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Evidence: Testimony of State-Employed Physician Inadmissible

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statute is remedial and should be construed liberally.[45] Since the Minnesota court recognizes the right of plaintiff to prove his case by questioning defendant, its position in *Hoffman*, the basis of which appears to be "fairness" to defendant, is difficult to justify. Similarly, if the statute is to be construed liberally, the limitation of questions to "all material matters" should not be interpreted to exclude questions of opinion. Inasmuch as evidence of proper medical practice in a particular community is essential to establish defendant's negligence, it is clearly a material matter.

Therefore, it is submitted that if the Minnesota court desires to rely on outstate law for guidance on this issue it should rely on what that law *presently* is. Since the majority of the cases relied on in *Ericksen* have since been overruled, the court should adopt the *McDermott* position and permit plaintiff to examine defendant on all material matters of fact and opinion. It is further submitted that the court should not require an "offer of proof" since the nature of the questioning of an adverse party is usually exploratory and thus it would not be reasonable to require plaintiff to state what he will prove by questioning defendant.

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Defendant was arrested for the fatal shooting of his wife. A Board of Examiners found him mentally incompetent to stand trial and committed him to the Minnesota Security Hospital.[1] After two months of treatment by the hospital's psychiatric consultant, defendant was adjudged competent to stand trial on the charge of first degree murder. Defendant pleaded not guilty by reason of insanity[2] and introduced exhaustive medical testimony

45. Bylund v. Carrol, 203 Minn. 484, 488, 281 N.W. 873, 875 (1938) (referring to MINN. STAT. § 9816 (Mason 1927), which is similar to MINN. R. CIV. P. 43.02).

1. Upon finding that a defendant is unable to stand trial before a verdict is rendered, the court is required to commit him to the proper state institution for safekeeping and treatment. *See* MINN. STAT. § 631.18 (1965).

2. If at the time of committing the crime, defendant was unable to discern "the nature of his act, or that it was wrong," he is excused from criminal liability in Minnesota. *See* MINN. STAT. § 611.026 (1965).

in his defense.[3] On rebuttal the prosecution attempted to introduce the testimony of the treating psychiatric consultant from the Security Hospital. The defense objected on the ground of physician-patient privilege.[4] The trial judge overruled the objection, stating that the privilege does not apply to a state-employed physician and his institutionalized patient. Defendant was convicted of second degree murder and appealed. The Minnesota Supreme Court reversed, *holding* that the Minnesota privilege statute[5] applies without distinction to private physician-patient relationships and relationships between state-employed physicians and patients confined in state hospitals. The court further held that the defendant did not waive the privileged character of the relationship by placing in issue the defense of insanity and by furnishing his own testimony and that of medical experts on the subject. *State v. Fontana*, 152 N.W.2d 503 (Minn. 1967).

The physician-patient privilege, which was unknown at common law,[6] has been a fertile source of controversy since its initial

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3. The defendant testified at great length about his pre-crime medical history. This testimony included a detailed description of the defendant's inability to defecate for long periods of time, and a general account of the decrepit state of his bowels. The four doctors who testified for the defense concentrated on his mental state. They called the defendant a hypochondriacal schizophrenic, an undifferentiated schizophrenic, and a schizophrenic with paranoid tendencies. Record at 149, 202, 205, 239, 274, 320.

4. A licensed physician or surgeon shall not, without the consent of his patient, be allowed to disclose any information or any opinion based thereon which he acquired in attending the patient in a professional capacity, and which was necessary to enable him to act in that capacity; after the decease of such patient, in an action to recover insurance benefits, where the insurance has been in existence two years or more, the beneficiaries shall be deemed to be the personal representatives of such deceased person for the purpose of waiving the privilege hereinbefore created, and no oral or written waiver of the privilege hereinbefore created shall have any binding force or effect except that the same shall be made upon the trial or examination where the evidence is offered or received. . . .

MINN. STAT. § 595.02(4) (1947). Ch. 640, § 4 [1967] Minn. Laws 788 amended this section to include the words "or dentist" following the word "surgeon."

5. *See id.*

6. *See* C. DEWITT, PRIVILEGED COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT 10 (1958) [hereinafter cited as DEWITT]; C. MCCORMICK, EVIDENCE § 101 (1954) [hereinafter cited as MCCORMICK]; 8 J. WIGMORE, EVIDENCE § 2380 (McNaughton rev. 1961) [hereinafter cited WIGMORE]. In Duchess of Kingston's Trial, 20 How. St. Tr. 355, 573 (1776), Lord Mansfield first rejected an assertion of the privilege:

If a surgeon was voluntarily to reveal these secrets, to be sure, he would be guilty of a breach of honor and a great indiscretion; but to give that information in a court of justice,

adoption in New York in 1828.[7] Despite the forceful opposition of some of the most respected legal minds in the country,[8] the privilege has been adopted by two-thirds of the states and many of the territorial possessions of the United States.[9]

Among the jurisdictions where the privilege has been adopted, there is no universal agreement as to the scope of the privilege and what constitutes waiver thereof. However, as a general rule to which there are a few notable exceptions,[10] it has not been variations in statutory language which have resulted in the wide jurisdictional differences, but rather the disparate ways in which various courts have dealt with waiver of the privilege.[11]

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which by the law of the land he is bound to do, will never be imputed to him as any indiscretion whatever.

7. N.Y. REV. STAT. art. 8, § 73 (1828).

8. *See, e.g.*, DEWITT 39; MCCORMICK §§ 101-08; A. VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 342, 578 (1949); 8 WIGMORE §§ 2380-91; Chaffee, *Privileged Communications: Is Justice Served or Obstructed By Closing the Doctor's Mouth on the Witness Stand?*, 52 YALE L.J. 607 (1943); Purrington, *An Abused Privilege*, 6 COLUM. L. REV. 388 (1906); Sawyer, *The Physician-Patient Privilege: Some Reflections*, 14 DRAKE L. REV. 83 (1965).

9. See DEWITT app., for a collection of the various privilege statutes.

10. *See, e.g.*, D.C. CODE ANN. § 14-308 (1955); MICH. STAT. ANN. § 27.911 (1938); NEB. REV. STAT. § 25-1206 (1965); N.C. GEN. STAT. § 8-53 (1953); VA. CODE ANN. § 8-289.1 (1950). In California, the doctor-patient privilege does not apply in criminal cases. *See* People v. Ditson, 57 Cal. 2d 415, 369 P.2d 714, 20 Cal. Rptr. 165, *cert. denied*, 371 U.S. 852 (1962), *cert. dismissed*, 372 U.S. 933 (1963).

11. In several jurisdictions, strict interpretations of the physician-patient privilege statutes have been applied. In Missouri, whose privilege statute is almost identical to Minnesota's (*compare* MO. ANN. STAT. § 491.060(5) (1939), *with* MINN. STAT. § 595.02(4) (1965)), a strict judicial interpretation has resulted in several decisions which are directly opposite to the resolution of the *Fontana* case. *See* State v. Cochran, 356 Mo. 778, 203 S.W.2d 707 (1947). In a recent decision, the Alaska Supreme Court ruled that the mere commencement of personal injury litigation would be considered an implied waiver of the privilege. Mathis v. Hilderbrand, 416 P.2d 8 (Alas. 1966). For comment on the advantages and drawbacks of this approach, see 51 MINN. L. REV. 575 (1966).

In another recent case, the New York court stated that it was clear that when medical proof of causation of disability or death is tendered in support of a claim, the physician-patient privilege is waived on the thesis that the claimant's own essential proof has opened the door. Beeler v. Hildan Crown Container Corp., 26 App. Div. 163, 271 N.Y.S.2d 373 (1966). The New York court has also held that the patient, in both civil and criminal cases, implicitly waives the privilege by personally testifying in detail as to his injury or illness, by voluntarily disclosing his physical ailments or conditions as well as by voluntarily calling a physician as a witness. People v. Preston, 13

The Minnesota court has viewed the statutory privilege as a broad grant of power to the patient to exclude medical testimony in lawsuits.[12] Although the court has said that "judges should take care to see that the privilege is not made an instrument for cheating justice,"[13] and that it is a shield and not a sword,[14] the cases manifest a consistent judicial reluctance to interfere with or restrict the patient's exercise of the privilege.[15]

The Minnesota court, however, has generally recognized a waiver of the privilege in three instances. *Mass v. Laursen*[16] held that the introduction of a physician's testimony is a waiver of the privilege to the extent that the opponent may cross-examine him as to any information acquired during the course of treatment. In addition, *State v. Emerson*[17] held that the privilege is waived when a defendant consents to a routine physical examination which he knows is being conducted for the purpose of securing evidence against him. Finally, waiver has been found generally where the litigant has been examined by two or more physicians at the same time, and he attempts to introduce the testimony of one while excluding that of the other. In such a case, the court has found a waiver as to the testimony of the second doctor.[18]

Misc. 2d 802, 176 N.Y.S.2d 542 (King County Ct. 1958).

The strict interpretation, as exemplified by the cases mentioned above, does not have the support of the majority of United States jurisdictions where the privilege has been enacted. *See* 8 WIGMORE §§ 2389-90. It is rather the liberal approach which has gained favor in this country. It has been held that testimony by the complainant as to the nature of his injuries will not waive the privilege. *See, e.g.*, Roeder v. North Am. Life Ins. Co., 259 Minn. 168, 106 N.W.2d 624 (1960). The Minnesota court has also stated that the introduction of testimony by one doctor will not waive the privilege as to other doctors who have treated the litigant for the *same* or different ailments. Ostrowski v. Mockridge, 242 Minn. 265, 65 N.W.2d 185 (1954); Polin v. St. Paul Union Depot Co., 159 Minn. 410, 199 N.W. 87 (1924).

12. "As far as the statute goes, it creates a right with which courts have no right to interfere." Nelson v. Ackerman, 249 Minn. 582, 592, 83 N.W.2d 500, 507 (1957). "The statute was enacted for the benefit of the patient and any change or correction should come from the legislature and not as a result of judicial legislation by the courts." Tweith v. Duluth, M. & I.R. Ry., 66 F. Supp. 427, 431 (D. Minn. 1946).

13. Doll v. Scandrett, 201 Minn. 316, 321, 276 N.W. 281, 283 (1937). *See also* Olson v. Court of Honor, 100 Minn. 117, 110 N.W. 374 (1907).

14. Snyker v. Snyker, 245 Minn. 405, 408, 72 N.W.2d 357, 359 (1955).

15. *See* Mass v. Laursen, 219 Minn. 461, 18 N.W.2d 233 (1945).

16. 219 Minn. 461, 18 N.W.2d 233 (1945).

17. 266 Minn. 217, 123 N.W.2d 382 (1963).

18. Leifson v. Henning, 210 Minn. 311, 298 N.W. 41 (1941); Doll v. Scandrett, 201 Minn. 316, 276 N.W. 281 (1937).

Waiver has also been recognized in one specialized instance which is especially germane to the instant case. The Minnesota Court in *Ostrowski v. Mockridge*[19] held that the privilege is not waived by a party who calls medical experts with reference to information acquired by another doctor who attended to him. In other words, if a party is examined by doctors *A* and *B*, the party may then introduce the testimony of doctor *C* whose knowledge is based only upon the written examination reports of *A* and *B* while still retaining the ability to assert the privilege against personal testimony by *A* and *B*.

The first part of the *Fontana* opinion dealt with the ground upon which the trial judge allowed the psychiatric consultant's testimony: namely that the privilege does not apply to state hospital inmates. Holding this to be error, the court reasoned that there is no valid reason why the fact that the taxpayers pay the medical bill should operate to make normally confidential communications fair game for public scrutiny. Hence, the court concluded that if the physician-patient privilege exists at all, it should exist without distinction as to patients in state supported institutions, unless the statute specifically provides to the contrary.[20] Since the state conceded[21] that the trial judge erred in allowing the psychiatric consultant's testimony on the ground that Fontana had been in a state hospital, the portion of the court's opinion devoted to this question was surplusage.

The court then reached the central issue in the case:[22] whether the defendant's use of medical testimony resulted in a waiver of the physician-patient privilege as it applied to the psychiatric consultant. While sympathetically acknowledging the

19. 242 Minn. 265, 65 N.W.2d 185 (1954).

20. *See* OP. ATT'Y GEN. OF MINN. 88-A-27-D (1933); Smart v. Kansas City, 208 Mo. 162, 190, 105 S.W. 709, 716 (1907). *See also* Linscott v. Hughbanks, 140 Kan. 353, 362, 37 P.2d 26, 31 (1934); McGrath v. State, 200 Misc. 165, 169, 104 N.Y.S.2d 882, 887 (Ct. Cl. 1950); Washington v. Sullivan, 60 Wash. 2d 214, 244, 373 P.2d 474, 479 (1962). *Contra* Solovino v. State, 187 Misc. 253, 62 N.Y.S.2d 17 (Ct. Cl. 1946), *modified*, 271 App. Div. 618, 67 N.Y.S.2d 202 (1946) (increasing damages), *aff'd as modified*, 297 N.Y. 460, 73 N.E.2d 174 (1947).

21. Brief for Respondent at 6.

22. At the trial, the judge excluded the psychiatric consultant's testimony without any reference to the issue of waiver. On appeal, although the defendant's brief dealt only with the ground upon which the trial judge excluded the testimony, the issue of waiver was strongly raised in the state's brief. Under Minnesota appellate procedure, the supreme court is required to examine and render judgment on the record before it, even if assignments of error are insufficient to raise an error. MINN. STAT. § 632.06 (1965). *See* State v. Siebke, 216 Minn. 181, 12 N.W.2d 186 (1943).

state's contention that there is no justification for a rule which allows a defendant to permit a physician favorable to his case to testify as to confidential matters, and then to assert the statutory privilege against the testimony of any opposing expert on the same subject,[23] the court rejected the state's contention that Fontana had waived the physician-patient privilege by his extensive use of medical and personal testimony. The court stated that analogous foreign decisions cited in support of this contention could not be relied upon since they were the products of dissimilarities in statutory language.[24] The court reviewed the three instances in Minnesota where waiver of the privilege has generally been found.[25] However, after making no effort to analyze or distinguish them, the court attempted to apply the specialized instance of waiver utilized in *Ostrowski v. Mockridge.*

Finally, the court cryptically stated that the privilege has greater force in criminal cases because the privilege has its roots in constitutional derivations. In support of this conclusion, the court relied on a recent Minnesota case which held,[26] in effect, that absent express statutes protecting the accused against the dangers of self-incrimination in cases where he pleads insanity as a defense, the courts have no legal basis for ordering an examination either to determine his mental condition at the time of the alleged crime or to qualify an expert psychiatric witness to testify at trial.[27]

The court's difficulty in applying the privilege statute may be partially the result of inherent ambiguity in the language of the statute. Although the statute makes specific mention of waiver, it is impossible from the face of the provision to tell whether such language was intended to apply to cases like *Fontana* or only to those of a different nature. In view of the punctuation of the statute[28] it seems most likely that the section dealing with waiver was not included with the intent to cover situa-

23. At some points the court seemed apologetic to the state for the impact of its decision on the administration of criminal justice. State v. Fontana, 152 N.W.2d 503 (Minn. 1967).

24. *Id.* at 507.

25. *Id.* at 506.

26. State v. Olson, 274 Minn. 225, 143 N.W.2d 69 (1966).

27. The court stated that such examinations would violate the accused's right against self-incrimination. U.S. CONST. amend. V; MINN. CONST. art. 1, § 7. See 51 MINN. L. REV. 306 (1966) for a detailed discussion of State v. Olson, 274 Minn. 225, 143 N.W.2d 69 (1966).

28. The semi-colon in the middle of the statute makes it difficult to tell whether the waiver language at the end refers back to the first several lines or only to the matter after the semi-colon concerning

tions like that found in the instant case.[29]

Notwithstanding this problem with statutory phraseology, the large portion of the *Fontana* opinion dealing with the physician-patient privilege is not well argued. Such a criticism is compelled by several factors. Initially, the language of the Minnesota statute does not compel the *Fontana* result. Although the court stated that the varying decisions in different jurisdictions may be attributed to a dissimilarity of the various statutory provisions,[30] this statement is inaccurate. A number of jurisdictions have privilege statutes almost identical to Minnesota's but have reached opposite results in cases similar to *Fontana*,[31] on the public policy ground that the privilege must not be used merely to suppress relevant evidence in courts of law.[32]

Second, an analysis of the three instances the court cited where waiver of the privilege is recognized in Minnesota was indispensable,[33] especially in the case of the unitary examination by two or more physicians.[34] Logically, it is difficult to see how the unitary examination is distinguishable from *Fontana*, since the underlying rationale seems equally applicable to both: once a party consents to a disclosure by one physician,[35] the reason behind the privilege ceases to exist.[36] In short, if the reason for the statute is to save the patient from embarrassing public disclosures,[37] it can properly be said that by calling one or more physicians to discuss his medical problems, the party has shown that he does not fear an open discussion of those problems. Never, in the course of its opinion, did the court attempt to meet this argument, although it was forcefully raised in the state's brief.[38]

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posthumous waiver by a decedent's personal representatives. *See* note 4 *supra*.

29. Although the court in *Fontana* included the waiver language when it quoted the statute, it made no mention of the statutory language in its discussion of waiver later in the opinion. Moreover, when it cites the statute, the court omits the words dealing with decedent's representatives which are found between the semi-colon and the mention of waiver.

30. *See* note 24 supra and accompanying text.

31. *See* note 11 *supra*.

32. *See, e.g.*, Milano v. State, 44 Misc. 2d 290, 293, 253 N.Y.S.2d 662, 667 (Ct. Cl. 1964).

33. *See* note 25 *supra* and accompanying text.

34. *See* note 18 *supra* and accompanying text.

35. *See* note 3 *supra* (Fontana consented to disclosures by four).

36. 8 WIGMORE § 2390, at 862-65.

37. *See* 8 WIGMORE § 2380, at 830; DEWITT 24; MCCORMICK § 101, at 212.

38. Brief for Respondent at 11-14.

In addition, it is difficult to see why the *Fontana* court relied on the *Ostrowski* case. The trial record reveals only one occasion out of four when the defendant asked one of his medical experts to testify about information acquired by another physician in attending him. The great bulk of the defendant's medical testimony was devoted to his pre-crime medical history and its implications as to his sanity at the time of the shooting. More disturbing is the fact that the discussion of information acquired by another doctor was the court's only attempt to apply the privilege to the facts of the case.

Finally, the court failed completely to explain how the statutory physician-patient privilege is rooted in the constitutional privilege against self-incrimination, if indeed that is what the court meant. Nonetheless, one can conjecture that the court was concerned with the method by which Fontana was committed and treated in the state hospital. Since the commitment subsequent to the hearing before the Board of Examiners was compulsory, the defendant was forced to take treatment at the state facility.[39] Because the treatment[40] was compulsory, any extractions of inculpatory evidence might also be considered compulsory, thereby violating the defendant's privilege against self-incrimination. This argument is extremely difficult to answer, and it seems extraordinary that the court did not choose to elaborate and rely on it.[41]

Instead, the court cited *Taylor v. United States*,[42] where the District of Columbia Circuit Court of Appeals held that there was no waiver of the physician-patient privilege dispite the defendant's extensive use of medical testimony. In citing that decision as support for the proposition that the doctor-patient privilege is grounded in "constitutional roots," the Minnesota court

39. MINN. STAT. § 631.18 (1957).

40. Although the *Fontana* opinion makes no allusion thereto, the court may have been worried about some of the methods used to treat mental patients, such as shock, hypnosis, and drugs. Clearly, compulsory extractions of information obtained through the use of these methods would be inadmissible. *See* Miranda v. Arizona, 384 U.S. 436 (1966); Jackson v. Denno, 378 U.S. 368 (1964).

41. The question whether judicial limitations on the defendant's right to invoke the physician-patient privilege are violative of his right against self-incrimination has been faced by several jurisdictions (*see* note 11 *supra*), but ignored by the great majority (*see* DEWITT, *supra* note 6, at 113). The latter seem to feel that a reading of the two privileges together as appears to have been done in *Fontana*, would constitute such a restriction of the administration of criminal justice as to be untenable.

42. 222 F.2d 398 (D.C. Cir. 1955).

failed to make two seemingly crucial observations. First, the federal court never made any statement to the effect that its decision rested on constitutional grounds. Second, the federal case was repudiated by Congress five months after it was handed down by an amendment to the District of Columbia Code.[43]

If this was indeed the rationale of the Minnesota court, then the administration of criminal justice may be greatly hampered. In every case in which a defendant raises the defense of insanity, the prosecution will be unable to introduce any medical testimony unless the defendant consents. By careful use of the physician-patient and self-incrimination privileges, a defendant will effectively be able to parade favorable expert witnesses to the stand without worrying about any unfavorable expert testimony. Such a situation clearly calls for redress.

A solution to this situation involves the close balancing of two competing public policies: the need to provide the accused with a guaranty against the use of compelled testimony in determining his guilt; and the need of the state and society for an effective administration of criminal justice. Under *Fontana*, the former is given preference to the total exclusion of the latter. Such a situation must not be allowed to stand. What is needed is a solution which recognizes the validity of both policies, and, since the answer apparently will not be forthcoming from the present Minnesota Court,[44] the legislature must provide the solution.

In the search for a workable compromise, it should be noted that an impressive argument has been made for the retention of the physician-patient privilege when psychiatric testimony is involved.[45] It is said that unimpeded disclosure to psychiatrists is absolutely essential to effective treatment.[46] Considering the sensitive nature of mental illness and the general lack of public sophistication in this area,[47] such a contention seems highly plausible. Thus, any solution must take into account the valid need to preserve, to whatever extent consistent with the two other policy interests, the confidentiality of this relationship.

43. D.C. CODE ANN. § 14-308 (1955). The *Taylor* case was also rejected by the American Law Institute soon after it was handed down on the ground that such a handicap to the prosecution should not be borne in light of the defendant's willingness to expose his medical condition in an open courtroom. 32 A.L.I. PROCEEDINGS 237 (1955).

44. *See* note 12 *supra*.

45. *See* Guttmacher & Weihofen, *Privileged Communications Between Psychiatrist and Patient*, 28 IND. L.J. 32 (1952).

46. *Id.* at 34.

47. *Id.* at 32.

Although several approaches have been suggested,[48] one solution has been formulated which effectively balances the three interests which must be protected.[49] It is based on the premise that since all privileges are barriers to the ascertainment of facts, there must be a strong benefit derived from the assertion of the privilege in order to justify the obstacle to the discovery of fact which the privilege will present. Starting with this assumption, it is proposed that the privilege will not apply in those proceedings in which the patient introduces his mental condition as an element of his claim or defense. Following such an introduction, the presiding judge will make his own preliminary investigation as to the importance, relevancy, and nature of the state's medical testimony. Based on this investigation the judge will decide whether a just resolution of the case demands that the privilege be waived. The judge's investigation would reveal the extent to which the prosecution would be handcuffed by the assertion of the privilege, the danger of infringing the defendant's right against self-incrimination,[50] and finally, whether a disclosure of

48. One approach, enacted by Congress for the District of Columbia in response to Taylor v. United States, 222 F.2d 398 (D.C. Cir. 1955), totally abrogates the physician-patient privilege in criminal cases when the accused raises the defense of insanity or is charged with causing a death. However, this fails to safeguard the confidentiality of the psychiatrist-patient relationship, and, in light of State v. Olson, 274 Minn. 225, 143 N.W.2d 69 (1966), it might also fail to meet Minnesota's self-incrimination standards.

Another solution proposes that the contents of psychiatric examinations made prior to trial shall be admissible in a proceeding to determine the defendant's mental condition whether or not such communication is deemed privileged. This proposal also ignores the confidential aspect of the relationship. In addition, unless a bifurcated trial procedure was provided wherein the guilt issue was tried separately from the insanity issue, it would raise serious self-incrimination problems. For a discussion of the bifurcated trial, see 51 MINN. L. REV. 306, 310-11 (1966).

49. 4 HARV. J. LEGIS. 307 (1967).

50. Naturally, if this investigation revealed that some of the evidence sought to be introduced would violate the privilege against self-incrimination, that evidence would have to be excluded. State v. Olson, 274 Minn. 225, 143 N.W.2d 69 (1966). This dilemma concerning the state's ability to introduce medical testimony has been squarely faced in one jurisdiction. A number of Missouri cases hold that if an accused raises the defense of insanity, he thereby waives not only the physician-patient privilege, *see* note 11 *supra*, but also his constitutional guaranty against self-incrimination. State v. Swinburne, 324 S.W.2d 746 (Mo. 1959); State v. Sapp. 356 Mo. 705, 203 S.W.2d 425 (1947). This approach apparently denies the controlling nature of two of the three policy interests mentioned above: the confidentiality of the psychiatrist-patient relationship, and the right of the accused to be protected against self-incrimination.