

Privacy v Duty of Care

In recent years Privacy Legislation has been introduced by the Commonwealth Government and by various state and territory governments throughout Australia. The legislation has created obligations for health service providers in relation to the way they collect, store and maintain, use and disclose health information.

One of the major principles underpinning Privacy legislation in Australia is the requirement that a health organisation can only use or disclose health information for the primary purpose for which it was collected, unless the patient consents to the use or disclosure (or one of the limited exceptions applies).

At the same time, health service providers must always be conscious of the need to discharge their duty of care towards all patients. Is there a tension between obligations in relation to Privacy and obligations in relation to Duty of Care? In addressing this question it is useful to have regard to a recent decision of the NSW Court of Appeal in the case of *Harvey v PD* (judgment 30 March 2004).

The Harvey Case

In the *Harvey Case* two doctors practising in a medical centre were found to have breached their duty of care to a patient who contracted HIV as a result of marrying and having unprotected sex with a partner who was HIV positive. Before marrying, in November 1998, the Plaintiff and partner had seen the first doctor in a joint examination and had agreed to have HIV blood tests. The Plaintiff's test was clear, the partner's test was positive.

The Plaintiff attended the medical centre and was handed a copy of her results by a receptionist. She requested her partner's results and was told she could not have them as they were confidential.

The first doctor telephoned the partner and advised him of the positive HIV result. He told him he should attend the medical centre and collect a letter of referral to a specialist immune clinic. The partner attended the medical centre

and saw a second doctor. Neither doctor took any steps to ascertain whether the partner had informed the Plaintiff of his HIV status. The partner did not attend the appointment at the immune clinic. The Plaintiff gave her results to her partner but the partner deceived the Plaintiff by giving her false results showing he was negative.

The Plaintiff again attended the medical centre in December 1998 for contraception and in February 1999 for medical advice regarding a proposed trip to Ghana. On both occasions she was seen by another doctor at the practice. There was nothing on her treatment card to indicate her relationship with her infected partner who was also a patient of the practice.

The Plaintiff contracted HIV, probably in August 1999, and had a child with the infected partner.

Findings by the Court

n The Court of Appeal said the first doctor owed a duty of care to both patients and that the duty included, in the course of the initial consultation, the need to discuss obtaining mutual consent for disclosure to each other of the results of the testing at a further consultation and the possibility of discordant results. The duty sprang from the obligation the law imposes upon a medical practitioner to exercise reasonable care and skill, not only in treatment, but also in the provision of professional advice.

n The Court found the partner did not consent to the disclosure of his results to the Plaintiff because the question had not arisen at the initial consultation and it was the doctor's negligent failure to inform them of the need for consent to disclose the results to each other and how they proposed to deal with discordant results should that occur. The Court found that both parties would have

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said the other could have access to the results if it had been raised in the consultation as it should have been. Further, the Court found that if the partner had indicated he was not prepared to disclose the results, then the Plaintiff would have discontinued the relationship with him.

n The Court said there was nothing unreasonable in taking a lead from the couple's own expressed needs in their joint consultation and seeking to facilitate a situation of mutual disclosure in the presence of their doctor and it would, indeed, be unreasonable on the part of the doctor to deny that important element of counselling.

n It is significant that the Trial Judge also found that the pathology results for each patient should have been provided personally by a medical practitioner. By allowing the Plaintiff to obtain her results from a receptionist, she was precluded an opportunity to ascertain whether she was likely to be informed of her partner's HIV status.

n The Trial Judge also found the doctors should have ensured that the records of the two patients were adequately cross-referenced. Had this occurred, it would have been apparent when the Plaintiff attended the medical centre in December 1998 and January 1999 that she was unaware of her partner's infection.

n Finally it was found by the Trial Judge that the doctors breached their duty of care to the Plaintiff by failing to follow up the Partner and ensure he had attended the appointment that had been made for him at the immune clinic (the Court of Appeal found it not necessary to make a finding on this point).

It is important to bear in mind the Courts' findings were in the context of the parties arranging a joint consultation for the clearly stated purpose of ascertaining whether either had sexually transmitted diseases before engaging in unprotected sex in contemplation of marriage. For that reason, had the doctor done what he was duty bound to do, namely raise the question of consent to disclosure, mutual disclosure and the possibility of discordant results, the parties would more likely than not have consented to their results being made available to each other at a further consultation.

Conclusion

The breaches of duty of care found in the *Harvey Case* are not "at odds" but rather sit comfortably with the Privacy legislation in Australia. Information may be disclosed with consent, but not otherwise and the case does not suggest the information could have been disclosed without consent. However, the case highlights a doctor's separate duty of care to a patient which includes, in the particular circumstances, the duty to obtain consent for mutual disclosure of vital information which the doctor should have known would be important to the patients' relationship. That need for disclosure could only safely be done by the patients having a further consultation with the doctor where the results were discussed and where there would be no opportunity for the type of deception that, in fact, occurred where the infected partner privately produced a false result to the Plaintiff. n

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