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Privileged Communications - Abrogation of the Physician-Patient Privilege to Protect the Battered Child

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LEGISLATION NOTES

PRIVILEGED COMMUNICATIONS–ABROGATION OF THE PHYSICIAN-PATIENT PRIVILEGE TO PROTECT THE BATTERED CHILD

> Parents have the primary responsibility for meeting the needs of their children. Society has an obligation to help parents discharge their responsibility. Society must assure this responsibility when parents are unable to do so.[1]

STATEMENT OF THE PROBLEM

Severe physical beatings and cruel punishment inflicted upon children by their parents or others entrusted with their care are reaching alarming proportions. Each day newspapers carry accounts of parents who have brutally beaten, burned, stabbed or suffocated their children with weapons ranging from baseball bats to plastic bags.

The American Humane Association stated that a total of 662 cases of child abuse were reported in 1962.[2] Of those children brutally beaten, one-quarter had died, and of those children who had died, fifty-four per cent were children under two. Parents were responsible for seventy-two per cent of all cases reported. More significant, however, were doctor's estimates that if all cases of child abuse were reported to the authorities, the total would reach ten thousand per year.[3] The American Medical Association Committee on Child Abuse has said, "[I]t is likely that it will be found to be more a frequent cause of death than such well recognized and thoroughly studied diseases as leukemia, cystic fibrosis, and muscular distrophy."[4]

In view of these alarming statistics, legislators, once content with statutes which provided a penalty for child abuse, contemplated more comprehensive legislation. The problem the legislators faced was how to assure immediate reporting of the vast number of unreported cases to a child welfare agency who could prevent further abuse to the child. Medical personnel appeared to be the most reliable source for such reporting, since they could casily detect a case of child abuse and they would be willing in most cases

[1] STAFF OF CHILDREN'S BUREAU, U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, THE ABUSED CHILD 5 (1963).

[2] Until 1962, no state had enacted legislation for the reporting of certain cases of physical abuse, neglect, or injury to children.

[3] TIME, Jan. 8, 1965, p. 43.

[4] Kempe, *The Battered Child Syndrome,* 181 A.M.A.J. 1 (1962).

to accept the responsibility of reporting.[5] Lawmakers then sought to determine why these people did not report child abuse cases in the past and how legislation could correct this situation in the future. As a result of these legislative studies many statutes have been enacted, an examination of which is the topic of this note.

THE MODEL ACT

In 1962, the Children's Bureau of the United States Department of Health, Education, and Welfare, aroused by the increase of attacks on young children by parents or other caretakers, developed a model act for the states. The model act is a statement of principles and suggested language for state legislation on the reporting of incidents involving the physically abused child.

Because the medical practitioner is the most qualified person to form a reasonable belief as to how the injury occurred, the model act suggested mandatory reporting of child abuse by medical personnel and institutions. The model act provides that physicians, nurses, and institutions treating physically abused children shall make reports to appropriate child welfare or law enforcement authorities when they have reason to believe that the child was injured in other than an accidental fashion. Immunity from liability on account of such reports is provided to one acting in good faith, and information with respect to physical abuse is declared not to be privileged matter, secured against disclosure. Failure to make a report is punishable as a misdemeanor. The significance of the model act is that the physician, while acting in good faith, no longer need fear a civil suit for reporting an alleged child beating by a parent. A physician who issues a report containing slanderous or libelous statements about the parent is immune to actions initiated by the parent based on such statements. It is the intention of the drafters of the model act to grant immunity from civil suit to certain medical personnel to encourage them to report and thus increase the number of cases reported, so that welfare or law enforcement agencies may take appropriate action to safeguard the child.[6] If this is not sufficient the model act provides that failure to report is a misdemeanor.

If the welfare or law enforcement agency, upon receipt of a report of child abuse, should commence legal action against the parent,[7] any communication between the physician and the child would no longer be privi-

[5] De Francis, *Laws for Mandatory Reporting of Child Abuse*, 39 STATE GOVERNMENT 8 (1966).

[6] The general statutory provision of each state differs as to whether law enforcement agencies or welfare agencies should investigate reports.

[7] The model act presupposes the existence in the states of adequate, applicable legal and social machinery, and that these will be put in motion by the making of the required reports.

leged,[8] and would be admissible in a judicial proceeding. The physician can testify as to the information he has acquired by treating the child in his professional capacity. The aim of the physician-patient privilege is to induce the patient to make full disclosure to the physician so that a proper treatment may be administered. It was never intended as a shield to protect a person who caused injury to another.

The model act has been the basis in whole or in part for all state legislation on child abuse. In three years (1963–1965), a total of forty-six jurisdictions[9] have enacted mandatory laws requiring the reporting of child abuse. It is interesting to note that as recently as 1962, there were no such laws.

THE ILLINOIS STATUTE AND OTHER STATE ENACTMENTS

The Illinois statute requiring the reporting of certain cases of child abuse became operative July 1, 1965,[10] and states in part:

Any physician, surgeon, dentist, osteopath, chiropractor, podiatrist, or Christian Science practitioner having reasonable cause to believe that a child brought to him for examination, care or treatment has suffered injury or disability from any physical abuse or neglect inflicted upon him other than by accidental means, and any hospital to which a child is brought suffering from injury,

[8] The physician-patient privilege in the law of evidence, which excludes communication between physician and patient, is wholly statutory. The legislature may modify it at any time or withdraw it entirely.

[9] ALA. STAT. tit. 11, ch. 62.010-070 (Supp. 1965); ALASKA STAT. § 11.67.010 (Supp. 1965); ARIZ. REV. STAT. ANN. § 13-842-01 (Supp. 1965); ARK. STAT. ANN. ch. 8, § 42-801 (Supp. 1965); CAL. ANN. CODE art. 2, § 11161.5 (Supp. 1965); Col. Sess. Laws, 1963, ch. 77, § 1; Public Acts of the State of Conn. 1965, No. 580, p. 839; FLA. STAT. ANN. § 828.041 (Supp. 1965); Ga. Laws 1965, No. 488, § 74-111; IDAHO CODE ch. 16, § 1841 (Supp. 1963); ILL. ANN. STAT. ch. 23, § 2042 (Smith-Hurd Supp. 1965); IND. STAT. § 199.335 (Supp. 1965); Iowa Laws 1965, Sen. File 60, p. 209; Kan. Sess. Laws 1965, H.B. 508, p. 860; KY. REV. STAT. ANN. § 199.335 (Supp. 1964); LA. REV. STAT. § 14:403 (Supp. 1965); Me. Leg. Service 1965, ch. 1056, § 3851; MD. ANN. CODE art. 22, § 11A (Supp. 1964); MASS. ANN. LAWS ch. 119, § 39A (Supp. 1964); Mich. Sess. Laws 1964, No. 98, § 14.564; MINN. STAT. ANN. § 626.554 (Supp. 1965); MO. ANN. STAT. § 210.105 (Supp. 1965); MONT. REV. CODE ANN. ch. 9, § 10-901 (Supp. 1965); Neb. Laws 1965, Leg. Bill 444, p. 612; NEV. REV. STAT. ch. 298, § 1 (Supp. 1965); N.H. REV. STAT. ANN. ch. 571, § 26 (Supp. 1965); N.J. STAT. ANN. § 916-81 (Supp. 1964); N.M. STAT. ANN. art. 9, § 13-9-12 (Supp. 1965); N.Y. ANN. LAWS BK. 39, § 483d (Supp. 1965); N.C. GEN. STAT. § 14-318.2 (Supp. 1965); N.D. Laws 1965, H.B. 539, ch. 327, § 1; Ohio Adv. Sess. Laws 1965, H.B. 218, § 215.1421; Okla. Sess. Laws 1965, ch. 43, § 845; Ore. Laws Reg. and Spec. Sess. 1965, ch. 472, § 146.710; Penn. Laws 1965, Pub. Law 872, § 330; R.I. Pub. Laws 1964, ch. 130 § 40-13.1-6; S.C. CODE OF LAWS ANN. ch. 4, § 20-302.1 (Supp. 1965); S.D. Laws 1964, H.B. 511, p. 123; TENN. CODE ANN. § 38-601 (Supp. 1964); TEX. STAT. ANN. art. 695, c-2 (Supp. 1965); UTAH CODE ANN. § 55-16-1 (Supp. 1965); VT. STAT. ANN. tit. 13, § 1355 (Supp. 1965); Wash. Leg. Service 1965, ch. 14, § 1; W.VA. CODE ANN. § 4904 (50A) (Supp. 1965); WIS. STAT. ANN. § 325.21 (Supp. 1965); WYO. STAT. ANN. § 14-2811 (Supp. 1965).

[10] Introduced into the House of Representatives by Reps. Peskin, F. Wolf, Dawson, Saperstein, Railsback, and Morgan. Introduced into the Senate by Senators Cherry, Gottschalk, Finley, McGloon, Swanson, and Graham.

physical abuse, or neglect apparently inflicted upon him other than by accidental means shall promptly report or cause report to be made in accordance with the provisions of this act.[11]

The statute requires that reports be made immediately to the Department of Children and Family Services[12] and may, in addition, be made to the local law enforcement agency.[13] Those participating in the making of a report are immune from any legal action that otherwise might have occurred. The Department has complete investigative authority and may petition the appropriate court for removal of a child whenever it believes it is necessary.[14]

In specifying those who may report and those having authority to report cases of physical abuse, neglect, or injury to children, Illinois eliminated the registered nurse.[15] It was the theory of the legislature[16] that only individuals qualified to form a reasonable belief as to how the injuries occurred should be allowed to report cases of child abuse. The only individuals so qualified are those persons with the power to give a medical diagnosis, and under Illinois law, the registered nurse is prohibited from making such a diagnosis.[17]

Among those states with mandatory reporting statutes, some states have permitted certain non-medical personnel to report acts of child abuse with no medical diagnosis being required. Montana has required both social workers and school teachers to issue reports to the county attorney and in return are granted immunity from personal liability.[18] The social worker doing field work may learn from the child that he has been beaten by his parent, or the social worker may notice wounds which reasonably led him to believe that the child has suffered abuse. The school teacher is in much the same position to learn of or notice child abuse. The advantage of requiring both the social worker and school teacher to report child abuse is that they often come into contact with the abused child before he is taken for medical treatment. In fact, many reports of child abuse indicate consider-

[11] ILL. ANN. STAT., supra note 9.

[12] The Child Welfare officer in the state of Illinois has the responsibility to act on reports of child abuse.

[13] The Illinois statute defines local law enforcement agency as "Police of a city, town, village or other incorporated area or the sheriff in an unincorporated area." See ILL. ANN. STAT., *supra* note 9.

[14] ILL. ANN. STAT., *supra* note 9.

[15] This deviated from the model act where the registered nurse was considered privileged to report cases of child abuse.

[16] Interview with Ill. State Rep. Bernard M. Peskin in Chicago, Illinois, August 18, 1965.

[17] ILL. ANN. STAT. ch. 91, § 35.35 (Smith-Hurd Supp. 1965).

[18] MONT. REV. CODE ANN., *supra* note 9.

able delay between the time of the injury and medical attention for the child. It must also be noted that the child may never receive medical attention. In that instance, the teacher or social worker stands in an optimum position to protect the child from further abuse.

Wyoming has gone the farthest in this area in defining who reports and requires reporting by "any other person having cause to believe . . ." that the child has been abused.[19] Such a statute may produce countless reports which have no medical justification. An individual may in good faith see an injured child and from the surrounding circumstances surmise that the child has been abused by his parent when in fact the injury was accidentally incurred. A report issued by such an individual could cause a parent a great deal of embarrassment. However, it appears that the Wyoming legislature is willing to chance any unfounded reports on the possibility that one of the reports may help a child who might have otherwise been the victim of further abuse.

WHAT ACTS MUST BE REPORTED

While there is lack of uniformity in defining those persons qualified to report acts of child abuse, there is even greater divergence in the language used by the various states in describing what acts constitute child abuse.[20] The wording of the Maine statute provides that "any injury or injuries inflicted upon him other than by accidental means . . ." constitutes child abuse.[21] The language of the statute is very broad and can encompass any possible range of injuries to warrant a belief the child was abused. The physician is left with little discretion. If he believes the injury to be an accident, he must report it. The language of the Illinois statute reads "injury or disability from physical abuse or neglect inflicted upon him, other than by accidental means. . . ."[22] While the statute makes no attempt to define physical abuse, it gives flexibility with the addition of the phrase "or neglect," recognizing that abuse can result from an act of omission as well as an act of commission. The Illinois legislature was cognizant of the fact that an act of neglect, such as failure to feed or clothe a child, can result in injuries as serious as those inflicted by an act of physical abuse upon a child. Therefore, those individuals in Illinois who must report acts of physical abuse must, in addition, report acts of neglect.[23]

ACTION TAKEN ON RECEIPT OF A REPORT

The purpose of initially reporting to the Department, rather than to the police, is to rescue the child from a possible harmful situation, and not to

[19] WYO. STAT. ANN., *supra* note 9.

[20] *Supra* note 5.

[21] Me. Leg. Service, *supra* note 9.

[22] ILL. ANN. STAT., supra note 9.

[23] *Ibid.*

punish the abusive parents.[24] The main concern of the Department following receipt of the report is to determine whether abuse is likely to be repeated. In evaluating the situation, the Department assesses the circumstances in the home which led to the act of abuse, parental attitudes, and the strength of the conviction with which the parents desire to keep the child. If the Department sees no immediate danger for the child in the home, the parents will be allowed to retain custody of the child, and the Department will develop a counseling plan aimed at stabilizing the family to prevent further abuse. If the removal of the child is necessary, the Department will petition the court for custody and will place the child in a foster home or a suitable child care institution. After the child is removed, the Department will help the parents prepare for the child's return home. Many times the abusive parent is emotionally disturbed or mentally ill but may, upon treatment, become a responsible parent and provide a good home for the child. Certainly this procedure is more favorable than initially reporting to the police who would undoubtedly prosecute the parent. An unsuccessful prosecution[25] may subject the child to increased danger, because the parent may become embittered by his experience with the police and the court. However, this is not to say that parents should never be prosecuted for deplorable acts against their children. The Department will always consult the states attorney and inform him of all the facts and make recommendations. It then becomes his duty to determine whether criminal action will be taken against the parent.

The state of Rhode Island[26] has adopted a provision similar to that of Illinois by allowing the Department to petition the court for removal of the child from the custody of his parents, when such a course of action is necessary. It is well established that in chastising a child, the parent must be careful that he does not exceed the bounds of moderation. If he does, the law will refuse to recognize his parental privilege,[27] and forfeiture or loss of the child may result. The natural rights to the custody and control of the infant are subject to the powers of the state and may be restricted and regulated by appropriate legislative or judicial action.[28] If a state in its mandatory reporting statute fails to include a provision calling for removal

[24] Vincent De Francis, Director of the Children's Division of the American Humane Society has stated that protection of the child cannot fully be provided by reporting or punishing the abusive parent, rather protective services must be established to protect the child against further abuse.

[25] Because these acts usually take place in the privacy of the home without outside witnesses, lack of evidence makes it difficult to sustain the burden of proof beyond a reasonable doubt.

[26] R.I. Pub. Laws, *supra* note 9.

[27] Barry v. Sparks, 306 Mass. 80, 27 N.E.2d 731 (1940).

[28] Hersey v. Hersey, 271 Mass. 595, 171 N.E. 818 (1930).

of the child when necessary, the state may still remove the child from custody of the parent if such be the law in other portions of their statutes or as part of its case law.

INCENTIVES FOR COMPLIANCE

The model act suggested two methods for obtaining compliance with the mandatory reporting law. One, a clause granting immunity from civil or criminal action to medical personnel reporting cases of child abuse and the other a penalty clause making it a misdemeanor for wilful failure to report a case of an injury inflicted upon a child. Florida is one state that included both an immunity and a penalty clause in its statute.[29] Illinois, however, eliminated a penalty clause from its statute and merely granted immunity from civil or criminal liability to anyone participating in the making of a report pursuant to the act.[30] An individual issuing a report against another pursuant to the act is privileged against a suit for libel or slander due to false statements contained in the report. The individual initiating the report is "'presumed to be acting in good faith" with no intent to libel or slander the person reported.

The rationale for eliminating a penalty clause was that in determining whether an injury inflicted upon a child would necessitate the issuance of a report, the physician would have to use his own judgment in deciding if the injury was accidental or nonaccidental. If the physician failed to issue a report and the injury turned out to be non-accidental, the prosecutor would find it difficult to prove that the failure to issue a report was wilful. It would be difficult to prove that the physician was guilty of anything more than poor judgment. The legislature took the position that the physician's sense of responsibility plus immunity from legal actions would be sufficient to obtain the desired results of the act.

RESULTS UNDER THE ILLINOIS LAW

In the first month of operation of the new "battered child" law, the Illinois Department of Children and Family Services responded to thirty three reports of suspected child abuse. In the next two weeks, twenty-six cases were reported. In total, fifty-nine cases were reported in six weeks.[31] The volume of reports was much higher than ever previously encountered for corresponding periods of the State's record. Of the first thirty-three reports of suspected child abuse, twenty-seven reports were made by hospitals, five reports were submitted by doctors, from their offices, and one report came from another source. At least eight of the hospital reports were originated

[29] FLA. STAT. ANN., *supra* note 9. [30] ILL. ANN. STAT., *supra* note 9.

[31] Letter received from Donald H. Schlosser, Illinois Public Information Officer, Aug. 17, 1965, on file with the *De Paul Law Review*.

by doctors, making the physicians responsible for thirteen of the thirty-three cases reported. Apparently, the increased volume of reports resulted from the enactment of the abused child law. While the physician may have hesitated to report a suspected case of child abuse in the past, it appears that he is willing to report it today because the law has protected him from any legal repercussions.

In February of 1966, a seven-month summary was released indicating that a total of two hundred and ninety-nine cases had been reported.[32] The types of abuse suspected included a total of thirty-one cases of malnutrition. Such a statistic illustrates that acts of omission on the part of the parent account for a large percentage of child abuse. The Illinois lawmakers exercised considerable foresight by including injury from neglect within its child abuse statute. This provision was not included by the majority of states that enacted similar child abuse legislation. Oregon, who in its original statute did not include the reporting of any acts of omission, amended its statute in 1965 to permit the investigation of cases of wilful or neglected child starvation.[33] As states who have required the reporting of certain acts of neglect issue statistics on the number of neglected children, more and more state legislatures will amend their statutes, realizing the need to protect the child abused by neglect.

CONCLUSION

While the legislation in Illinois, as in other states, has definitely increased the number of child abuse cases reported, a question arises as to whether the legislation is sufficient to protect those ten-thousand children each year who are abused by their parents or other adults.[34] The American Medical Association does not believe it is:

> The current approach to the problem embraces little more than a recommendation that state legislatures enact laws compelling physicians to report to the police when there is reasonable cause to suspect non-accidental injury. This is a social problem in which the physician plays but a part; visiting nurses, social workers, guardians, counselors and others frequently learn of cases before medical care is demanded or received.[35]

The author is of the opinion that the Illinois statute should require the social worker, marriage counselor, teacher and registered nurse to report acts of abuse inflicted upon children. These individuals, although not quali-

[32] Letter received from William H. Ireland, Dept. of Children and Family Services, Division of Planning and Research and Statistician, Feb. 8, 1966, on file with the *De Paul Law Review*.

[33] Ore. Laws Reg. and Spec. Sess., *supra* note 9.

[34] *Supra* note 3.

[35] Editorial Office of the General Counsel, A.M.A., *Battered Child Legislation*, 188 A.M.A.J. 386 (1964).

fied to make a medical diagnosis, may be instrumental in protecting the child who is prevented from receiving medical attention.

If a child was not properly clothed or fed, his case probably would not come to the attention of a physician unless the child developed pneumonia or suffered from severe malnutrition. However, if the child were of school age, his teacher would become aware of the neglect of the child and could inquire as to the child's home situation. The teacher could file a report to the Department of Children and Family Services. Upon receipt of the report, the Department would conduct an investigation which in turn would lead to the protection of the child. If the child were not of school age, it might be the social worker doing field work, or the marriage counselor advising the abusive parents, who might discover and prevent further neglect of the child.

If the parent intentionally and excessively abused his child, he might be criminally liable for either assault or battery. If the parent had knowledge that seeking medical attention for the child would expose him to criminal prosecution, the child may never visit a physician. Among those children fortunate enough to be taken to a physician, it is often discovered that the child had previously suffered injury that has become permanent. Here again, it is the social worker, teacher, marriage counselor, or nurse who could report and protect the abused child.

An interesting comparison between the Illinois statute for reporting child abuse and the Illinois statute for reporting venereal disease[36] illustrates the need for amendment to the current child abuse statute. In each statute, the physician is required to report and is granted immunity. However, the similarity between the two statutes ends there. A child is invariably too young to think or act for himself and is generally completely dependent upon his parents who could easily prevent him from receiving medical attention. On the other hand, an adult suffering from venereal disease is generally independent, and if he desires medical attention he will receive it without any interference. It is obvious, then, that a statute protecting a child requires additional safeguards to render it as effective as a statute protecting an adult. The child abuse statute would be greatly enhanced if teachers, social workers, nurses and marriage counselors, in addition to physicians, were required to report all cases of child abuse that came to their attention. Of course, they would have to be granted immunity from litigation when acting on a reasonable belief that a child has been abused. This added safeguard will fill the gap created by the existing statute by protecting the child who is not taken to a physician by his parents.

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[36] ILL. ANN. STAT. ch. 126, § 21 (Smith-Hurd Supp. 1965).