# Nothing more than a fishing expedition?

## Medical privacy in litigation

By Bill Madden

For some time now, and despite an earlier decision of the NSW Supreme Court,[1] a degree of uncertainty and tension has existed on the issue of whether, and in what circumstances, a defendant's representative ought be able to speak to a plaintiff's treating doctor.

Justice Campbell, sitting in the NSW Supreme Court Professional Negligence List, was asked to consider this question recently in *Kadian v Richards* [2004] NSWSC 382.[2] The decision helpfully sheds much-needed light on the question posed.

Although the matter arose in a medical negligence context, the same principles should apply to other injury litigation.

### BACKGROUND FACTS

The plaintiff was a six-year-old boy, Ankur, born with a congenital heart disease and a defective right kidney.

The first defendant was the paediatrician who had care of Ankur during the first nine months of his life, and was sued concerning an alleged delay in diagnosis of the congenital heart disease. The second defendant was, in effect, the Auburn hospital, where Ankur's mother received some antenatal treatment, and where Ankur was born.

When Ankur was nine months old, the first defendant referred him to Dr Gary Sholler, a paediatric cardiologist. Ankur also saw a paediatric nephrologist Dr Deborah Lewis, who treated Ankur from time to time, and continued to treat him throughout his life.

### THE ISSUE

The defendants' representatives wished to speak to Dr Sholler and Dr Lewis.

The plaintiff's representatives refused. However, they did offer to consider provision of consent for a written report, as follows: 'In an attempt to resolve this dispute before 1 November, please provide us with a list of questions which the first defendant proposes to have Dr Sholler address, so that we can consider whether to advise the plaintiffs to authorise Dr Sholler to address such questions in writing. We suggest that the said list of questions be provided to us by way of a proposed letter of instruction addressed to Dr Sholler, requesting a formal report.'

This offer was refused. 'We do not propose to prepare a specific list of questions. It is not practicable to do so as the answers to set questions may necessitate other areas of inquiry … We are prepared to provide you with a list of issues … which we intend to discuss with Dr Sholler … it may be necessary to proceed beyond the listed issues.'

### ORDERS SOUGHT

The orders that the first defendant sought were as follows:

'1. 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.

'2. 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.'

### OBLIGATION OF CONFIDENCE

Justice Campbell, in his judgment and in an appendix,[3] undertook an exhaustive review of overseas authorities.

Ultimately, however, Justice Campbell elected to follow the 2001 decision of Assisting Justice Solomon in *McGuire v Ferguson and Anor*:[4] 'It was, likewise, a case where

representatives of a medical practitioner sued for negligence wished to interview the current treating doctor and certain other doctors who had been involved in the treatment of the plaintiff. … Counsel for the first defendant submitted that *McGuire v Ferguson* is distinguishable, on the ground that in that case the application was made at a time when the trial was imminent, and that the treating doctors were to be called at the trial. While I accept counsel's statement from the Bar table that those were the factual circumstances in which the application was made in *McGuire v Ferguson*, those facts form no part of the reasoning of Solomon AJ. I decline to distinguish the case on that basis. Given that the reasoning consists of announcing conclusions without explaining why they are right, neither am I prepared to simply follow the case without giving independent consideration to the relevant principles.'[5]

That independent consideration ultimately came down to three points:

1. A doctor is under a duty not to voluntarily disclose, without the consent of his or her patient, information which the doctor has gained in his or her professional capacity, save in very exceptional circumstances.
2. Those very exceptional circumstances include circumstances where the information:
   - if not disclosed, could endanger the lives or health of others;
   - concerns a dishonesty or other iniquity inherently incapable of being the subject matter of an obligation of confidence;
   - is acquired in the course of an actual or reasonably apprehended breach of the criminal law or where a statute requires certain types of information to be disclosed.
3. This was not a case where there was any basis to believe that any information acquired by Dr Sholler or Dr Lewis, concerning Ankur, fits into any such very exceptional circumstances.

The court's consideration of the recent privacy legislation and the related health records' legislation did not appear to take the matter much further.

## WAIVER OF OBLIGATION OF CONFIDENCE

This was the crux of the matter – had the plaintiff, by commencing litigation, to some extent impliedly waived certain of his rights, as recognised above?

If so, in respect of which particular doctors was that right waived, and did the waiver extend to oral discussions between his treating doctors and the defendant's representatives?

The court noted that Ankur's act of commencing proceedings against the first defendant was inconsistent with doctor-patient confidentiality continuing to exist between Ankur and the first defendant concerning the matters that were the subject of the litigation.

That followed, as a defendant must have a fair opportunity to defend the case brought against him. If a defendant were bound by an obligation of confidentiality concerning his treatment of a plaintiff, it would not be possible for him to tell his own lawyers what happened concerning treatment, so that he could defend himself. Neither could he tell expert witnesses what had happened.

But as the court noted,[6] even when a patient sues his own doctor, not all obligations of confidentiality between them are waived. If there are aspects of the patient's treatment, or confidential information that the patient has disclosed, which has no bearing on the subject matter of the suit, the doctor must still maintain confidentiality concerning those matters. Inconsistency exists only to the extent to which it is necessary for the confidentiality to be treated as at an end if the doctor is to have a fair opportunity of defending the action.

Extending the consideration beyond the position of a defendant, when a plaintiff sues a medical practitioner >>

Even when a patient sues his own doctor, not all obligations of confidentiality between them are waived.

(or presumably someone else), and alleges that the defendant's negligence has had effects on his health, the plaintiff has himself made the state of his health a relevant matter for inquiry in the litigation.

The passage from the judgment which appears crucial to the outcome is extracted as follows: 'There are, however, various means by which such a defendant can obtain information about the course of treatment which the plaintiff has undergone, and the symptoms which the plaintiff has exhibited after ceasing to be under the defendant's care, which can be obtained without an out-of-court interview impinging on the doctor-patient confidentiality between the plaintiff and his new treating doctor.

'Whether it is inconsistent for the plaintiff to proceed with the litigation, and assert an ongoing obligation of confidence from his treating doctor, depends on whether the means available to the defendant to be informed about, and inquire into, the plaintiff's health are sufficient to enable the defendant to have a fair opportunity of defending the claim. I turn to consider the various means a defendant in such an action has of obtaining information about the plaintiff's health, so far as is relevant to the litigation.'[7]

## FACTORS TAKEN INTO ACCOUNT

Having taken the matter down this path, Justice Campbell went on to consider a number of factors relevant to its outcome, which will come as no surprise to experienced lawyers. A short, selective listing of those of particular interest is sufficient for the purposes of this article:

- The records of the relevant treating doctors could be subpoenaed;
- The records of the relevant treating doctors had in fact been subpoenaed, and there was no complaint about the adequacy of those records;[8]
- The treating doctors could be subpoenaed by the defendant, to give evidence at trial.

The defendant's own experts, in providing a report complying with the NSW Supreme Court expert witness code of conduct, did not seek to qualify the report (or at least, not until prompted) by saying that an opinion could not be given without extra information from a treating doctor.[9]

This, in particular, was seen by the court as having significant weight.[10]

The assertion that the mere commencement of the litigation represented an implied waiver of confidentiality failed. Quoting from the judgment: 'The mere fact that confidential information might be of use to a party to civil litigation is not enough to cause an obligation of confidence not to apply.'[11]

## CONCLUSION

In this particular matter, the court was clearly concerned, particularly in relation to one of the treating doctors, that the application was nothing more than a fishing expedition.[12]

In attempting to draw some statements of principle from this decision: firstly, it seems abundantly clear that there is not what the court described as a bright-line rule, whereby the commencement of proceedings always acts as a waiver of confidentiality: '... 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.'[13]

There is not a bright-line rule whereby the commencement of proceedings always acts as a waiver of confidentiality.

Secondly, a court will be reticent to force a waiver of confidentiality unless a defendant can persuade the court that it is necessary in the interests of justice and, more particularly, to enable the defendant to have a proper opportunity to defend himself: 'If a litigant satisfies the court that a fair trial of the action cannot be had while the opposing litigant insists on a right to keep information confidential, the court can stay the action until that right of confidentiality is no longer insisted on. The onus is on the party who seeks such an order to establish a prima facie case that there actually is information which is being kept secret from that party, that while it is kept secret a fair trial of the action will not occur, and that the circumstances are appropriate to exercise the significant power of granting a stay.'[14]

Thirdly, despite the defendant's failure in this application, distinguishable circumstances may exist. 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. ■

**Notes:** **1** *McGuire v Ferguson and Anor* (Supreme Court of New South Wales, Common Law Division, 11 December 2001, Solomon AJ, unreported). **2** Judgment delivered 33 June 2004. **3** Para 159 onwards. **4** See note 1. **5** Paras 42-3. **6** Para 77. **7** Paras 78-9. **8** Para 126. **9** Para 145, 146. **10** Para 147. **11** Para 46. **12** Para 153. **13** Para 93. **14** Para 111.

**Bill Madden** *is a partner in professional negligence at Slater & Gordon, Sydney.* **PHONE** *(02) 9762 1719.* **EMAIL** *wmadden@slatergordon.com.au*