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WAIVER OF THE PHYSICIAN-PATIENT PRIVILEGE IN MISSOURI

I. INTRODUCTION

There was no such thing as the physician-patient privilege at common law.¹ Under the common law a physician was required to testify to privileged matters at trial;² however, there was still an ethical obligation in the medical profession not to disclose privileged matters. The physician-patient privilege was only the result of statutory enactment. New York in 1828 was the first American jurisdiction to pass such a statute³ and Missouri followed in 1835.⁴ Today, only about one-third of the American jurisdictions do not have the physician-patient privilege.⁵ The purpose behind the passage of these statutes was to protect the patient. It was felt that the patient would not make a full disclosure to his physician of his illness because he feared that the physician might be compelled to disclose in court the details of the illness and treatment. After the enactment of the statute, the patient, without fear, could disclose all relevant matters to his physician and get the best possible treatment.⁶

The present Missouri privilege statute is as follows:

The following persons shall be incompetent to testify: . . . (5) a physician or surgeon, concerning any information which he may have acquired from any patient while attending him in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician or do any act for him as a surgeon.⁷

1. *Randolph v. Supreme Liberty Life Ins. Co.*, 359 Mo. 251, 221 S.W.2d 155 (En Banc 1949); *Blankenbaker v. St. Louis & S.F.R. Co.*, 187 S.W. 840 (Mo. 1916); *Epstein v. Pennsylvania R.R.*, 250 Mo. 1, 156 S.W. 699 (En Banc 1913).

2. *Duchess of Kingston's Trial*, 20 How. St. Tr. 355 (1776).

3. N. Y. Rev. St. 1828, II, 406 (Part III c. VII, art. 9, § 73).

4. Mo. Laws 1835, p. 623, § 17.

No person authorized to practice physic or surgery, shall be required or allowed to disclose any information which he may have acquired from any patient, while attending him in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon.

5. Examples of such jurisdictions are Connecticut, Delaware, Florida, Georgia, Maine, Maryland, Massachusetts, New Jersey, Rhode Island, Tennessee, Texas, Vermont, and West Virginia.

6. The Missouri courts have recognized this purpose behind the physician-patient privilege. In *Hartley v. Calbreath*, 127 Mo. App. 559, 565, 106 S.W. 570, 572 (K.C. Ct. App. 1907), the court said: "The primary object of the statute is the relief of the patient, and to that end it has made the way clear for him to permit a complete examination and to give full and free communication of everything connected with his ailment which may be necessary to enable the physician to prescribe for him." See also *Epstein v. Pennsylvania R. Co.*, 250 Mo. 1, 156 S.W. 699 (En Banc 1913); *Webb v. Met. Street Ry.*, 89 Mo. App. 604 (K.C. Ct. App. 1901); *Groll v. Tower*, 85 Mo. 249 (1884).

7. § 491.060(5), RSMo 1959. It should be noticed how similar this is to the original Missouri statute, *supra* note 4.

Even though the statute speaks of being "incompetent to testify" the statute has been interpreted to mean that it creates a physician-patient privilege. To claim the benefit of this statute two requirements must be met. First, there must be a professional relationship between the physician and the patient. There need not be an expressed or implied contract, but there must be an intent on the part of both for treatment of medical problems. However, if only the patient intends treatment, there is still a privilege because the purpose of the statute is to protect the patient.⁸ Second, the information must have been furnished for the purpose of treatment or prescription. Facts outside of the treatment are not privileged, including statements as to the cause of the condition for which the patient is obtaining treatment.⁹

II. WAIVER

In Missouri, unlike most jurisdictions, there is no general statute which specifies acts which amount to a waiver of the privilege. Waiver of the privilege is, however, found in Missouri case law. In *Carrington v. City of St. Louis*¹⁰ and *Blair v. Chicago & A. Ry. Co.*¹¹ the defendants objected to the testimony given by the treating physician which was offered by the plaintiff-patient. In both cases the court held that the statutory privilege did not create an absolute disqualification, and thus the patient was able to waive it.

A. Who May Waive the Privilege

In general, the same people who are able to claim the privilege are able to waive it. First, it may be waived by the patient; the treating physician cannot waive it because it is for the protection of the patient.¹² Second, those in privity with the patient are able to waive the privilege as well as claim it. Those considered in privity with the patient are: (a) devisees and heirs at law,¹³ (b) beneficiaries under an insurance policy,¹⁴ (c) representatives of the deceased patient,¹⁵ and (d) representatives under a wrongful death action.¹⁶ A natural guardian can

8. *Smart v. Kansas City*, 208 Mo. 162, 105 S.W. 709 (1907).

9. *See State v. Cochran*, 356 Mo. 778, 203 S.W.2d 707 (1947), which applies this conclusion but is decided on other grounds. For a good discussion of the physician-patient privilege in Missouri see Peterson, *The Patient-Physician Privilege in Missouri*, 20 K.C. L. Rev. 122 (1952).

10. 89 Mo. 208, 1 S.W. 240 (1886).

11. 89 Mo. 383, 1 S.W. 350 (1886). *See also* *Groll v. Tower*, 85 Mo. 249 (1884).

12. *Foerstel v. St. Louis Public Service Co.*, 241 S.W.2d 792 (St. L. Mo. App. 1951); *Marx v. Parks*, 39 S.W.2d 570 (St. L. Mo. App. 1931); *Cromeenes v. Sovereign Camp of Woodmen of the World*, 205 Mo. App. 419, 224 S.W. 15 (Spr. Ct. App. 1920); *Blair v. Chicago & A. Ry.*, 89 Mo. 383, 1 S.W. 350 (1886); *Carrington v. City of St. Louis*, 89 Mo. 208, 1 S.W. 240 (1886).

13. *Thompson v. Ish*, 99 Mo. 160, 12 S.W. 510 (1889).

14. *Toler v. Atlanta Life Ins. Co.*, 248 S.W.2d 53 (St. L. Mo. App. 1952).

15. *Groll v. Tower*, 85 Mo. 249 (1884).

16. *Denny v. Robertson*, 352 Mo. 609, 179 S.W.2d 5 (1944).

raise the privilege, or waive it, if it is in the best interest of the child to do so.¹⁷ Finally, the patient before death can waive the privilege for those in privity after death.¹⁸

B. How May the Privilege Be Waived?

1. Express Waiver

The patient or his privity may expressly waive the physician-patient privilege. One type of express waiver is a written waiver by the patient.¹⁹ Another type can be an express waiver by contract. This type of waiver is often found in insurance policies. In *Russel v. Missouri Ins. Co.*²⁰ the court held that there was a waiver by contract because the policy contained this provision:

I expressly waive, on behalf of myself, and of any persons who shall have or claim my interest on any policy issued hereunder all provisions of law forbidding any doctor or other person who has attended or examined me from disclosing any knowledge or information acquired thereby, and I hereby expressly authorize such doctor or other persons to make such disclosures.²¹

There may be some problem as to consideration, but it has been held that this waiver becomes part of the consideration of the contract itself.²²

The next question is whether once an express waiver is given, can it be withdrawn? In *Graham v. Guarantee Life Ins. Co.*²³ there was an express waiver which allowed the defendant to check the plaintiff-patient hospital record. The defendant checked the hospital record and a year later the patient withdrew the waiver. The court held that the patient could not withdraw the waiver because the defendant had acted upon it. Thus it could be argued that an express waiver may be withdrawn if the other party does not act upon it.

Finally, it should be mentioned that many insurance policies require the beneficiary to answer proofs of death sent by the insurer. The court has held that answering these questions does not waive the physician-patient privilege. However, these proofs of death are admissible into evidence as admissions made

17. *In re M-P-S, a Minor*, 342 S.W.2d 277 (St. L. Mo. App. 1961), recognized this right, but here the mother was not able to raise the privilege in a child neglect case because it was not in the best interest of the child.

18. *Keller v. Home Life Ins. Co.*, 95 Mo. App. 627, 69 S.W. 612 (St. L. Ct. App. 1902). Here there was a waiver by contract in an insurance policy and this was held binding on the beneficiary.

19. *Toler v. Atlanta Life Ins. Co.*, 248 S.W.2d 53 (St. L. Mo. App. 1952); *Davenport v. City of Hannibal*, 108 Mo. 471, 18 S.W. 1122 (1892).

20. 232 S.W.2d 812 (St. L. Mo. App. 1950). See also *Cromeenes v. Sovereign Camp of Woodmen of the World*, 205 Mo. App. 419, 224 S.W. 15 (Spr. Ct. App. 1920); *Modern Woodmen of American v. Angle*, 127 Mo. App. 94, 104 S.W. 297 (St. L. Ct. App. 1907).

21. *Russell v. Missouri Ins. Co.*, 232 S.W.2d 812, 814 (St. L. Mo. App. 1950).

22. *Keller v. Home Life Ins. Co.*, 95 Mo. App. 627, 69 S.W. 612 (St. L. Ct. App. 1902).

23. 267 S.W.2d 692 (St. L. Mo. App. 1954).

by the beneficiaries.²⁴ As such, they are not given conclusive effect.²⁵ The reason why answering the proofs of death does not act as a waiver is because they are required by the policy to be answered, and furnishing what is required under the policy does not obligate the beneficiary to furnish more, or to waive the privilege as to additional facts.

2. Waiver Per Se

Even though Missouri does not have a general statute on the waiver of the physician-patient privilege, it does have specific statutes which provide that the privilege shall not apply in certain described circumstances. This will be called waiver per se. The first of these statutes is the "battered child statute," which in effect allows a doctor to report injuries of children under twelve if the doctor has reasonable cause to believe that these injuries were inflicted other than by accident by the parents or other people responsible for the care of the child. The statute then goes on to say: "Neither the physician-patient privilege nor the husband-wife privilege shall be a ground for excluding evidence regarding a child's injuries or the cause thereof, in any judicial proceeding resulting from a report pursuant to this section."²⁶ It could be argued that this statute does not have much of an effect because a natural guardian can only claim the privilege for a child if it is in the best interest of the child to do so.²⁷ Still, the statute is important because it leaves it up to the physician to decide whether to make the report .

A second statute deals with abortion prosecutions:

In prosecutions for abortions or for manslaughter occasioned by abortion or miscarriage, or by an attempt to produce either, or attempted abortion or for any crime of which abortion or miscarriage may be a part of the essential facts to be proven . . . any physician or medical practitioner who may have attended or prescribed for such woman shall be a competent witness in said cause to testify concerning any facts relevant to the issue therein, and shall not be disqualified or held incompetent by reason of his relation to such woman as an attending physician or surgeon.²⁸

This statute does change the general rule of the privilege. This would occur when the women on whom the abortion was performed was not willing to have a treating doctor testify, or if she died and the privies refused to allow the treating doctor to testify.

A third Missouri statute provides that in a drug violation case "information communicated to a physician in an effort unlawfully to procure any such drug shall

24. *Metropolitan Life Ins. Co. v. Ryan*, 237 Mo. App. 464, 172 S.W.2d 269 (St. L. Ct. App. 1943); *Fitzgerald v. Metropolitan Life Ins. Co.*, 149 S.W.2d 389 (St. L. Mo. App. 1941); *Rush p. Metropolitan Life Ins. Co.*, 63 S.W.2d 453 (St. L. Mo. App. 1933); *Masson v. Metropolitan Life Ins. Co.*, 225 Mo. App. 925, 36 S.W.2d 118 (K.C. Ct. App. 1930); *Hicks v. Metropolitan Life Ins. Co.*, 196 Mo. App. 162, 190 S.W. 661 (St. L. Ct. App. 1916).

25. *Frazier v. Metropolitan Life Ins. Co.*, 161 Mo. App. 709, 141 S.W. 936 (St. L. Ct. App. 1911).

26. § 210.105, RSMo 1967 Supp.

27. See note 17 and related text.

28. § 546.310, RSMo 1959.

not be deemed a privileged communication."²⁹ But then the statute goes on to provide that there is still a privilege if the patient was professionally treated and such information was necessary for treatment. This statute does not change the general rule of the privilege because the latter part of the statute maintains the privilege.

Fourth, there is a relaxation of the physician-patient privilege in the workmen's compensation area. Two sections of the Missouri statute reach this result. One provides that the evidence of a treating physician shall be admissible in evidence only if his report has been made available to all parties.³⁰ Another sets out those people who are able to get the treating physician's report or the hospital record. These include the commissioner, employer, and the employee.³¹ Thus, the employee must furnish full information of his injury if he wants to introduce his treating doctor as a witness to show the extent of that injury.

Under the Uniform Vital Statistics Act,³² a death certificate is not privileged and can be introduced into evidence. The theory behind this is that once the death certificate is made, it becomes public and the purpose behind the physician-patient privilege is defeated.³³ Even though a hospital record can be introduced as an exception to the hearsay rule,³⁴ it still can be objected to on the grounds of the physician-patient privilege. The court has reached this result because a hospital record is similar to the doctor himself testifying.³⁵

Finally, by case law there is a waiver per se of the privilege if the treating doctor is testifying at an insanity proceeding.³⁶

3. Implied Waiver

In Missouri, the waiver may be implied; that is, it may be inferred from the conduct of the patient. First, if the patient calls a treating doctor as a witness, and that doctor testifies as to the treatment, there is a waiver.³⁷ Second, if the patient himself fully testifies as to the treatment there is a waiver. In *Epstein v. Pennsylvania R. Co.*³⁸ the patient testified fully as to the treatment given him and

29. § 195.170, RSMo 1959.

30. § 287.210, RSMo 1959. See also § 287.140(5), RSMo 1959 which refers to § 287.210, RSMo 1959.

31. § 287.140(6), RSMo 1959.

32. § 193.130, RSMo 1959.

33. *Randolph v. Supreme Liberty Life Ins. Co.*, 359 Mo. 251, 221 S.W.2d 155 (En Banc 1949).

34. §§ 490.670 and 490.680, RSMo 1959.

35. *Fitzgerald v. Metropolitan Life Ins. Co.*, 149 S.W.2d 389 (St. L. Mo. App. 1941).

36. *Metropolitan Life Ins. Co. v. Ryan*, 237 Mo. App. 464, 172 S.W.2d 269 (St. L. Ct. App. 1943).

37. *Demonbrun v. McHaffie*, 348 Mo. 1120, 156 S.W.2d 923 (1941); *Wells v. City of Jefferson*, 345 Mo. 239, 132 S.W.2d 1006 (1939); *State v. Long*, 257 Mo. 199, 165 S.W. 748 (En Banc 1914); *Oliver v. Aylor*, 173 Mo. App. 323, 158 S.W. 733 (Spr. Ct. App. 1913); *Epstein v. Pennsylvania R. Co.*, 250 Mo. 1, 156 S.W. 699 (En Banc 1913); *Carrington v. City of St. Louis*, 89 Mo. 208, 1 S.W. 240 (1886).

38. 250 Mo. 1, 156 S.W. 699 (En Banc 1913). See also *Demonbrun v. McHaffie*, 348 Mo. 1120, 156 S.W.2d 923 (1941).

this was held to be a waiver.³⁹ In *Blankenbaker v. St. Louis & S.F.R. Co.*⁴⁰ there was a waiver when the patient testified as to advice given him of his physical condition and of his future fitness to work. In *Highfill v. Mo. Pac. Ry. Co.*⁴¹ there was a waiver after the patient testified that Doctor Wood treated him and examined him and found a bruise on his back. There was held to be a waiver because the patient was in effect testifying as to what the physician told him.

However, there is no waiver if the patient's description of the injury is within general knowledge and does not require expert testimony.⁴² Further, there is no waiver of the privilege if the patient only testifies that there was treatment and he was in the hospital. These two examples illustrate that there can be no waiver if what the doctor or the patient testifies to is not privileged. In *Bouligny v. Metropolitan Life Ins. Co.*⁴³ the plaintiff, claiming as beneficiary under a life insurance policy, read into evidence the report of one Doctor Cropp, the medical examiner of the insurer. The defendant argued that this was a waiver of the privilege. But the court held that this was not privileged in that Doctor Cropp did not examine for treatment, and there can be no waiver if there is not a privilege.

Next, there is no waiver if the patient testifies as to the treatment on cross-examination. This is because the waiver must be voluntary, and this "voluntary" element is not present on cross-examination.⁴⁴ There is no waiver even if the patient's attorney fails to object to this questioning on cross-examination.⁴⁵ Also, there is no waiver later at trial if the patient answers the depositions and interrogatories of the opposing party. This is because it is similar to cross-examination and is not voluntary. In *State v. Vardeman*⁴⁶ the defendant sent the plaintiff several interrogatories. One of these said: "Please state the *type* and *number* of examination or treatments you have taken from said practitioners and the *date* of each such exam and/or treatment."⁴⁷ The court held that this was not privileged because it was not the physician being asked and it was within the general knowledge of the patient. But the court went on to say that, "relator will suffer no waiver of the privilege . . . It is well settled that to waive the confidential privi-

39. There was also held to be waiver on two other grounds. First was allowing a treating physician to testify. Second was the failure to object to the testimony of a treating doctor offered by the opposing party.

40. 187 S.W. 840 (Mo. 1916).

41. 93 Mo. App. 219 (K.C. Ct. App. 1902).

42. *Edwards v. St. Louis & S.F.R. Co.*, 166 Mo. App. 428, 149 S.W. 321 (St. L. Ct. App. 1912). See also *Holloway v. Kansas City*, 184 Mo. 19, 82 S.W. 89 (1904).

43. 133 S.W.2d 1094 (St. L. Mo. App. 1939).

44. *Hemminghaus v. Ferguson*, 358 Mo. 476, 215 S.W.2d 481 (1948); *Gilpin v. Aetna Life Ins. Co.*, 234 Mo. App. 566, 132 S.W.2d 686 (K.C. Ct. App. 1939); *Rush v. Metropolitan Life Ins. Co.*, 63 S.W.2d 453 (St. L. Mo. App. 1933); *Cable v. Johnson*, 63 S.W.2d 433 (Spr. Mo. App. 1933); *Holloway v. Kansas City*, 184 Mo. 19, 82 S.W. 89 (1904).

45. *Monpleasure v. American Car & Foundry Co.*, 293 S.W. 84 (St. L. Mo. App. 1927).

46. 422 S.W.2d 400 (K.C. Mo. App. 1967).

47. *Id.* at 403.

lege in question, 'the party's admission must be voluntary, which is not the case when it is extorted under cross-examination.'"⁴⁸

There is an implied waiver of the physician-patient privilege if the patient fails to object to the testimony of a treating doctor offered by the opposing party.⁴⁹ There is also an implied waiver as to later suits with the same testimony if the privilege is waived in an earlier suit.⁵⁰ But in *Metropolitan Life Ins. Co. v. Ryan*⁵¹ the court held that a waiver in the trial of one cause will not be extended to the trial of another and different cause. For a waiver, the same parties in interest who were present and represented in one proceeding must be present and represented in the later proceeding. If a criminal defendant raises an insanity defense this is a waiver of the privilege as to the physicians treating him for this condition.⁵² If the patient brings a malpractice suit, the defendant-physician is able to testify over the privilege objection of the plaintiff-patient. Also, any consulting doctor who was present at the time of the treatment may testify.⁵³ The privilege is waived here as a matter of fairness to the defendant-physician.

4. Waiver by the Plaintiff-Patient Bringing Suit

From the above implied waivers it could be argued that the mere bringing of any suit for personal injury would act as an implied waiver. However, before 1968 the Missouri courts had held that the bringing of a personal injury suit is not an implied waiver.⁵⁴ *Smart v. Kansas City*⁵⁵ reached this result on the reasoning that the privilege is a matter of legislative policy which should not be rendered inoperative by the mere filing of a suit.

In 1968, the Missouri Supreme Court decided *State ex rel. McNutt v. Keet*.⁵⁶ In this case the plaintiff alleged that she suffered personal injuries in an automobile collision. Part of the injuries claimed were the aggravation of a preexisting nervous condition and of preexisting arthritis and neuritis. The defendant claimed that

48. *Id.* at 408.

49. *Chamberlain v. Chamberlain*, 230 S.W.2d 184 (St. L. Mo. App. 1950). This case mainly talked about the husband-wife privilege, but said that the same result would be reached for the physician-patient privilege. See also *Epstein v. Pennsylvania R. Co.*, 250 Mo. 1, 156 S.W. 699 (En Banc 1913); *Elliott v. Kansas City*, 198 Mo. 593, 96 S.W. 1023 (1906).

50. In *Ryan v. Metropolitan Life Ins. Co.*, 30 S.W.2d 190 (K.C. Mo. App. 1930), the plaintiff sued first as the widow and sole heir but later was substituted as a party plaintiff in the capacity of administratrix. The court held that a waiver at the first trial was effective for the second trial. See also *Elliott v. Kansas City*, 198 Mo. 593, 96 S.W. 1023 (1906).

51. 237 Mo. App. 464, 172 S.W.2d 269 (St. L. Ct. App. 1943).

52. *State v. Swinburne*, 324 S.W.2d 746 (Mo. En Banc 1959); *State v. Cochran*, 356 Mo. 778, 203 S.W.2d 707 (En Banc 1947); *State v. Sapp*, 356 Mo. 705, 203 S.W.2d 425 (1947).

53. *Hartley v. Calbreath*, 127 Mo. App. 559, 106 S.W. 570 (K.C. Ct. App. 1907); *Cramer v. Hurt*, 154 Mo. 112, 55 S.W. 258 (1900).

54. *Hemminghaus v. Ferguson*, 358 Mo. 476, 215 S.W.2d 481 (1948); *Foman v. Liberty Life Ins. Co.*, 227 Mo. App. 70, 51 S.W.2d 212 (K.C. Ct. App. 1932); *Hartley v. Calbreath*, 127 Mo. App. 559, 106 S.W. 570 (K.C. Ct. App. 1907); *Cramer v. Hurt*, 154 Mo. 112, 55 S.W. 258 (1900).

55. 208 Mo. 162, 105 S.W. 709 (En Banc 1907).

56. 432 S.W.2d 597 (Mo. En Banc 1968).

these conditions would be the same even without the accident. The trial court, on the defendant's motion, ordered the plaintiff to undergo a medical examination by a physician. This physician was not able to form an opinion on how much the accident aggravated the preexisting injuries. Thereafter, the defendant sought to discover prior medical and hospital records of the plaintiff so that the physician could form an opinion as to the aggravation of the injuries. The trial court denied this motion for discovery because these prior records were privileged. The defendant then sought a writ of mandamus to compel discovery.

The Supreme Court in *McNutt* held that the plaintiff, by pleading a personal injury suit in which injuries were in dispute, waived the physician-patient privilege. The court was able to reach this decision by using three well established rules of law in the area of waiver of the physician-patient privilege. First, it noted that the patient is able to waive the privilege.⁵⁷ Second, in a suit of this kind the patient at the trial would have to waive the privilege in order to recover damages.⁵⁸ Third, by only allowing the waiver when the plaintiff brought in his medical testimony would be using the privilege "both as a shield and a dagger at one and the same time."⁵⁹ If the privilege was not waived until trial this would be unfair to the defendant. The court felt that if an earlier waiver were not allowed, the trial court should give the defendant a continuance in order to be fair.⁶⁰ The court believed that this earlier waiver was necessary because: "This will help in reaching the ultimate object of every trial, which is to get at the truth, and we are unable to see how the interests of justice are served by permitting the plaintiffs to stand on the privilege before trial and then abandon it at trial."⁶¹

The *McNutt* case expressly overruled the earlier cases which held that the bringing of a personal injury suit did not waive the privilege. Now, when the pleadings show that a personal injury is in dispute, the filing of the pleadings will waive the privilege.⁶² It can be argued that this result will extend not only to personal injury suits but also to suits on life insurance policies. This is because one of the principal defenses is that the insured misrepresented his health when the policy was taken out. Thus, it is important to know the exact medical condition of the insured at a certain time in the past.

III. SCOPE OF THE WAIVER

After there is a waiver of physician-patient privilege, what is the scope of the waiver? There should not be any problem if the waiver is express, because the waiver will usually state its scope. For example, an express waiver could say that

57. See notes 10 and 11 and related text..

58. See notes 37 and 38 and related texts.

59. 432 S.W.2d at 601. See notes 68 and 69 and related text.

60. *Id.* at 601.

61. *Id.* at 602.

62. This case is similar to *Mathis v. Hilderbrand*, 416 P.2d 8 (Alas. 1966). Here the court held that a plaintiff in a personal injury suit waived the privilege by bringing suit; this waiver permitted the attending doctor to testify on pretrial deposition as to the injuries sued on. This case also was decided on the theory that the privilege would be waived at trial and it would be unfair to the defendant to wait this long.

only hospital records are to be examined. The scope of the waiver becomes a problem if the waiver is implied.

The early cases held that the waiver only applies to the particular doctor whose testimony was given, or to the particular doctor about whose treatment the patient testified.⁶³ In *Mellor v. Missouri Pac. Ry.*⁶⁴ the plaintiff-patient was treated by both Doctor Scott and Doctor Glancie. The plaintiff called Doctor Glancie as a witness, and then the defendant tried to call Doctor Scott as a witness. In holding that Doctor Scott could not testify the court said that "it does not necessarily follow that, by introducing such a witness, the patient impliedly waives his right to object to every witness that may be called by his adversary in relation to the same subject."⁶⁵ But in *Epstein v. Pennsylvania R. Co.*,⁶⁶ the court reached an opposite result. Here the plaintiff-patient fully testified as to the treatment given him, and the defendant introduced without objection by the plaintiff, the testimony of Doctor Elston, who treated the plaintiff for the same injury. Next, the defendant offered into evidence the depositions of two doctors who also treated the plaintiff at the same time. The court held that these two doctors could testify. *State v. Long*⁶⁷ further supported the result reached in *Epstein* by holding that if there is a waiver, the waiver applies to all doctors who treat for the same trouble even though their treatment is at different dates. Thus a waiver cannot be partial or for a particular person.⁶⁸ The court uses the language that the physician-patient privilege should not be used as both a shield and a dagger.⁶⁹ That is, once what happened is made public, the patient cannot claim the privilege in order to benefit himself.

*Wells v. City of Jefferson*⁷⁰ further shows the scope of the waiver. Here the patient-plaintiff brought an action for personal injuries caused by the defective conditions of a street. One of the injuries claimed was continuous pain in his

63. *Epstein v. Pennsylvania R.R.*, 143 Mo. App. 135, 122 S.W. 366 (St. L. Ct. App. 1909); *Hartley v. Calbreath*, 127 Mo. App. 559, 106 S.W. 570 (K.C. Ct. App. 1907); *Smart v. Kansas City*, 208 Mo. 162, 105 S.W. 709 (En Banc 1907), dissenting opinion of J. Lamm; *Webb v. Met. Street Ry.*, 89 Mo. App. 604 (K.C. Ct. App. 1901).

64. 105 Mo. 455, 14 S.W. 758 (1890).

65. *Id.* at 461, 14 S.W. at 759-60.

66. 250 Mo. 1, 156 S.W. 699 (En Banc 1913).

67. 257 Mo. 199, 165 S.W. 748 (En Banc 1914).

68. *State v. Burchett*, 302 S.W.2d 9 (Mo. 1957); *Baker v. Baker* 363 Mo. 318, 251 S.W.2d 31 (1952); *Foerstel v. St. Louis Public Service Co.*, 241 S.W.2d 792 (St. L. Mo. App. 1951); *State v. Sapp*, 356 Mo. 705, 203 S.W.2d 425 (1947); *Demonbrun v. McHaffie*, 348 Mo. 1120, 156 S.W.2d 923 (1941); *Weissman v. Wells*, 306 Mo. 82, 267 S.W. 400 (1924); *Priebe v. Crandall*, 187 S.W. 605 (St. L. Mo. App. 1916); *McPherson v. Harvey*, 183 S.W. 653 (K.C. Mo. App. 1916); *Michaels v. Harvey*, 179 S.W. 735 (K.C. Mo. App. 1915); *Oliver v. Aylor*, 173 Mo. App. 323, 158 S.W. 733 (Spr. Ct. App. 1913); *O'Brien v. Western Implement Mfg. Co.*, 141 Mo. App. 331, 125 S.W. 804 (K.C. Ct. App. 1910).

69. In *Epstein v. Pennsylvania R. Co.*, 250 Mo. 1, 27, 156 S.W. 699, 707 (En Banc 1913), the court said: "He who invokes the statute must do so with the full and unqualified understanding that it is a shield to him and not a sword for others; that its beneficent object is to protect him in his rights, and not to impair those of his adversary." See also *State ex rel. McNutt v. Keet*, 432 S.W.2d 597, 601 (Mo. En Banc 1968).

70. 345 Mo. 239, 132 S.W.2d 1006 (1939).

head which the plaintiff alleged was not present before the injury. The plaintiff called as witnesses two doctors who had treated him for the injury. The defendant, on cross-examination of the doctors, tried to show that after the accident they *also* treated the plaintiff for syphilis, which could cause headaches. The court held that there was a waiver as to this further treatment, and that the jury was entitled to know the whole truth about the plaintiff's condition. Also, the court held that calling one doctor in a personal injury suit waived the privilege as to the other doctors who treated the plaintiff after the time of his injury.

However, there is still a limit as to the scope of the waiver. In *Cable v. Johnson*,⁷¹ the plaintiff-patient called three treating doctors to testify as to whether the accident caused a miscarriage. The defendant tried to introduce a doctor who treated the plaintiff six years before for syphilis, which condition would make a miscarriage more likely. The court held that there was no waiver. It distinguished *State v. Long*⁷² on the grounds that then there was not treatment for the same injury at about the same time. In *Hemminghaus v. Ferguson*⁷³ the plaintiff-patient called several doctors to testify who had treated him at the time of the accident. The defendant argued to the jury that the plaintiff failed to call one Doctor Stein. This argument could not be made if the privilege had not been waived. The court held that the privilege had not been waived because Doctor Stein had treated the plaintiff eight years before and for an injury which was not connected to the injury in dispute.⁷⁴

The recent case of *State ex rel. McNutt v. Keet*⁷⁵ also recognized that there is a limit to the scope of waiver of the physician-patient privilege. The court in that case stated: "The waiver which we today recognize does not mean that it automatically extends to every doctor or hospital record a party has had from birth regardless of the bearing or lack of bearing, as may be, on the matters in issue."⁷⁶ Still the scope of the waiver in Missouri is fairly broad. There is no problem if the patient was treated by other doctors at about the same time for the same injuries. But *Wells v. City of Jefferson*⁷⁷ and *State ex rel. McNutt v. Keet*⁷⁸ go further, and seem to say that once the privilege is waived, other medical evidence can be introduced which is reasonably connected to the condition in issue.⁷⁹

71. 63 S.W.2d 433 (Spr. Mo. App. 1933).

72. 257 Mo. 199, 165 S.W. 748 (En Banc 1914). See note 67 and related discussion in text.

73. 358 Mo. 476, 215 S.W.2d 481 (1948).

74. See the concurring opinion in *Epstein v. Pennsylvania R.R.*, 250 Mo. 1, 39, 156 S.W. 699, 711 (En Banc 1913), in which Lamm, C.J. said: "[I]t does not mean that if a litigant uses a physician as a witness, thereby, and without more, every other physician he has ever had at other times, places, or occasions may be thereby allowed to break the seal of professional secrecy."

75. 432 S.W.2d 597 (Mo. En Banc 1968).

76. *Id.* at 602.

77. 345 Mo. 239, 132 S.W.2d 1006 (1939).

78. 432 S.W.2d 597 (Mo. En Banc 1968). Here the privilege was held waived as to prior hospital records which showed the extent of prior injuries so that the effect of the negligent act in issue could be measured.

79. Peterson, *The Patient-Physician Privilege in Missouri*, 20 K.C. L. REV. 122, 133 (1952).

IV. CONCLUSION

Missouri was the second American jurisdiction to enact the statutory physician-patient privilege. While the Missouri legislature did not also enact a general statutory waiver of the privilege, waiver of the privilege was recognized in the case law. Over the years, the grounds for waiver became more numerous. This judicial development was culminated in *State ex rel. McNutt v. Keet* which held "that once the matter of plaintiff's physical condition is in issue under the pleadings" of a personal injury suit, "plaintiff will be considered to have waived the privilege . . ."⁸⁰ Further, the Missouri courts have developed the doctrine that once there is a waiver, it will be given a broad scope. These two facts have greatly lessened the impact and use of the physician-plaintiff privilege at or before trial.

The results reached by the Missouri courts are desirable. There was no physician-patient privilege at common law. A number of states passed physician-patient privilege statutes in order to allow the patient to tell all his problems to his physician without fear of his doctor disclosing it in court or elsewhere, but it is doubtful that the statute really achieves this purpose. First, most people when they are sick will readily tell the doctor all even if there is no privilege. Second, most people have no knowledge of this privilege. Third, people often tell other people about their diseases and visits to the doctor. Fourth, this privilege really does not produce more or better medical treatment. About a third of the American jurisdictions do not have the physician-patient privilege and their medical practice is as advanced as that in states which have the privilege.⁸¹ Against the privilege itself should be weighed the judicial search for truth. The assertion of the privilege could result in all the truth not being brought to light.⁸² Truth is more important than some slight embarrassment to the patient.

THOMAS E. TONEY

80. *State ex rel. McNutt v. Keet*, 432 S.W.2d 597, 601 (Mo. En Banc 1968).

81. See note 5 *supra*.

82. Finally, it should be noted that a bill has been introduced in the Missouri Senate which would amend § 491.060(5), RSMo 1959, the general statute on the physician-patient privilege in Missouri. This proposal is Senate Bill No. 284. The bill provides that the physician-patient privilege would not be waived until the plaintiff took the stand at trial or until other medical testimony is introduced at trial. This amendment would legislatively overrule the holding in *State ex rel. McNutt* which allows a waiver before trial.