

Louisiana Law Review

Volume 44 | Number 6

Symposium: Family Law

July 1984

The Louisiana Supreme Court and the Physician-Patient Privilege: *Arsenaux v. Arsenaux*

Greg Gerard Guidry

Repository Citation

Greg Gerard Guidry, *The Louisiana Supreme Court and the Physician-Patient Privilege: Arsenaux v. Arsenaux*, 44 La. L. Rev. (1984)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol44/iss6/10>

This Note is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kayla.reed@law.lsu.edu.

THE LOUISIANA SUPREME COURT AND THE PHYSICIAN-PATIENT PRIVILEGE: *Arsenaux v. Arsenaux*

Plaintiff wife sued for a separation from her husband on the grounds of abandonment. Alleging freedom from fault, she sought alimony, and additionally sought custody of a minor child and child support. The husband reconvened seeking a divorce on the grounds of adultery. In order to establish his claim, the husband sought to prove that his wife had become pregnant some two years following his vasectomy and had thereafter obtained an abortion. His effort was frustrated by the wife's successful assertion in the trial court that the medical records of her alleged abortion fell within the health care provider privilege for civil cases and her constitutional right to privacy. The husband successfully appealed from the trial court's judgment in favor of the wife.¹ The Louisiana Supreme Court, in a four to three decision, reversed and *held* that the medical record in question is a communication under the explicit wording of the health care provider statute and, as such, should not be admitted. The court determined that the case did not fall within any of the statutory exceptions to the privilege. The court also based its decision upon a consideration of the wife's constitutional right to privacy.² The three dissenters argued that the wife had waived her privilege to have the evidence excluded by alleging freedom from fault.

Arsenaux v. Arsenaux, 428 So. 2d 427 (La. 1983).

The supreme court's decision in *Arsenaux* represents the prevailing of Louisiana's physician-patient privilege³ over full factual disclosure in a case involving adultery, abortion, and a vasectomy. By asserting the statutory privilege, the wife was able to show freedom from fault and consequently collect alimony despite the availability of evidence of the wife's abortion under circumstances which indicate adultery. This result seems inequitable and necessitates an evaluation of the physician-patient privilege. Generally, the privilege operates quite effectively and produces inequitable results only in extraordinary circumstances. However, the clear wording of the statute limits the options available to the judiciary to remedy those certain situations in which the privilege leads to a harsh result. As evidenced by *Arsenaux*, some corrective action is necessary to

Copyright 1984, by Louisiana Law Review.

1. The court of appeal reversed the judgment of the trial court on the ground that the statutory privilege and the constitutional right to privacy had been waived by the wife's contention that she was free from fault and consequently eligible to receive alimony. *Arsenaux v. Arsenaux*, 417 So. 2d 856 (La. App. 4th Cir. 1982).

2. Although the court's considerations relative to the wife's right to privacy weighed upon its decision, the constitutional aspects of *Arsenaux* are beyond the scope of this note as is the family law aspect.

3. Although Louisiana's health care provider statute is much broader than a general physician-patient privilege in that it covers many health care providers, the two phrases will be used interchangeably in this note.

avoid injustice, and since the judiciary is clearly bound by the plain language of the statute, the solution must come from the legislature.

Louisiana's Physician-Patient Privilege

Prior to the enactment⁴ of Louisiana's health care provider statute, contained in Louisiana Revised Statute 13:3734,⁵ Louisiana did not recognize any physician-patient privilege in civil cases.⁶ The statute provides that a party in a civil case has a privilege to have any communication made to a health care provider which relates to the party's medical treatment or diagnosis kept confidential.⁷ The statute also recognizes certain specific exceptions to the privilege.⁸ The privilege in criminal cases

4. Although no physician-patient privilege existed at common law, two-thirds of the states have enacted some sort of statutory privilege. Those states without statutory privileges include Georgia, Illinois, Maryland, Massachusetts, New Jersey, Rhode Island, South Carolina, Tennessee, Texas, and Vermont. Three other states, Alabama, Connecticut, and New Hampshire, have modified the common law rule of no privilege to an extent.

5. La. R.S. 13:3734 (Supp. 1983) provides in pertinent part:

B. Except as hereinafter provided, in civil cases, proceedings before a medical review panel, pursuant to R.S. 40:1299.47 and in medical and dental arbitration proceedings, pursuant to R.S. 9:4230-4236, and in proceedings and investigation preliminary to all such actions, a patient or his authorized representative has a privilege to refuse to disclose and to prevent a health care provider from disclosing any communication, wherever made, relating to any fact, statement or opinion which was necessary to enable that health care provider or any other health care provider to diagnose, treat, prescribe or act for the patient.

6. See *Moosa v. Abdalla*, 248 La. 344, 178 So. 2d 273 (1965); See also Pugh, *The Work of the Louisiana Appellate Courts for the 1965-1966 Term—Evidence*, 26 La. L. Rev. 606, 614 (1966).

7. The following excerpt describes the circumstances giving rise to the privilege: To give rise to the privilege, a physician must be employed in his professional capacity by a patient. The privilege does not apply when a physician makes an examination pursuant to a court order. Nor does the admission of hospital records into criminal proceedings violate the privilege. Finally, information communicated to a physician in an effort to obtain illegal narcotics is not privileged.

Comment, *Competent Opinions and Privileges*, 21 Loy. L. Rev. 422, 446 (1975); See also Comment, *The Physician-Patient Privilege in Louisiana and its Limitations*, 31 Tul. L. Rev. 192 (1956).

8. La. R.S. 13:3734(c) (Supp. 1983) provides:

C. There shall be no privilege for any communication under this Section where:

(1) Either before or after probate, upon the contest of any will executed, or claimed to have been executed, by such patient, or after the death of such patient, in any action involving the validity of any instrument executed, or claimed to have been executed by him, conveying or transferring any immovable or movable property, any health care provider who has attended said patient may disclose any communication regarding the patient which was necessary to enable him to diagnose, treat, prescribe or to act for such deceased.

(2) After the death of the patient, the executor of his will, or the administrator of his estate, or the surviving spouse of the deceased, or if there be no surviving spouse, the children of the deceased personally, or if minors, by their representative, may give such consent, in any action or proceeding brought to recover

is similar but is not as broad and contains no list of exceptions.⁹

The enactment of the health care provider statute in 1968 caused substantial change in Louisiana law. In one pre-1968 decision the Louisiana Supreme Court permitted one parent in a heavily contested custody case to gain access to the psychiatric records of the other parent despite objections that the material was privileged.¹⁰ Since the statute's enactment, however, this type of information has been excluded under the physician-patient privilege.¹¹ Louisiana courts have consistently interpreted the civil statute as prohibiting a physician from testifying without the patient's consent as to any information acquired in attending the patient unless the

damages on account of the death of the patient, to permit any health care provider who may have attended said patient at any time to disclose any communication regarding said patient which was necessary to enable him to diagnose, treat, prescribe or act for such deceased.

(3) If any person brings an action to recover damages, in tort or for worker's compensation under federal or state laws, for personal injuries, such action shall be deemed to constitute a consent by the person bringing such action that any health care provider who has attended such person at any time may disclose any communication which was necessary to enable him to diagnose, treat, prescribe or act for said patient.

(4) The bringing of an action, to recover for the death of a patient, by the executor of his will, or by the administrator of his estate, or by the surviving spouse, or if there be no surviving spouse, by the children personally, or if minors, by their representative, shall constitute a consent by such executor, administrator, surviving spouse, or children or representative to the disclosure of any communication by any health care provider who may have at any time attended said deceased.

(5) If any health care provider reasonably believes in good faith that any legal proceeding enumerated in Paragraphs (3) or (4) under this Subsection, has or may be instituted for or on behalf of said patient, such health care provider may disclose any communication acquired by him which was necessary to enable him to diagnose, treat, prescribe or act for said patient.

D. Any action or proceeding described in Subsection C of this Section which constitutes a consent for a health care provider to testify at a trial on the merits shall be deemed a consent for purposes of any discovery method authorized by Articles 1421 et seq. of the Louisiana Code of Civil Procedure.

9. La. R.S. 15:476 (1981) provides:

No physician is permitted, whether during or after the termination of his employment as such, unless with his patient's express consent, to disclose any communication made to him as such physician by or on behalf of his patient, or the result of any investigation made into the patient's physical or mental condition, or any opinion based upon such investigation, or any information that he may have gotten by reason of his being such physician; provided, that the provisions of this article shall not apply to any physician, who, under the appointment of the court, and not by a selection of the patient, has made investigation into the patient's physical or mental condition; provided, further, that any physician may be cross-examined upon the correctness of any certificate issued by him.

10. *Moosa v. Abdalla*, 248 La. 344, 178 So. 2d 273 (1965).

11. *Wing v. Wing*, 393 So. 2d 285 (La. App. 1st Cir. 1980); discussed in Pugh & McClelland, *Developments in the Law, 1980-1981—Evidence*, 42 La. L. Rev. 659, 667 (1982).

action falls within one of the enumerated exceptions to the health care provider statute.¹²

Exposition and Resolution of the Problem

Although confidential communications are generally not protected from disclosure, certain privileges are recognized. For example, communications that are deemed privileged in Louisiana, in addition to physician-patient communications, include those between an attorney and his client,¹³ a husband and wife,¹⁴ a clergyman and his penitent,¹⁵ and a newspaperman and his sources.¹⁶ By their very nature, testimonial privileges hinder the full disclosure of all relevant evidence.¹⁷ Commentators argue that the physician-patient privilege, as well as the other testimonial privileges, encourages fraud¹⁸ and that the privilege is unnecessary since in only very few instances is the communication actually intended to be confidential.¹⁹

12. *Vincent v. Lemaire*, 370 So. 2d 190 (La. App. 3d Cir. 1979); *Wing v. Wing*, 393 So. 2d 285 (La. App. 1st Cir. 1980); *Heable v. Heable*, 248 So. 2d 847 (La. App. 2d Cir. 1971).

In interpreting the criminal statute, however, the courts have not felt as strictly bound by the clear wording of the statute. In *State v. Berry*, 324 So. 2d 822 (La. 1975), the defendant, on trial for murder, pled not guilty by reason of insanity. The state proffered evidence concerning the defendant's mental condition over his objection that the information fell under the physician-patient privilege. The supreme court affirmed the trial court's admission of the evidence stating that "the waiver may also result from other circumstances by which the patient *impliedly* waives his right to claim the privilege." 324 So. 2d at 827.

The supreme court again disregarded the express consent requirement contained in the criminal statute in *State v. Aucoin*, 362 So. 2d 503 (La. 1978). Once again the court was confronted with a defendant, convicted of murder, who pled not guilty by reason of insanity. The court acknowledged that an implied waiver does not have a place within the clearly worded requirements of the criminal medical privilege and concluded that this was not a waiver since the defendant clearly did not wish to waive anything. However, the court was of the opinion that the defendant's inconsistent posture of pleading insanity while invoking the privilege resulted in an *implied restriction* on his use of the privilege which prevented its assertion under these circumstances. Although the court used a slightly different analysis in *Aucoin* than in *Berry*, its intention was the same, namely, to prevent injustice by limiting the application of the privilege.

13. La. Civ. Code art. 2283; La. R.S. 15:475 (1981).

14. La. R.S. 15:461 (1981) (criminal only).

15. La. R.S. 15:477 (1981) (criminal only).

16. La. R.S. 45:1452 (1982).

17. See Pugh & McClelland, *Developments in the Law, 1982-1983—Evidence*, 44 La. L. Rev. 335, 345 (1983).

18. For example, Professor McCormick stated: "More than a century of experience with the statute has demonstrated that the privilege in the main operates not as the shield of privacy but as the protector of fraud. Consequently the abandonment of the privilege seems the best solution." McCormick, *Evidence* § 105, at 228 (2d ed. 1972).

19. For example, Professor Wigmore stated: "From asthma to broken ribs, from ague to tetanus, the facts of the disease are not only disclosable without shame, but are in fact often publicly known and knowable by everyone—except the appointed investigators of truth." 5 Wigmore, *Evidence* § 2380, at 207 (2d ed. 1923).

The reason for allowing this hinderance to the disclosure of evidence, however, is that at times society demands that the fact-finding role of the law yield in order to protect other rights which are equally or more highly valued.²⁰ This suppression of the truth places an onerous burden upon the judicial system and arguably should only be tolerated, if at all,²¹ when the societal need clearly outweighs the harm done by withholding relevant evidence from the fact-finder.²² Professor Wigmore, after generally evaluating the existence of privileges as an exception to the policy of providing the court with all necessary facts, developed four fundamental conditions which are necessary to the establishment of a testimonial privilege: (1) the communication must be intended to be confidential; (2) the relationship must be one to which the confidentiality of the communication is essential; (3) the relationship must also be one which the public deems worthy of protecting; and (4) the injury resulting from disclosure of the communication must outweigh the injustice resulting from nondisclosure.²³ A privilege should be recognized only when these four conditions are present.

Since no common-law privileges exist in Louisiana, it is only through legislative action that a privilege can be enacted. Once the legislature has spoken, the judiciary must apply the statute within the bounds of discretion permitted by law.²⁴ Although the Louisiana legislature has clearly manifested its will in enacting the health care provider statute, the wisdom of their decision may certainly be questioned. In applying Wigmore's four conditions to the physician-patient privilege, only the third criterion is clearly present—namely, that the relationship is one which the public deems worthy of protecting.²⁵

20. See Note, Evidence—Privileged Communication—Physician-Patient Privilege—Louisiana Civil Procedure, 12 *Loy. L. Rev.* 142, 144 (1965).

21. Professor Wigmore once stated: "It is certain that the practical employment of the privilege has come to mean little but the suppression of useful truth—truth which ought to be disclosed and would never be suppressed but for the sake of any inherent repugnancy in the medical facts involved." 8 Wigmore, *Evidence* § 2380, at 831 (McNaughton rev. 1961).

22. See McCormick, *Evidence* § 72, at 151 (2d ed. 1954).

23. 5 Wigmore, *Evidence* § 2287, at 7 (2d ed. 1923).

24. The Louisiana Supreme Court stated: "When a law is clear and free from all ambiguity, we are not at liberty to disregard the letter of it, under the pretext of pursuing its spirit." *Hibernia Nat. Bank v. Louisiana Tax Comm.*, 195 La. 43, 55, 196 So. 15, 18 (1940). See also *State v. Vallery*, 212 La. 1095, 34 So. 2d 329 (1948); *State v. Maestri*, 199 La. 49, 5 So. 2d 499 (1942). Civil Code articles 13-21 guide the judiciary in interpreting code articles and statutes. Generally, these articles provide that when a law is clear, it should be applied according to its plain meaning. Former Chief Justice Sanders stated: "No aids for interpretation are needed. 'Candles are not to be lighted when the sun shines brightly.'" Sanders, *The Judge: The Extent and Limit of His Role in a Civil Law Jurisdiction*, 50 *Tul. L. Rev.* 511, at 513 (1976).

25. Wigmore evaluated the physician-patient privilege in light of his four conditions and concluded: "A negative answer to any one of these questions would leave the privilege without support. In truth, all of them, except the third, may justly be answered in the negative." 5 Wigmore, *Evidence* § 2380, at 206 (2d ed. 1923).

Although there is a substantial policy interest in insuring that the public receives the best health care possible, the other three criteria appear to be lacking. In the vast majority of situations, the symptoms of the patient are not intended to be confidential. In fact, many ailments are readily visible and are freely disclosed by the patient to friends and relatives. As far as the second condition is concerned, one in need of physical care would rarely be deterred from seeking treatment by the fear of subsequent disclosure in court. Arguably, the fourth criterion, that the injury to the relationship is greater than the injury to justice, is also not satisfied.²⁶ In most instances, the patient has no valid reason to keep his physical condition private, and oftentimes his reason may actually be to perpetrate a fraud on the court. In a personal injury action, for example, the very fact which is sought to be protected is that the litigant was not injured at all.²⁷ Even when a controversial topic such as abortion comes into litigation, which a patient may legitimately wish to be kept confidential, the evidence of such medical treatment is often necessary for a fair adjudication. In such a situation, the policy supporting disclosure of the evidence increases greatly and, theoretically, confidentiality may be required to yield upon a balancing of the policy interests. Certainly in the ordinary situation where there is very little concern that the communication remain private, the injury to justice by the exclusion of this evidence outweighs any potential injury to the physician-patient relationship.²⁸

The weaknesses of the physician-patient privilege are obvious,²⁹ but the purpose of this note is not to advocate the abolition of the privilege.³⁰ Rather, the preceding discussion is intended to show that the physician-patient privilege is unpopular with commentators for valid reasons and to suggest that the legislature reevaluate the physician-patient privilege. The role of the judiciary is to apply the statute as a manifestation of

26. See 5 Wigmore, *Evidence* § 2380, at 207 (2d ed. 1923): "But (4) that the injury to that relation is greater than the injury to justice—the final canon to be satisfied—must most emphatically be denied. The injury is decidedly in the contrary direction. Indeed, the facts of litigation to-day are such that the answer can hardly be seriously doubted."

27. *Id.* at 207.

28. *Id.*

29. One commentator wrote: "In the few instances where honest patients do dread disclosure of their physical condition by a doctor, their fear is not that the truth may some day be fired from him in court, but that he may voluntarily spread the facts among his friends and their's in conversation." Chafee, *Privileged Communications: Is Justice Served by Closing the Doctor's Mouth?*, 52 *Yale L.J.* 607, 617 (1943).

30. For discussions of the physician-patient privilege see L. DeWitt, *Privileged Communications Between Physician and Patient* (1958); R. Slovenko, *Psychotherapy, Confidentiality, and Privileged Communication* 20-24 (1966); Black, *The Marital and Physician Privileges—A Reprint of a Letter to a Congressman*, 1975 *Duke L.J.* 45 (1975); Morgan, *Suggested Remedy for Obstructions to Expert Testimony by Rules of Evidence*, 16 *U. Chi. L. Rev.* 285 (1943); Note, *Physician-Patient Privilege*, 27 *La. L. Rev.* 361 (1967); Note, *Medical Jurisprudence—Privileged Communications Between Physician and Patient—State Regulation and Right to Privacy*, 39 *Tenn. L. Rev.* 515 (1972).

legislative will. Although the courts have recognized the problem with Louisiana's privilege, their hands are tied in that they cannot go beyond the clear wording of the statute.³¹

The redactors of the health care provider statute have attempted to address problem areas involving the physician-patient privilege by adopting a list of exceptional situations in which the assertion of the privilege will not be permitted.³² For example, when a litigant brings an action to recover damages in tort for personal injuries, he is deemed to have consented to the admission of relevant medical evidence. These exceptions resolve some of the problems with the privilege, but as evidenced by *Arsenaux*, at least one more problem is not adequately dealt with by the statute.³³ Certainly the legislature could not be expected to anticipate every situation in which it would be unfair for a litigant to invoke the privilege, especially one as unique as that in *Arsenaux*. Rather, the legislature must develop a more flexible statute which would give the judiciary greater discretion.

By denying the husband the opportunity of presenting evidence of his wife's abortion under circumstances which indicate adultery, the wife in *Arsenaux* was able to show freedom from fault and consequently collect alimony. Although the inequity of the result is fairly obvious, the majority was constrained by the language of the statute and could not go through the evaluation necessary to determine whether the assertion of the privilege was proper in this situation. Rather, the court correctly adopted a literal interpretation of the health care provider statute, apparently being of the opinion that since the legislature spelled out the cases in which the medical privilege is waived, any additional judicially-created exception would "contravene the statute and flout the law."³⁴ This conclusion is supported by the fact that the statute is a fairly recent manifestation of legislative will.³⁵

The legislature must act to give the judiciary the needed flexibility

31. See *infra* note 24.

32. See *infra* note 7.

33. See *Heable v. Heable*, 248 So. 2d 847 (La. App. 2d Cir. 1971) for another example.

34. *Arsenaux*, 417 So. 2d at 430.

35. The holding in *Arsenaux* seems to indicate that there is little chance of the supreme court finding a future litigant in a civil action to have impliedly waived his privilege, and no circumstances will constitute a waiver unless they fall within one of the statutory exceptions. However, the court actually left this door open, albeit through *obiter dicta*, by suggesting that because the wife's physical condition was not an essential element of her suit, the court would not infer that she impliedly waived the privilege. Therefore, if a future litigant's physical condition is an essential element of his cause of action or defense the court may very well find this party to have impliedly waived the privilege although the action does not fall within one of the enumerated exceptions. The three dissenters in *Arsenaux* believed that the wife had in fact made her freedom from fault an issue by seeking alimony, thereby impliedly waiving the privilege. Consequently, all seven justices apparently agree that an implied waiver is possible.

to equitably resolve actions in which an essential issue in the action is the existence of a mental or physical condition or ailment.³⁶ Approximately two-thirds of the states have enacted some sort of statutory privilege.³⁷ These statutes vary widely as to wording and scope, but the enacting states can be divided into three general categories. The first group includes states which have enacted a strict statute which contains no list of exceptions.³⁸ The second group, by far the smallest, includes states such as Louisiana which have enacted statutes containing some common exceptions.³⁹ The third group includes states which have more liberal provisions for waiver of the privilege when the litigant takes an inconsistent posture which would make it unfair to permit him to assert the privilege.⁴⁰ In states falling within the first two categories, problems similar to *Arsenaux* have arisen and have promoted discussion.⁴¹ In each instance, the commentators have urged a liberalization of the waiver doctrine whether by judicial interpretation, if the statute lends itself to such interpretation, or by legislative action if the statute leaves no room for interpretation, as is the case with Louisiana's health care provider statute.

The Missouri Supreme Court had to deal with a strictly worded statutory privilege which is very similar to Louisiana's criminal statute⁴² in that it contains no list of exceptions. Faced with situations in which the plaintiff asserted a cause of action which placed his health at issue, that court responded by adopting a liberal interpretation of that state's

36. Wigmore presented the following example illustrating a litigant's contradictory position in such a situation:

The whole reason for the privilege is the patient's supposed unwillingness that the ailment should be disclosed to the world at large; hence the bringing of a suit in which the very declaration, and much more the proof, discloses the ailment to the world at large, is of itself an indication that the supposed repugnancy to disclose does not exist. By any other conclusion the law practically permits the plaintiff to make a claim somewhat as follows: "I tender witnesses A, B, and C, who will openly prove the severe nature of my injury. But I object to the testimony of witness D, a physician called by the opponent to prove that my injury is not so severe as I claim, because it is extremely repugnant to me that my neighbors should learn the nature of my injury!" The position is especially absurd when (as is often the case) the dreadful disclosure, which the privilege prevents, is the fact that the plaintiff suffered no injury at all.

8 Wigmore, *Evidence* § 2389, at 855 (T. McNaughton rev. ed. 1961).

37. See *infra* note 4.

38. *Ariz. Rev. Stat. Ann.* § 12-2235 (1982); *Minn. Stat. Ann.* § 595.02(4)(1974) (Supp. 1984); *Mo. Rev. Stat.* 491.060(5)(1952) (Supp. 1984).

39. *Idaho Code* § 9-203(4)(1948) (Supp. 1984); *La. R.S.* 13:3734 (Supp. 1983).

40. *Calif. Evid. Code* § 990-996 (1966); *Iowa Code Ann.* § 622.10 (Supp. 1983-84).

41. See Hogan, *Waiver of the Physician-Patient Privilege in Personal Injury Litigation*, 52 *Marq. L. Rev.* 75 (1968); Copple, *Physician-Patient Privilege: A Need to Revise the Arizona Law*, 6 *Ariz. L. Rev.* 292 (1965); Comment, *Waiver of the Physician-Patient Privilege in Missouri*, 13 *St. L. L. J.* 459 (1969).

42. See *infra* note 8.

statute.⁴³ The Louisiana Supreme Court is unable to liberally interpret the health care provider statute since Louisiana's physician-patient privilege contains a list of exceptions, and a judicial expansion of this list would in effect create law. Therefore, the only solution in Louisiana is for the legislature to amend the statute.

Federal Rule of Evidence 501⁴⁴ deals with privileged communications. This rule provides that in criminal cases the federal common law, as interpreted in the light of reason and experience, will apply. In civil actions and proceedings, state privilege law applies in situations in which the state law supplies the rule of decision. Proposed Federal Rule of Evidence 504⁴⁵, relative to the psychotherapist-patient privilege, was not accepted. However, this rule and those based upon it are pertinent to the present discussion in that they provide an excellent example of an exception which could easily be added to Louisiana's health care provider statute and which would allow the courts to equitably deal with any possible situation which may arise in the future. This exception would relieve the legislature of the impossible task of attempting to anticipate every situation in which an exception to the physician-patient privilege would be proper by providing that the privilege would be waived whenever the litigant proceeds in such a manner that his health becomes a material issue. Uniform Rule of Evidence 503⁴⁶ corresponds exactly to proposed Federal Rule of Evidence 504, except that the former makes provision for a physician-patient privilege rather than limiting the scope of the statute to psychotherapists as was done in the latter. Subdivision (d)(3) of the Uniform Rule provides:

(3) Condition on element of claim or defense. There is no privilege under this rule as to communications relevant to an issue of the [physical,] mental . . . or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense.

In fairness and to avoid abuses, the patient, by injecting his condition into litigation, must be said to have waived the privilege.

The states which have adopted provisions similar to this subdivision⁴⁷

43. *State ex rel McNutt v. Keet*, 432 S.W.2d 597 (Mo. 1968). In *Keet* the Missouri Supreme Court held that once the matter of a plaintiff's physical condition is an issue under the pleadings, the plaintiff will be considered to have waived the statutory physician-patient privilege, insofar as information from doctors or medical and hospital records bearing on that issue are concerned.

44. Fed. R. Evid. 501.

45. Fed. R. Evid. 504 (Proposed Official Rule 1973).

46. Unif. R. Evid. 503.

47. Alaska's privilege, Alaska Rules of Evidence, Rule 504 (1979), is similar to the uniform rule, as are the rules adopted by Florida (Fla. Stat. Ann., Evidence Code § 50.503

have allowed their courts the flexibility to insure that in situations involving the medical privilege, the interests of justice are kept paramount without forcing the courts to elect between creating a fiction in order to circumvent the clear wording of the statute or allowing an injustice. This type of exception would make certain that private communications will be exposed only when relevant to the matter before the court and only to the extent necessary to reach a fair adjudication. The social policy underlying the privilege—namely, insuring that the public receives the best health care possible—will still be advanced while the injury to the judicial system by the exclusion of relevant evidence will be lessened.⁴⁸ The Louisiana legislature could adopt a similar provision, and in doing so would untie the hands of the courts and allow them to equitably resolve difficult decisions such as the one presented in *Arsenaux*.

Conclusion

Louisiana courts have been placed in a dilemma in applying the civil and criminal statutes dealing with the relationship between physician and patient. In criminal cases, the supreme court has prevented inequities by creating the implied waiver of the privilege in situations in which it would be unfair to allow its assertion. In civil cases, society has had to bear results which seem inequitable. This dilemma cannot be resolved by a judiciary that is confined within the clear wording of a recently enacted statute. The problem must be solved by the legislature, and this can be done by a complete reevaluation of the physician-patient privilege and the adoption of a provision similar to subdivision (d)(3) of Uniform Rule of Evidence 503. Such a provision would limit the scope of the privilege by creating a broader exception and would provide the judiciary with the needed discretion to equitably resolve cases involving the physician-patient privilege.

Greg Gerard Guidry

(1975)), Arkansas (Ark. Stat. Ann. § 28.1001, Uniform Rules of Evidence, Rule 503 (1979)), Maine (Me. Rev. Stat. Ann., Maine Rules of Evidence, Rule 503 (Supp. 1978)), North Dakota (N.D. Rules of Evidence, Rule 523 (Supp. 1933)), Oklahoma (Okla. Stat. Ann., tit. 12, § 2503(1780) (Supp. 1983-84)), and South Dakota (S.D. Rules of Evidence, § 19-13-3 (1923)). Nevada (Nev. Rev. Stat. § 49.215 (1979)) and New Mexico (N.M. Stat. Ann., Rules of Evidence, Rule 503 (1979)) have limited the application of the rule to psychotherapists.

48. A Justice on the Wisconsin Supreme Court stated the matter aptly in his dissent:

In the last analysis, therefore, this statute must be said to have been enacted to save from shame and disgrace those who by their own acts have forfeited their honor. If this could be done without at the same time working injustice to the innocent and the pure, the purpose might be somewhat praiseworthy. But where the innocent are made to suffer to shield the wicked and the guilty from the publicity of their own misconduct, the cost of generous consideration becomes too great.

Maine v. Maryland Cas. Co., 172 Wis. 350, 178 N.W. 749, 752 (1920).