived is undisputed.[5] But, well-settled as this general principle is, the various ways in which waiver may be accomplished deserve mention[6] in passing.

Although the privilege is plainly that of the patient during his life, it passes to his personal representative at his death; and the latter may waive it.[7] The Wisconsin Court, however, holds that the privilege becomes even more sacred after the death of the patient and that the deceased's representative is incapable of waiving it.[8]

Unless a statute requires express waiver,[9] the privilege may be waived by implication. The bringing of an action by the patient or his representative, in itself, will not constitute a waiver even when an essential issue is the existence of a physical ailment,[10] *e.g.*, in actions

[3] Creech v. Woodmen of the World, 211 N. C. 658, 191 S. E. 840 (1937).

[4] This privilege did not exist at common law. Sherman v. Sherman, 1 Root 486 (Conn. 1793); Remington v. Rhode Island Co., 37 R. I. 393, 93 Atl. 33 (1915); Banigan v. Banigan, 26 R. I. 454, 59 Atl. 313 (1904); Crow v. State, 89 Tex. Cr. 149, 230 S. W. 148 (1921); Trial of Duchess of Kingston, 20 How. St. Tr. 573 (House of Lords, 1776); 5 WIGMORE, EVIDENCE (2d ed. 1923) §2380.

Twenty-seven jurisdictions in the United States have created this privilege by statute. 5 WIGMORE, EVIDENCE (2d ed. 1923) §2380, note 5.

Since this privilege is strictly statutory, the decisions are controlled by the wording and construction of the statute of the particular jurisdiction. However, general propositions in regard to waiver may be derived from analogy to other privileges for confidential communications which did exist at common law, *e.g.*, between attorney and client, husband and wife.

[5] 5 WIGMORE, EVIDENCE (2d ed. 1923) §2388.

[6] The following is not intended to be an exhaustive analysis of all the cases dealing with the various types of waiver, but merely an illustrative foundation for the discussion of the particular problem of waiver clauses in applications for insurance.

[7] Schirmer v. Baldwin, 182 Ark. 581, 32 S. W. (2d) 162 (1930); Marker v. McCue, 50 Idaho 462, 297 Pac. 401 (1931); Penna. Mutual Life Ins. Co. v. Wiler, 100 Ind. 92 (1884); Miser v. Iowa State Traveling Men's Ass'n, 273 N. W. 155 (Iowa 1937); Goram v. Hickey, 145 Kan. 54, 64 P. (2d) 587 (1937) (heirs entitled to waive the privilege although executor of the will opposed waiver); Fraser v. Jennison, 42 Mich. 206, 3 N. W. 882 (1897); Parker v. Parker, 78 Neb. 535, 111 N. W. 119 (1907); National Life and Casualty Co. v. Heard, 148 Okla. 274, 298 Pac. 619 (1931); Indus. Comm. of Ohio v. Warnke, 131 Ohio St. 140, 2 N. E. (2d) 248 (1936).

[8] Borosich v. Metropolitan Life Ins. Co., 191 Wis. 239, 210 N. W. 829 (1926); Maine v. Maryland Casualty Co., 172 Wis. 350, 178 N. W. 749 (1920); *In re* Hunt's Will, 122 Wis. 460, 100 N. W. 874 (1904).

[9] For an example of a statute requiring express waiver see N. Y. CIV. PRAC. (Cahill, 1931 §§352, 354. In the absence of statute, express waiver is not necessary on any principle. *Cf.* Blackburn v. Crawford's Lessee, 3 Wall. 175, 18 L. ed. 186 (1866).

[10] But see 5 WIGMORE, *op. cit. supra* note 5, §2389, in which the author severely criticizes this rule.

for personal injury,[11] actions to recover on insurance policies,[12] and testamentary contests.[13] The privilege may be waived by the patient by referring specifically in his own testimony to communications made to his physician.[14] But where the patient testifies only as to his symptoms it is held not a waiver of the privilege, since there is given in evidence no communication by word or act.[15] Waiver may be accomplished by the patient or his representative in calling the physician as a witness and examining him as to the physical condition of the patient;[16] but the offer of the testimony of one physician is not a waiver of the privilege as to the testimony of other physicians present in consultation with him.[17] However, a waiver of the privilege as to one physician called by the opponent (by failure to object) is a waiver of the privilege as to other physicians.[18] A waiver of the privilege at a former trial, however accomplished, will bar a claim of the privilege at a subsequent trial.[19]

By far the most common form of waiver is an express stipulation to that effect in applications for insurance. In giving legal effect to this type of clause the courts are confronted with the oft' presented choice between allowing a party to contract as he pleases, so long as he acts voluntarily, and protecting him from his own lack of vision and im-

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Where so specifically provided by statute, CODES, LAWS, AND CONST. AMEND. OF CALIF. (Deering, 1935) §1881, par. 4, the bringing of an action will of itself constitute waiver. See Webb v. Francis J. Lewald Coal Co., 214 Cal. 182, 186, 4 P. (2d) 532, 533 (1931), (1932) 20 CALIF. L. REV. 302.

[11] Federal Mining Co. v. Dalo, 252 Fed. 356 (C. C. A. 9th, 1918).

[12] Foman v. Liberty Life Ins. Co., 227 Mo. App. 70, 51 S. W. (2d) 212 (1932).

[13] 5 WIGMORE, *op. cit. supra* note 10, §2389.

[14] Rauh v. Deutscher Verein, 51 N. Y. Supp. 985 (1898); Mutual Life Ins. Co. v. McKim, 54 Ohio App. 66, 6 N. E. (2d) 9 (1935).

[15] Inspiration Consol. Copper Co. v. Mendez, 250 U. S. 400, 34 Sup. Ct. 553, 63 L. ed. 1058 (1919), *aff'g* 19 Ariz 151, 166 Pac. 278 (1917); Williams v. Johnson, 117 Ind. 273, 13 N. E. 872 (1887); May v. Northern Pacific Ry., 37 Mont. 522, 81 Pac. 328 (1905); Green v. Town of Nebagamain, 113 Wis. 508, 89 N. W. 520, 1902). *Contra:* Forrest v. Portland Ry. L. & P. Co., 64 Ore. 240, 129 Pac. 1048 (1913).

[16] Metropolitan St. Ry. v. Jacobi, 112 Fed. 924 (C. C. A. 2d, 1901); Traveler's Bldg. & Loan Ass'n v. Hawkins, 182 Ark. 1148, 34 S. W. (2d) 474 (1931); Wheelock v. Godfrey, 100 Cal. 587, 35 Pac. 317 (1893); Pittsburg C. C. & St. L. Ry. v. O'Connor, 171 Ind. 686, 85 N. E. 969 (1908); Hier v. Farmers Mut. Life Ins Co., 67 P. (2d) 831 (Mont. 1937); McDonnell v. Monteith, 59 N. D. 750, 231 N. W. 854 (1930).

[17] Metropolitan St. Ry. v. Jacobi, 112 Fed. 924 (C. C. A. 2d, 1901); Penna. Mutual Life Ins. Co. v. Wiler, 100 Ind. 92 (1884); Barker v. Cunard S. S. Co., 36 N. Y. Supp. 256 (1895). *Contra:* State v. Long, 257 Mo. 199, 165 S. W. 748 (1914); (1914) 28 HARV. L. REV. 116; Schlard v. Henderson, 4 N. E. (2d) 205 (Ind. 1936).

[18] Capron v. Douglass, 193 N. Y. 11, 85 N. E. 827 (1908).

[19] Pittsburgh C. C. & St. L. Ry. v. O'Connor, 171 Ind. 686, 85 N. E. 969 (1908); Elliot v. Kansas City, 198 Mo. 593, 96 S. W. 1023 (1906); McKinney v. Grand St. P. P. & F. Ry., 104 N. Y. 352, 10 N. E. 544 (1887).

". . . After its publication no further injury can be inflicted upon the rights and interests which the statute was intended to protect, . . . the consent having been once given and acted upon, cannot be recalled" McKinney v. Grand St. P. P. & F. Ry., 104 N. Y. 352, 355, 10 N. E. 544 (1887).

providence. On the one hand we have the reasoning of Dean Wigmore. "Since experience has shown that the testimony of physicians who might assist in the discovery of the truth is likely to be suppressed by the insured's claim of privilege, and since the contract of insurance is a voluntary transaction for both parties, the insurer's insistence on a provision of this sort in his contract is no more than a reasonable measure of self-protection."[20] On the other hand we have the theory of the Michigan Court. ". . . We remain of our opinion that . . . our statute clearly expresses the legislative intent to prohibit, as a matter of public policy, anticipatory waivers of this nature which are to become operative after the mouth of the patient is closed by death."[21]

The overwhelming weight of authority holds such clauses to be valid waivers which preclude an assertion of the privilege in an action on the policy,[22] while New York and Michigan hold these waivers invalid for reasons to be discussed presently.

Under the majority view such a clause is not only binding on the insured but enforceable against beneficiaries, or any person claiming any interest under the policy.[23] Under this line of authority the wording of the particular clause is strictly construed in order to limit the scope of the waiver. Therefore, where the stipulation is construed to limit the waiver to communications made to physicians who examined the insured prior to the signing of the application, the clause is not a waiver as to future communications.[24] But evidence of communica-

[20] 5 WIGMORE, *op. cit. supra* note 13, §2388(b).

[21] Gilchrist v. Mystic Workers of the World, 196 Mich. 247, 248, 163 N. W. 10, 11 (1917).

[22] Wirthlin v. Mut. Life Ins. Co., 56 F. (2d) 137 (C. C. A. 10th, 1932); Lincoln Nat. Life Ins. Co. of Ft. Wayne, Ind. v. Hammer, 41 F. (2d) 12 (C. C. A. 8th, 1930); New York Life Ins. Co. v. Renault, 11 F. (2d) 281 (D. C. D. N. J., (1926); Andreveno v. Mutual Reserve Fund Life Ass'n, 34 Fed. 870 (E. D. Mo., 1888); Trull v. Modern Woodmen of America, 12 Idaho 318, 85 Pac. 1081 (1906); Mutual Life Ins. Co. v. Willis, 37 Ind. App. 48, 76 N. E. 560 (1906); Sovereign Camp W. O. W. v. Farmer, 116 Miss. 626, 77 So. 655 (1918); Keller v. Home Life Ins. Co., 95 Mo. App. 627, 69 S. W. 612 (1902); Fuller v. Knights of Pythias, 129 N. C. 318, 40 S. E. 65 (1901); Templeton v. Mutual Life Ins. Co. of N. Y., 177 Okla. 94, 57 P. (2d) 841 (1936).

[23] Trull v. Modern Woodmen of America, 12 Idaho 318, 85 Pac. 1081 (1906); Mutual Life Ins. Co. v. Willis, 37 Ind. App. 48, 76 N. E. 560 (1906); Keller v. Home Life Ins. Co., 95 Mo. App. 627, 69 S. W. 612 (1902); Modern Woodmen of America v. Angle, 127 Mo. App. 94, 104 S. W. 297 (1907); Falkinburg v. Prudential Life Ins. Co. of America, 273 N. W. 478 (Neb. 1937); New York Life Ins. Co. v. Snyder, 116 Ohio St. 693, 158 N. E. 176 (1927).

At least one court following the majority rule has held that such a clause should be construed strongly against the insurer since insurer drew the contract and since such a stipulation is provided as a means of aiding the insurer to avoid the policy on the ground of fraudulent misrepresentations as to the health of the insured Turner v. Redwood Mutual Life Ass'n of Fresno, 13 Cal. App. (2d) 573, 57 P. (2d) 222 (1936).

[24] Pride v. Interstate Business Men's Ass'n of Des Moines, 207 Iowa 167, 216 N. W. 62 (1927).

Of course, the waiver in such a case is not anticipatory, in the sense of applying to future *communications;* but is anticipatory in the sense of applying to a future *claim of the privilege* at a later trial. Accordingly, this may or may not

tions made subsequent to the signing of the application is admissible where the clause provides for disclosures by any physician who ". . . heretofore attended or may hereafter attend . . ." the insured.[25] In those applications where the clause does not by its own terms define the extent of waiver, but merely provides for waiver of the statute, the scope will of course depend upon the construction of the statute itself.[26]

The New York statute[27] requires an express waiver at the time of the trial or at the time of the examination of the physician, and therefore such a stipulation is held not to be a waiver.[28] But the statute does not affect the validity of a stipulation made prior to its enactment.[29]

The Michigan Court holds these stipulations invalid[30] and attempts to justify its position on two grounds. The first is that public policy forbids such a waiver because it operates after death has sealed the lips of the insured and he cannot then raise his voice in contradiction. This argument takes no account of the possibility of a case arising in which the patient *himself* sues on an accident policy, the application for which contains such a clause. Should such a case arise[31] it would be impossible for the court logically to apply this argument, and if it intends to continue its policy of holding these waivers invalid it would necessarily have to resort to another line of reasoning. The second ground on which the Michigan Court bases its decision is that the Michigan statute creating the privilege[32] provides, by amendment,[33] only one situation in which the privilege may be waived, *viz.*, by the heirs at law of the patient in a contest of the patient's will. It is argued by the Michigan Court that the statute creates an "absolute privilege"[34] and that this

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fall within the ban of the Michigan Court's rule, depending upon which connotation it attaches to the term "anticipatory waiver."

[25] Metropolitan Life Ins. Co. v. Brubaker, 78 Kan. 146, 96 Pac. 62 (1908); Fuller v. Knights of Pythias, 129 N. C. 318, 40 S. E. 65 (1901).

[26] Sovereign Camp v. Farmer, 116 Miss. 626, 77 So. 655 (1917).

[27] "The last three sections (creating the privileged communications) apply to any examination of a person as a witness unless the provisions thereof are expressly waived upon the trial or examination by the person confessing, the patient or client" N. Y. CIV. PRAC. (Cahill, 1931) §354.

[28] Meyer v. Knights of Pythias, 198 U. S. 508, 25 Sup. Ct. 754, 49 L. ed. 1146 (1905), *aff'g* 178 N. Y. 63, 70 N. E. 111 (1904); Holden v. Metropolitan Life Ins. Co., 165 N. Y. 13, 58 N. E. 771 (1900); Davis v. Supreme Lodge, K. H., 165 N. Y. 159, 58 N. E. 891 (1900).

[29] Foley v. Royal Arcanum, 151 N. Y. 196, 45 N. E. 456 (1896); Dougherty v. Metropolitan Life Ins. Co., 33 N. Y. Supp. 873 (1895).

[30] Gilchrist v. Mystic Workers of the World, 188 Mich. 466, 154 N. W. 575 (1915); Gilchrist v. Mystic Workers of the World, 196 Mich. 247, 163 N. W. 10 (1917).

[31] A search of the Michigan decisions reveals no case involving these facts.

[32] COMP. LAWS MICH. (1929) §14216.

[33] *Ibid.* (Amended 1909.)

[34] It is difficult to understand what the Court means by the term "absolute privilege." An "absolute privilege" might refer (1) to a rule of outright *incompetency*—which is no privilege at all; or it might refer (2) to a gen-

amendment creates the sole exception to it.[35] This conclusion is not only inconsistent with the law applied to waiver of other statutory privileges but is also inconsistent with previous Michigan decisions which have held that the patient or those who represent him after his death may waive the privilege expressly,[36] or by failure to claim the privilege before the physician's testimony is admitted in evidence.[37]

The strictness of the Michigan rule and the weakness of its foundation leave no doubt that the majority rule represents the better view. The latter is consistent with the law pertaining to waiver of the other privileges for confidential communications[38] and is supported by the strong argument that the enforcement of these clauses greatly diminishes the possibility of recovery on fraudulent insurance claims.

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uind privilege which must be claimed, but which is "absolute" in the sense that it cannot be waived except by failure to claim it.

[35] Gilchrist v. Mystic Workers of the World, 188 Mich. 466, 475, 154 N. W. 575, 578 (1915).

[36] Fraser v. Jennison, 42 Mich. 206, 3 N. W. 882 (1897); Grand Rapids & Ind. R. R. v. Martin, 41 Mich. 667, 3 N. W. 173 (1897).

[37] Breisenmeister v. Knights of Pythias, 81 Mich. 525, 45 N. W. 977 (1890).

[38] 5 WIGMORE, EVIDENCE (2d ed. 1923) §§2327-2329, 2340.