Medical Ethics and the Law: The Conflict between Dual Allegiances

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Everywhere medical confidences are regarded as sacred and precious. One of the highest duties of the physician is to keep secret and inviolate the intimate knowledge of the patient's ailment or physical imperfection, especially that which he learned by means of communication, observation or examination in the course of his professional employment.

In the horse-and-buggy days of long ago, the physician was familiarly referred to as a "country doctor." He was a practitioner only; the health of his patient was his one and only concern. His interest in the health of the community in general, while not entirely absent, was considered nevertheless as outside the sphere of his private practice. Little was known about the dangers and causes of the spread of contagious and infectious diseases. The varied and highly efficient public agencies, which today concern themselves with the general health and welfare of the whole community, had not yet been created except in a very limited sense. The private practitioner conceived that his primary duty was to restore the health of his patient and that in this endeavor he was bound to silence, even when the protection of the public might seem to require revelation. Moreover, public opinion usually approved this view since it was the common practice of well-meaning persons to sedulously conceal the unpleasant fact that one of their kinsmen was the victim of "galloping consumption," smallpox, typhoid fever, diphtheria or some other "dreadful" disease, especially if it were a disgraceful or loathsome one.

In more recent times, however, medicine has made great strides in the field of public health and has gone far beyond the traditional practice of the "country doctor." During the 20th century, medicine has developed along lines which separate it from that of the previous period. Today, it comprises three major disciplines — practice, public health and research. There has been a notable effort on the part of the medical profession to adopt methods and knowledge derived from the special sciences, with the result that some of the most important improvements have been made in the
field of preventive medicine. More and more, in the interest of the public at large, the medical profession is employing its knowledge, skill and experience in the prevention and control of disease, particularly those diseases of a dangerously contagious or infectious character.

Unquestionably, the patient must be given primary and ultimate consideration. But the physician's duty does not necessarily end with the patient; the health of the community may also have to be considered. Accordingly, it is now generally recognized that in particular circumstances the physician occupies a two-fold relation toward the subject-matter of his employment. The rights and interests of the patient and those of the State, as guardian of the health and safety of its citizens, may have to be balanced, one against the other. Two widely disparate duties stem from these dual allegiances: (a) an ethical duty to the patient, (b) a legal or, sometimes, a moral duty to the public or to particular members thereof. Many and variant are the occasions when the physician must decide whether in the furtherance of his public duty he shall voluntarily reveal the medical confidences of his patient, or, in the maintenance of his private duty, he shall resolutely shield them from disclosure.

What, then, are the occasions when the physician must faithfully guard the confidences of his patient? What are the occasions when his duty to the State, to his family or to his intimate friends will justify the abrogation of his ethical duty to his patient? In other words, when may the doctor tell? When should he tell? When must he tell? What are the risks to which he may expose himself, if his act of revealing his patient's confidences, however done, cannot be justified? These are questions which constantly harass the medical profession. A duty owed to the patient, to the State or to particular persons, if breached, may result in serious consequences. Not only is it possible that the physician may render himself liable in damages in a civil action brought by the aggrieved party, but there is also the hazard that he will be subjected to a criminal prosecution or that he will be censured by a state board of medical examiners for "unprofessional conduct", or, even worse, that he will be deprived of his license to practice. Obviously, these matters merit consideration.

Hippocrates (circa 400 B.C.), renowned as the "Father of Medicine," was perhaps the first to express the ethical duty of the medical man. His

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1 Forbes, Some Questions of Medico-Legal Interest, 13 Medico-Leg. & Crim. Rev. 18 (1945) "It is quite natural and proper for a practitioner to consider the services he may render to the community as a citizen, to consider his relationship with the consideration of justice, and to consider his loyalties towards his family and intimate friends, and often these loyalties pull in opposing directions, and the result is not always one which acts in the direction of the accepted ethical decisions with regard to professional conduct."

2 Similar questions were discussed by Birkenhead, Lord Chancellor of England, in an essay, Should a Doctor Tell?, in 1 Points of View 33 (3d ed. 1922).
Oath, a self-imposed criterion of professional conduct, has come down through the ages and even today is taken by many young men and women as they enter the medical profession.

Pledging himself that never would he voluntarily divulge the medical confidences of his patients, Hippocrates vowed, among other things:

Whatsoever things I see or hear concerning the life of men, in my attendance on the sick or even apart therefrom, which ought not to be noised abroad, I will keep silence thereon, counting such things to be as sacred secrets.  

Protected by no greater guaranty of secrecy than this, countless generations of men and women, freely and confidently, have entrusted their most intimate and delicate secrets to their medical advisers.

It must be remembered, however, that the Hippocratic Oath is nothing more than a solemn avowal by the physician that he will not gratuitously make known the confidences of the patient; and especially that he will not indulge in loose and idle gossip about the patient's malady, but will faithfully observe a decent regard for the patient's right to privacy. Generally speaking, the physician is left to decide for himself what things in his professional relationships "ought not to be noised abroad." But the physician's ethical duty of secrecy is not absolute. However binding the Hippocratic Oath may be as a creed or commandment, it cannot be considered as transcending the legal duty imposed upon every citizen to testify when lawfully summoned and sworn as a witness in a court of justice. This fundamental principle is expressly recognized by the American Medical Association. Occasionally, there will be someone who will prefer the role of

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8For the complete Oath, see Foxe, The Oath of Hippocrates, 19 PSYCHIATRIC Q. 17 (1945); Brandeis, The Physician and Medical Ethics, 38 MED. REV. OF REV. 699 (1932). For interpretation of each clause, see Flanagan, The Spirit of the Oath, 57 VA. MED. MO. 538 (1930). Florence Nightingale is said to have imposed a similar oath upon herself when she began her celebrated career as a nurse.

9Purrington, An Abused Privilege, 6 COL. L. REV. 388, 395 (1906); Birkenhead, Should a Doctor Tell? in 1 POINTS OF VIEW 33 (3d ed. 1922); Riddell, The Law of Medical Confidence, 2 LANCET 4 (1927).

6Morrison v. Malmqust, 62 So.2d 415, 416 (Fla. 1953) "We apprehend that no physician, under the protection of this (Hippocratic) code, time-honored as it is, and laudable as his determination to respect it might be, could refuse to tell in a court of justice news that had reached him, inside or outside his profession, or from intercourse with his fellow men, himself determine whether he should divulge it, and whether telling it at the command of a court would amount to spreading it abroad."

7Principles of Medical Ethics of the Am. Med. Ass'n, Ch. II, § 1 (1943) "The confidences should be held as a trust and should never be revealed except when imperatively required by the laws of the state." For a fine discussion of this Code of Ethics, see Brandeis, The Physician and Medical Ethics, 38 MED. REV. OF REV. 699 (1932).
an unyielding martyr rather than that of a law-abiding citizen, but this is a choice which he alone must make.8

**The Physician’s Duty in Matters Relating to the Public Health**

No patient can reasonably expect that if his malady is found to be of a dangerously contagious or infectious nature, he can still insist that for his own benefit it be kept secret from those to whom, if there were no disclosure, such disease would be transmitted. Hence, the information given to the physician by the patient, though confidential, must be given and received subject to the qualification that, if the patient’s disease is of a dangerous and so highly contagious or infectious a nature that it will necessarily be passed on to others unless the danger is disclosed to them, then the physician should, in that event, be entitled to make so much of a disclosure to such persons as is necessary for their protection.9 In such cases, the physician’s ethical duty of secrecy owed to the patient must yield to the paramount moral duty of disclosure owed to the community.10 In the main, however, the physician no longer need ponder this conflict of allegiances, since, in a large majority of the states, the lawmakers have imposed upon him a positive legal duty to disclose to designated public officials or particular persons the nature of his patient’s disease, especially if it be a communicable one.11 In such cases, the mandate of the legislature, derivable from the fundamental principle, *salus populi est suprema lex*, must be obeyed without question,12 and the physician who acts in good faith need have no fear

8 Lord Dawson of Penn, a renowned British surgeon, once said: "The principle of the protection of medical witnesses in the interests of their patients is one which, amongst doctors, is a religious conviction, and there are confidences which no force would ever compel us to unfold." *Lancet* 619, 621 (April, 1922) Webster, *Legal Medicine and Toxicology* 34 (1930) "In acting in this manner and in refusing to answer questions involving what he believes to be a matter between himself and his patient, the medical witness must remember that he may be punished for contempt of court for such refusal, but he will rest assured that he has merited the confidence of his patient and has lived up to the highest ethics of his profession." See also, 60 L.J. 473 (1925); 86 Sol. J. 380 (1942)

9 Simonsen v. Swenson, 104 Neb. 224, 177 N.W. 831 (1920).


11 The courts have consistently held that laws reasonably designed to promote and protect the public health and well-being are clearly within the police powers of the state, and are not in violation of the Constitution of the United States, or that of any state. State v. Wordin, 56 Conn. 216, 14 Atl. 801 (1887); *Ex parte Lewis*, 528 Mo. 843, 42 S.W.2d 21 (1931), *Ex parte Fowler*, 85 Okla. Crim. 64, 184 P2d. 814 (1947).

12 Compliance is also an ethical duty. Am. Med. Ass’n Principles of Medical Ethics, Chap. IV, § 2 (1943)
in the least that in so doing, he may subject himself to liability in damages. It must be borne in mind, however, that to make available to the physician exemption from liability for making the disclosure, the report which he is required to make to the public authorities should not extend beyond what is essential to a strict compliance with the statute, or what is absolutely necessary to properly protect persons likely to be exposed to the danger of the disease. It is altogether likely that patients afflicted with communicable diseases will object to having their cases reported, but it would hardly be contended that the physician could excuse his non-compliance with the positive requirements of the law by showing a dissent in the particular case. It will be noted also that even though the physician be mistaken in his diagnosis but makes his report in good faith and without malice, the responsibility for what is done thereafter rests solely upon the public health authorities.

So well have the lawmakers kept pace with the almost incredible advance in preventive medicine and public health that it is difficult to conceive of any type of serious contagious or infectious disease which the physician is not required by law to report to a duly constituted public health board or officer. There is little, if any, similarity in the wording of these statutes. Some are needlessly verbose and specific; others are succinct and general. Some require the physician to notify not only the public health authorities, but also particular persons who may come in contact with the afflicted patient. In many states, the physician is required to report not only cases of communicable diseases coming under his observation or care, but also various other maladies, injuries and physical defects which however serious and dangerous to the persons afflicted are not necessarily dangerous to the public at large. In some states the physician, or the person in charge of a hospital, is required to report all cases of cancer or other malignant tumors, occupational diseases, injuries to workmen compensable under Workmen's Compensation Laws, cerebral palsy, infants' eye diseases, premature births, congenital defects, blindness, epilepsy, drug addicts, indigent afflicted adults

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13 McGuire v. Amyx, 317 Mo. 1061, 297 S.W.2d 968 (1927). Statutes in some states expressly absolve the physician from liability. MINN. STAT. ANN. § 144.68 (Supp. 1952); OHIO REV. CODE § 4731.22 (OHIO GEN. CODE § 1275).
15 People v. Shurly, 131 Mich. 177, 91 N.W 139 (1902).
17 Alaska Sess. Laws 1949, c. 118; KAN. GEN. STAT. ANN. § 65-117 (1949 Supp.) Venereal diseases have received special attention in several states. See Missouri, Montana, and North Carolina statutes.
18 MICH. STAT. ANN. § 14.105 (1937). See also OHIO REV. CODE § 4731.22 (OHIO GEN. CODE § 1275), which permits a physician to disclose a patient's venereal disease to specified persons.
and pregnant women, physically handicapped children, and deaths resulting from contagious, infectious, or epidemic disease or under suspicious circumstances.

The statutes above referred to are mandatory, and must be obeyed. Should the physician fail to make the reports required by law, he may subject himself to a criminal prosecution the penalty of which, if he be found guilty, is usually a fine, or imprisonment, or both; in addition, he may even be deprived of his license to practice. It has been held, and rightly so, that the physician-patient privilege statute affords no excuse, in a criminal prosecution of a physician, for his failure to report to the public authorities a disease dangerous to the public health.

A physician who violates the statutory duty to notify the public health authorities of every case of reportable disease within his personal knowledge may subject himself to liability in damages in an action in tort for negligence if it can be shown that his negligence was the proximate cause of injury to the patient or to others. It has been held that, aside from the statutory duty to report to the public health authorities, there is also the moral duty of the physician who is attending a person afflicted with a communicable disease to give notice thereof to other persons who are known to be in dangerous proximity to such patient; and a failure to perform this duty will constitute negligence on the part of the physician, making such evidence available to any person in the recovery of damages resulting directly and proximately from such neglect on the part of the physician.

In Davis v. Rodman, plaintiffs, the parents of eight children, brought an action for damages against two physicians who had attended two of the children afflicted with typhoid fever. Defendants did not advise plaintiffs or their children of the nature of the disease or warn them of the danger of exposure; nor did they report the cases to the public health authorities as re-
quired by law. Later, plaintiffs and three more children contracted the disease, one of whom died as a result. In their petition, however, plaintiffs failed to allege that the negligence of defendants was the proximate cause of the disease contracted by plaintiffs and the other children. Judgment was, therefore, entered for defendants. The supreme court affirmed the judgment, but declared emphatically the duty of a physician in such circumstances.25 Apart from any statutory duty to report, the American Medical Association places the entire responsibility upon the physician to decide what action he should take to protect healthy persons from becoming infected.26

**THE PHYSICIAN'S DUTY IN MATTERS RELATING TO CRIME**

It should be the moral and social duty of every physician, as it is of every ordinary individual, to render such assistance as he can in the investigation and discovery of crime and to afford all information which will lead to the detection and arrest of the criminal. In modern civilized societies the medical profession and the police play important parts and perform indispensable functions. Fortunately, in matters pertaining to the public health and safety, there has always been a noticeable attitude of cooperation between them. This is especially true in cases involving a crime where the death of a person resulted from acts of violence, or where there is a suspicion

25 *Id.* at 391, 227 S.W at 614: "The relation of a physician to his patient and the immediate family is one of the highest trust. And he owes a duty to those who are ignorant of such disease, and who by reason of family ties, or otherwise, are liable to be brought into contact with the patient, to instruct and advise them as to the character of the disease. This was incumbent upon the defendants regardless of the rules and regulations of the State Board of Health on the subject. One of the rules of the State Board of Health requires 'every physician to report, as soon as possible, every case of communicable disease, declared notifiable, which occurs in his practice. ' Violation of the rule was evidence of negligence." See Skillings v. Allen, 143 Minn. 323, 173 N.W 663 (1919), and note 13, *supra*.

26 *Am. Med. Ass'n Principles of Medical Ethics, Chap. II, § 1 (1943)* "There are occasions, however, when a physician must determine whether or not his duty to society requires him to take definite action to protect a healthy individual from becoming infected, because the physician has knowledge, obtained through the confidences entrusted to him as a physician, of a communicable disease to which the healthy individual is about to be exposed. In such case, the physician should act as he would desire another to act toward one of his own family under like circumstances. Before he determines his course, the physician should know the civil law of his commonwealth concerning privileged communications." It is difficult to understand why the medical profession fears the application of the physician-patient privilege statutes as is indicated in the last sentence quoted above. Such fear is not warranted. The privilege is a testamentary one only. It has no application to disclosures made outside of a judicial proceeding. *See People v. Shurly, 131 Mich. 177, 91 N.W 139 (1902); Simonsen v. Swenson, 104 Neb. 224, 177 N.W 831 (1920)*. The Note in 52 Col. L. Rev. 383, 398 (1952), is in accord with this view, but suggests that the privilege statutes of Louisiana, Michigan, Minnesota, New York and Wisconsin "might be read as imposing a duty of extra-judicial non-disclosure."
of poisoning. From this rapport a new and specialized practice known as Medical Jurisprudence, or Clinical Forensic Medicine, has emerged. It has instituted its own techniques and has produced its own appropriate literature. Hence, new methods for the detection of crime and for the procurement and preparation of evidence for use in criminal prosecutions have been evolved, whereby the objectives of the laws relating to criminal procedure have been notably advanced.

There are occasions, however, when the physician cannot divest himself entirely of the notion that professional etiquette prohibits his cooperating with the police. Of course, if the suspected person is not his patient, his duty is clear and he will have no qualm in informing the police of his suspicions. But if, to his dismay, he discovers, in the course of his professional employment that the suspect is a patient of his, his attitude towards the spectacle of his moral duty is likely to be flabby and timid. Many physicians are apprehensive that, in the present state of the law, one who volunteers the facts, or his suspicions, to the police will not be protected from subsequent litigation. In all fairness, it may be said that there is some justification for their fear. Except in special circumstances to which reference will be made later there are no statutes which impose a positive duty upon a physician to report to the police the criminal acts of his patient.

It is manifest that professional confidences should be respected; nevertheless, there must be some limits to the ethical duty of secrecy owed to the patient, since there is also the moral or social duty owed to the State. The difficulty is to point to any clear rule upon which the physician can safely rely in concrete cases. In England, for many years, the matter has been the subject of considerable discussion. For the most part, British physicians have steadfastly maintained that they are not necessarily entitled to give information to the police regarding the criminal activities of their patients; that it is no part of the duty of a physician to act as a private detective. This

27 2 Taylor, Principles and Practice of Medical Jurisprudence 248 (10th ed. 1948) "The duties of a medical practitioner in cases of poisoning are twofold. He must first undertake the care and treatment of the patient, and secondly to do his duty as a citizen in helping the authorities in arriving at a correct interpretation of the case. A medical man need not make himself officious on such occasions, but he would be unmindful of his duty as a member of society if he did not aid the cause of justice by extending his scientific knowledge to the detection of crime."

28 Brothers, Medical Jurisprudence (3d ed. 1930); Davidson, Forensic Psychiatry (1952); Glaister, Medical Jurisprudence and Toxicology (7th ed. 1942); GuttmacHer and Weihofen, Psychiatry and the Law (1952); Herzog, Medical Jurisprudence (1931); Oppenheim, A Treatise on Medical Jurisprudence (1935); Schaffel, Medical Jurisprudence (1931); Taylor, Principles and Practice of Medical Jurisprudence (1948)

attitude is based upon the theory that the secret is still the patient's secret, and that the physician obtained the information upon the implied condition that he would use it in the interest of the patient alone. Also it has been argued that after the crime has been committed, for the purpose of bringing the guilty to justice, there is no logical reason why the professional secrecy accorded to the lawyer should be respected more than the professional secrecy of the physician; that if it is not good policy for the state to interfere between a lawyer and his client, neither is it good policy to interfere between a physician and his patient.\footnote{For reports of committees and articles and comments by medical men, lawyers and laymen, see \textit{Brit. Med. J.} 287 (July-Dec., 1943); \textit{Brit. Med. J.} 1248. (Jan.-June, 1939); \textit{Brit. Med. J.} 206, 255 and 293 (Jan.-June, 1916); 1 \textit{Brit. Med. J.} 815, 861, 869, 882, 1000, 1065, 1413 and 1487 (1896); 2 \textit{Curr. Leg. Thought} 50 (1935); 102 \textit{Just. P.} 746 (1938); 79 \textit{Just. P.} 3 (1915); 70 \textit{Just. P.} 419 (1906); 88 \textit{L. J.} 20 (1939); 86 L. J. 323 (1938); 49 L. J. 713 (1914); 164 L. T. 10 (1927); 153 L. T. 228 (1922); 333 \textit{Living Age} 320 (1927); 3 \textit{Police J.} 201 (1930); 82 \textit{Sol. J.} 898 (1938).}

Of course, the real problem concerns only the occasion where the physician \textit{passively abstains} from informing the police. There is all the difference in the world between active concealment and passive non-revelation. No one would seriously contend that the physician should actively assist the patient in concealing his identity or aiding him to escape arrest. By actively assisting in concealment the physician would himself be guilty of a crime.\footnote{1 \textit{Brit. Med. J.} 1000 (1906) There is, however, respectable opposition to these views. Lord Riddell, \textit{The Law and Ethics of Medical Confidences}, 2 \textit{Curr. Leg. Thought} 50, 56 (1935) "It is also plain that when, in the course of his professional duties he has reason to think that a serious crime has been committed, he is bound to help to bring the offender to justice, although this may involve the arrest of his patient. Indeed, even in the absence of a confession by a criminal, it would be the duty of the doctor to warn the police if he thought the circumstances suspicious. If the patient were innocent he would not suffer. If he were guilty, he would get no more than his deserts."}

It does not follow, however, that he would incur the same guilt by mere abstention from action.\footnote{14 \textit{Am. Jur.} 102. The notorious bandit, John Dillinger, was once wounded in an encounter with the police and, escaping arrest, was treated by a physician who knew his patient to be a fugitive from justice but agreed to harbor him and shield him from the police. For this offense the physician was arrested, tried and convicted by a federal court and was sentenced to two years imprisonment and to pay a fine of $1000. \textit{See} Woodward, \textit{Medical Secrecy and The Reporting of Crimes}, 30 \textit{Am. Med. Ass'n Bull.} 100 (1935).}

On the other hand, if the case is one in which the secret involves the existence of an \textit{avowed intent to commit a crime}, such that the physician by keeping silent may make himself more or less an accessory to the crime, or may practically allow the crime to be committed,\footnote{Even in a case of felony, mere silence, after knowledge that a crime has been committed, does not make the party failing to report the matter to the police an accomplice or an accessory after the fact. \textit{State v. Potter}, 221 N.C. 153, 19 S.E.2d 257 (1942); \textit{Commonwealth v. Guild}, 111 Pa. Super. 349, 170 Atl. 699 (1934).}
it would seem that the physician would not merely be entitled but bound by the moral duty,³⁴ which every citizen owes to the State, to inform the police.³⁵ Some of the leading members of the legal and medical professions in England frankly espouse this view.³⁶ In resolving this conflict between the physician's dual allegiances, perhaps the only conclusion that can reasonably be reached is that, in the absence of a statutory command, the decision is one which only the physician, after a careful consideration of all the facts and circumstances, can, in good conscience, make.³⁷

Ordinarily, a patient consulting a physician would have no reason to reveal to him his participation in a crime, and his conduct would rarely cause the physician to suspect it. But if the patient has been involved in a crime of violence in which some person was killed and the patient was so beaten, cut or otherwise wounded as to require medical treatment, it is quite possible that the patient, either by refusing to relate the cause of his injury or by trying to explain it, will excite such suspicion or reveal enough facts as to warrant the physician in believing that his patient has committed a serious crime. Under such circumstances, it would seem to be the physician's highest duty to notify the police at once. With respect to the crime of murder, this view has generally been approved in England by judges and lawyers.³⁸ Some regard the duty as absolute.³⁹ In America, there appears to be no judicial decision which considers the duty of a physician in such cases. Moreover, the problem has not received the consideration that has been

³⁴ Generally speaking, a legal duty is one to which the law will enforce obedience, while a moral or social duty is one which rests for its observance upon public censure only. Inasmuch as the duty which lies upon the ordinary citizen to inform the police is one to which no legal consequences attach, it is a moral or social duty—not a legal one. Lindley, L. J. in Stuart v. Bell, [1891] L.R.A.B.D. 341, 350: "I take moral or social duty to mean a duty recognized by English people of ordinary intelligence and moral principles, but at the same time not a duty enforceable by legal proceedings, whether civil or criminal."

³⁵ This view was forcibly put by Lord Justice Inglis in his address to a jury in the trial of Dr. Pritchard for poisoning his wife. See Glaister, The Medical Profession and The Police, 3 POLICE J. 201 (1930) Lord Birkenhead discussed a similar case in his essay, Should a Doctor Tell? in 1 POINTS OF VIEW 33, 49 (3d ed. 1922)

³⁶ Birkenhead, supra note 35; Lord Dawson of Penn, LANCET 619 (April, 1922)

³⁷ Note, Legal Protection of the Confidential Nature of the Physician-Patient Privilege, 52 COL. L. REV. 383 (1952); 2 TAYLOR, PRINCIPLES AND PRACTICE OF MEDICAL JURISPRUDENCE 249 (10th ed. 1948) It should be noted that John Edgar Hoover, Director of the F.B.I., has recommended that physicians aid the United States in its fight against communism "by reporting immediately to the F.B.I. any information of this nature (Communist ideology) which might come into their possession." 144 J. AM. MED. ASS'N 1094 (1950) It is not conceivable that the medical profession will ever approve this recommendation.

³⁸ In the celebrated case of Kitson v. Playfair, 1 Brit. Med. J. 815 and 882 (1896), Mr. Justice Hawkins (later Lord Brampton) remarked: "There might be cases where it was the obvious duty of a medical man to speak out. In a case of murder for instance."
given it in England; in fact, neither the legal nor the medical professions appear at all concerned. In some instances, the authors of medical textbooks have commented on the duty of the physician, but the discussions are usually brief and the conclusions discordant.

The legislatures of a few states and the councils of some cities, aware of the valuable assistance the medical profession can render the police, have enacted statutes and ordinances which require the physician or hospital attendant who treats any person suffering wounds caused by a bullet, knife or other weapon, or by some suspicious act of violence, to inform the police of the circumstances, together with the name and description of the patient and other facts that may be of assistance to them. This is a legal duty, a positive command which must be obeyed; a violation thereof is usually punishable by fine, or imprisonment, or both.

Everywhere abortion, except if it be necessary for therapeutic reasons, is considered a crime; yet the number of criminal abortions occurring each year is appalling. It has been estimated that 500,000 occur annually in the United States. Abortionists who commit these shocking crimes engage in their nefarious practice with little fear of detection or punishment, yet, for this dismal record of law enforcement the police are not alone culpable.

5 Medical Men and Professional Secrecy, 79 JUST. P. 3 (1915) "In the case of murder of an adult actually accomplished, the duty should be recognized as an absolute one; for instance, if a medical man knows that a murder has been committed and that the assailant is believed to be severely hurt, there should be no hesitation in informing the police if a person so wounded consults him and gives no satisfactory explanation of his condition" (Italics supplied).

4 In its Principles of Medical Ethics (1943), the American Medical Association does not discuss the matter; only in a vague way is a duty even inferred. However, in a case where the patient is the victim of some violence and is likely to die, the Director of the Bureau of Legal Medicine of the Association has advised physicians to notify the police in time to enable them, if they so desire, to procure from the patient a dying declaration. See Woodward, Medical Secrecy and The Reporting of Crimes, 30 AM. MED. ASS'N BULL. 100 (1935).

GUTTMACHER AND WEIHOFEN, PSYCHIATRY AND THE LAW 276 (1952); HAYT, HAYT, AND GROESCHEL, LAW OF HOSPITAL, PHYSICIAN, AND PATIENT 547 (2d ed. 1952).

6 Ariz. Code Ann. § 43-2208 (1939); Iowa Code Ann. § 147.111 (1949); N.Y. Penal Code, § 1915; Code of City of Akron, Ohio, c.25, § 74 (1952). For comment on the ineffectiveness of such laws, see Woodward, Medical Secrecy and The Reporting of Crimes, 30 AM. MED. ASS'N BULL. 100 (1935). In some states, the physician is required to report to law enforcement officers the death of any patient who shall have died from acts of violence or under unusual or suspicious circumstances. La. Rev. Stat., Code of Crim. Proc. 15:39 (1950); Wis. Stat. § 366.20 (1951).


7 Tulkoff, Legal and Social Control of Abortion, 40 KY. L.J. 410 (1952). In England and Wales, between 110,000 and 150,000 occur each year. 86 L.J. 323 (1938).
They are seldom made aware of the crime until after the victim is dead and the lips of the state's best witness are sealed forever. Some drastic measures for curbing this widespread evil must be devised. The laws, long since enacted, have done little to lessen its frequency.\textsuperscript{45} Something more than a penal statute is needed. A more resolute attitude of cooperation between the medical profession and the police appears to offer the best practical means for bringing abortionists before the bar of justice. Many of the victims, seeking relief from their agony, come under the observation of other physicians and the condition of these women and the means whereby it was brought about must surely become apparent to them. If the physician would promptly report the facts to the police, the careers of many of these criminal practitioners would end. In nearly every case of criminal abortion, however, the physician faces the usual dilemma: Shall he observe the ethical duty of secrecy, or shall he observe the moral or social duty of disclosure? In the absence of a legislative command, the answer is not always an easy one.\textsuperscript{46} Lord Birkenhead spiritedly argued that crimes of abortion might well be materially reduced if medical men considered their duty as citizens at least as highly as their supposed duty of keeping secret their patients' misdeeds.\textsuperscript{47} On the other hand, the highly esteemed Lord Dawson of Penn with equal earnestness contended that the physician is bound to protect the confidence of his patient.\textsuperscript{48} It will be noted, however, that other eminent professional men have vigorously opposed Lord Dawson's view.\textsuperscript{49}

\textsuperscript{45}Note, \textit{A Functional Study of Existing Abortion Laws}, 35 \textit{COL. L. REV.} 87 (1935).

\textsuperscript{46} \textit{A Doctor's Dilemma}, 86 L.J. 323 (1938). “We quite agree as to the moral obligation which binds every doctor to respect the confidence of the patient; but he also owes a duty to the public at large and to justice. There is a tendency, we think, to magnify the first at the expense of the second, but in truth it is no easy matter to say which duty prevails.”

\textsuperscript{47}His lordship relates the case of a London abortionist whose victim died while he was operating on her. The police found in his rooms records which showed that he had performed some 400 abortions. “When one thinks calmly of the many other deaths which must have ensued as a consequence of the operations upon the 400 women concerned, when one thinks of the ruined health and shattered lives one becomes impatient of a claim set up by a medical practitioner that he is entitled, under a plea of privilege, to neglect the obvious duty of a citizen and to abstain from giving to the proper authority information which would have saved many a life and put an end to a social pest. It must also be recollected that the woman in this class of case is equally a criminal—she is generally the instigator of the crime.” Birkenhead, \textit{Should a Doctor Tell?} in 1 \textit{POINTS OF VIEW} 33, 52 (3d ed. 1922)

\textsuperscript{48}“If once he were to give that particular patient away, or make a practice of doing so, it would so undermine the confidence of the public as to the secrecy of what passes between doctor and patient, that a greater harm would be done to the public than any possible good result that could ensue in the vindication of justice.” \textit{LANCET} 619 (April, 1922). For the view of the Vienna Medical Association, see 80 J. AM. MED. ASS'N 1327 (1923); for the abnormal situation in France caused by its penal statute, see 80 J. AM. MED. ASS'N 1326 (1923)

\textsuperscript{49}1 \textit{BRIT. MED. J.} 1065 (1896); 102 \textit{JUST. P.} 746 (1938)
As the question has received far more consideration in England than in any other country and, for all practical purposes, seems now to be settled, a brief review of the controversy may not be out of place. We must go back to the year 1896, when Justice Hawkins (later Lord Brampton), in the celebrated case of Kitson v. Playfair, is reported to have said that a physician is under no duty to report to the police the fact that his patient is the victim of an illegal operation; that "a thing like that would be a monstrous cruelty." There the matter rested until 1914, when Justice Avory, in a case of criminal abortion, expressed the view that if, in such a case, the woman is likely to die, it is the duty of the physician to inform the police. When his remarks were brought to the attention of the Council of the British Medical Association, a full discussion was had and a resolution was adopted to the effect that a physician should not under any circumstances report voluntarily the facts to the police since the state has no right to claim that it is entitled to such information. Subsequently, the Royal College of Physicians of London adopted a similar resolution. By 1937, the menace of criminal abortions had not abated and, in response to public demand, an investigation of the problem was undertaken by a committee of distinguished men and women, both professional and lay, under the leadership of Mr. Norman Birkett, K.C. Evidence was taken from a host of witnesses. Two years later, the committee made its report and recommendations. It refused to support a proposal that a clear obligation be imposed by a statute which would require a physician to notify the police of any criminal abortion coming to his knowledge in the course of his professional employment. However, the committee did emphasize the need of closer cooperation by the medical profession with the police. Accordingly, in England, the de-

\[\text{\textsuperscript{1953}}\]

Reported by a medical observer in 1 BRIT. MED. J. 815 and 882 (1896).

BRIT. MED. J. 206 (Jan.-June, 1916); Medical Etiquette and Criminal Abortion, 49 L.J. 713 (1914); 2 TAYLOR, PRINCIPLES AND PRACTICE OF MEDICAL JURISPRUDENCE 103 (10th ed. 1948).

BRIT. MED. J. 206 (Jan.-June, 1916).

It suggested, however, that the physician should urge the patient to make a statement which may be used as evidence, provided always that her chances for recovery are not thereby impaired; but, in the event of her refusal, the physician should continue to treat her to the best of his ability. BRIT. MED. J. 206 (Jan.-June, 1916); 2 TAYLOR, PRINCIPLES AND PRACTICE OF MEDICAL JURISPRUDENCE 103 (10th ed. 1948).

BRIT. MED. J. 1248 (Jan.-June, 1939).

\[\text{\textsuperscript{20}}\] Id. at 1249: "We desire, moreover, to state that there is in our view, a risk that the medical profession may press too far their claim that they are precluded by their duty to their patients from volunteering information to the police; the interests of the community in general, and even of the patient herself, may be allowed to be obscured by undue insistence upon the importance of maintaining the confidential relation between doctor and patient, when information might well be given without, in effect, any real breach of confidence."
cision whether the physician shall notify the police is left to his conscience alone. To many persons, the position taken by the medical profession may seem reasonable and necessary; to others, it must appear regrettable, if not unworthy. But whatever one's opinion may be, there the matter rests today.  

In America, the question is still an open one. The American Medical Association has taken no action upon the matter. Moreover, no court, federal or state, has yet been called upon to decide whether, in the absence of a positive mandate of the legislature, there is any duty, moral or social, which requires the physician to notify the police when he discovers that his patient is the victim of an abortionist. In some instances, the authors of medical writings have advised physicians to inform the police. Others have expressed doubt whether the medical profession would observe such a rule. However, the legislatures of a few states and the councils of some cities have enacted statutes or ordinances which require the physician who treats any woman suffering material injury as the result of the commission of a criminal offense, or, specifically, from a criminal abortion, to report the facts to the police or health authorities; also all cases within his personal

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68 88 L.J. 20 (1939) "For one thing we should be very grateful to the Committee; they have not recommended any drastic tightening-up of the law in the direction of punishing or detecting the parties to an abortion. The whole tenor of their report shows that they are fully aware that this evil can be cured only by social and economic measures, not by legal ones."

69 It must not be supposed, however, that this is the declared law of England. Neither Parliament nor the courts have yet affirmed the position taken by the medical profession.

50 No mention is made of the subject in its Principles of Medical Ethics (1943).

51 Some courts have held that the physician-patient privilege statute prohibits a physician, when sworn as a witness, from disclosing confidential information without the consent of the patient in criminal trials where an illegal abortion is the subject of the charge; but, as we have pointed our earlier, these decisions have no bearing upon the question of the duty of a physician to make, or refrain from making, an extra-judicial and voluntary report to the police of the fact that an illegal operation has been performed upon his patient.

52 Hayt, Hayt and Groeschel, Law of Hospital, Physician and Patient 547 (2d ed. 1952) Herzog, Medical Jurisprudence § 928 (1931) "It is the duty of the physician called in any case in which he suspects that a crime has been committed, to inform the police of such facts as may enable the authorities to apprehend the criminal and procure his punishment."

53 Woodward, Medical Secrecy And The Reporting Of Crimes, 30 Am. Med. Ass'n Bull. 100, 104 (1935) "It is sometimes suggested that a physician should report to the police authorities all cases of supposedly criminal abortion coming to his notice. In the absence of a direct and positive mandate of law, it is not likely the American physicians will ever give serious consideration to the establishment of any hard and fast rule with respect to the matter. Even if the law directly and summarily called for reports of such cases, the likelihood of compliance would be slight, slighter probably than is compliance with present laws calling for reports of cases of venereal diseases."

54 Ariz. Code Ann. § 43-2208 (1939); Iowa Code Ann. § 147.111 (1949)
knowledge where the death of any woman has resulted from such crime. It should be noted also that, by statute in some states, the physician-patient privilege of non-disclosure does not apply and the physician who attended the victim may therefore testify.

CIVIL LIABILITY FOR BREACH OF THE IMPLIED CONDITION OF SECRECY

In a large number of jurisdictions, legislatures have seen fit to prohibit the disclosure of medical confidences by a physician on the witness stand, but there is little or no statutory protection for the patient from the betrayal of his confidences by his physician outside the courtroom. No state has yet made the willful betrayal of a patient's intimate secrets a crime; however, in many states, upon such ground, the physician's license may be suspended or revoked. Since the statutory privilege which protects the physician-patient relationship is solely a testimonial one and applicable in judicial proceedings only, it is plain that it has no bearing upon disclosures made elsewhere by the physician.

Mo. Stat. Ann. § 546.310 (Vernon's 1953); N.Y. Code of Crim. Proc. § 398-a; Wis. Stat. § 325.26 (1951). In the absence of such a statute, the decisions of the courts of the states which recognize the physician-patient privilege of non-disclosure are in conflict as to the question whether the privilege applies in criminal prosecutions.

Thirty-one states, the District of Columbia and five territories and possessions of the United States have enacted, in some form or other, a testimonial privilege for the protection of the physician-patient relationship.

Guttmacher and Weihofen, Psychiatry and The Law 276 (1952) "In the main, the patient's confidences are protected against disclosure outside the courtroom primarily by the code of professional ethics rather than by law." Chafee, Privileged Communications: Is Justice Served or Obstructed by Closing The Doctor's Mouth On The Witness Stand?, 52 Yale L.J. 606, 616 (1943) "Legislatures and courts have been occupied for over a century in closing the physician's mouth in the very place where the truth is badly needed. And yet the much more important obligation of his silence in private life has hardly been considered. 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 forced from him in court, but that he may voluntarily spread the facts among his friends and theirs in conversation. Yet against this really dangerous possibility the statutes and courts give almost no protection." See Md. Cas. Co. v. Maloney, 119 Ark. 434, 178 S.W. 387 (1917); Nelson v. Nederland Life Ins. Co., 110 Iowa 600, 81 N.W. 807 (1900); Buffalo Loan, Trust and Safe Deposit Co. v. Knights Templar and M.M.A. Ass'n, 126 N.Y. 450, 27 N.E. 942 (1891); State v. Miller, 105 Wash. 475, 178 Pac. 459 (1919).

People v. Shurly, 131 Mich. 177, 91 N.W. 139 (1902); Cramer v. Hurr, 154 Mo.
It has been said, however, that, subject to certain qualifications, it is an implied term of the contract with the physician that he will not voluntarily reveal the confidences of the patient; hence, the question arises whether a breach of this implied obligation will subject the physician to an action for damages by the aggrieved patient. There appears to be no case in America or in England, where an action for damages has been brought against a physician based simply on a disclosure of confidential information in breach of the implied obligation to keep silent, although, of course, actions have been brought where the communication complained of amounted to a libel or slander. In Scotland the point was raised many years ago.

The wife of plaintiff had given birth to a child six months after marriage. Plaintiff was asked for some explanation by the session of the Kirk, of which he was an elder. He requested defendant, a physician, to examine the child to see if it had been born prematurely. Defendant made the examination and reported to plaintiff that the child was fully developed. Without plaintiff's knowledge or consent, defendant sent a copy of the report to the minister of the Kirk, in consequence of which plaintiff was expelled from the session. Thereupon, plaintiff brought an action for damages against the physician for breach of the implied obligation of secrecy. The court held the action maintainable, declaring emphatically that the law would enforce such obligation.

Moreover, it has been held that an action for damages will lie against a

112, 55 S.W 258 (1900); Simonsen v. Swenson, 104 Neb. 224, 177 N.W 831 (1920) See also 1 Ops. Att'y Gen. [Ohio] 70 (1919); Lipscomb, Privileged Communications Statute—Sword and Shield, 16 Miss. L.J. 181 (1944). There is a remote possibility that the statutes of Louisiana, Michigan, Minnesota, New York and Wisconsin may be construed as imposing a duty upon a physician to refrain from making an extra-judicial disclosure of the patient's confidences. The whole history of the privilege, however, is against such construction.

71 164 L.T. 10 (1927)
72 Lord Riddell reports an interesting case in Austria which involved this question. 333 Living Age 320 (1927).
73 There is a dictum in one case which assumes such an action is maintainable. Smith v. Driscoll, 94 Wash. 441, 162 Pac. 572 (1917).
74 It will be remembered that there is no physician-patient privilege in England or Scotland.
75 AB v. CD, 14 Sess. Cas. (Dunlop) 2d ser. 177 (1851) See Comment, 174 L.T. 188 (1932).
76 Lord Fullerton said: "That a medical man, consulted in a matter of delicacy, of which the disclosure may be most injurious to the feelings and, possibly, the pecuniary interests of the party consulting, can gratuitously and unnecessarily make it the subject of public communication, without incurring any imputation beyond what is called a breach of honour, and without the liability to a claim of redress in a court of law, is a proposition to which, when thus broadly laid down, I think the court will hardly give their countenance." Cf. AB v. CD, 7 Fraser's Rep. 5th ser. (Scot.) 72 (1904)
physician who violates a *specific statutory prohibition* against extra-judicial disclosures. It is well known that most of the states have enacted statutes which provide that no person shall practice medicine without first having obtained a license therefor from the duly constituted state authority, and which also provide that such license may be suspended or revoked when the physician is found guilty of "unprofessional or dishonorable conduct." Among the acts of misconduct defined by such statutes is the willful betrayal of a professional secret. Statutes of this type impose a *positive duty* upon the physician not to voluntarily disclose the confidences of the patients; accordingly, a breach of this duty may under certain circumstances afford redress in a civil action against the physician for damages naturally flowing from such wrong.

It was not until 1920 that the highest court of any state was called upon to determine the liability of a physician who voluntarily revealed in an extra-judicial communication the medical confidences of his patient. Considerable notoriety was given to the case of *Simonsen v. Swenson* and it became the subject of comment by lawyers and medical men alike. Briefly, the facts were: Plaintiff roomed at a hotel operated by Mrs. B. He became afflicted with sores on his body and consulted defendant, who informed him that he believed he had contracted syphilis. Defendant was also the physician of Mrs. B's family and acted as the hotel's house physician when one was needed. Defendant warned plaintiff there was danger of his transmitting the disease to others if he remained at the hotel and requested him to leave the next day. When defendant learned that plaintiff had not left, he informed Mrs. B that he thought plaintiff was afflicted with "a contagious disease" and advised her to disinfect his room. Plaintiff was forced to depart. Subsequently, he consulted another physician who made a Wasserman test, the result of which was negative. Thereupon plaintiff brought an action for damages for alleged breach of duty. He contended that, having shown the relationship of physician and patient, the law prohibits absolutely a disclosure of any confidential information at any time or under any circumstances, and that a breach of this duty of secrecy gives rise to a cause of action in favor of plaintiff. After denying plaintiff's claim that defendant

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77 Usually the State Board of Medical Examiners, or the State Board of Health.
78 The phrase "willful betrayal of a professional secret" does not necessarily apply to any and all disclosures that a physician may intentionally make, irrespective of their harmless character. It implies that there must be some design or purpose and intent to do an injury. *McPheeters v. Medical Examiners*, 103 Cal. App. 297, 284 Pac. 938 (1930).
79 104 Neb. 224, 177 N.W. 831 (1920).
80 *20 Col. L. Rev. 890* (1920); *34 Harv. L. Rev. 312* (1921); *30 Yale L.J. 289* (1921); *52 Yale L.J. 607, 616* (1943); *75 J. Am. Med. Ass'n* 1207 and 1153 (1920).
81 The imputation of a contagious venereal disease is actionable per se as slander;
had breached the obligation of secrecy allegedly imposed on him by the physician-patient privilege statute, the Nebraska Supreme Court held that defendant had violated the provisions of another statute which provided that the license of a physician could be revoked if he were guilty of "unprofessional and dishonorable conduct", that one of the acts of misconduct defined by the statute was "the betrayal of a professional secret to the detriment of the patient", and that a wrongful act of this nature would ordinarily give rise to a civil action for damages naturally resulting therefrom. However, the court also held that the obligation of secrecy is not absolute; on the contrary, it is subject to qualification under certain circumstances. As we have pointed out earlier, there are occasions when the physician is under a moral or social duty to report a dangerous disease to those who might otherwise come in contact with the afflicted patient. Strictly speaking, therefore, the word "betrayal," as used in these statutes, signifies a wrongful disclosure of a medical secret. In the Simonsen case, the disclosure was not wrongful, because the circumstances warranted and fully justified the disclosure, erroneous though it was. Therefore, the plaintiff had no cause for complaint.

In another case, the facts were different, but the court announced once more the rule that where a positive duty is imposed by statute, a breach thereof by a physician will give rise to an action for damages brought by the person for whose benefit the duty was imposed. The defendant Blaisdel was the superintendent of one of the state's mental hospitals. The Mental Hygiene Law of New York makes all case records of the hospital confidential and privileged except in specified circumstances. Plaintiff alleged defendant breached this law when, by letter, addressed to the defendant, Carp, he enclosed plaintiff's hospital record. Regarding the case as one of

but the case was not tried upon that theory since it was plain that defendant acted in good faith, without malice, and had adequate grounds for his belief.

"The disclosure of confidences in this case was not by the defendant as a sworn witness, and this statute (Section 7898), therefore, obviously does not apply and has no bearing on this case."

"The decision has met with some criticism. Professor Chafee, in 52 YALE L.J. 607, 616 (1943), says: "Certainly, disclosure of risks of infection is very desirable; but it would be wiser to require all contagious diseases to be reported to a public officer, who should have power to take all steps necessary to protect people from the patient. There are obvious dangers in leaving it to every physician to determine whether circumstances justify him in betraying intimate confidences to the lay public." See also 34 HARV. L. REV. 312 (1921) The American Medical Association, in its Principles of Ethics, Ch. II, § 1, (1943) leaves it up to the physician to determine whether or not his duty to society requires him to take definite action to protect healthy individuals from becoming infected.

first impression, the court relied upon the rule laid down in the Simonson case.\(^8\) By a parity of reasoning, the court held that the Mental Hygiene Law imposed a positive duty on officials in charge of mental hospitals not to make case records available to anyone; and that for a breach of such duty the common law affords redress in an action for damages. The novelty of the situation presents no obstacle to recovery, since the law will not suffer an injury and a damage without a remedy.\(^8\)

**CIVIL LIABILITY OF PHYSICIAN FOR DEFAMATION OF PATIENT**

Almost every physician at some time or other has been disinclined, when summoned as a witness in a judicial proceeding, to testify fully and frankly concerning the physical or mental condition of his patient; or has been unwilling to volunteer information to the police concerning the criminal acts of his patient; or has failed to inform members of the patient's family or his intimate friends that he was suffering from a dangerously contagious or infectious disease, especially when it was a disgraceful one. Undoubtedly, upon the particular occasion, the physician's earnest desire to protect the confidences of his patient had much to do with his decision, but privately, perhaps, he would have admitted at the time that the most persuasive motive for his conduct was the fear that he might be subjected to an action for damages for libel or slander, if later it should develop that his belief as to his patient's guilt was groundless, or that his diagnosis of his patient's malady was wrong. It must be admitted that there is some justification for the physician's fear of liability on such occasions.\(^8\)

Generally speaking, a physician, like any ordinary individual, is amenable to the law of libel and slander. The defamatory character of a false statement is neither destroyed nor diminished by the fact that the one who utters it is a medical man and makes the communication in his professional capacity; rather it is an aggravation of such defamation that it is backed by his professional skill and authority.\(^8\) It is well established, however, that not every false and defamatory statement is actionable. For reasons of public policy the law sometimes will relieve the person who utters defamatory

\(^8\) See note 14 supra.

\(^8\) Plaintiff's second cause of action was for a violation of the physician-patient privilege statute (N.Y. CIv. PRAC. ACT. § 352). The court dismissed this on the ground that the relation of physician and patient did not exist.

\(^8\) The celebrated case of Kitson v. Playfair, 1 BRIT. MED. J. 815 and 882 (1896), is an excellent illustration. An eminent and highly esteemed physician was mulcled in enormous and probably unprecedented damages for communicating facts and his deductions therefrom concerning the plaintiff which were detrimental to her private character.

\(^8\) Perkins v. Mitchell, 31 Barb. 461 (N.Y. 1860); Alpin v. Morton, 21 Ohio St. 536 (1871).
matter concerning another from liability for damages.\textsuperscript{89} When the cause or occasion of the publication, be it oral or written, is such as to render it proper and necessary for common convenience or for the health and safety of the public or particular persons, the publisher should be and generally is protected and is not liable in damages even though the defamatory statement may develop later to be false.\textsuperscript{90} Accordingly, if the physician believes that the moral duty owed to the public or to particular persons to make the communication transcends his ethical duty\textsuperscript{91} to abstain from making it, he will receive the same protection which the ordinary individual receives under the same or similar circumstances.\textsuperscript{92} Legal compulsion,\textsuperscript{93} or the patient's consent, is, of course, a lawful excuse for the disclosure of the patient's medical confidences; but the performance of a moral duty may also justify it.\textsuperscript{94} There are occasions when it would seem to be the plain duty of the physician to make the communication even though it may result in the disparagement of the patient's character or reputation. In such cases, the occasion is considered "privileged," and for reasons of public policy the publisher is absolved from the liability that would otherwise be imposed upon him. These occasions\textsuperscript{95} are usually divided into two classes, those absolutely privileged and those conditionally privileged.\textsuperscript{96}

**Absolute Immunity: Judicial Proceedings\textsuperscript{97}**

There are occasions on which public policy\textsuperscript{98} requires that a person be wholly absolved from responsibility for the utterance of defamatory words,

\textsuperscript{89} I COOLEY, LAW OF TORTS § 151 (4th ed. 1932)
\textsuperscript{90} Dunnett v. Nelson, [1926] Sess. C. 764, 769. "It may be unfortunate that a person against whom a charge that is not true is made should have no redress, but it would be contrary to public policy and the general interests of business and society that persons should be hampered in the discharge of their duty or the exercise of their rights by constant fear of actions for slander."

\textsuperscript{91} The physician must not overlook the very potent fact that the exact nature and extent of this ethical duty has never been clearly defined.
\textsuperscript{92} Simonsen v. Swenson, 104 Neb. 224, 177 N.W 831 (1920); Smith v. Driscoll, 94 Wash. 441, 162 Pac. 572 (1917).
\textsuperscript{93} Simonsen v. Swenson, supra note 92, at.228, 177 N.W at 832: "When a physician, in response to a duty imposed by statute, makes disclosure to public authorities of private confidences of his patient, to the extent only of what is necessary to a strict compliance with the statute on his part, and when his report is made in the manner prescribed by law, he of course has committed no breach of duty towards his patient and has betrayed no confidences, and no liability could result."
\textsuperscript{94} Simonsen v. Swenson, supra note 92.
\textsuperscript{95} There is no end to the perplexing questions involved in the law of libel and slander, and it would be impossible to deal adequately with them in this article. Discussion will, therefore, be limited to typical situations which are apt to confront the physician in his day-to-day practice.
\textsuperscript{96} Some courts employ the terms "qualified privilege," "qualifiedly privileged" or "quasi-privileged."
since on these occasions it is advantageous for the public interest that persons should speak freely and fearlessly. In England, the law is clear and conclusive that no action of slander lies against any witness for words spoken in the ordinary course of any proceeding before any court of law, and this is true even though the words spoken were spoken maliciously, without any justification or excuse, from personal ill-will and anger against the person defamed, and even though they are entirely irrelevant to the issues on trial. The American rule, by the great weight of authority, differs from the English rule only in that the allegedly defamatory matter must be relevant and material to the issue in order to be absolutely privileged. In matters falling within this rule, the question of malice has no place. A physician is in the same situation as any other witness, and his rights and responsibilities must be determined by the same legal standards that are applied to witnesses generally. In a few jurisdictions the rule of absolute privilege is recognized by statute.

A physician, in answering a question asked by the court or by counsel, is not bound at his peril to determine its materiality or relevancy to the issue being tried. If his testimony is responsive to a question to which no objection is made, or to which an objection has been overruled, no action for slander can be based thereon, even though the answer be defamatory, immaterial and given maliciously. If his statement is voluntary— one

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97 Judge Van Vechten Veeder's articles in volumes 3, 4, 9 and 10 of the Col. L. Rev. on The History of Defamation and on Absolute Immunity in Defamation are exhaustive classics of the law of libel and slander. The principles of "privilege" are ably discussed.

98 Erie County Farmers' Ins. Co. v. Crecelius, 122 Ohio St. 211, 171 N.E. 97 (1930).
99 1 COOLEY, LAW OF TORTS § 151 (4th ed. 1932).
100 Dawkins v. Rokeby, L.R. 7 H.L. 744 (1875); Munster v. Lamb, 11 Q.B.D. 588 (1883); Royal Aquarium v. Parkinson, 1 Q.B.D. 431 (1892).
102 The words "relevant and pertinent" are most frequently used by the courts, but other terms having the same significance are often used. 3 RESTATEMENT, TORTS § 588, comment c (1938) "Testimony to be privileged need not be material or relevant to the issues if it has some reference to the subject of the litigation." 17 R.C.L. § 87; Note, 12 A.L.R. 1247; Note, 81 A.L.R. 1119.
104 Smith v. Driscoll, 94 Wash. 441, 445, 162 Pac. 572, 573 (1917) "We can conceive of no possible reason why the protection which the law places about witnesses generally, should be denied to a particular witness merely because he is a physician. We must look, therefore, to the cases of libel and slander to ascertain the rule of immunity from civil liability which the law grants to witnesses generally." Watson v. M'Ewan, [1905] A.C. 480.
105 CAL. PENAL CODE § 258 (1949); REV. LAWS OF HAWAII § 11460 (1945).
106 Veazy v. Blair, 86 Ga. App. 721, 72 S.E.2d 481 (1952); Boyd v. Wynn, 286
not given in reply to a question—it may still be privileged, regardless of his motive, provided it is relevant and bears upon the issue being tried.\textsuperscript{108} In other circumstances, he enjoys only a conditional privilege, depending upon whether he acted in good faith and believed his testimony to be pertinent as well as true.\textsuperscript{109}

The doctrine of absolute privilege applies not only to statements made by a witness in judicial proceedings, but also to those made before any tribunal constituted by law, which, though not a court in the ordinary sense of that word, nevertheless exercises judicial functions.\textsuperscript{110} Hence, the testimony of a physician in a hearing before commissioners of insanity is privileged.\textsuperscript{111} Moreover the doctrine does not require that the defamatory statements be given from the witness stand during the trial of the case. The immunity secured by the rule extends to every step in the proceedings. Accordingly, a defamatory and false statement made by a physician in a private interview with one of counsel regarding the nature of his testimony in the event he should become a witness in a pending or contemplated lawsuit, is entitled to the protection of absolute privilege.\textsuperscript{112} In the celebrated case of \textit{Watson v. M'Ewan},\textsuperscript{113} Lord Chancellor Halsbury held that the rule absolves the physician from the consequences of defamatory statements concerning his patient when made to a litigant or to his counsel in preparing the case for trial.\textsuperscript{114} But the physician is not justified in making the state-

\begin{footnotes}
\item[109] Weil v. Lynds, 105 Kan. 440, 185 Pac. 51 (1919); Lamberson v. Long, 66 Mo. App. 253 (1896); Keeley v. Great Northern Ry., 156 Wis. 181, 145 N.W. 664 (1914); Henderson v. Broomhead, 4 H. & N. 567 (1859); Revis v. Smith, 18 C.B. 126 (1856); 17 R.C.L. § 87; NEWELL, LIBEL AND SLANDER § 371 (4th ed. 1924).
\item[110] Royal Aquarium v. Parkinson, 1 Q.B.D. 431 (1892). For examples of such proceedings, see Veeder, \textit{Absolute Immunity in Defamation: Judicial Proceedings}, 9 COL. L. REV. 463, 464 (1909); 1 COOLEY, LAW OF TORTS § 153 (4th ed. 1932); 53 C.J.S. § 104(b).
\item[111] Corcoran v. Jerrel, 185 Iowa 532, 170 N.W. 776 (1919); Bonner v. Diller, 60 Pitts. L.J. 585 (1912).
\item[112] 3 RESTATEMENT, TORTS § 558 (1938). Schmitt v. Mann, 291 Ky. 80, 84, 163 S.W.2d 281, 284 (1942) "It is common practice, and in many instances, a necessary practice, for attorneys to interview witnesses and obtain statements from them before the trial or before the suit is instituted, and witnesses should feel free to furnish any information in their possession."
\item[105] [1905] A.C. 480.
\item[114] For a report of the Scottish Court below, see AB v. CD, [1904] 7 Fraser (Ct. of
\end{footnotes}
Statement to persons not concerned with preparing the evidence for trial.\textsuperscript{116} Statements made by physicians or other persons in affidavits used for various purposes in judicial proceedings are likewise protected;\textsuperscript{116} also those made in depositions;\textsuperscript{117} and in reports prepared by physicians for use in hearings in workmen's compensation cases.\textsuperscript{118}

**CONDITIONAL IMMUNITY**

In the absence of absolute privilege, it is well settled that an action lies for the publication of a false and defamatory statement concerning another; and the law considers such publication as malicious unless it is made in good faith by a person in the discharge of some public or private duty—legal, moral or social—or in the conduct of the publisher's own affairs in matters where his own interest is concerned. In such cases the occasion prevents the inference of malice which the law usually draws from unauthorized communications and affords a conditional or qualified defense depending upon the absence of actual malice.\textsuperscript{119} It is obvious that no definite line can be so

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\textsuperscript{117} Schmitt v. Mann, 291 Ky. 80, 163 S.W.2d 281 (1942); Hager v. Major, 353 Mo. 1166, 186 S.W.2d 564 (1945); Keeley v. Great Northern Ry., 156 Wis. 181, 145 N.W. 664 (1914); Henderson v. Broomhead, 4 H. & N. 569 (1859); Revis v. Smith, 18 C.B. 126 (1856); 17 R.C.L. § 84; 53 C.J.S. 104 d(2); 33 AM. JUR. § 152; 1 COOLEY, LAW OF TORTS § 156 (4th ed. 1932)

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Southern Ice Co. v. Black, 136 Tenn. 391, 401, 189 S.W. 861, 865 (1916) “Qualified privilege extends to all communications made in good faith upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty to a person having a corresponding interest or duty; and the privilege embraces cases where the duty is not a legal one, but where it is of a moral or social character of imperfect obligation.”
drawn as to mark off with precision the occasions which are privileged and those which are not, but it is safe to assume that a statement is conditionally privileged if made under circumstances and in a manner which repel, preclude or rebut the inference of malice arising prima facie from a publication prejudicial to the character or reputation of another. The question whether an occasion of privilege exists is usually one for the court to decide. There still may remain the question whether the publisher has so abused the occasion as to destroy the privilege which would otherwise be his. This is a question for the jury. Of course, if a person is proved to have stated that which he knew to be false, no one need inquire further. Everyone assumes thenceforth that he was malicious. But “malice” does not necessarily mean a particular ill-will towards another. It may also mean such a wanton and reckless disregard of the rights of another as to be the equivalent of ill-will. There is a state of mind short of deliberate falsehood by reason of which a person may properly be held by the jury to have abused the occasion, and in that sense to have spoken maliciously. It is not enough, however, to show a want of reasoning power, or stupidity, for these traits themselves do not constitute malice. Hence, the true test is whether the publisher honestly believed what he said was true and not whether some one else, placed as he was, would have believed it.

We shall now observe how these principles of conditional privilege apply to situations in which the physician sometime may find himself involved.

Ordinarily, to utter of another words which impute to him a crime involving moral turpitude or subjecting him to an infamous punishment is slander, and the wrong thus committed is actionable per se; however, there are occasions when the law will relieve a person who makes a false incriminating charge against another from liability in damages to the person injured thereby. For reasons of public policy, such a charge is protected

121 Brice v. Curtis, 38 App. D.C. 304 (1912); 3 Restatement, Torts § 619 (1938); See Note, 26 A.L.R. 830.
122 Brice v. Curtis, supra note 35. Problems relating to the burden of proof are varied and complex. Discussion is quite beyond the scope of this article. See Note, 54 A.L.R. 1143.
124 Royal Aquarium v. Parkinson, 1 Q.B.D. 431 (1892); Clark v. Molyneaux, 3 Q.B.D. 237 (1887)
126 Joseph v. Baars, 142 Wis. 390, 125 N.W. 913 (1910)
127 3 Restatement, Torts § 570 (1938); 53 C.J.S. § 53(b); 33 Am. Jur. § 11.
and privileged if made in good faith to some law enforcement officer for
the purpose of detecting and bringing to the bar of justice the suspected
culprit. It is likely that the privilege will also afford protection when
the communication is made to one not an officer if its purpose is to avert
the commission of a crime, or to aid in the capture of a fugitive from
crime. As pointed out earlier, the law of libel and slander applies to the
physician as well as to the ordinary citizen; hence, where it appears that
the communication was made in good faith for the sole purpose of insti-
gating an investigation or to aid in capturing the suspected criminal, and
the element of malice is not at all present, the physician making the state-
ment or charge will be protected and not rendered liable in damages,
even though he volunteers the information and it develops later that it was
false. Accordingly, for the sake of public justice, statements and charges
which would otherwise be slanderous are protected if bona fide made in the
prosecution of an inquiry into a suspected crime.

But information should not be given to any person, not even to one ordi-
narily entitled to receive it, unless the physician entertains an honest desire
to promote or render aid in the investigation of a suspected crime, since it
is not likely that the privilege, with its consequent protection, will attach, if
given for any other reason. It seems quite certain that if the physician's real
motive for his disclosure is to gain some personal advantage for himself, no
privilege will attach. Furthermore, the publication must be held with-
in reasonable bounds. The law will not protect an excessive publication —
one which reaches far beyond what is reasonably necessary to achieve the
purpose for which the privilege is given.

Generally speaking, an occasion is conditionally privileged when the cir-
cumstances induce a correct or reasonable belief that facts exist which af-
fect the health and well-being of a member of the immediate family of the

128 3 Restatement, Torts §§ 598 (1938); See Note 140 A.L.R. 1466.
129 3 Restatement, Torts §§ 598, comments e (1938); Gately, Libel and Sla-
der 237 n.17 (2d ed. 1929).
403, 58 S.E. 1051 (1907); Lightbody v. Gordon, [1882] 9 Sc. Sess. Cas. (4th Ser.)
934. See also, 3 Restatement, Torts §§ 599-601 (1938).
131 Gately, Libel and Slander 236 (2d ed. 1929) "The mere fact that the de-
fendant did not wait to be asked what he knew of the matter but volunteered the
information will make no difference." See also Newell, Slander and Libel 418
(4th ed. 1924).
133 Padmore v. Lawrence, [1840] 11 Ad. & El. 380.
134 Gillis v. Powell, 129 Ga. 403, 58 S.E. 1051 (1907); Hill v. Miller, 9 N.H.
2 (1837); Gately, Libel and Slander 238 (2d ed. 1929).
135 Gillis v. Powell, supra note 134; 3 Restatement, Torts §§ 604 (1938);
publisher, or a member of the immediate family of the recipient, or of a
third person, and that the knowledge of the defamatory matter will be of ser-
vice in the lawful protection of such persons.138

Will this rule protect the medical practitioner? To illustrate the prob-
lem, let us suppose that the physician has been consulted by a young man
who complains of suffering from a mild skin rash and asks that some oint-
ment be prescribed which he himself may administer, since he is to be
married that afternoon and will leave at once for a honeymoon in South
America. Upon inquiry the physician learns that his patient's fiancé is the
daughter of an intimate friend. After an examination the physician con-
cludes that the patient has syphilis and explains to him the danger of in-
festing his bride. The patient denies that he has the disease and insists on
going ahead with the marriage. Believing it to be his moral duty to warn
the girl and her parents, the physician informs them that the young man
is afflicted with a venereal disease. The girl refuses to marry him. Later
it develops that the physician's diagnosis was wrong. Can the physician be
held liable in damages in an action of slander brought by the patient? Again,
let us assume that the physician is consulted by a locomotive engineer who
thinks he is suffering from nervous exhaustion. The physician diagnoses
a serious heart condition and warns the patient that he is not fit to drive a
locomotive since he will endanger the lives of innocent persons. The
patient denies that he has any heart disease and insists on returning to work.
Believing it to be his moral duty to the public to inform the patient's em-
ployer of his diagnosis, the physician does so. The company lays off the
engineer. Later it develops that the physician's diagnosis was wrong. Can
the physician be held liable in an action of slander brought by the patient?
Other illustrations may be found, such as that revealed in the case of Kitson
v. Playfar.137 Upon each of these occasions, it is fair to assume that every
right-minded person would admit that there exists a clear moral and social
duty on the part of the physician to inform the persons interested or likely
to be injured of the danger to which they may be exposed by reason of the
patient's physical condition. In doing so, he will prevent the patient from
inflicting harm upon others. The evil consequences to innocent persons
which may result from his failure to inform or warn them would seem not
only to entitle, but to require, the physician to disclose what he honestly
believes to be true so that such consequences may be promptly and success-
fully averted.138

It is everywhere conceded that a communication made bona fide upon

138 3 RESTATEMENT, TORTS § 597 (1938); 17 R.C.L. §§ 115-117
137 1 BRIT. MED. J. 815 and 882 (1896) For other examples of the problem, see
Lord Riddell, Law and Ethics of Medical Confidences, 333 LIVING AGE 320 (1927);
Lord Birkenhead, Should a Doctor Tell? in 1 POINTS OF VIEW 39-47 (2d ed. 1922)
any subject matter in which the person communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, even though it contains disparaging matter which, without this privilege, would be slanderous and actionable; and this is true notwithstanding the duty be not a legal one, but only a moral or social duty of imperfect obligation. Hence, a communication made in the discharge of a moral duty and looking to the prevention of wrong towards another or to the public is privileged when made in good faith. In such cases, although the statements made may have been false, malice cannot be implied from the mere fact of publication. Moreover, the fact that the statement is volunteered will not of itself destroy the privilege. Circumstances may exist which make it the moral duty of the publisher to make the communication even though no request for information has been made. The officiousness of the publisher in volunteering the statement, though it may become an important element for consideration in deciding whether he acted under a sense of duty or from some ulterior motive, is not the decisive test in determining whether the occasion is privileged.

Judges who have had to decide whether the occasion justified the publishing of the defamatory matter have frequently experienced great difficulty in defining what kind of social or moral duty will afford a legal justification. This may be a question which the judge must determine, without

Someone will suggest that the physician could accomplish the desired result by reporting the case to the health authorities and thus gain the immunity from liability which the law affords to those who are required to report specified diseases. The trouble with this suggestion is that in many cases the law does not require the physician to make a report; moreover, it is obvious that, on some occasions, the time element is of tremendous importance. Even though the health authorities were notified, it is more than likely that any action taken by them would be too late; the evil consequences may already have occurred. Not infrequently, therefore, the physician's warning to particular persons must be given at once, else it is of no use whatever.

The word "interest" is not used in any technical sense. It is used in its broadest popular sense, as when one says that a man is "interested" in knowing a fact—not interested in it merely as a matter of gossip or curiosity, but as a matter of substantial importance quite apart from its mere quality as news. Howe v. Lees, [1910] 11 Com. L.R. (Australia) 361.


Several states have enacted laws relating to the conditional or qualified privilege. UTAH CODE ANN. § 45-2-3 (1953); CALIF, CIVIL CODE § 47; MONT. REV. CODES § 64-208 (1947).


Greenlands, Ltd. v. Wilmhurst, supra note 143; 3 RESTATEMENT, TORTS § 595(2) (1938).
any evidence, by the light of his own knowledge of the world and his own views on social morality. Lord Justice Lindley once said: "I take moral duty to mean a duty recognized by English people of ordinary intelligence and moral principal, but at the same time not a duty enforceable by legal proceedings, whether civil or criminal. Would the great mass of right-minded men in the position of the defendant have considered it their duty under the circumstances to make the communication?" It is plain that the decision of the physician must depend upon the circumstances of each case, the nature of the information, the gravity of the danger or harm sought to be avoided and the relative position of the physician and the person or persons receiving the information. Of course, in every case, the physician's prime duty is towards his patient; therefore, he should first make every effort to avert the impending danger by whatever means he may possess, rather than disclose a professional confidence. However, if he reasonably believes that the danger cannot be averted in any other way, the law will regard the communication as privileged if, at the very outset, it be made with an intent to bestow a benefit, and not to injure anyone. It must be bona fide, and if this is satisfactorily proved and the circumstances are such that the physician should freely and fairly state the facts as he believes them to be, the communication will be privileged even though it be defamatory and false.

It is essential that the physician's statement of facts or his conclusions be made to a proper person, one who is entitled to receive the information.

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148 In a case of communicable disease, the American Medical Association leaves the decision to the sound discretion of the physician. Principles of Medical Ethics, Ch.II, § 1 (1943) "There are occasions, however, when a physician must determine whether or not his duty to society requires him to take definite action to protect a healthy individual from becoming infected, because the physician has knowledge, obtained through the confidences entrusted to him as a physician, of a communicable disease to which the healthy individual is about to be exposed. In such a case, the physician should act as he would desire another to act toward one of his own family under like circumstances."

In Ohio, a physician, knowing that one of the parties to a contemplated marriage has a venereal disease, may so inform the other party without incurring liability in damages for making such disclosure. OHIO REV. CODE § 4731.22 (OHIO GEN. CODE § 1275)

149 See comment on the dilemma which confronts a physician under The Matrimonial Causes Act (1937) in England. 187 L.T. 248 (1939)
150 Simonsen v. Swenson, 104 Neb. 224, 177 N.W 831 (1920) See note 151, infra.
151 Perkins v. Mitchell, 31 Barb. 461 (N.Y. 1860) In Alpin v. Morton, 21 Ohio St. 536 (1871), a physician who had attended an unmarried girl said to several persons, including her mother, that she was pregnant. In an action for damages for slander, a verdict was rendered for the plaintiff. In affirming the judgment, Day,
Accordingly, as previously noted, a physician was justified in informing a hotel keeper that one of her guests was suffering from an infectious disease. Likewise, a physician is justified in warning a girl and her family that her fiancé is afflicted with a venereal disease, and no action for slander will lie if the information was given in good faith even though his diagnosis was wrong. The fact that the disclosure is made by one physician to another is not a decisive factor, although in some instances that fact may have significance. Thus, where a family physician sent his patient to another physician for examination and treatment, a report made by the latter to the former to the effect that the patient had syphilis was privileged notwithstanding the fact that the report was false. Where a physician was employed by the defendant in a personal injury case to examine plaintiff's alleged injury and report his findings to defendant's attorney, a defamatory statement contained in the report could not be made the basis of an action for defamation in the absence of proof of express malice. A communication from the physician of a private school to the parents of a student informing them that the child's dismissal was due to the fact that she had a venereal disease was privileged even though his diagnosis was wrong.103

101 Simonsen v. Swenson, 104 Neb. 224, 177 N.W 831 (1920). It should be noted that this case was not based on slander, but on breach of confidence. It was admitted that there was no evidence of malice on the part of the physician, hence an action for slander could not be maintained. However, the decision would undoubtedly have been the same had the action been based on slander.

102 In Ohio, this is recognized by statute. OHIO REV. CODE § 4731.22 (OHIO GEN. CODE § 1275).


A letter from the superintendent of a hospital to the father of a patient stated his child had been classified as "colored," was placed in a "colored" ward and was in fairly good condition. Although such statement about a white person, which the patient was, would ordinarily be libelous per se, it was held to be a privileged communication because written in discharge of a duty, in good faith and to a person entitled to receive the information.

Even though the circumstances may justify the physician's disclosure of his patient's state of health to others, the justification does not extend to a wanton or excessive publication. The fact that the statement is made unnecessarily, though without malice, may, having regard to its nature, make it an unwarranted disclosure and bar the defense of privilege. As before noted, the publication should go no further than is required by the social or moral duty to publish. A physician must, therefore, be careful that his statements concerning the patient's state of health reach only those who are entitled to hear them. However, the fact that third persons not lawfully interested in the disclosure are present and hear it will not alone destroy the privilege if their presence was unavoidable or with the knowledge and consent of the patient, and was not in any sense sought for by the physician. Thus, an erroneous opinion delivered by a physician to his patient, an unmarried woman, that she was pregnant, and spoken in the presence of the patient's sister who was present at plaintiff's request, was privileged since there was no evidence to indicate malice or lack of good faith.

When the physician does not stand in any confidential relation to the third person or persons interested, it is difficult sometimes to define what circumstances will be sufficient to impose upon him the duty of volunteering the information. The common sense view would seem to be that whenever a physician is so situated that it becomes right, in the interests of society, that he should inform members of the public of certain facts relating to his patient, then, if he, in good faith and without malice, does disclose the facts for the purpose of protecting such persons, it is a privileged communication. It has been held, and rightly we think, that if a person has

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157 Kenney v. Gurley, 208 Ala. 623, 95 So. 34 (1923)
158 Collins v. Okla. State Hospital, 76 Okla. 229, 184 Pac. 946 (1916). See also, Taylor v. Glothefelty, 201 F.2d 51 (6th Cir. 1952)
163 Davies v. Sneed, L.R. 5 Q.B. 608 (1870)
reason to believe that human life would be imperiled by his remaining silent, he may, without fear of consequences, volunteer information, defamatory though it be, to those thus exposed to danger, even though he himself be not personally concerned. Hence, in the case of the locomotive engineer, it would seem to be the plain duty of the physician to inform the proper officer of the railroad company that his diagnosis indicated that his patient was suffering from heart disease. If such communication is made with the honest purpose of protecting the public and in the full belief that his information is true, it will be privileged even though it be volunteered and made to a complete stranger.

The physician who discloses the truth has little to fear if his patient should sue him for damages for libel or slander. In civil actions, it has long been held as a rule of the common law that the truth of the facts constituting the slanderous or libelous statement may be pleaded by way of justification and, if proved, affords a complete defense. The motive and purpose of the publisher are immaterial and cannot be made the subject of inquiry. The rule proceeds upon the principle that if the defamatory matter is true, the plaintiff has sustained no damage for which he can claim redress in a court of law. The law will not permit a person to recover damages in respect of an injury to a character which he either does not, or ought not, to possess. In a few states, however, by reason of constitutional or statutory provisions, the rule of the common law has been modified to the extent that truth alone is not a complete defense. If the defendant is to prevail, he must further allege and prove that he published the alleged defamatory matter with good motives and for justifiable ends.

In order to establish a plea of justification, however, the physician must prove that the defamatory matter complained of was true; it is not enough

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104 Coxhead v. Richards, 2 C.B. 569 (1846).
105 Missouri Pac. Ry. v. Richmond, 73 Tex. 568, 11 S.W 555 (1889). Although the informer in this case was not a physician, the rule stated would logically apply to a physician as well.
106 Castle v. Houston, 19 Kan. 417 (1877). Commonwealth v. Snelling, 32 Mass. (15 Pick.) 337 (1834). A thorough discussion of this subject is quite beyond the scope of this article. Only a few of the more important principles are stated. For a more complete treatment, see 3 Restatement, Torts § 582 (1938); 35 Am. Jur. §§ 117-119; 53 C.J.S. §§ 137-139; Gately, Libel and Slander 172-185 (2d ed. 1929); Newell, Slander and Libel §§ 696-699 (4th ed. 1924); Ogders, Libel and Slander 149-157 (6th ed. 1929).
107 Commonwealth v. Snelling, supra note 166.
109 Ogren v. Rockford Star Printing Co., 288 Ill. 405, 123 N.E. 587 (1919); Wertz v. Sprecher, 82 Neb. 834, 118 N.W 1071 (1908). This is especially true in criminal prosecutions for libel.
for him to prove that he believed that it was true, or that he heard the statement made by another;\textsuperscript{170} not even if he named the person who told him the defamatory facts.\textsuperscript{171} It is well established that a defendant is not required to justify precisely every word of the alleged defamatory statement. It is sufficient if the substance of the statement be true. Immaterial variances and defects of proof upon immaterial matters count for nothing.\textsuperscript{172} In other words, if the physician can prove that the main charge or gist of the libel or slander is true, the mere fact that there is a slight inaccuracy in one or more of its details will not prevent him from succeeding in a defense of justification.\textsuperscript{173}

\textsuperscript{170} Watkin v. Hall, L.R. 3 Q.B. 396 (1868).

\textsuperscript{171} McPherson v. Daniels, [1829] 10 B. & C. 263.

\textsuperscript{172} Hearne v. DeYoung, 119 Cal. 670, 52 Pac. 150 (1898); Edwards v. Bell, 1 Bing. 403 (1824).