Michigan Law Review

Volume 54 | Issue 3

1956

Evidence - Physician - Patient Privilege - Applicability to Communication Between State Mental Hospital Psychiatrist and Criminal Internee

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EVIDENCE — PHYSICIAN-PATIENT PRIVILEGE — APPLICABILITY TO COMMUNICATION BETWEEN STATE MENTAL HOSPITAL PSYCHIATRIST AND CRIMINAL INTERNEE—Defendant was committed to a public mental hospital[1] before standing trial on an indictment for robbery. One year later he was brought to trial after being discharged from the hospital as mentally competent. His only defense was insanity. The psychiatrist who had been appointed by the court to examine the defendant testified in support of this defense. The prosecution, in turn, introduced the testimony of the hospital psychiatrist

[1] Pursuant to 18 U.S.C. (1952) §4244, p. 2579.

who had attended the defendant during his internment. This psychiatrist was instructed by the trial court that communications between him and the defendant were not privileged. Accordingly, he testified that the defendant had told him that his insanity was feigned. It was the hospital psychiatrist's belief that at the time of the hospital examinations the defendant was competent to distinguish between right and wrong. Defendant was found guilty and convicted. On appeal, *held,* reversed, one judge dissenting. Information obtained by a psychiatrist of a public mental hospital while attending an inmate comes within the provisions of the District of Columbia privilege statute[2] which makes such confidential information inadmissible in evidence. *Taylor v. United States,* (D.C. Cir. 1955) 222 F. (2d) 398.

The common law did not provide a privilege for communications between physician and patient.[3] However, statutes enacted by thirty-one states[4] exclude such testimony and preserve the confidences between physician and patient in order to encourage the seeking of medical care.[5] Although it can be argued that this privilege applies to psychiatrists simply because they are physicians,[6] distinctions are made between the case where the patient is examined only as to his mental fitness[7] and the case where he is treated for mental illness.[8] In the former, the communications are not privileged because the purpose of the usual doctor-patient relationship, the seeking of treatment, is not present. Since the defendant in the principal case was committed for treatment, the issue of the statute's applicability relates to the broader question of whether the necessary relationship exists between a state hospital psychiatrist and a committed inmate.[9] A psychia-

2 "In the courts of the District of Columbia no physician or surgeon shall be permitted, without the consent of the person afflicted, or of his legal representative, to disclose any information, confidential in its nature, which he shall have acquired in attending a patient in a professional capacity and which was necessary to enable him to act in that capacity. . . ." D.C. Code (1951) §14-308.

3 MCCORMICK, EVIDENCE §101 (1954).

4 For a recent compilation, see 47 N.W. UNIV. L. REV. 384 (1952).

5 See Stayner v. Nye, 227 Ind. 231, 85 N.E. (2d) 496 (1949); 8 WIGMORE, EVIDENCE, 3d ed., §2380a, p. 810 (1940).

6 See 47 N.W. UNIV. L. REV. 384 (1952) for a discussion of the applicability of the privilege to psychiatrists absent a statutory privilege for doctors generally. Two states which have no privilege for physicians have recently enacted one for clinical psychologists. Ga. Code Ann. (1937; Supp. 1951) tit. 84, §84-3118; Ky. Rev. Stat. (1953) §319.110.

7 See 107 A.L.R. 1491 (1937); Hopkins v. State, 212 Miss. 772, 55 S. (2d) 467 (1951).

8 Casson v. Schoenfeld, 166 Wis. 401, 166 N.W. 23 (1918); Linscott v. Hughbanks, 140 Kan. 353, 37 P. (2d) 26 (1934).

9 In the principal case, the dissent believed that the rationale of the cases which hold that no doctor-patient relationship exists when an accused person is examined by government doctors should apply, drawing a distinction between government officers and private physicians, rather than between examination and treatment. Supporting this view are Liske v. Liske, (Sup. Ct. 1912) 135 N.Y.S. 176 (hospital records required by Mental Hygiene Law held admissible in annulment proceedings) and Scolavino v. State of New York, 187 Misc. 253, 62 N.Y.S. (2d) 17 (1946), affd. 297 N.Y. 460, 74 N.E. (2d) 174 (1947) (hospital records required by Mental Hygiene Law held admissible in action against the state for negligence). For later New York cases to the contrary, see note 11 infra.

trist must encourage the patient to divulge his innermost thoughts,[10] and, when a committed patient cooperates in this method of treatment in order to further his recovery, his statements to the therapist should fall within the protection of the statute. Accordingly, most courts have held that the privilege applies to communications between public hospital physicians and committed patients.[11] Under the privilege statutes not only must the information be disclosed in confidence to the psychiatrist in his professional capacity, but it must also be related to the patient's treatment.[12] Since any statement a mental patient might make to his doctor could conceivably be related to his treatment, and since hospital psychiatrists usually conduct their consultations in their professional capacity,[13] these requirements ordinarily would be met. Nevertheless, in criminal insanity cases policy may dictate that the privilege be lifted in order to permit the better administration of justice.[14] In several states the privilege of the statutes is limited to civil actions[15] or there are specific exemptions for certain criminal indictments.[16] The statute in the principal case removes the privilege in homicide and criminal battery cases when required in the interest of public justice.[17] In assessing the value of the privilege as it applies to communications between a state hospital psychiatrist and a committed criminal patient, several considerations must be taken into account. First, the preservation of the privilege would tend to promote the early recovery of the criminally insane by encouraging them to disclose freely their repressed thoughts. Secondly, it may be argued that the state sets a trap for the patient by committing him pending trial, only to use statements he made in confidence to a hospital doctor to convict him when and if he can stand trial. On the

[10] GUTTMACHER AND WEIHOFEN, PSYCHIATRY AND THE LAW 272 (1952).

[11] Westphal v. State, 191 Misc. 688, 79 N.Y.S. (2d) 634 (1948); McGrath v. State, 200 Misc. 165, 104 N.Y.S. (2d) 882 (1950). See also Lumpkin v. Metropolitan Life Ins. Co., 75 Ohio App. 310, 62 N.E. (2d) 189 (1945), affd. 146 Ohio St. 25, 64 N.E. (2d) 63 (1945); 22 A.L.R. 1217 (1923). But see note 9 supra.

[12] See, e.g., D.C. Code (1951) §14-308.

[13] Exceptions will of course arise, as in Commonwealth v. Sykes, 353 Pa. 392, 45 A. (2d) 43 (1946), where a communication to the hospital psychiatrist was held not privileged because he received it in his capacity as superintendent and not as physician.

[14] For other situations where the privilege is denied for policy reasons, see 8 WIGMORE, EVIDENCE, 3d ed., §2385, p. 825 (1940); 45 A.L.R. 1357 (1926); 2 A.L.R. (2d) 647 (1948).

[15] 2 Idaho Code (1948) §9-203; Mont. Rev. Code Ann. (1949) tit. 93, §93-701-4; Ore. Rev. Stat. (1953) c. 44, §44.040; Pa. Stat. Ann. (Purdon, 1930) tit. 28, §328; S.D. Code (1939) tit. 36, §36.0101; Utah Code Ann. (1953) tit. 78, §78-24-8.

[16] D.C. Code (1951) §14-308 (homicide or criminal battery); Wis. Stat. (1953) c. 325, §325.21 (homicide). A few states make special provision for a criminal privilege. Ariz. Code Ann. (1940) §23-103; La. Rev. Stat. (1950) tit. 15, §476; Minn. Stat. (1954) §595.02; Miss. Code Ann. (1944; Supp. 1954) §1697; Wash. Rev. Code (1952) tit. 10, §10.52020.

[17] D.C. Code (1951) §14-308. Application of the "public justice" criterion is a matter of discretion with the trial judge. Catoe v. United States, (D.C. Cir. 1942) 131 F. (2d) 16. Cf. N.C. Gen. Stat. (1953) §8-53; ALI MODEL CODE OF EVIDENCE, rules 222, 223 (1942). In the principal case, the dissenting opinion urges judicial extension of the statutory exception to the situation presented.

other hand, retention of the privilege permits the accused to select as witnesses only those psychiatrists who will testify favorably and to silence those who could expose a fabricated insanity defense.[18] In light of the severe criticism of the doctor-patient privilege generally,[19] it may be time for the legislatures to review the policy of the statutes, at least as they apply to criminal inmates and state hospital psychiatrists.

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18 The problem of false insanity defenses could possibly be solved by an improved administration of the insanity tests given before the criminal is committed.

19 Chafee, "Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?" 52 YALE L. J. 607 (1943); MCCORMICK, EVIDENCE, §108 (1954); 8 WIGMORE, EVIDENCE, 3d ed., §2380a (1940).