Michigan Law Review

Volume 45 | Issue 1

1946

EVIDENCE -WITNESSES - PRIVILEGED COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT--STATUTORY EFFECT OF ASSERTING PRIVILEGE IN ACTIONS ON INSURANCE CONTRACTS

William H. Buchanan S.Ed.
University of Michigan Law School

Follow this and additional works at: https://repository.law.umich.edu/mlr

 Part of the Contracts Commons, Evidence Commons, Health Law and Policy Commons, and the Insurance Law Commons

Recommended Citation
William H. Buchanan S.Ed., *EVIDENCE -WITNESSES - PRIVILEGED COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT--STATUTORY EFFECT OF ASSERTING PRIVILEGE IN ACTIONS ON INSURANCE CONTRACTS*, 45 MICH. L. REV. 106 (1946).
Available at: https://repository.law.umich.edu/mlr/vol45/iss1/10

This Regular Feature is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

EVIDENCE — WITNESSES — PRIVILEGED COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT—STATUTORY EFFECT OF ASSERTING PRIVILEGE IN ACTIONS ON INSURANCE CONTRACTS—Plaintiff, beneficiary of an insurance policy (but not the personal representative of the deceased insured), sued to recover the amount of the policy from the insurance company. As a defense the defendant claimed that the policy never became effective because the insured had made material misrepresentations in the application as to his state of health. To show that there had been such misrepresentations, the defendant proved that the insured had been treated by physicians during the five years preceding the issuance of the policy. Upon objection by plaintiff the court excluded the testimony of the doctors as to the nature of the illness for which the insured was treated. *Held*, the admission of the privileged testimony could be objected to by any party to the litigation, and because of statute [1] the court must presume a material misrepresentation and award judgment to the defendant. *Roth v. Equitable Life Assurance Society of United States*, (N.Y. S. Ct. 1945) 59 N.Y.S. (2d) 707.

It is the usual rule [2] that the only person who can assert the privilege of a communication between a physician and his patient is the patient or his personal representative, and the New York holding that any party to the litigation could assert the privilege seems to be an exception to this rule. This physician-patient privilege, which was originally designed to encourage a person to talk freely to his doctor regarding his ailments,[3] was often used to prevent insurance companies

[1] N.Y. Insurance Law, § 149, subd. 4, 27 N.Y. Consol. Laws (McKinney, 1940). This statute provides that if any misrepresentation as to medical treatment or consultation is proved, and the insured or any other person having or claiming a right under such contract shall prevent full disclosure and proof of the nature of the disease ailment or other medical impairment for which treatment or care was given, such misrepresentation shall be presumed to have been material.

[2] 8 WIGMORE ON EVIDENCE, 3d ed., § 2386 (1940).

[3] 28 R.C.L. 532 (1921) and cases there cited; 8 WIGMORE ON EVIDENCE, 3d ed., §§ 2380a, 2383 (1940). "There is little to be said in favor of the privilege, and a great deal to be said against it." Id., § 2380a at p. 814.

from revealing that insured persons made material misrepresentations concerning their medical histories when application for the insurance was made.[4] Actions by the insured in the case of disability or accident insurance were often aided by the assertion of the privilege, and, because of the statutory language, the defendant insurer was unable to reveal that the plaintiff was not entitled to recovery. The same difficulties appeared in the case of life insurance policies where the plaintiff was the personal representative of the deceased insured. Realizing that the courts' hands were tied by their interpretation of the privilege statutes, some legislatures passed laws limiting the right to assert the privilege.[5] However, where the relief from the legislatures was not broad enough, or, more often, where the legislatures failed to act at all, the insurance companies began to make a waiver of this privilege a condition of the policy.[6] The New York statute relied on in the principal case, is no doubt an attempt to correct the evils resulting from the use of the privilege in insurance cases. The broad interpretation given to it, although, in effect, it prevents assertion of the privilege in actions on insurance contracts, will do much to prevent recovery on fraudulent claims.[7] It is hoped, in the interests of justice, that the many states which followed the example of New York in enacting their statutes giving a privileged status to the physician-patient communications [8] will follow New York in eliminating the privilege in actions on insurance contracts where their courts have refused to hold valid a waiver provision in the contract itself.[9]

William H. Buchanan, S.Ed.

[4] See, e.g., Renihan v. Dennin, 103 N.Y. 573 at 580, 9 N.E. 320 (1886); Siebern v. Mutual Life Insurance Co. of New York, 69 App. Div. 846, 55 N.Y.S. (2d) 603 (1945).

[5] See, e.g., Uniform Narcotic Drug Act, § 17, par. 2 (1932); Mich. Comp. L. (1929) § 8435 (Workmen's Compensation).

[6] Such a waiver has been sustained by most courts. However, New York and Michigan have held such waivers to be invalid. Knights of Pythias v. Meyer, 198 U.S. 508, 25 S. Ct. 754 (1905), affirming 178 N.Y. 63, 70 N.E. 111 (1904); Gilchrist v. Mystic Workers of the World, 188 Mich. 466, 154 N.W. 575 (1915). See note, 16 N.C. L. REV. 53 (1937).

[7] By "fraudulent" the writer does not mean a conscious effort on the part of any particular plaintiff to defraud the defendant insurer, but rather an exaction of payment from such a defendant brought about by actions preventing the insurer from showing circumstances which would excuse it from payment.

[8] New York was the first state to adopt a physician-patient privileged communication statute, N.Y. Rev. Stat. (1828) II, 406 (Part III, c. VII, art. 9, § 73), and many of the states which subsequently adopted such statutes used the New York statute as a model. 8 WIGMORE ON EVIDENCE, 3d ed., § 2380 (1940).

[9] Note 6, supra.