The Physician-Patient Privilege in Oklahoma

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THE PHYSICIAN-PATIENT PRIVILEGE
IN OKLAHOMA

I. INTRODUCTION

The purpose of this article is to discuss the physician-patient privilege in general and to suggest the Oklahoma Legislature either repeal or amend Okla. Stat. tit. 12, §385(6) (1961), especially as it regards personal injury litigation. There are three instances when the privilege usually is claimed. The first concerns the truthfulness of an applicant's representations in suits on insurance policies. Second, the privilege appears in will contests when the decedent's testamentary capacity is at issue. The third instance concerns the claim of privilege in personal injury actions where liability is no longer a question, but the extent of injuries is at issue.¹

At common law there was no privilege which a patient could invoke at trial to conceal communications made by him to his physician.² In the United States, it was not until 1828 in New York that the first statute appeared granting the privilege.³ The precursor of the current Oklahoma privilege statute applying to physicians was adopted by Oklahoma's

¹ Welsh, Another Anomaly — The Patient's Privilege, 13 Miss. L. J. 137 (1941).
   No person authorized to practice physic or surgery shall be allowed to disclose any information which he may have acquired in attending any 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.
first legislature in 1890.\textsuperscript{4} This section was borrowed from the Kansas Code which in turn was patterned after the Code of Ohio. Ohio's provision resulted from a commission study for revision of that state's laws on procedure. The commission prepared its statute based on a report in 1850 of the New York Commissioners of practice and pleading.\textsuperscript{5} Since New York was the first state to pass such legislation, the question arises as to why such a statute ever came into being in light of the common law policy of disregarding any privilege in communications between the physician and his patient.

In 1836 the commissioners on statutory revision in New York implied the reason for the physician-patient privilege was the analogy to the already recognized privilege attendant to the attorney-client relationship.\textsuperscript{6} Professor McCormick believes that an early English case was the persuau-

\textsuperscript{4} Law of August 18, 1890, ch. 70, § 13, [1890] Okla. Laws 1, (now\textsuperscript{\textcopyright} Okla. Stat. tit. 12, §385 (6) (1961)) provides in part:
The following persons shall not be competent witnesses: . . . Physicians, as to matter communicated to them, as such, by patients, in the course of their professional business, or advice given in such cases.

\textsuperscript{5} Chicago, R. I. & P. Ry. Co. v. Hughes, 64 Okla. 74, 75, 166 P. 411, 413 (1917).

\textsuperscript{6} VIII J. Wigmore, Evidence §2380(a), at 828 (McNaughton Rev. 1961) [hereinafter cited as Wigmore] quoting from the commissioner's report:
The ground on which communications to counsel are privileged, is the supposed necessity of a full knowledge of the facts, to advise correctly, and to prepare for the proper defense or prosecution of a suit. But surely the necessity of consulting a medical advisor, when life itself may be in jeopardy, is still stronger. And unless such consultations are privileged, men will be incidentally punished by being obliged to suffer the consequences of injuries without relief from the medical art, and without conviction of any offense.
sive force which led the New York legislators to adopt the privilege. In that case one justice stated by way of dictum that:

There are cases, to which it is much to be lamented that the law of privilege is not extended; those in which medical persons are obliged to disclose the information which they acquire by attending in their professional characters.7

Professor McCormick is of the opinion the legislatures of many states, including New York, were receptive to the idea of privilege in this area because the legislators did not wish to be accused of looking out solely for the interests of the legal profession.8 Another writer, quoting from an 1884 issue of TIDY LEGAL MEDICINE, points out that legislatures were prompted by the protests of the medical profession:

It seems a monstrous thing to require that secrets affecting the honor of families, and perhaps confided to the medical advisor in a moment of weakness, should be dragged into the garish light of a lawsuit.9

Furthermore, the Model Code of Evidence did not include the privilege in the preliminary draft:

... and it was only after a request from the American Medical Association that the matter be reconsidered that the doctor-patient privilege was included largely as a matter of professional courtesy.10

However, this propensity for comparing the two privileges is without basis. A client enters the attorney's office

8 McCormick §108, at 222.
many times with litigation on his mind and what he divulges must be considered in that light. But, a patient usually goes to see his doctor with a cure, rather than a courtroom, in his mind.\textsuperscript{11}

II.

BASIC REQUIREMENTS

In order for the privilege to be invoked it must first be determined if the necessary relationship between an individual and his doctor exists. Generally the basic requirement in order for the privilege to attach is that "... the professional service of the physician is accepted by the patient for the purpose of treatment."\textsuperscript{12} This gives rise to the necessary relationship, but it further must be determined the communications or information for which protection is sought has been obtained for the purpose of treatment, as opposed to examination only,\textsuperscript{13} although it is not required the treatment actually be rendered.\textsuperscript{14} One early Oklahoma decision involved prosecution for rape wherein the prosecuting attorney directed the prosecutrix to be examined by a physician. The court held in accordance with the general rule, and allowed the defense to call as a witness the examining physician to testify.\textsuperscript{15}

In another Oklahoma decision involving a rape prosecution the defendant went to a physician to discover if the prosecuting witness was pregnant. The conversation between the doctor and defendant concerned whether the prosecutrix was

\textsuperscript{11} McCormick §108, at 222.
\textsuperscript{12} 58 Am. Jur. Witnesses §413 (1948).
\textsuperscript{13} "The general rule ... is that where the physician or surgeon is consulted for the purpose of examination only, and not for treatment, communications made to him, or information acquired by him, on such examination, are not privileged." Annot., 107 A.L.R. 1945 (1937).
\textsuperscript{14} 58 Am. Jur. Witnesses § 415 (1948).
\textsuperscript{15} Leard v. State, 30 Okla. Cr. 191, 235 P. 243, 244 (1925).
pregnant and if so, if the doctor knew of anything to relieve the condition. The State on appeal argued the doctor's testimony was admissible because the defendant was not consulting him as a patient. However, the court stated the defendant went to the doctor for professional advice and therefore the communications fell within the ambit of the privilege.\textsuperscript{16}

Although the Oklahoma Court stated that the scope of the privilege statute should not be "unduly extended", it would seem this is precisely what it did. The statute clearly pertains to communications "... with reference to any physical or supposed physical disease ...."\textsuperscript{17} In this case the defendant complained of no physical ailment but sought "professional advice" about the condition of another individual. The court stated the purpose of the privilege was to protect the right of privacy.\textsuperscript{18} Perhaps the court was tacitly basing its decision on public policy; if the facts had arisen in a civil case the interpretation of the statute might have been different.

It is also a requisite that the communications be intended as confidential, and where the circumstances surrounding the communication demonstrate what was revealed was not intended to be confidential, then the privilege is not applicable.\textsuperscript{19} However, the privilege is not vitiated necessarily because someone other than the physician happens to be present. Most jurisdictions have held that the presence of a nurse or someone working in a comparable capacity does not harm the privileged status of communications. Oklahoma has held in accord with this view.\textsuperscript{20}

\textsuperscript{17} OKLA. STAT. tit. 12, §385(6) (1961).
III. REASONS ASCRIBED TO THE PATIENT'S PRIVILEGE

Regarding evidentiary privileges it has been said:

They do not in any wise aid in the ascertain-ment of truth, but rather they shut out the light. Their sole warrant is the protection of interests and relationships which . . . are regarded as of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice.\(^\text{21}\)

Although many privilege statutes state the physician is "incompetent" to testify, this does not mean that his testimony would be untrustworthy or unreliable. The rules of privilege were designed to apply only in specific instances where the relationship between certain persons was deemed, on the basis of public policy, to be of such a special nature that any communication or information arising therefrom could not be divulged except with the permission of the protected individual. Hence, these rules render a witness incompetent to testify only as to certain matters and do not affect his competency generally.\(^\text{22}\)

As there was no recognition of the physician-patient privilege at common law, it would seem there must have been some extraordinary reasons which inspired New York to pass a privilege statute and more than half of the other states, including Oklahoma, to follow its lead.\(^\text{23}\) What then are some

\(^{21}\) McCormick \& 72, at 152.
\(^{22}\) 97 C.J.S. Witnesses \$252 (1957).
\(^{23}\) There are 18 states as well as the United Kingdom which do not recognize the patient's privilege. Those states are: Alabama, Connecticut, Delaware, Florida, Georgia, Kentucky, Louisiana, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New Mexico, Rhode Island, South Carolina, Tennessee, Texas and Vermont.
of the reasons or purposes for which the communications between a physician and his patient are deemed to warrant a privileged status?

Two reasons ascribed to the institution of this privilege are as follows: first, the recognition of the doctor's canons of secrecy based on the "... theory that the personal privacy of the patient's body was entitled to be respected,"24 and second, legislators' fear of criticism.25 However these reasons, although they may have been important considerations in the passage of the statutes, are not directly related to the purposes as stated most frequently by the courts.

One of the purposes frequently noted is the belief that by making the communications privileged, confidence will be inspired in the patient and he will therefore divulge more to the doctor, thus better enabling the doctor to diagnose and treat the patient.26

Another, and perhaps by far the fundamental, purpose ascribed to the privilege is:

... based on a theory of community outrage and repugnance at having one physician act against his patient's interest. ... This is an argument based, not on an intrinsic incompetency, but on the limit the community places upon a search for truth. That is to say, the need is not so great that truth must be demanded at the cost of humiliating or embarrassing a patient by the public disclosure of his revelations made to his physician in confidence.27

24 A.B.A. REP. 570, 590 (1938).
25 Wigmore §2380 (a).
Oklahoma courts have held in accord with this second reason the purpose is to protect the rights of privacy.28

These are the purposes which most courts have enunciated as underlying the physician-patient privilege. Although some courts may state the purpose a little differently, the import is generally the same.29

IV.

WAIVER

Even if the privilege attaches it still may be waived, either expressly or by implication30 by anyone with the right to claim it.31 The basis for waiver has been stated as follows:

The doctrine of waiver is based upon the theory that conduct which either reveals the physical injuries of the patient or discloses the privileged communications destroys any reason for protecting the confidential communications since the patient has already voluntarily disclosed his physical injuries or the privileged communications.32

The most common example of express waiver is by contract and is found in applications for life insurance. The Oklahoma Supreme Court has held this manner of waiver is permissible under the state privilege statute. In Oklahoma Protective Assn. v. Montgomery,33 the insured signed an application which stated in part: "... I hereby authorize any physician ... who has attended me ... to disclose...

29 See generally Jones §838.
30 Id. §846.
31 City of Altus v. Martin, 268 P.2d 228, 234 (Okla. 1964).
any information thus acquired. The court emphasized that the certificate of insurance was issued only on the strength and as a result of this waiver, and reversed the trial court's decision that the testimony of attending physicians was not admissable. Absent reliance by the insurer upon the waiver, it is doubtful such waiver would have been effective.

The area of express waiver seems to be well settled. Problems arise, however, when implied waiver or interpretation of statutory waiver are encountered. Most states having the physician-patient privilege also declare what constitutes a waiver thereof in their statutes. These statutory definitions of waiver have been placed in four categories and state waiver occurs when:

(1) testimony of physician is offered.
(2) the patient offers himself as a witness,
(3) the trial court compels disclosure, and
(4) the patient commences an action for personal injuries or puts his mental or physical condition in issue.

The Oklahoma statute comes within category (2) above, but with the additional limitation that the waiver extends

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34 Id. at 136, 16 P.2d at 136.
36 D.R.I. 20.
37 OKLA. STAT. tit. 12, §385 (1961) provides in part: The following persons shall be incompetent to testify: ... A physician or surgeon concerning any communication made to him by his patient with reference to any physical or supposed physical disease, or any knowledge obtained by a personal examination of any such patient: Provided, that if a person offer himself as a witness, that is to be deemed a consent to the examination; also, ... if [a] ... physician or surgeon on the same subject, within the meaning of the last three subdivisions of this Section.
only so far as the subject matter testified to by the patient. In answering the question of what constitutes a waiver of the privilege under the Oklahoma statute has proved to be difficult. However, some guidelines have been established. The first Oklahoma case to construe the privilege statute was Roeser v. Pease. In Roeser the plaintiff alleged that she had received internal injuries which led to backaches and headaches which she had never had prior to the accident. The plaintiff testified not only with regard to her general health, but also specifically referred to her headaches. The issue at trial was whether the accident had caused these pains or whether they had resulted from some other cause. It is significant to note the plaintiff's doctor was questioned only as to the plaintiff's health and condition at the time he examined her. Subsequent to a jury finding in favor of the plaintiff, the defendant's attorney learned from the doctor the plaintiff had complained of back pains and headaches prior to the time of the accident. As a result of this new evidence, the judgment was reversed and the case remanded for a new trial, the court saying:

The effect of her testimony was to lead the jury to believe that she had not suffered from the same afflictions prior to the accident. If she can go upon the witness stand and testify that she had not suffered from these afflictions prior to the accident, and then prevent the only available impeaching testimony from being disclosed, by a claim of privilege, it would seem that a mockery is being made of justice, and we do not think our statute contemplates such a condition.

In another early case the descriptive testimony of the plaintiff as to a bruise on her hip and the pain resulting

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39 37 Okla. 222, 131 P. 534 (1913).
therefrom was held to be a waiver of her privilege.\textsuperscript{41} The court in Chicago R. I. & P. Ry. Co. v. Hughes,\textsuperscript{42} held it was error to exclude certain testimony of the plaintiff. Here the plaintiff first testified he received a rupture as a result of an accident. Later, on cross-examination, the plaintiff stated he had never told his doctor he had previously been ruptured. The plaintiff then called his physician and the defendant in this cross-examination asked the doctor if the plaintiff had given him a prior history of rupture. The plaintiff’s objection to this question was sustained on the ground of privilege. However, on appeal the court in effect held that under these circumstances it was permissible to cross examine the physician with regard to the plaintiff’s denial of a prior injury.

Further, the Oklahoma Supreme Court has held that testimony elicited on cross-examination on a subject not testified to in direct examination is not “voluntary” and therefore does not constitute a waiver.\textsuperscript{43}

In 1956, notwithstanding the earlier decisions, the Oklahoma Supreme Court, in Hudson v. Blanchard,\textsuperscript{44} held that a waiver does not occur when a party takes the witness stand and testifies as to the facts of an injury.\textsuperscript{45} The plaintiff had testified as to her injuries, describing where she was hurt. Also, the plaintiff testified that the doctor had taped her side, arm and back, as well as testifying to difficulty in performing household chores. The court stated “. . . [u]nless the waiver of the privilege provided by the statute be held to go only to ‘communications’ with the attending physician, it becomes obvious that the statute is meaningless and a nullity.”\textsuperscript{46}

\textsuperscript{41} City of Tulsa v. Wicker, 42 Okla. 539, 141 P. 963 (1914).
\textsuperscript{42} 64 Okla. 74, 166 P.2d 411 (1917).
\textsuperscript{44} 294 P.2d 554 (Okla. 1956).
\textsuperscript{45} Id. at 560.
\textsuperscript{46} Id.
The *Hudson* decision was contradictory to previous Oklahoma cases on the subject of waiver and has recently been overruled. Prior to *Hudson* it had been the law that where a plaintiff testified in her own behalf as to the nature and extent of her injuries as well as to the time and place for treatment "... she waived the privilege ... of having her communication with her physician treated as confidential."47 However, the court in *Hudson* erroneously construed the previous decisions stating the waivers had been based on the patient's testimony about *communications* concerning the injuries. Therefore, under the *Hudson* doctrine unless a patient specifically referred to the conversations he had with his physician, he could testify at length about his illness or injury and would not waive the benefits of the privilege.

The problems presented by the holding in *Hudson* have since been alleviated by the decision in *Robinson v. Lane*.48 In *Robinson*, the plaintiff sued for damages arising from an automobile accident. He was treated by a number of physicians before and during hospitalization and was examined one year after the accident by a doctor recommended by his counsel. The examining doctor testified at trial for the plaintiff regarding his injuries. Later the defendants called two physicians who had treated the plaintiff while hospitalized. Plaintiff objected on the basis of the privilege.

Justice Williams, speaking for the court, stated the plaintiff voluntarily testified as to the "... nature and extent of his injuries and the time, place and manner of treatment ...",49 and that under the pre-*Hudson* decisions this would constitute a waiver.

48 480 P.2d 620 (Okla. 1971).
49 Id. at 621.
The decision in Robinson, specifically overrules Hudson v. Blanchard, and the court stated that "... when a litigant testifies concerning a particular ailment and its treatment, he has removed the reasons for the privilege. By his own conduct, he has made known to a jury and the public the ailment or disability he is suffering. After such public disclosure, there is no longer any need for the application of the privilege."\textsuperscript{50}

The Oklahoma privilege statute provides in essence that the only place where waiver of the privilege may be effected is at the trial of the case since the statute requires the holder of the privilege to "offer himself as a witness."\textsuperscript{51} Accordingly, the Oklahoma Court in Avery v. Nelson\textsuperscript{52} held that plaintiff's testimony in response to questions of the defendant's counsel in her deposition, regarding communications to her physician, did not constitute a waiver of her privilege for two reasons. First, the waiver was not voluntary,\textsuperscript{53} and second merely bringing a suit for personal injuries does not constitute a waiver.\textsuperscript{54} This second reason in effect means that in Oklahoma, if objection is made, privileged information may not be obtained through the discovery process.

\textsuperscript{50} Robinson v. Lane, 480 P.2d 620, 622 (Okla. 1971). The court states:

\ldots when a litigant testifies concerning a particular ailment and its treatment, he has removed the reasons for the privilege. By his own conduct, he has made known to a jury and the public the ailment or disability he is suffering. After such public disclosure, there is no longer any need for the application of the privilege.


\textsuperscript{53} Id. at 77.

\textsuperscript{54} Id. at 79.
When an individual brings an action to recover for personal injuries two general questions arise. First, the inquiry as to whether the acts of the defendant were the cause of the plaintiff's alleged injuries. If this issue can be answered affirmatively, then the second query materializes—that being the extent of the injuries sustained, if any, as a result of the defendant's acts. It is in regard to the second of these that the physician-patient privilege most often is claimed, and when the problem of waiver manifests itself.

Before a plaintiff is entitled to a money judgment in his favor he must prove he has been damaged, and in order to demonstrate this he invariably must use medical testimony. The claim of privilege occurs when the plaintiff places medical testimony in evidence by way of his treating physician. If the physician is cross-examined with regard to any communication made to him by the plaintiff-patient, or as to any information gained by him during the course of examination or treatment, an objection founded on the privilege immediately ensues. Unless the plaintiff previously has waived the privilege by testifying as to the nature and extent of his injuries and any treatment, the objection would be sustained under the existing Oklahoma statute.

However, it is suggested that the physician-patient privilege be abolished in Oklahoma for the following reasons. At the outset it is maintained when the underlying reasons for a particular statute are no longer valid, then it is time to repeal or modify the statute. With this in mind, the reasons promulgated for the physician-patient privilege should be examined.

To maintain the privilege statute was enacted to conform to the canon of secrecy of the medical profession appears

55 See pp. 158-59 & notes 6, 9 supra.
inconsistent when juxtaposed to reality, since the canon is based on respect for an individual's privacy, and most people have no qualms about relating to others the circumstances and extent of their injuries. Also, it has been stated that doctors support the privilege statute to uphold "... their esteem for the tradition, dignity and honor of the profession". As regards this, Professor McCormick poses the question that if the primary result of the privilege is to allow an individual to testify to the facts of an injury without his physician being able to refute them, then "... does such a privilege, and such enforced silence, promote the honor and dignity of the medical profession?"

Another reason for the institution of this privilege has been the analogy of the relationship between the physician and patient to that of the attorney and client. This analogy has been vigorously attacked on the basis that a patient who goes to a doctor for treatment does not, in the majority of cases, have a future lawsuit on his mind, at least at that time. However, a client frequently visits an attorney in contemplation of possibility of future litigation.

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63 As part of its report to the 61st Annual meeting of the American Bar Association, the section on judicial administration stated:
And yet the odd thing about the privilege is that it is usually invoked to protect from disclosure a bodily condition which has not been kept secret at all from friends and neighbors, and which only the tribunal of justice must not learn about.
64 McCormick § 108, at 222.
65 In Hudson v. Blanchard, 294 P.2d 554 (Okla. 1956), the plaintiff testified regarding injuries to her neck, shoulder and back as well as to the treatment given by her doctor, but the privilege prevented the defendant-doctor from rebutting her allegations by showing x-rays taken by him when he treated the plaintiff.
66 McCormick §108, at 222.
67 Id. at 221.
The distinction between the two relationships has been recognized by the medical profession. One author, writing for the Journal of The American Medical Association has stated:

The services of an attorney are sought primarily for aid in litigation . . . while those of the physician are sought for physical care . . . the physician being called upon with comparative infrequency to make disclosure, would not be consciously affected in his relation with the patient. The function of the two learned professions being entirely distinct, the moral effect upon them of the absence of the privilege would be different.61

In commenting on the New York Statute of 1828 one writer criticizes the privilege saying "[i]f they expected to close the door to fraud they failed of success for they opened that door particularly wide. They were, not unnaturally, misled by the false analogy . . . [between the two relationships]."62 Therefore, although there is an understandable propensity to compare the privilege relating to these two professions, the purposes of each differ and the same rule should not obtain in each.

A third argument favoring the privilege has been the concept that if a patient knows his communications to a physician will be kept secret, he will disclose more fully to a doctor the information necessary for treatment.63 This too is a false premise. Most people do not know the privilege exists, although its rationale assumes they do. Even if it were assumed that patients are cognizant of the privilege, very few would fail to disclose information based upon the fear someone would discover their problems during future litigation.64

62 Purrington, An Abused Privilege, 6 Colum. L. Rev. 388, 393 (1906); accord, 4 Okla. L. Rev. 381, 385 (1951).
63 See p. 163 supra.
64 Note, Privileged Communications between physician and patient, 33 Ill. L. Rev. 483, 484 (1938).
An individual in need of medical attention, it is submitted, is primarily concerned about his immediate disability, giving little thought to possible subsequent testimony. Moreover, in the eighteen states which never have recognized the physician-patient privilege as well as other states where the waiver provisions are very liberal, there is nothing to demonstrate patients in those states disclose any less to their physicians than do patients in those states which adhere strictly to the privilege.\(^\text{65}\)

It is interesting to note that the Proposed Federal Rules of Evidence provide for a psychotherapist-patient privilege, but provide none for the doctor and his patient.\(^\text{66}\) Doctors and psychotherapists deal with completely different problems and the necessity for confidential communications is far more understandable in the relationship between the latter and his patient.\(^\text{67}\)

Another reason attributed to enforcement of a physician-patient privilege is to prevent embarrassment. However, one writer states that in many cases which he has reviewed, he found no instances which fit into the "... alleged motive and purpose behind the statute—to prevent humiliation or shame from disclosure of the nature of the disease."\(^\text{68}\) Wigmore

\(^{65}\) See note 23 supra.


\(^{67}\) The advisory Committee note on the rule, quoting from Report No. 45, Group for the Advancement of Psychiatry, states:

Among physicians, the psychiatrist has a special need to maintain confidentiality. His capacity to help his patients is completely dependent upon their willingness and ability to talk freely.

\(^{68}\) Curd, Privileged Communications Between the Doctor and his Patient—An Anomaly of the Law, 44 W. Va. L.Q. 165, 168 (1938).
poses the following question: "Does the communication originate in a confidence?" The Professor answers his question by maintaining the majority of things communicated to a doctor are in no sense confidential. With the exception of venereal disease, there are few things which a patient tries to shield from public view; in fact most problems are openly discussed, and if not openly visible, are at least communicated to close friends and relatives. Even assuming some communications to a physician are embarrassing, this does not mean that all communications should be suppressed.

In light of the foregoing, it may be concluded the foundations upon which the physician-patient privilege rests are not solid ones, and therefore the privilege statute should not be retained. However, there are other grounds which lead to the same conclusion. Professor McCormick has attributed three evils to the physician-patient privilege, which are as follows:

1) The exclusion of testimony of the treating doctor upon the crucial issues of the case, since it is he who has the best knowledge of the patient's physical or mental condition.

2) The distorted picture presented to the court when a patient and certain doctors testify, but the treating physician is not allowed to contradict, and upon which the court or jury must base its decision.

3) The complexities and problems resulting from a statute that is repugnant to justice and which leads to conflicting appellate decisions.

Regarding number two above, Hudson v. Blanchard presents a unique illustration in that the defendant was also the

69 Wigmore §2380 (a), at 829.
70 Id.
71 D.R.I. 9.
72 McCormick §108, at 223.
73 294 P.2d 554 (Okla. 1956).
attending physician. Accordingly he was not allowed to present x-rays of the plaintiff which would have shown the possibility that the plaintiff's injuries resulted from a previous accident. Thus, use of the physician-patient privilege allowed only one side of the incident to be heard in court. This same case also stands as an example of number three in that it was in conflict with prior Oklahoma decisions, being overruled fifteen years later.\footnote{74}{See pp. 167-68 supra.}

As to the use of the privilege it has been said:
A privilege has its chief practical benefit when it enables a party to exclude from the record a witness . . . or line of proof which is essential to the adversary's case, lacking which he cannot get to the jury at all on a vital issue.\footnote{75}{McCormick §81, at 164.}

It is submitted the privilege is used for this reason—as a trial tactic—rather than for the grounds which supposedly underlie it; that " . . . the injustice of such a rule far outweighs its few benefits . . . [and that] . . . it would be more desirable to abolish the privilege."\footnote{76}{Note, Privileged Communications Between Physician and Patient, 33 ILL. L. REV. 483, 485 (1938); accord, Wigmore §2380 (a).}

VI.

THE PHYSICIAN-PATIENT PRIVILEGE AND DISCOVERY

The physician-patient privilege in Oklahoma, as a result of \textit{Avery v. Nelson},\footnote{77}{455 P.2d 75 (Okla. 1969).} acts to prevent effective pre-trial medical discovery in personal injury lawsuits. Although an argument might be made that the privilege statute does not seriously hinder the defendant's case because there may be other means of acquiring medical information, this begs the issue. Although
in Oklahoma a physical examination may be ordered in the court's discretion,\textsuperscript{78} this may not always be as helpful to an attorney preparing a defense as it would seem.

It is quite easy to imagine a situation in which two individuals would be diametrically opposed as to the causation of some particular event. So too, doctors often disagree, not only to what may have caused a certain injury or illness, but also to the extent thereof. This point of disagreement is important to a defendant. He must prepare his defense based on the allegations of the plaintiff, and if he does not know what the plaintiff's physician believes the cause or extent of the injury to be, then independent medical examinations, while helpful, may not be adequate.

Even though a waiver of the privilege may occur at trial, this does not solve the problems encountered by the defense. The waiver, if any, comes too late. Many times a plaintiff, in order to recover, will waive his privilege. Therefore, application of the privilege to the period before trial is opposed to modern pre-trial discovery purposes. As a result "... the privilege gives the plaintiff patient a decisive tactical advantage since he may prevent discovery and then surprise the defendant and present the privileged evidence at trial."\textsuperscript{79}

This element of surprise is of special significance when it pertains to medical evidence. It is hard to attempt to discredit or to conduct a penetrating cross-examination of a doctor in his field of expertise. In order to do so, a great deal of pre-trial study is required of the plaintiff's medical proof. As one author has stated, "[y]ou can't prepare to combat what you don't know about. It's just that simple."\textsuperscript{80}

\textsuperscript{78} Witte v. Fullerton, 376 P.2d 244 (Okla. 1962).
\textsuperscript{79} D.R.I. 25.
\textsuperscript{80} Griffin, \textit{Pre-Trial Discovery of Plaintiff's Medical Claim—The Medical Blueprint}, 12 DEFENSE L. J. 111, 113 (1963).
The above-quoted statement presents succinctly the argument against the physician patient privilege as it relates to pre-trial discovery. The petitioner in Avery v. Nelson propounded the argument that:

... lawsuits are not surprise parties nor guessing games, but are solemn proceedings ... to find the truth and that this result is better accomplished when both parties to the litigation have equal access to the evidence which will be offered at trial.\(^81\)

Justice Lavender, writing for the majority, stated that the court was in complete agreement with the petitioners but was faced with a statutory provision regarding waiver, and that it was for the legislature to change the statute.\(^82\) Justice Hodges in his dissent stated an election should be made at the pre-trial conference as to whether the plaintiff claims or waives the privilege, and that a plaintiff should not be allowed to claim the privilege before trial and then waive it when trial begins.\(^83\)

It is maintained, therefore, the Oklahoma physician-patient privilege should be abolished altogether in personal injury suits or the statute should be modified because the privilege is based on a rationale which has little validity and because it runs counter to the modern trend in discovery.

VII.
CONCLUSION

Justice Lavender in writing for the majority of the court in Avery v. Nelson.\(^84\) with regard to the petitioners argument that the trend is to permit full discovery and that lawsuits are not guessing games, stated:

\(^{81}\) 455 P.2d 75, 77 (Okla. 1969).
\(^{82}\) Id. at 79.
\(^{83}\) Id. at 81.
\(^{84}\) 455 P.2d 75 (Okla. 1969).
While the court finds itself in complete accord with the [these] views . . . we also find ourselves facing a statutory proviso . . .\textsuperscript{85}

and also that:

If it [the legislature] should determine that the privilege statute should be amended to provide that the filing of a lawsuit in which one asks for damages for personal injuries shall be ipso facto a waiver of the privilege, then it is within . . . [their] prerogative . . . to do so.\textsuperscript{86}

It is submitted the time has come when the Oklahoma legislature should amend the privilege statute. There are a number of alternatives which could be adopted to replace the present statute, some of which follow. First of all, the privilege could be completely abolished. It should be remembered that there was no privilege at common law,\textsuperscript{87} and that there are eighteen states which never enacted it.\textsuperscript{88}

Professor Wigmore states "[t]he adoption . . . [of a privilege statute] . . . in any other jurisdiction is earnestly to be deprecated,"\textsuperscript{89} thereby implying the best course of action would be to discard the physician patient privilege. Professor McCormick concurs saying the most effective remedy for the evils of the privilege would be preservation or re-institution of the common law practice.\textsuperscript{90}

Secondly, and perhaps the next-best solution, would be the enactment of a statute which provides the privilege be waived as soon as a suit for personal injuries is filed. Minnesota has so provided, the statute stating in part:

\textsuperscript{85} \textit{Id.} at 77.  
\textsuperscript{86} \textit{Id.} at 79.  
\textsuperscript{87} See p. 157 and note 2 \textit{supra}.  
\textsuperscript{88} See note 23 \textit{supra}.  
\textsuperscript{89} WIGMORE §2380(a), at 832.  
\textsuperscript{90} MCCORMICK §108, at 224.
PHYSICIAN-PATIENT PRIVILEGE

If at any stage of an action a party voluntarily places in controversy . . . [his] physical condition . . . , such party . . . waives any privilege he may have had in that action regarding the testimony of every person who has examined or may thereafter examine him. . . .

Pennsylvania also has a similar statute which provides that physicians may not disclose information concerning a patient "... except in civil cases, brought by such persons, for damages on account of personal injuries."92

The third remedy would be the adoption of the Uniform Rules of Evidence, the provisions of which are similar to the above-described statutes of Minnesota and Pennsylvania. The Uniform Rules state "[t]here is no privilege . . . in an action which the condition of the patient is an element or factor of the claim or defense of the patient. . . ."93

Furthermore, the Oklahoma Rules of Evidence were considered in December, 1969 at a meeting of the Oklahoma Bar Association, and proposed Rules of Evidence were submitted at that time. The Uniform Rules of Evidence were used as a guide for the proposed rules, and rule 26(4)94 is the same as Uniform Rule 27(4). These proposed rules have not yet been adopted, but it is urged the provisions of rule 26 concerning the physician-patient privilege be given serious consideration.

A fourth alternative would be the adoption of a rule similar to the one established in North Carolina. The salient feature of this statute is that it allows the trial judge to compel disclosure of the privileged matter "... if in his opinion the

91 MINN. R. CIV. P. 35.03 (1936).
92 PA. STAT. tit. 28, §328 (1936).
93 UNIFORM RULES OF EVIDENCE 27(4); accord, KAN. STAT. §60-427(d) (1965).
same is necessary to a proper administration of justice."\textsuperscript{95} This type of statute also has been suggested by professors Wigmore\textsuperscript{96} and McCormick.\textsuperscript{97} Moreover, the American Bar Association's Committee on the Improvement of the Law of Evidence has recommended the North Carolina statute.\textsuperscript{98}

However, this solution has been criticized on the grounds that it does not allow pre-trial discovery and grants too much discretion to the trial judge, whose decision would be difficult to overturn on appeal.\textsuperscript{99}

The process of legislative change generally is snail-like. There are usually many obstacles to overcome, including the interests and fears of individuals within the legislative process. This is exemplified by the experience of the State of Indiana,\textsuperscript{100} where a statute similar to Uniform Rule of Evidence 27(4) was passed in both houses of the general assembly. However the bill never was signed by the governor, an attorney, who believed that it would tend to undermine the other privileges, including that of attorney and client. Therefore, the analogy between these two relationships not only was partly responsible for the institution of the physician-patient privilege but it still survives, making change all the more difficult. Other states have had success in breaking down this comparison. The State of Oklahoma should also recognize the distinction and change the archaic rule which has existed since statehood.

\textit{Edward D. Cosden, Jr.}

\textsuperscript{96} Wigmore §2380 (a), at 832.
\textsuperscript{97} McCormick §108, at 224.
\textsuperscript{98} 63 A.B.A. Rep. 570, 590 (1938).
\textsuperscript{99} D.R.I. 21.