March 17, 1996

CONFIDENTIALITY

MEDICAL ETHICS AND THE LAW

1. INTRODUCTION

> "Whatsoever things I see or hear concerning the life of men, in my attendance on the sick or even apart therefrom, which ought not to be noised abroad, I will keep silence thereon, counting such things to be as sacred secrets."
>
> The Hippocratic Oath - re Confidentiality

The legal philosopher, Lon Fuller, distinguished between what he described as "the morality of aspiration" which he denoted as ethics and the morality of duty, which is the law. Ethics, as he saw it, is that code of conduct which embodies ideals which we strive to maintain in our professional careers, the breach of which leads to punishment by our peers and which are related to how we are perceived both by ourselves and by our fellowman. Law, on the other hand, provides boundaries of actions which are set by society, beyond which we may go only at the risk of being subjected to external sanctions, such as incarceration, as opposed to being suspended from practice or loosing our license to practice, which are the sanctions which generally follow upon a breach of our codes of ethics.

For centuries, Medical Practitioners have been able to abide by and adhere to the code of ethic which requires them to respect the confidentiality of information obtained in the treatment of their patients without significant interference by the law. However, the increasing demands of society has given rise to the emergence of a body of law which is increasingly reducing the confidentiality which exists between doctor and patient. This shift from adherence to the absolute terms of the Hippocratic Oath to the rule of law, means that neither the lawyer nor the doctor can continue to ignore the actual or potential effects thereof on the practice of their respective professions.

2. MEDICAL ETHICS AND THE COMMON LAW

The essence of the Hippocratic Oath with respect to doctor/patient confidentiality has been expressed in modern terms in many jurisdictions but is now invariably qualified to reflect current social trends. For example, the Australian Medical Association's Code of Ethics, expresses the Oath in this way:

> "It is the Practitioner's obligation to observe strictly the rule of professional secrecy by refraining from disclosing voluntarily without the consent of the patient (save with statutory sanction) to any third party, information which he has learnt in his professional relationship with the patient."

Similarly, the Canadian Medical Association's Code of Ethics (1990) states that "an ethical physician will keep in confidence information derived from a patient, or from a colleague regarding a patient, and divulge it only with the permission of the patient except when otherwise required by law."

This modern codification of the obligation to adhere to the requirement of confidentiality between doctor and patient, recognises that limitations have been placed by the law, upon the absolute obligation which is embodied in the Hippocratic Oath. Indeed, our Courts, while placing great weight upon Legal Professional Privilege - the confidentiality of exchanges between lawyers and their clients - have given limited recognition to the confidentiality between Doctor and patient, where that confidentiality is being relied upon in legal proceedings. The lawyer will argue that there are significant reasons relating to the interest of justice, for the regard which Courts have for the confidentiality of communications between lawyer and client. However, the following extract from Halsbury's Laws of England 4th Edition Vol. 30 page 22 paragraph 19, illustrates the Court's approach to the confidentiality between medical practitioners and their patients:

> "The relationship between a medical practitioner and his patient does not excuse the practitioner, whatever medical

> etiquette may require, from the obligation, if directed to do so, to give evidence in a court of law or to disclose records or other documents in the course of legal proceedings. He is in the same position as any other person who is not specially privileged in this respect by the law. He may be summoned to give evidence in civil or criminal causes, and may be liable to be punished for contempt of court if he neglects to attend.
>
> In civil cases, a judge has no discretion on grounds of confidentiality alone to direct a doctor that he need not disclose information which came to him through his professional relationship with a patient. Where, however, such disclosure would be in breach of some ethical or social value involving the public interest, the court has a discretion to uphold a refusal to disclose relevant evidence if it considers that on balance the public interest is better served by excluding such evidence. A doctor may therefore be required to disclose on oath information which came to him through his professional relationship with a patient, and he may be committed for contempt of court if he refuses to answer."

It is significant to note that some of the cases which have been relied upon by Halsbury's Laws of England in support of this summary of the law, date back to the 18th Century, although the editor was careful to point out that those earlier cases should now be read in the light of the House of Lords decision in the case of D v National Society for the Prevention of Cruelty to Children (1977) 1 All ER 589. In that case the House of Lords was called upon to decide whether a voluntary society which provides care for abused children, but was not under any statutory duty to provide such care, could be compelled to disclose the name of an informant who had falsely advised it that a parent was abusing her child. The House of Lords held that the Society was entitled to withhold the information and could not be compelled by the Court to disclose same in civil proceedings which were brought by the parent against the Society.

That the case did not itself deal with the question of the confidentiality between doctor and patient does not detract from its significance, which lies in the fact that the Court recognised that it is a matter of what is in the public interest which is the all important factor in determining whether or not information which is obtained in confidence should be disclosed. In the words of Lord Diplock:

> "The fact that information has been communicated by one person to another in confidence ... is not of itself a sufficient ground for protecting from disclosure in a Court of law the nature of the information or identity of the informant if either of these matters would assist the Court to ascertain facts which are relevant to an issue on which it is adjudicating. The private promise of confidentiality must yield to the general public interest that in the administration of justice truth will out, unless by reason of the character of the information or the relationship of the recipient of the information to the informant, a more important public interest is served by protecting the information or the identity of the informant from disclosure in a court of law".

By referring to the confidence as being a "private promise of confidentiality" Lord Diplock appears to be leaning in favour of describing the confidence as being a private interest as opposed to it being in the public interest to see the such confidences are observed and adhered to. Nevertheless, as we shall see, subsequent decisions have viewed it as a matter of public interest that such confidences are observed.

Interestingly, in the case of Tarasoff v Regents of the University of California 1976 131 Cal Rrtr 14 the California Supreme Court held that a psychologist had a "duty to warn" a person whom his patient had threatened to kill, if the psychologist believed " or should have believed" the threat to be real. In that case the patient left the psychologist's care and murdered his former girlfriend, an action that the psychologist had believed was so likely, that he had sought unsuccessfully to have his patient involuntarily committed. Here the California Court recognised a duty on the part of the Doctor to disclose to a potential victim, her plight, in direct conflict with the public interest in maintaining the confidential nature of the doctor patient relationship. But the Judge, Justice Torbriner, considered that this public interest was outweighed by the interest of the victim and society when he stated that:

> "In this risk-infected society we can hardly tolerate the further exposure to danger that would result from a concealed knowledge of the [doctor] that his patient was lethal. If the exercise of reasonable care to protect the threatened victim requires the doctor to warn the endangered party ... we see no sufficient societal interest that would protect unjustified concealment. The containment of such risk lies in the public interest."

Initially, this approach by the California Court was the subject of criticism by English legal commentators, for the reason that in those circumstances, the psychologist was regarded as being under a duty to disclose his patient's condition to the likely victim. Indeed, in the 1988 All England Reports Annual Review (page 216), the commentary on the decision is that "It is unlikely that an English Court would look on this problem in the same way."

Not surprisingly, a similar problem arose in the case of W v Egdell (1989) 1 All ER 1089. W, who had shot and killed four people and wounded two others, was convicted of manslaughter and was detained as a patient in a secure hospital without limit of time, as a potential threat to public safety. He subsequently applied for a review, with the hope of being transferred to a regional secure unit and ultimately to being discharged. His Solicitors retained a consultant psychiatrist (Dr. Egdell) to report on his mental condition for use in support of his application for review. The report was unfavourable and, among other things, suggested that W might have a "psychopathic deviant personality".

His Solicitors withdrew the application and when the Dr. Egdell learnt of this and of the fact that neither the review Tribunal nor the hospital charged with W's management had received the report, he contacted the Medical Director of the hospital, discussed W's case with him and they both agreed that the hospital should have a copy of the report in the interest of W's further treatment. The hospital thereafter forwarded a copy of the Report to the Home Office on the Dr. Egdell's recommendation and to the Department of Health and Social Security. The Home office referred the matter to the review Tribunal for its consideration and forwarded to it a copy of the report.

W was understandably displeased upon learning this and sued all the players in this scenario claiming firstly, an injunction restraining the Defendants from disclosing the report, secondly, delivery up of all copies thereof and thirdly, damages for breach of the duty of confidence. The

Judge at first instance (Scott J) held that the duty of confidence owed by the doctor in the circumstances of this case was subordinate to his public duty to disclose the results of his examination to the authorities responsible for the patient if, in his opinion, such a disclosure was necessary to ensure that the authorities were fully informed about the patient's condition. Although the doctor was under a duty of confidence to W, this did not bar him from disclosing the report to the hospital, since it was relevant to his treatment, or to the Home Office or the review Tribunal, since they needed to be fully informed about W's mental condition when making decisions concerning his future. W's claim was dismissed by Scott J and on appeal to the Court of Appeal. On appeal he contended that the public interest in the duty of confidence owed to him by his doctor outweighed the public interest in his disclosing the report to the Defendants.

This decision, like that of the California Supreme Court, recognised both the doctor's duty of confidentiality to his patient and the duty on the part of the Doctor to disclose confidential information where the circumstances demand disclosure, as being in the public interest. The Court of Appeal clearly experienced the dilemma when it was forced to adopt the approach that "although the basis of the law's protection of confidence is that, there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest favouring disclosure.

Consequently, you may ask whether there a significant difference between the disclosure to the Defendants in W v Egdell and disclosure to one or more members of the public who are potential victims of the patient as in the California Supreme Court's decision, both being in the public interest? I think not and am of the view that if the English Court were now to be faced with the particular circumstance with which the California