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CPLR 4504(a): A Plaintiff in a Personal Injury Action Cannot Effect a Waiver of the Defendant's Physician-Patient Privilege by Placing the Defendant's Physical Condition "In Controversy"

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despite a defendant's retention of counsel on an unrelated pending charge.[34]

While a defendant's right to counsel must be safeguarded, it also "must be tempered with reason and common sense."[35] Whereas New York has a significant interest in promoting proper criminal investigations, it has a minimal interest in protecting a defendant's right to counsel in a foreign state's proceeding.[36] New York investigations should not be unduly encumbered by pending prosecutions in foreign jurisdictions. Such foreign jurisdictions retain the right to determine—based on their own standards and those of the federal Constitution—whether a New York investigation violated the defendant's right to counsel. Keeping these considerations in mind, along with the practical difficulties associated with the proposed extension of the rule, it is urged that the New York Court of Appeals reject such an extension.[37]

Thomas J. Cahill

CIVIL PRACTICE LAW AND RULES

CPLR 4504(a): A plaintiff in a personal injury action cannot effect a waiver of the defendant's physician-patient privilege by placing the defendant's physical condition "in controversy"

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[34] *See, e.g.*, People v. Bertolo, 65 N.Y.2d 111, 480 N.E.2d 61, 490 N.Y.S.2d 475 (1985) (police knew defendant had been arrested on minor charges several months earlier, but had no knowledge that charges were still pending and that defendant was represented by counsel on charges); People v. Colwell, 65 N.Y.2d 883, 482 N.E.2d 1214, 493 N.Y.S.2d 296 (1985) (mem.) (police were aware that defendant was represented on appeal for prior conviction); People v. Lucarano, 61 N.Y.2d 138, 460 N.E.2d 1328, 472 N.Y.S.2d 894 (1984) (defendant denied having counsel on pending unrelated charge, though defendant was in fact represented on charge); People v. Krom, 61 N.Y.2d 187, 461 N.E.2d 276, 473 N.Y.S.2d 139 (1984) (police were aware that defendant was represented but emergency situation existed).

[35] *Bing*, 131 Misc. 2d 62, 66, 499 N.Y.S.2d 313, 316 (Sup. Ct. Nassau County 1985). As Justice Cardozo noted: "[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament." Snyder v. Massachusetts, 291 U.S. 97, 122 (1934).

[36] *See Bing*, 146 App. Div. 2d at 184, 540 N.Y.S.2d at 250.

[37] On March 20, 1990, the New York Court of Appeals heard oral argument on Mr. Bing's appeal from the Second Department's decision in People v. Bing, 146 App. Div. 2d 178, 540 N.Y.S.2d 111 (1989).

CPLR 3121(a) permits any party, after commencement of an action in which the physical condition of the adversary is "in controversy," to obtain disclosure of hospital records relating to such condition.[1] While CPLR 4504(a) enables the adversary to prevent

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[1] CPLR 3121(a) (McKinney Supp. 1990). Section 3121(a) provides in pertinent part:

> (a) Notice of examination. After commencement of an action in which the . . . physical condition . . . of a party . . . is in controversy, any party may serve notice on another party to submit to a physical . . . examination by a designated physician . . . . The notice may require duly executed and acknowledged written authorizations permitting all parties to obtain . . . the records of specified hospitals relating to such . . . physical condition . . . .

Id.

CPLR 3121(a) requires only that the party's physical condition be "in controversy" and not that it be "at issue," *i.e.*, raised in the pleadings. *See* Fisher v. Fossett, 45 Misc. 2d 757, 758, 257 N.Y.S.2d 821, 822-23 (Sup. Ct. Erie County 1965) (in auto accident case where defendant stated before trial that she blacked out but plaintiff did not raise her physical condition in his pleading, defendant's condition was not at issue but was "in controversy" and release of hospital records was compelled under CPLR 3121(a)). The requirement that a party's physical condition be "at issue" is related to the issue of whether a party has waived the physician-patient privilege. *See infra* note 3 and accompanying text.

In personal injury actions a plaintiff who asserts a claim for his physical injury clearly places his physical condition "in controversy." *See, e.g.*, Evens v. Denny's, Inc., 129 Misc. 2d 767, 768, 494 N.Y.S.2d 67, 68 (Sup. Ct. Erie County 1985) (negligence action where plaintiff suffered personal injury); Adlerstein v. South Nassau Communities Hosp., 109 Misc. 2d 158, 161, 439 N.Y.S.2d 605, 608 (Sup. Ct. Nassau County 1981) (medical malpractice action); 3A WK&M § 3121.01, at 31-413.

A defendant will be deemed to have placed his physical condition "in controversy" when he asserts his physical condition "either by way of counterclaim or as a defense to the plaintiff's claim." Koump v. Smith, 25 N.Y.2d 287, 295, 250 N.E.2d 857, 862, 303 N.Y.S.2d 858, 865 (1969); *see also* Gaglia v. Wells, 112 App. Div. 2d 138, 139, 490 N.Y.S.2d 829, 830 (2d Dep't 1985) (defendant did not place his physical condition "in controversy" by asserting loss of memory because such loss was not asserted as a defense to liability).

A plaintiff may place a defendant's physical condition "in controversy" by alleging and obtaining adequate factual support that the defendant's physical condition was a cause of the injury. *See, e.g.*, *Koump*, 25 N.Y.2d at 300, 250 N.E.2d at 864, 303 N.Y.S.2d at 869 (statements without factual support will not suffice); Constantine v. Diello, 24 App. Div. 2d 821, 821, 264 N.Y.S.2d 153, 154 (4th Dep't 1965) (submission to an eye exam granted where plaintiff's allegation that defendant was suffering from defective eye condition while operating a motor vehicle was supported by eye test during a pre-trial hearing); Soybel v. Gruber, 132 Misc. 2d 343, 346, 504 N.Y.S.2d 354, 356 (N.Y.C. Civ. Ct. N.Y. County 1986) (landlord's unsupported claim that 84-year-old tenant was too ill to keep apartment did not place tenant's condition "in controversy"); *cf.* Swartz v. Koster, 129 Misc. 2d 342, 344, 493 N.Y.S.2d 82, 85 (Sup. Ct. Nassau County 1985) (defendant's physical condition not in issue solely through plaintiff's pleadings). *But see* Shalhoub v. Viverito, 133 Misc. 2d 765, 766, 508 N.Y.S.2d 135, 137 (Sup. Ct. Queens County 1986) (defendant's physical condition was the very essence of the action and therefore "in controversy" even absent proof). In such a case "[t]he burden of proving that the party's . . . physical condition is in controversy . . . is on the party seeking the [disclosure of the] hospital records." *Koump*, 25 N.Y.2d at 300, 250 N.E.2d at 864, 303 N.Y.S.2d at 869.

The scope of the disclosure under CPLR 3121(a) encompasses only those hospital records which are relevant to the physical condition placed "in controversy." *See, e.g.*,

discovery of such records by asserting the physician-patient privilege,[2] the adversary is deemed to have waived the privilege in a personal injury action if she *affirmatively* puts her physical condition in issue.[3] Recently, in *Dillenbeck v. Hess*,[4] the Court of Appeals held that when a defendant in a personal injury action validly asserts the physician-patient privilege, a waiver of that privilege is not effected simply because the plaintiff, in compliance

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O'Leary v. Sealey, 50 Misc. 2d 658, 659, 271 N.Y.S.2d 55, 56 (Dist. Ct. Nassau County 1966) (in automobile accident case, physical examination of defendant was denied where it was not determinative of whether defendant had an epileptic seizure at time of accident).

[2] CPLR 4504(a) (McKinney Supp. 1990). Section 4504(a) provides in part: "Unless the patient waives the privilege, a person authorized to practice medicine . . . shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity." *Id.*

The physician-patient privilege did not exist at common law and in 1828 New York became the first state to enact the privilege. 2 N.Y. Rev. Stat. 1829 part III, ch.7, tit. 3, art. 8; *see* Williams v. Roosevelt Hosp., 66 N.Y.2d 391, 395, 488 N.E.2d 94, 96, 497 N.Y.S.2d 348, 350 (1985); E. CLEARY, MCCORMICK ON EVIDENCE § 98, at 243 (3d ed. 1984); E. FISCH, FISCH ON NEW YORK EVIDENCE § 541 (2d ed. 1977).

The burden of proof is on the person asserting the privilege to establish the requirements of CPLR 4504. *See Koump*, 25 N.Y.2d at 294, 250 N.E.2d at 861, 303 N.Y.S.2d at 864.

[3] *See Koump*, 25 N.Y.2d at 294, 250 N.E.2d at 861, 303 N.Y.S.2d at 864. The privilege may be waived at any time, including pre-trial, and even by a contract made prior to the trial. *See* Lynch v. Mutual Life Ins. Co., 55 Misc. 2d 179, 181, 284 N.Y.S.2d 768, 770 (Sup. Ct. Bronx County 1967) (physician-patient privilege could not be invoked where plaintiff's contract of insurance contained waiver of privilege against medical record disclosures). However, the scope of the waiver is limited to medical information related to the particular physical condition placed in issue by waiving in the waiving party's pleading. *See, e.g.*, Josephs v. Oliver, 48 App. Div. 2d 688, 688, 367 N.Y.S.2d 836, 837 (2d Dep't 1975) (plaintiff who placed her heart condition in issue by waiving physician-patient privilege with regard to matters related to heart condition); Gorman v. Goldman, 36 App. Div. 2d 767, 767, 321 N.Y.S.2d 296, 297-98 (2d Dep't 1971) (plaintiff who commenced personal injury action did not waive privilege for treatment of totally unconnected condition).

A plaintiff will be deemed to have waived the privilege upon commencement of a personal injury action. *See* Fedell v. Wierzbieniec, 127 Misc. 2d 124, 126, 485 N.Y.S.2d 460, 462 (Sup. Ct. Erie County 1985). A defendant will waive the privilege by "affirmatively assert[ing] [his] . . . [physical] condition either by way of counterclaim or to excuse the conduct complained of by the plaintiff." *Koump*, 25 N.Y.2d at 294, 250 N.E.2d at 861, 303 N.Y.S.2d at 864.

A party who fails to object to the disclosure of privileged information will also be deemed to have waived the physician-patient privilege. *See* Iseman v. Delmar Medical-Dental Bldg., Inc., 113 App. Div. 2d 276, 279, 495 N.Y.S.2d 747, 750 (3d Dep't 1985); Hughson v. St. Francis Hosp. of Port Jervis, 93 App. Div. 2d 491, 500, 463 N.Y.S.2d 224, 230 (2d Dep't 1983). A defendant will not waive the privilege merely by denying the plaintiff's allegations even if his condition is "in controversy"; *See Koump*, 25 N.Y.2d at 294, 250 N.E.2d at 861, 303 N.Y.S.2d at 864. These rules are based on the rationale that a party should not be able to use the physician-patient privilege as a sword to prevent disclosure of the nature of the very condition on which suit for damages is brought. *See id.*

[4] 73 N.Y.2d 278, 536 N.E.2d 1126, 539 N.Y.S.2d 707 (1989).

with CPLR 3121(a), places the defendant's physical condition "in controversy"; a valid waiver requires the beneficiary of the privilege to place his or her own physical condition "in controversy."[5]

In *Hess*, Tonia Dillenbeck was killed and her son was seriously injured in a head-on collision between their automobile and another vehicle driven by the defendant, Sherry Hess.[6] The defendant sustained serious injuries and was hospitalized immediately after the accident.[7] The hospital administered a blood alcohol test to the defendant for diagnostic purposes which indicated a blood alcohol level of 0.27 percent, well above the legal limit of 0.10 percent.[8] The plaintiffs'[9] complaint alleged that the defendant's intoxicated condition was the proximate cause of the accident.[10] The defendant denied the allegations of the complaint and asserted the affirmative defenses of comparative negligence and the plaintiffs' failure to wear seat belts.[11] The plaintiffs moved, pursuant to CPLR 3121(a), to compel disclosure of any medical records relating to the defendant's physical condition at the time of the accident, including the results of the blood alcohol test.[12] The defend-

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[5] *Id.* at 280-81, 536 N.E.2d at 1128, 539 N.Y.S.2d at 709.

[6] *Id.* at 281, 536 N.E.2d at 1128, 539 N.Y.S.2d at 709.

[7] *Id.*

[8] *Id.* at 281, 282 & n.2, 536 N.E.2d at 1128 & n.2, 539 N.Y.S.2d at 709 & n.2. The blood alcohol test was not administered at the direction of a police officer or by court order. *Id.* at 281, 536 N.E.2d at 1128, 539 N.Y.S.2d at 709. If the test had been administered in that manner, the results would have been subject to disclosure. *See infra* notes 30-31 and accompanying text.

[9] The plaintiffs in *Hess* were Donald Dillenbeck, the administrator of Tonia Dillenbeck's estate, and Tonia's son, who was seriously injured in the accident. Dillenbeck v. Hess, 140 App. Div. 2d 766, 766, 527 N.Y.S.2d 647, 647 (3d Dep't 1988), *aff'd*, 73 N.Y.2d 278, 536 N.E.2d 1126, 539 N.Y.S.2d 707 (1989).

[10] *Hess*, 73 N.Y.2d at 281, 536 N.E.2d at 1128, 539 N.Y.S.2d at 709. The complaint also alleged that the codefendants, owners of Red's Good Luck Tavern and Eddie's Conklin Inn, where the defendant had allegedly been drinking prior to the accident, negligently contributed to her intoxication. *Id.*

[11] *See id.* at 282, 536 N.E.2d at 1128, 539 N.Y.S.2d at 709. The defendant was convicted of criminally negligent homicide after a jury trial though the results of the blood alcohol test were held inadmissible at that trial. *See id.* at 282 n.2, 536 N.E.2d at 1128 n.2, 539 N.Y.S.2d at 709 n.2. The criminal court concluded that the test results fell within the physician-patient privilege and that the defendant had not waived the privilege. *Id.* It should be noted that had the defendant waived the privilege at the criminal trial it would have been deemed waived in *Hess*. *See supra* note 3.

[12] *Id.* at 282, 536 N.E.2d at 1129, 539 N.Y.S.2d at 710. In support of the motion the plaintiffs submitted, *inter alia*, a police accident report, three affidavits of persons who claimed to have been with the defendant prior to the accident and observed her consume alcohol over a seven-hour period, and an affidavit by the plaintiffs' attorney. *Id.* The plaintiffs also submitted portions of the defendant's examination before trial wherein she claimed

ant cross-moved for an order of protection asserting the physician-patient privilege under CPLR 4504(a).[13]

The trial court denied the plaintiffs' motion and granted the defendant's cross-motion.[14] The Appellate Division, Third Department, affirmed and concluded that the privilege was not waived where the defendant merely denied the allegations of the complaint and had not affirmatively placed her physical condition "in controversy," notwithstanding that her physical condition at the time of the accident was "undeniably in issue."[15]

The Court of Appeals, in a 4-3 decision, affirmed the judgment of the Appellate Division.[16] Writing for the majority, Judge Alexander noted that the plaintiffs satisfied their threshold burden under CPLR 3121(a) by placing the defendant's physical condition at the time of the accident "in controversy."[17] However, the majority reasoned that the hospital records sought by plaintiffs "indisputably" fell within the reach of the defendant's physician-patient privilege.[18] Relying on its earlier decision in *Koump v. Smith*,[19] the

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no memory of any of the events prior to the accident except having one drink at Red's Good Luck Tavern earlier in the day. *Id.*

[13] *Id.* The protective order was sought pursuant to CPLR 3122. *Id.*

[14] *Id.* at 282-83, 536 N.E.2d at 1129, 539 N.Y.S.2d at 710.

[15] Dillenbeck v. Hess, 140 App. Div. 2d 766, 767, 527 N.Y.S.2d 647, 648 (3d Dep't 1988), *aff'd*, 73 N.Y.2d 278, 536 N.E.2d 1126, 539 N.Y.S.2d 707 (1989).

[16] *Hess*, 73 N.Y.2d at 295, 536 N.E.2d at 1137, 539 N.Y.S.2d at 718.

[17] *Id.* at 288, 536 N.E.2d at 1133, 539 N.Y.S.2d at 714. After discussing the reasons behind the physician-patient privilege and the criticisms of those reasons, the majority relied heavily on the principles enunciated in Koump v. Smith, 25 N.Y.2d 287, 250 N.E.2d 857, 303 N.Y.S.2d 858 (1969). *Hess*, 73 N.Y.2d at 286-88, 536 N.E.2d at 1131-32, 539 N.Y.S.2d at 712-13. The majority reasoned that under *Koump* the initial burden of putting the defendant's physical condition "in controversy" was on the plaintiff. *See id.* at 287, 536 N.E.2d at 1132, 539 N.Y.S.2d at 713.

[18] *Id.* at 289, 536 N.E.2d at 1133, 539 N.Y.S.2d at 714. The court stated that the "hospital records relating to defendant's physical condition and blood alcohol content following the accident . . . indisputably fall[] within the scope of the physician-patient privilege as information acquired by a physician 'in attending [defendant] in a professional capacity, and which was necessary to enable him to act in that capacity.'" *Id.* (quoting CPLR 4504(a)).

[19] 25 N.Y.2d 287, 250 N.E.2d 857, 303 N.Y.S.2d 858 (1969). In *Koump*, the plaintiff was allegedly injured in a head-on collision between his vehicle and that of the defendant. *Koump*, 25 N.Y.2d at 289, 250 N.E.2d at 858, 303 N.Y.S.2d at 860. The complaint alleged that at the time of the accident the defendant was drunk and that the cause of the accident was the defendant's intoxicated condition. *See id.* at 289-90, 250 N.E.2d at 858, 303 N.Y.S.2d at 860. The only evidence offered by the plaintiff to put the defendant's physical condition "in controversy" was the plaintiff's pleadings and a statement in his attorney's affidavit that "the police report says that the policeman said that Dr. Sperling said that the defendant appeared intoxicated—a double link of hearsay." *Id.* at 299, 250 N.E.2d at 864, 303 N.Y.S.2d at 868. The court held that this was insufficient to place the defendant's phys-

Hess court held that the defendant did not waive the privilege simply by denying the allegations of the complaint or by testifying that she had no memory of the events prior to the incident.[20] Additionally, the privilege was not waived by the defendant's assertions of comparative negligence and the plaintiffs' failure to wear seat belts.[21] Faced with a proper 3121(a) request and a valid privilege claim, the court concluded that the plaintiff could not effect a waiver of the defendant's privilege merely by satisfying the "in controversy" requirement of CPLR 3121(a).[22]

Writing in dissent, Judge Bellacosa argued that the defendant did seek to excuse her conduct by affirmatively pleading comparative negligence and the plaintiffs' failure to wear seat belts, as well as by claiming a loss of memory of the events prior to the accident.[23] The dissent further reasoned that in situations where a defendant has actually avoided placing his physical condition "in controversy," the plaintiff should be able to effect a waiver by demonstrating that the defendant's physical condition is, in fact, "in controversy."[24] Finally, the dissent contended that the defen-

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ical condition "in controversy." *Id.* at 300, 250 N.E.2d at 864-65, 303 N.Y.S.2d at 869.

[20] *Hess*, 73 N.Y.2d at 289, 536 N.E.2d at 1133, 539 N.Y.S.2d at 714. The court concluded that no waiver was effected by applying the rule laid down in *Koump* that a party does not waive the privilege merely by denying the allegations of the complaint—the party "must affirmatively assert the condition 'either by way of counterclaim or to excuse the conduct complained of by the plaintiff.'" *Id.* at 288, 536 N.E.2d at 1132, 539 N.Y.S.2d at 713 (quoting *Koump*, 25 N.Y.2d at 294, 250 N.E.2d at 861, 303 N.Y.S.2d at 864). The majority reasoned that neither the defendant's denial of allegations in the complaint nor her testimony regarding her memory loss was asserted to excuse her conduct. *Id.* at 289, 536 N.E.2d at 1133, 539 N.Y.S.2d at 714.

[21] *Id.* "A litigant will be deemed to have waived the privilege when . . . that person has affirmatively placed his or her mental or physical condition in issue." *Id.* at 287, 536 N.E.2d at 1132, 539 N.Y.S.2d at 713. "[N]either defense seeks to excuse the conduct complained of by asserting a mental or physical condition." *Id.* at 289, 536 N.E.2d at 1133, 539 N.Y.S.2d at 714.

[22] *Id.* The majority reasoned that the plaintiff could not effect a waiver of the defendant's privilege by placing the defendant's physical condition "in controversy" because this would confuse the evidentiary requirements of CPLR 3121(a) with those of CPLR 4504(a). *Id.* Moreover, the privilege is personal to the person asserting it and can be waived only by the patient or an authorized representative. *Id.*

[23] *Id.* at 295, 536 N.E.2d at 1136, 539 N.Y.S.2d at 717 (Bellacosa, J., dissenting). The dissent argued that, under *Koump*, these facts were enough to show that the defendant affirmatively placed her physical condition in issue and thus waived the privilege. *Id.* at 295, 536 N.E.2d at 1137, 539 N.Y.S.2d at 718 (Bellacosa, J., dissenting).

[24] *Id.* (Bellacosa, J., dissenting). The dissent also contended that "when a party is clearly not on a 'fishing expedition,' the interest of letting truth triumph outweighs the defendant's desire to cloak highly relevant scientific evidence in secrecy." *Id.* at 294, 536 N.E.2d at 1136, 539 N.Y.S.2d at 717 (Bellacosa, J., dissenting).

dant did not have a "legally cognizable privilege expectation" with respect to the results of the blood alcohol test, especially in light of the present-day policies of the legislature[25] and statutory enactments in the area.[26]

Although the *Hess* majority properly applied the rules articulated in *Koump v. Smith*, it is suggested that the result of the *Hess* decision was inequitable and that continued application of the physician-patient privilege in personal injury actions will perpetuate unjust results.

The paramount policy rationale underlying the physician-patient privilege is the promotion of public health by encouraging the public to fully disclose to physicians information necessary for treatment and diagnosis without having to worry about embarrassment or disgrace from the disclosure.[27] However, in jurisdictions that do not recognize this privilege there is no indication that the public is avoiding medical services because of possible embarrassment or disgrace.[28] In practice, litigators employ the physician-pa-

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[25] *See infra* notes 27-28.

[26] *Hess*, 73 N.Y.2d at 295, 536 N.E.2d at 1137, 539 N.Y.S.2d at 718 (Bellacosa, J., dissenting). The dissent referred to the statutory enactments in sections 1194(2)(a) and 1194(3)(b)(1) of the Vehicle and Traffic Law. *Id.* at 292, 536 N.E.2d at 1135, 539 N.Y.S.2d at 716 (Bellacosa, J., dissenting); *see infra* note 30 and accompanying text.

[27] *See* Williams v. Roosevelt Hosp., 66 N.Y.2d 391, 395, 488 N.E.2d 94, 96, 497 N.Y.S.2d 348, 350 (1985); E. CLEARY, *supra* note 2, § 98, at 244; E. FISCH, *supra* note 2, § 541, at 356. An additional rationale in support of the privilege is the fear that physicians would alter or conceal the truth when faced with the conflict between their legal duty to testify and their professional duty to remain silent. *See* E. FISCH, *supra* note 2, § 541. A third rationale, recently articulated, is that the physician-patient privilege is needed to protect the privacy expectations of the patient. *See* E. CLEARY, *supra* note 2, § 105, at 259; *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1544-48 (1985); *see also In re* Grand Jury Proceedings, 56 N.Y.2d 348, 352, 437 N.E.2d 1118, 1120, 452 N.Y.S.2d 361, 363 (1982) ("physician-patient privilege . . . is designed . . . to encourage full disclosure by the patient so that he can secure appropriate treatment from the physician").

[28] *See* E. FISCH, *supra* note 2, § 557, at 376; 5 WK&M § 4504.02, at 45-181. It has been a continuing theme among commentators that the privilege does not encourage patients to consult physicians or disclose their conditions more fully because thoughts of eventual litigatory disclosure are too remote, if ever contemplated at all. *See, e.g.*, Chafee, *Privileged Communications: Is Justice Served or Obstructed By Closing the Doctor's Mouth on the Witness Stand?*, 52 YALE L.J. 607, 609 (1943) (fear of litigation not a factor in patient-doctor relationship); Morgan, *Suggested Remedy for Obstructions to Expert Testimony by Rules of Evidence*, 10 U. CHI. L. REV. 285, 290-91 (1943) (remote fear of litigation does not deter full disclosure by patient; no evidence of impact on public health); Purrington, *An Abused Privilege*, 6 COLUM. L. REV. 388, 396 (1906) ("litigation is too uncommon an incident in the life of the average man for the anticipation of it to prove a deterrent").

It has also been noted that while the physician-patient privilege is analogous to the attorney-client privilege, there is a significant difference in the respective motivations of the

tient privilege as a tactic to conceal relevant scientific evidence, and in personal injury actions, the medical evidence often is "absolutely needed" in order to learn the truth.[29] Due to the continued adherence to this specious policy rationale underlying the privilege, and the necessity of medical records for learning the truth, plaintiffs in personal injury actions may often be deprived of a deserved remedy for their injuries.

Further, it is suggested that the *Hess* decision runs contrary to the obvious policy determination of the legislature to crack down on drunk driving. According to section 1194(2)(a) of the New York Vehicle & Traffic Law, a person who operates a motor vehicle is deemed to have consented to a blood alcohol test provided the test is administered at the direction of a police officer.[30] The results of the test administered by a police officer would have been subject to disclosure in *Hess* because the defendant's physical condition was "in controversy" and the physician-patient privilege would have

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client and the patient: the client's eye is to trial but the patient's only to cure. *See* WK&M § 4504.02, at 45-180 to -181; Curd, *Privileged Communications Between the Doctor and his Patient—An Anomaly of the Law*, 44 W. VA. L.Q. 165, 168-69 (1938).

The second rationale used to support the privilege, that physicians will alter or conceal the truth in order to uphold their professional duty of silence, is also without practical significance since absent the privilege, any disclosure would be by operation of law rather than personal breach. *See* Chafee, *supra* at 610 (alteration of truth and encouragement of perjury by physician unlikely).

The third rationale used to support the privilege, that the patient has a legitimate privacy expectation, carries perhaps the greatest weight. *See* Sawyer, *The Physician-Patient Privilege: Some Reflections*, 14 DRAKE L. REV. 83, 96 (1965) ("the privilege reflects the outrage all of us generate when a doctor . . . [discloses] confidences which he has been entrusted with"). However, the privacy expectation should not be considered absolute, but qualified and subject to defeat by a greater public interest. *See* Perry v. Fiumano, 61 App. Div. 2d 512, 517, 403 N.Y.S.2d 382, 385 (4th Dep't 1978) ("Privileged communications should not be disclosed unless '[t]he *injury* that would inure to the relation by the disclosure of the communications [is] *greater than the benefit* thereby gained for the correct disposal of litigation' ") (citing 8 WIGMORE, EVIDENCE § 2285, at 527 (McNaughton rev. ed., 1961); *cf.* People v. Doe, 107 Misc. 2d 605, 607, 435 N.Y.S.2d 656, 658 (Sup. Ct. Westchester County 1981) (in grand jury investigation of physician's billing practices, medical records were not subject to the privilege in view of overriding public interest in proper administration of Medicaid program).

[29] *See* 5 WK&M § 4504.02, at 45-182; *see also* E. FISCH, *supra* note 2, § 557, at 377 (privilege is used as "tactical maneuver" mainly to suppress facts injurious to adversary's legal position); Sawyer, *supra* note 28, at 85 (privilege is asserted to prevent consideration of relevant facts).

[30] *See* N.Y. VEH. & TRAF. LAW § 1194(2)(a) (McKinney Supp. 1989). Furthermore, under § 1194(3)(b)(1) a chemical test will be compulsory when authorized by court order. One of the conditions for issue of a court order is that a person other than the intoxicated operator of a motor vehicle be killed or seriously injured as the result of such operation. *See id.* § 1194(3)(b)(1).

been inapplicable.[31] In view of this statutory response to the drunk driving problem, the continued recognition of the physician-patient privilege in this area will create inconsistent results based solely on whether the blood alcohol test was administered by a physician or at the direction of a police officer.[32]

Therefore, it is submitted that the New York Legislature should repeal the physician-patient privilege embodied in CPLR 4504(a) to the extent that it applies to personal injury actions.[33] Alternatively, a qualifying provision could be added to CPLR 4504(a) to allow a court to compel disclosure when it is necessary to avoid inequitable results in personal injury actions.[34]

Anthony N. Magistrale

GENERAL MUNICIPAL LAW

GML § 50-e(5): Denial of renewed application to serve late notice of claim on city was not an abuse of discretion, despite the city's actual knowledge of essential facts of claim, where petitioner's delay was excessive, his excuse insufficient, and city was substantially prejudiced

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[31] *See supra* notes 17-18 and accompanying text.

[32] *See Hess*, 73 N.Y.2d at 292, 536 N.E.2d at 1135, 539 N.Y.S.2d at 716 (Bellacosa, J., dissenting); *see also Koump*, 25 N.Y.2d at 292, 250 N.E.2d at 860, 303 N.Y.S.2d at 862 (1969) ("question of whether the doctor-patient privilege obtains when a party's mental or physical condition is in controversy has not received uniform treatment by the lower courts").

[33] *See* E. FISCH, *supra* note 2, § 557, at 377; *see also Koump*, 25 N.Y.2d at 294, 250 N.E.2d at 861, 303 N.Y.S.2d at 864 ("in personal injury actions there is little reason for the [physician-patient privilege]"); *In re* Grand Jury Subpoena, 460 F. Supp. 150, 151 (W.D. Mo. 1978) (there is no physician-patient privilege under federal law).

[34] *See* N.Y. (Proposed) Code of Evidence § 501(c); E. CLEARY, *supra* note 2, § 105, at 260; 5 WK&M § 4504.02, at 45-183; *cf.* CPLR 4504, commentary at 319 (McKinney Supp. 1989) (when the plaintiff has "solid grounds" for placing defendant's physical condition in issue, the plaintiff's interests in obtaining a fair judgment should outweigh the privilege). North Carolina and Virginia have adopted such a provision in their physician-patient privilege statutes. *See* N.C. GEN. STAT. § 8-53 (1986) ("[the] judge . . . either at . . . the trial or prior thereto . . . may . . . compel disclosure if in his opinion disclosure is necessary to a proper administration of justice"); VA. CODE ANN. § 8.01-399 (1984) (similar language).