Doctor/patient confidentiality under siege

By Karen Stott

Do plaintiffs waive their right to doctor / patient confidentiality when they commence civil legal proceedings which put their health in issue?

Q: Does the defence have the right to engage a plaintiff's treating doctor as their forensic expert?

A: As the law in Australia presently stands, the answer to both questions is: NO

The development of specialist court lists designed to streamline parties' preparation of cases and narrow issues in dispute has complemented the courts' existing practice and procedural tools. Parties now regularly avail themselves of the ability to subpoena documentary evidence, exchange further and better particulars, interrogatories, witness statements, the ability to have the plaintiff medically examined, joint experts' meetings, etc, maximising the chances of reaching an agreeable resolution of the case, well before the need to go to trial.

However, it would appear that one of the nation's largest medical indemnity insurers, United Medical Protection, has been seeking for some time to make inroads on the law protecting the doctor/patient right of confidentiality.

Until recently, there has not been any judicial support for the concept that a patient's right to confidentiality of information held by a treating doctor (not a defendant to the case) should be waived when the patient brings an action in which their health is in issue. Judicial validation of this concept would result in there being no property in a witness, with defendants' representatives free to seek to interview any treating doctor[1] (so as to assist with the preparation of the defence's argument). The legal status quo is now the subject of appellate court review. In the NSW Supreme Court case of *Kadian v Richards & Ors*, these issues have been put to the test at an appellate level in Australia, for the first time, and could well end up before the High Court.

This interlocutory dispute was heard at first instance before Justice Campbell, whose decision in June 2004 held in favour of the plaintiffs.[2]

The defendant applicant sought leave to appeal and argument took place before their Honours Hodgson, Beazley and Stein JJ in the Court of Appeal in May 2005. The parties await the decision.

THE FACTS

The (infant) plaintiff sues in relation to the failure of the first defendant (treating paediatrician), to diagnose or refer to a suitable specialist to enable the diagnosis of his congenital heart defects. The referral was belatedly made when the plaintiff was aged nine months. It is alleged that the diagnosis ought to have been made from the time of birth, when he was first treated by the defendant, or soon thereafter during the course of the regular consultations that occurred.

Since the plaintiff's referral at age nine months, Dr Sholler has remained, to date, the primary specialist treatment-provider.

The defence sought permission from the plaintiff's parents to interview Dr Sholler regarding a range of issues spanning factual and hearsay evidence, as well as expert opinion in relation to both issues of liability and causation of damage.

That is, they intended to ask Dr Sholler whether the parents subsequently told him that they had been reporting various abnormal symptoms to the defendant during the first nine months, as alleged; whether the plaintiff's condition was such that it was negligent that the defendant (his colleague) failed to make the diagnosis or refer to a specialist at an earlier time; and whether, if given the opportunity to operate before the plaintiff had reached nine months of age, his prognosis would have been different.

THE INTERLOCUTORY DISPUTE

In a similar matter, an unsuccessful attempt was made by representatives of a medical practitioner sued for negligence, who wished to interview the current treating doctor and other doctors involved in the plaintiff's treatment. Assisting Justice Solomon in the NSW Supreme Court case of *McGuire v Ferguson & Anor*, in an unreported judgment in 2001, did not allow such an application.

Nevertheless, the same application was made in the present case. The application involved the same insurer, the same firm of solicitors and the same counsel.

The plaintiffs made a final submission that they should have the costs of the appeal regardless of the outcome, due to the novel points of law and the submission that the defendant's insurer is clearly trying to establish a useful precedent of assistance in all medical defence litigation. Counsel for the defendant denied this was the case.

THE LEGAL BACKGROUND

The majority of relevant cases (internationally) properly concern the concept of waiver of confidentiality in circumstances where maintaining confidentiality would impede the interests of justice in *criminal* proceedings.

However, the first main source of authority for the defence proposition to be applied in civil proceedings was in the Canadian case of *Hay v University of Alberta Hospital*, where Picard J defined the issue as follows:

> 'The issue requires a consideration of the position of a treating physician who will be called as a witness in a lawsuit. The fact that such a person is both a physician and a witness raises legal principles that may seem to conflict. The physician-patient relationship is clothed with confidentiality, a right which may be waived by the patient. Confidentiality is an important attribute of the physician-patient relationship, essential in promoting open communication between physician and patient. The patient may expressly waive this right or, by his actions, be found to have impliedly waived it. Alternatively, an overriding public interest or a statutory direction may justify a physician disclosing information about the patient. In the absence of such circumstances, the right remains and a physician who divulges confidential information could face an action for breach of confidentiality, a possibility which obviously causes physicians some concern.
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> However, once in the witness-box, a physician is like any other witness and cannot claim privilege, that is to say he is compellable to testify about matters involving the patient even in the absence of the patient's consent. An exception arises where privilege may be asserted on the basis of solicitor-client privilege but that is not the case here. Thus, in court, a physician must testify if asked about matters which would have been protected by the patient's right to confidentiality at an earlier time.
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> In the pre-trial stage, if the right to confidentiality is removed, the physician is in the position of any other witness and may be contacted without the requirement of consent of the party who will be calling him. Whether a witness agrees to an interview and what he chooses to say is within his authority and responsibility.'[3]

Picard J held:

> 'I find that the right of a patient to confidentiality ceases when he puts his health in issue by claiming damages in a lawsuit; the "raison d'etre" for confidentiality is gone. The right to confidentiality is then eclipsed by the right of those who face the action to know the basis and scope of the claim being advanced. The patient cannot use confidentiality to preclude the normal operation of the legal process and the adversary system. While many possible evils such as tampering with a witness can be postulated, I believe a physician may be less vulnerable to this than other witnesses and that few, if any, in the legal profession would stoop to such tactics.'[4]

A number of English cases, following the principle above, have expanded the position enunciated in *Hay*. In *Shaw v Skeet*,[5] Buckley J held that the plaintiff had no right to impose conditions on the interview, including any condition that his legal representatives be present.

In *Nicholson v Halton General Hospital NHS Trust*,[6] Sumner J held that the only restriction that a plaintiff can reasonably seek is that the defence's inquiries be confined to the issues in dispute and, within those confines, it is a matter for the defence as to how it seeks to obtain such information.

In seeking orders of the court in NSW in line with *Hay*, the defendant's application in *Kadian* concerned:

- A declaration that in commencing these proceedings the first plaintiff has waived his right to confidentiality which arises from the doctor/patient relationship between the first plaintiff and Dr Gary Sholler and Dr Deborah Lewis.
- An order that the proceedings be stayed until the plaintiff provides a signed written authority permitting Dr Gary Sholler and Dr Deborah Lewis to discuss their management and treatment of the first plaintiff with legal representatives of the first defendant.

In the case of *Hay* and the Canadian jurisdiction of Alberta, it would appear that the same rules regarding pre-trial methods of discovery, as apply in NSW, were not available.

The clinical records available to the defendant's forensic expert were not sufficient, in the expert's stated opinion, to enable him to form any meaningful view of the case. He stated that he was unable to form such a view without the benefit of specific information from the plaintiff's treating doctor.

THE INTERLOCUTORY HISTORY IN *KADIAN V RICHARDS & ORS*

The history of the defendant's application in the present case of *Kadian v Richards & Ors*, was as follows:

- The defendant issued a subpoena to Dr Sholler in relation to his medical records.
- The plaintiffs claimed legal professional privilege over a letter from Dr Sholler to their solicitors.
- The defence wrote to the plaintiffs' solicitors indicating their wish to interview Dr Sholler, and a Notice of Motion was promptly filed.
- The defence refused to agree to prepare a letter of instruction with a list of questions for the plaintiffs' consideration; insisting on a conference with Dr Sholler so that any range of issues could be canvassed with him.
- Following the plaintiffs' refusal to this, the parties were ready to argue the application before the court.
- The defence sought and obtained an adjournment. Unlike the circumstances in *Hay*, the defendant applicant had not provided any evidence alleging the inability of expert/s engaged to express a forensic opinion owing to the need for further information from the plaintiff's treating doctor.
- Some months later, when ready to proceed with its application, the defendant served a series of expert reports on the morning of the hearing. In an addendum report specifically prompted by the defence, one expert commented >>

to the effect that Dr Sholler's views on the subject '*are obviously important, possibly a key issue*'.

THE ARGUMENTS

In argument for the plaintiffs, it was submitted that the present case was distinguishable from *Hay*, as there was no shortage of factual evidence preventing any independent expert from being able to opine and report on the case. Such evidence had included a detailed chronology incorporating instructions from the plaintiff's parents; further and better particulars; and subpoenaed clinical records from all of the relevant treatment providers.

The plaintiffs had served a number of expert reports, none of which had referred to any difficulty in opining due to lack of information.

The defendant, too, had demonstrated that its own experts had been able to provide reports in accordance with the NSW Supreme Court 'Expert Witness Code of Conduct', save for any conclusions that might be drawn from the said addendum report, which had been prompted by the defendant's solicitors.

Furthermore, the defendant did not seek to demonstrate or indeed allege any deficiency in the clinical records of Dr Sholler, such as to necessitate an interview with or report from him.

Assisting Justice Solomon, in the NSW Supreme Court case of *McGuire v Ferguson & Anor*, declined to follow *Hay* and did not find that there had been any waiver by the plaintiff of the right to confidentiality in commencing legal proceedings; rather, that the public interest is best served by not interfering with the obligation of confidence owed to a patient by the treating doctor.

JUDGMENT

The subsequent judgment of His Honour Justice Campbell at first instance in *Kadian v Richards* was some 87 pages long and comprised the most comprehensive analysis of English, Canadian, New Zealand and Australian law on the point ever written. This seems to be in light of the fact that the issues in *Hay* were '*ripe for reconsideration*'[7], given the international mix of later decisions that have either followed or rejected it.

In his analysis of the Canadian cases, His Honour found there to be '*no consensus*'[8] in favour of *Hay* and no basis for '*the notion that whenever a plaintiff puts his or her health in issue, doctor-patient confidentiality is automatically waived*'.[9]

In his analysis of the English cases, His Honour found there to be more *obiter* than *ratio* support for *Hay*.[10]

The only Australian or New Zealand case to have considered *Hay* was that of *McGuire v Ferguson*, regarding which His Honour Justice Campbell noted that the court had declined to follow *Hay* but with limited reasoning for its decision.[11]

In the present case, therefore, His Honour stated his intention to give independent consideration to the relevant principles. This comprised further analysis of a doctor's obligation of confidence under the general law, under privacy legislation and case law, and detailed consideration of the concept of waiver of a right of confidentiality and circumstances where a stay of proceedings should be granted.

Suffice to say, His Honour did not follow the rule in *Hay*. In relation to the concept of waiver, the various means of pre-trial discovery enjoyed by the parties in this jurisdiction led His Honour to the conclusion that:

> 'When there are all these means available for a defendant to obtain information about the course of treatment which a plaintiff who sues for personal injuries has undergone, and the symptoms which that plaintiff has exhibited from time to time, it cannot be said that the mere fact that the plaintiff sues a medical practitioner for negligence, and alleges effects of that negligence concerning which he received treatment from other doctors, means that the maintenance of confidentiality by the plaintiff's treating doctors is *inconsistent* with the plaintiff bringing the action he or she brings.'[12]

In relation to the concept of whether a stay of proceedings should be granted, His Honour examined the factual evidence already in existence and noted that the defence had refused the opportunity offered by the plaintiffs to put written questions to Dr Sholler, rather than to convene with him face to face.

His Honour stated:

> 'If it was decided a fair trial could not occur while a right of confidentiality was insisted on, it would be inevitable that the Court would also decide it was appropriate to stay the action, even though preventing a plaintiff from litigating a claim is a serious thing to do.
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> It is not sufficient to grant a stay that a party would like the opportunity of fishing to see whether there might be any information relevant to the case which is kept from him or her by reason of the confidence. Nor is it sufficient that the party would like a trial run at cross-examination without the risk of obtaining unfavourable answers that always goes with cross-examining a witness with whom counsel has not previously conferred.'[13]

His Honour was not persuaded that a fair trial would not be had without the defendant's lawyers meeting Dr Sholler. The defence had not demonstrated any inadequacy in Dr Sholler's clinical records necessitating such a meeting. Other matters that the defence wished to discuss with Dr Sholler were within the knowledge of the defendant himself.[14] The interests of justice did not require that the defence have access to Dr Sholler, and so a stay of proceedings was not justified.[15]

And yet leave to appeal against His Honour Justice Campbell's decision has been sought, with substantive arguments on the appeal itself having been heard. The parties await the outcome.

PROPHYLACTIC MEASURES

Another experienced medico-legal practitioner, Bill Madden, has commented that a court may not necessarily refuse a defendant applicant's request for similar Orders, where there are distinguishable circumstances:

> 'For example, the position of a defendant may be somewhat easier if there is a clear statement of need from the defendant's own experts and the defendant does supply a list of precise questions, rather than simply insisting on an open-ended oral discussion. If the plaintiff then declines, the court might well stay proceedings with the benefit of a clearer picture of the nature and significance of topics on which a plaintiff is declining to make information available.'[16]

Indeed, to ward off such an outcome, this writer is of the view that it is imperative that comprehensive steps be taken prior to commissioning the first expert opinion in the case. If a plaintiff's own forensic expert/s are unable to provide a comprehensive opinion as to issues of liability AND causation of damage, then it is likely that the defendant's expert/s will have the same problem, such that 'distinguishable circumstances' may exist.

Preparation is the key. This common-sense approach is regarded as routine among practitioners specialising in medical negligence litigation. Yet, at the risk of stating the obvious, the following may be apposite:

- All relevant medical records should be gathered at the outset of an investigation; (noting that GPs' records should always be obtained as well as records of the relevant specialist/s and hospitals, *and* that a client may have seen a number of different GPs). Leave no stone unturned!
- To the extent that the clinical records do not 'speak for themselves', take care to obtain comprehensive instructions for the preparation of a 'Statement of Assumptions' to be referred to, in conjunction with the clinical records and other contemporaneous documentary evidence.
- Test those instructions with other relevant witnesses for reliability and consistency, and to ensure that they are sufficiently comprehensive:
  - take instructions from family members and other witnesses of fact, independently;
  - ask for written instructions and also ask for the same instructions face to face or over the phone if necessary. People always report in more detail when they are asked to talk about their recollection of events rather than to write them down; and
  - wait a few weeks and re-test the witnesses' instructions to see whether they are consistent or whether there is further information.
- Make sure that you have read the clinical and other relevant records and conducted any necessary medical research before you finalise instructions on the 'Assumptions', so that you can seek specific instructions on any issues that may be of forensic significance but that your witnesses might not have thought to tell you about.
- In other words: take care to ensure that the 'Assumptions' are complete, with no future need for additions or amendments. Only then are you ready to brief an expert for a forensic opinion.
- If your forensic expert is still unable to provide an opinion without the benefit of specific information from your client's treating doctor (and that information is not contained in the clinical records), then make the necessary enquiries of that treating doctor with a view to obtaining a disclosable treatment report dealing with the relevant issues.
- When all instructing documentation is disclosed to the defence together with your client's forensic report, there should be no reasonable grounds for the defence to make its application to confer with the plaintiff's doctor/s.

In finessing the concept to the Court of Appeal, the defendant/appellant in *Kadian* submitted that, should the relevant Orders be granted, the plaintiffs' legal representatives would be welcome to attend any such conference with Dr Sholler.

However, as the English authorities suggest, the defence may eventually be able to persuade the courts that the plaintiffs' representatives are not entitled to attend such a conference, notwithstanding the fact that such attendance may pose no threat to the defendant's case, or that it may be less expensive for all parties for the plaintiffs' team to attend.

Further, it would appear that a factor influencing His Honour Justice Campbell's decision to disallow the defence from conferring with Dr Sholler was the fact that the plaintiffs had initially offered to resolve the dispute by inviting the defence to submit a list of questions for Dr Sholler to answer by way of a formal report. The defence refused to do this, insisting on a conference with Dr Sholler regarding certain specific issues, as well as the freedom to inquire beyond those issues.

Had the dispute been confined to the issue of whether the plaintiffs' treating doctor could be asked by the defence to effectively render a written report addressing a list of questions (the scope of which may not have been agreed), the outcome of such an application may well have been in the defendant's favour.

This observation is qualified, however, with respect to the issue of whether the treating doctor can in fact be compelled to divulge such information, in the knowledge that the patient might not wish this to occur. Any subsequent finding by a court of waiver of confidentiality by a patient and/or that a stay of proceedings is warranted until the patient consents to the defence convening with a doctor, may very well prove academic if that doctor chooses not to be so involved, and the court abides that choice.

Issues relating to a doctor's Hippocratic Oath (not to act in any way that might harm his patient), a doctor's fiduciary duty to his patient, and issues of medical ethics generally, have yet to come under the legal microscope in this particular context.

Further: does this concept apply to any allied treatment provider, such as a nurse or a physiotherapist?

One thing is clear in relation to the concept of doctor-patient confidentiality: this is an area of the law that is likely to see further challenge. ■

Notes: **1** *Hay v University of Alberta Hospital* (1990), 40 CPC (2d) 176, Picard J. **2** *Kadian v Richards* [2004] NSWSC 382. **3** *Hay v University of Alberta Hospital* (1990) 69DLR (4th) 755, pp757-8. **4** *Ibid,* pp761-2. **5** *Shaw v Skeet* (QBD) [1996]7 Med LR. **6** *Nicholson v Halton General Hospital NHS Trust* [1999] EWCA Civ 1664. **7** *Kadian v Richards,* Op cit, p9. **8** *Ibid,*p21. **9** *Ibid,* p20. **10** *Ibid,* p26. **11** *Ibid,* p27. **12** *Ibid,* p51. **13** *Ibid, p60.* **14** *Ibid,* p72. **15** *Ibid,* p74. **16** Bill Madden, Slater & Gordon, 'Nothing More than A Fishing Expedition? Medical Privacy in Litigation', Australian Lawyers Alliance, *Precedent,* Issue 64, Sept/Oct 2004, pp36-8.

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