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Evidence -- Physician-Patient Privilege -- Compelling Disclosure of Privileged Information -- Discretion of the Trial Judge

G. B. H.

so long as both the entrant and his informer are acting under a business duty.[39] The court's prohibition of multiple hearsay was obviously meant to exclude any extra-judicial statements made by a patient referring to the cause of his injury.[40]

In view of the court's liberal opinion in the *Sims* case, it would seem that in the future the only obstacle preventing more frequent use of hospital records as evidence will be the physician-patient privilege. But, now that it is clear that such records may be admitted, perhaps the trial judge will closely examine them and not hesitate to exercise the discretion granted him to disclose the privileged communication "if in his opinion it is necessary to a proper administration of justice."[41]

S. EPES ROBINSON

Evidence—Physician-Patient Privilege—Compelling Disclosure of Privileged Information—Discretion of the Trial Judge

While at common law no privilege was recognized for communications between patient and physician,[1] North Carolina[2] and over thirty other states[3] have by statute created such a privilege. The

[39] *E.g.*, Breneman Co. v. Cunningham, 207 N.C. 77, 175 S.E. 829 (1934); Firemen's Ins. Co. v. Seaboard Air Line Ry., 138 N.C. 42, 50 S.E. 452 (1905), where record entries made by a train dispatcher based upon information obtained from a station agent 100 miles away were admissible to show the position of a train at a given time.

[40] See note 20 *supra*.

[41] N.C. GEN. STAT. § 8-53 (1953), in addition to establishing the physician-patient privilege, provides that the trial judge may order the disclosure of such privileged communications in order to facilitate a proper administration of justice. This provision in the statute was enacted to provide against an injustice resulting from the suppression of evidence by the patient's claim of privilege. In *Sims*, the Supreme Court, recognizing the legislature's intended purpose in making this provision, cast considerable doubt upon the soundness of the trial judge's decision not to compel disclosure of the record.

[1] "If a surgeon was voluntarily to reveal these secrets, to be sure, he would be guilty of a breach of honor 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." The Duchess of Kingston's Trial, 20 How. St. Trials 573 (1776). See also Capps v. Lynch, 253 N.C. 18, 116 S.E.2d 137 (1960); State v. Martin, 182 N.C. 846, 849, 109 S.E. 74, 76 (1921); STANSBURY, EVIDENCE § 63 (1946).

[2] N.C. GEN. STAT. § 8-53 (1953). North Carolina enacted its privilege statute in 1885 and it has remained in its original form, without amendment, to date. A similar statutory privilege is also provided for communications between clergymen and communicants. N.C. GEN. STAT. § 8-53.1 (Supp. 1961).

[3] New York in 1828 became the first state to depart from the common-law rule and provide for the privilege. Since then over two-thirds of the states have enacted similar legislation. See 8 WIGMORE, EVIDENCE § 2380 n.5 (McNaughton rev. 1961) where these statutes are compiled and quoted.

avowed object of the privilege is to inspire confidence in the patient and encourage him to make full and frank disclosure to the physician as to his symptoms and conditions.[4]

This privilege has often been criticized on the ground that it deprives the courts of relevant and reliable facts which in many cases would materially affect the outcome of litigation. The usefulness of such legislation has been further questioned by the contention that the object of the privilege—to encourage disclosure to the physician—is unrealistic. It is argued that seldom would a person be deterred from seeking medical aid and disclosing his conditions merely because of the possibility that such information could be used in a subsequent judicial hearing.[5]

The North Carolina General Assembly has enacted what is acclaimed by some as the most desirable form of a privilege statute.[6] By recognizing that the privilege may hamper the proper administration of justice by concealing the entire truth, but at the same time realizing that a patient must be able to place the utmost faith and confidence in his attending physician, a delicate balance was struck. The North Carolina statute provides:

> No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon: *Provided, that the presiding judge*

[4] Yow v. Pittman, 241 N.C. 69, 84 S.E.2d 297 (1954); State v. Martin, 182 N.C. 846, 109 S.E. 74 (1921). The New York Commissioners on Revision stated with respect to the privilege, "unless such consultations are privileged men will be incidentally punished by being obligated to suffer the consequences of injuries without relief from the medical art." Quoted in McCORMICK, EVIDENCE § 101, at 212 n.6 (1954). The North Carolina privilege statute is adapted from the original New York statute.

But see McCORMICK, *op. cit. supra* at 212 where the author states with reference to the theory of "full and frank disclosure" to the physician as the basis of the privilege: "if this were the only interest involved it is hard to suppose that the desire for privacy would outweigh the need for complete presentation of the facts in the interest of justice."

[5] See 8 WIGMORE, *op. cit. supra* note 3, at § 2380(a); Chaffee, *Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?*, 52 YALE L.J. 607 (1943); Purrington, *An Abused Privilege*, 6 COLUM. L. REV. 388 (1906).

[6] See 8 WIGMORE, *op. cit. supra* note 3, § 2381, at 832. The American Bar Association Committee on the Improvement of the Law of Evidence, in 1937-38, recommended retention of the physician-patient privilege, but with the addition of the North Carolina exception.

of a superior court may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice.[7]

By allowing the trial judge, in his discretion, to compel disclosure of what would normally be privileged information, it is generally felt that the evils of a physician-patient privilege are minimized.[8] Nevertheless, the recent case of *Sims v. Charlotte Liberty Mut. Ins. Co.*[9] vividly illustrates that such is not always the case.

In *Sims* the beneficiary sued to recover the proceeds of a life insurance policy. The defendant contended it was only obligated to refund the premiums because the insured had made material misrepresentations in the application for insurance which was the basis for the issuance of the policy. The defense was based on hospital records which showed that "the insured, nineteen days after she

[7] N.C. GEN. STAT. § 8-53 (1953). (Emphasis added.)

In order for the privilege to exist, there must exist the relation of physician and patient at the time the information in question is obtained. State v. Wade, 197 N.C. 571, 150 S.E. 32 (1929); State v. Newsome, 195 N.C. 552, 143 S.E. 187 (1928); State v. Martin, 182 N.C. 846, 109 S.E. 74 (1921). The information sought to be suppressed on the grounds of privilege must be information which was necessary to enable the physician to perform his professional services for the patient. Non-confidential matters are thus apparently not privileged. Capps v. Lynch, 253 N.C. 18, 116 S.E.2d 137 (1960); State v. Newsome, *supra;* State v. Martin, *supra;* Smith v. John L. Roper Lumber Co., 147 N.C. 62, 60 S.E. 717 (1908). The privilege will extend to all information obtained by the physician for the purpose of prescribing for the patient regardless of whether such information is received by direct communication from the patient himself, or is obtained by the physician through his own examination and observation. Smith v. John L. Roper Lumber Co., *supra.* The privilege is that of the patient alone and cannot be taken advantage of by another. Capps v. Lynch, *supra;* State v. Wade, *supra;* State v. Martin, *supra.* The privilege may be waived by the patient, or after the patient's death, by his personal representative. For a discussion of the problem of waiver, see Note, 16 N.C.L. REV. 53 (1937). If the trial judge decides to exercise his statutory power, and compel disclosure of what would otherwise be privileged information, a finding that the disclosure is necessary "to a proper administration of justice" must appear on the record. Metropolitan Life Ins. Co. v. Boddie, 194 N.C. 199, 139 S.E. 228 (1927), discussed in Note, 6 N.C.L. REV. 85 (1927).

[8] In MCCORMICK, *op. cit. supra* note 4, § 108, at 224, the author states with respect to the North Carolina privilege statute: "A clear-eyed and courageous judiciary, trial and appellate, with an appreciation of the need for truth and a fear of the suppression, could draw the danger of injustice from the privilege, under this provision."

The Virginia privilege statute similarly provides that the trial judge may compel disclosure of what would otherwise be privileged communications if such is felt to be necessary in the interest of justice. VA. CODE ANN. § 8-289.1 (Supp. 1962). The remainder of the privilege statutes in effect in other jurisdictions, do not provide for such an exception.

[9] 257 N.C. 32, 125 S.E.2d 326 (1962).

applied for insurance and five days after issuance of the policy, was suffering from cirrhosis, chronic pancreatitis, tubular nephrosis and chronic alcoholism";[10] whereas in the application, the insured represented that she was in good health, and had never had heart or kidney trouble, high blood pressure, or any other disease not specifically mentioned. The trial court excluded these hospital records without assigning any reason for its ruling.[11] To this exclusion an exception was taken, and the insurance company, appealing from an adverse verdict, claimed such exclusion to be error.

When evidence is excluded by the trial court without assigning a reason for its ruling, and the question of the admissibility of such is the basis of an appeal, the lower court's ruling will be affirmed if the evidence in question was inadmissible on *any* legal ground.[12] Thus in *Sims* if the hospital records were inadmissible for any reason, there was no error. The plaintiff on appeal claimed that the records were properly excluded on the grounds of (1) hearsay, and (2) privileged communication between patient and physician.[13] The court rejected the first contention, stating that even though the hospital records were hearsay, they were nevertheless admissible under the business records exception to the hearsay rule.[14] The court held, however, that the records did constitute privileged communications between physician and patient and accordingly affirmed the exclusion.[15]

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[10] *Id.* at 39, 125 S.E.2d at 331.

[11] *Id.* at 34, 125 S.E.2d at 328; Record, p. 18, Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962).

[12] 5 C.J.S. *Appeal & Error* § 1464(3) (1958); *cf.* Temple v. Temple, 246 N.C. 334, 98 S.E.2d 314 (1957); State v. Fleming, 204 N.C. 40, 167 S.E. 483 (1932).

[13] It should be noted that on appeal, the defendant insurance company confined its argument with respect to the hospital records to the question of hearsay. No argument on the question of exclusion on the grounds of privilege was made.

[14] The fact that the hospital records were admissible under the business records exception to the hearsay rule is discussed in Note, 41 N.C.L. REV. 621 (1963).

[15] There is some controversy over whether hospital records should constitute communications between physician and patient and be subject to the privilege. The court, in holding that G.S. § 8-53 did apply to hospital records insofar as they contain entries made by the attending physician or surgeon, or under their direction, first noted that the statute "extends not only to information orally communicated by the patient, but to knowledge obtained by the physician or surgeon through his own observation or examination while attending the patient in a professional capacity and which was necessary to enable him to prescribe." Quoting from Smith v. John L. Roper Lumber Co., 147 N.C. 62, 64, 60 S.E. 717, 71 (1908). The construction

The inequities of the *Sims* decision are apparent. Evidence which would tend to show a misrepresentation sufficient to invalidate the insurance policy[16] was suppressed because of the physician-patient privilege. It is indeed questionable whether the benefits to be derived by the deceased-insured keeping his infirmities confidential outweigh the benefits to be gained, in the form of substantial justice, from a full disclosure of the facts.[17] It would seem that the present

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placed on the statute by the court in *Smith* was dictum, but it has been accepted and repeated by the court in later cases. See, *e.g.*, Brittain v. Piedmont Aviation, Inc., 254 N.C. 697, 120 S.E.2d 72 (1961). The court further relied upon Annot., 22 A.L.R. 1217 (1923) wherein it is stated that the privilege extends to a hospital physician. It was felt that if a hospital physician was incompetent personally to testify, then information obtained by him and recorded in records was similarly inadmissible. The court was careful to limit their holding to entries made by the physician, or under his direction, which pertain to communications and information obtained in attending the patient, such information being necessary to enable him to prescribe for the patient. "Any other information contained in the records, if relevant and otherwise competent, is not privileged. The effect of the statute is not extended to include nurses, technicians, and others, unless they were assisting or acting under the direction of a physician or surgeon." 257 N.C. at 38, 125 S.E.2d at 331.

Justices Higgins and Parker concurred in the result, but felt that G.S. § 8-53 should not apply to hospital records. Justice Higgins states: "To me, the exclusion of hospital records is as out-of-date as the bustle, asafoetida, and the tomahawk. The statute does not require the exclusion unless a modern hospital is *a person duly authorized to practice physic,* and then only as to information *he* may have acquired." 257 N.C. at 42, 125 S.E.2d at 334.

The majority of the jurisdictions hold that hospital records do constitute privileged information insofar as they contain data acquired by the attending physician or under his direction. See McCORMICK, *op. cit. supra* note 4, § 290, at 613; 8 WIGMORE, *op. cit. supra* note 3, § 2382, at 839; Annots., 75 A.L.R. 378 (1931); 120 A.L.R. 1124 (1939); *cf.* Annots., 44 A.L.R.2d 553 (1955); 79 A.L.R.2d 890, 914 (1961).

[16] The insurance policy in question provided: "I agree that no obligation shall exist against said Company... unless upon said delivery of the policy I shall be alive and in good health." Even absence such a provision in the policy, it has been held that a misrepresentation of the type involved is a material misrepresentation and is sufficient to invalidate the policy. Tolbert v. Mutual Benefit Life Ins. Co., 236 N.C. 416, 72 S.E.2d 915 (1952).

[17] In actual practice the evidence is concealed only from the jury. In the present case the contents of the hospital records were revealed to the attorneys and the presiding judge, as well as all in the court room; for as is the usual practice with objectional evidence, the jury was sent out and the evidence presented so that the judge might rule on it. The contents of the hospital records not only appear in the Superior Court Record, but also are found in the Supreme Court Report of the case. Thus in reality, the only object served by the exclusion is to prevent the jury from knowing the truth at the time of the trial. How is the patient then benefited by the privilege—possibly only in the form of an unjust insurance claim allowed because of suppression of evidence.

The insurance company could have protected itself in one of two ways. It could have included a waiver clause in the policy providing that the

case was one in which the trial judge should have, in the exercise of his discretion, required disclosure for the proper administration of justice. The supreme court was apparently of the same opinion, for they clearly intimate in their opinion that it would have been proper for the trial judge to exercise his discretionary authority and allow the hospital records into evidence. Foreseeing possible inequities in the future because of the privilege, the court further stated "judges should not hesitate to require the disclosure where it appears to them to be necessary in order that the truth be known and justice be done."[18]

Why did the supreme court refuse to overrule the trial court's exclusion in view of the recognized injustice resulting from the exclusion of the records? The court assigned as its reason "the absence of a finding by the trial court that in its opinion, the admission of the hospital records was necessary to a proper administration of justice"[19] and without such a finding, the court felt that it was bound to hold the exclusion without error.

It can be argued that, under the circumstances, the absence of a finding of necessity by the trial judge should not bind the court on appeal. When evidence is excluded at the trial without reason, such exclusion will be affirmed on appeal if excludable on any ground. Thus in *Sims* the court was required to consider all possible grounds for exclusion. There being only one ground for exclusion—the physician-patient privilege—since hearsay was eliminated, the question was whether or not it was permissible for the trial judge to exclude the records on this ground. An argument may be constructed that such an exclusion would be error.

If privileged communication was the basis of the trial court's exclusion, the presumption on appeal is that the court made this ruling in the exercise of its discretion rather than as a matter of law.[20] While a discretionary order of the trial judge is generally

physician-patient privilege is waived in certain cases. The use of such a clause is discussed in Note, 16 N.C.L. REV. 53 (1937). The insurance company could also have required a physical examination prior to the issuance of the policy. Because of the low value of the policy, no medical exam was required in the present case.

[18] 257 N.C. 32, 39, 125 S.E.2d 326, 331.

[19] *Id.* at 39, 125 S.E.2d at 332.

[20] Brittain v. Piedmont Aviation, Inc., 254 N.C. 697, 703, 120 S.E.2d 72, 76 (1961). It is clear that if the trial judge excluded the evidence as a matter of law, rather than in the exercise of its discretion, the exclusion would be in error. Capps v. Lynch, 253 N.C. 18, 116 S.E.2d 137 (1960).

conclusive on appeal, such is not the case if the trial judge appears to have abused his discretionary authority.[21] Thus in *Sims* the court on appeal could well have concluded that *if* the trial judge excluded the records because of privilege—and it will be presumed that such exclusion is the result of an exercise of discretion—he abused his discretion. The records were hence not excludable on the grounds of privilege. This would be a desirable result for it would seem to be clearly an abuse of discretion to fail to compel disclosure of evidence which would materially alter the outcome of the litigation involved.

In an earlier North Carolina case the court was faced with an almost identical fact situation. In *Creech v. Sovereign Camp of the Woodmen of the World*[22] the defendant denied liability on an insurance policy on the grounds of misrepresentations of a material character in an application for insurance. The insured had claimed that he had suffered no disease within the past five years. The defendant sought to introduce into evidence testimony of a physician which would have shown that he had treated the insured in recent years. The trial judge excluded this testimony on the grounds of privilege, and further refused in the exercise of his discretion to require disclosure. On appeal, the exclusion was affirmed. While it could be argued that the effect of this decision is to hold that a refusal to compel a physician's testimony which shows a misrepresentation on an insurance policy application does not constitute an abuse of discretion, such does not in fact appear to be the impact of this decision. In *Creech* the evidence showed that the insured died of pneumonia contracted due to exposure on a hunting trip. The

[21] While there has thus far been no case in which a trial court's exclusion of evidence on the grounds of privilege has been reversed because of an abuse of discretion, it is nevertheless felt that such is the rule. With respect to other discretionary rulings by the trial judge, the rule is clearly established that such are subject to review and reversal in cases of an abuse of discretion. See, *e.g.*, Ponder v. Cobb, 257 N.C. 281, 126 S.E.2d 67 (1962); Goldston v. Wright, 257 N.C. 279, 125 S.E.2d 462 (1962); State v. Grundler, 251 N.C. 177, 111 S.E.2d 1 (1959); In the Matter of Humphrey, 236 N.C. 142, 71 S.E.2d 915 (1952); Elliott v. Swartz Indus., Inc., 231 N.C. 425, 57 S.E.2d 305 (1949). See generally 1 STRONG, N.C. INDEX *Appeal & Error* § 46 (1957).

The Virginia privilege statute (see note 8 *supra*) which similarly vests discretionary power in the trial judge to compel disclosure has not been interpreted on this point.

[22] 211 N.C. 658, 191 S.E. 840 (1937). While there is language in this case to the effect that a discretionary ruling of a trial judge is not reviewable, it is believed that the rule is otherwise in cases of an *abuse* of discretion. See note 21 *supra*.

death was in no way connected with the misrepresentation in the insurance application. In fact the court stated: "We cannot see how defendant was prejudiced by the exclusion of the evidence of the physician."[23] Thus this case simply seems to be one in which the court on appeal felt that the interests of justice would *not* be promoted by requiring disclosure by the physician, and consequently there was no abuse of discretion in refusing to admit the testimony into evidence.[24]

In the principal case the misrepresentations were directly related to the cause of death—the death was actually the result of a disease which the insured represented he did not have. Thus *Sims* presents a much stronger case for reversal on the grounds of abuse of discretion than did the *Creech* case where the death was unrelated to the insured's misrepresentations.

While the inequities of the *Sims* case may be more academic than real in that a new trial was granted on other grounds,[25] it may nevertheless represent an unfortunate precedent for the exclusion of physician-patient information. It is hoped that in the future the court will not consider this case as a binding precedent for the proposition that privileged information such as here, which will materially affect the outcome of the litigation, may nevertheless be excluded by the trial judge and such exclusion is not subject to review. Had the court on appeal adopted the procedure suggested in reviewing the exclusion of the hospital records, possible confusion as to the meaning of this decision would have been avoided, and the delicate balance of interests embodied in the North Carolina privilege statute would have been preserved.

G.B.H.

Outlawry: Another "Gothic Column" in North Carolina

Once one of the law's most potent weapons, outlawry has been relegated in modern society to an existence as an historian's curiosity. It is obsolete in England and exists in any form in only three of the United States.

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[23] *Id.* at 662, 191 S.E. at 843.

[24] In Metropolitan Life Ins. Co. v. Boddie, 196 N.C. 666, 146 S.E. 598 (1929) there is also language which would seem to intimate that exclusion of medical testimony tending to show misrepresentations by the insured on his application is not an abuse of discretion by the trial judge. However, this language is dictum in that this was not the issue raised and decided by the appeal.

[25] The new trial was granted for an error in the charge.