Disclosure of Information in Health Care

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The last decade has seen a dramatic shift away from medical paternalism and broad notions of therapeutic privilege as to whether patients should be given information about their treatment. Today doctors are being seen as having positive obligations to provide information to patients, and less discretion not to disclose.

The courts have in recent times recognised that a doctor could be negligent in not disclosing risks involved in a proposed procedure. However, whether the doctor was in fact negligent was seen as a matter for expert medical witnesses to indicate the established professional practice as to disclosure [1] Needless to say, the result of this so called objective approach was a conservative reluctance to find doctors liable for keeping information to themselves. Thus, the House of Lords in *Sidaway v Bethlem Royal Hospital Governors*[2] found a failure to warn of possible paralysis in a procedure to relieve pressure on a nerve root was not negligent, because it was the practice of a responsible body of competent neurosurgeons not to frighten patients about death or paralysis

The Australian courts began to move away from this approach in *F v R*.[3] In this case, the court had to consider whether the failure to disclose the slight risk of pregnancy after a tubal ligation was negligent. While deciding in favour of the defendant practitioner, and indicating that the practice of the profession will be important for the court to consider, the court nevertheless made it clear that it felt free to decide that a professional practice itself is unreasonable and to depart from it In the end it is the court which must say whether there was a duty owed and a breach of it.

The Court however in *F v R* firmly recognised the right of doctors not to disclose information in individual cases on the basis of therapeutic privilege As King CJ said, "Even where all other considerations indicate full disclosure of risks, a doctor is justified in withholding information, and in particular refraining from volunteering information when he judges on reasonable grounds that the patient's health, physical or mental, might be seriously harmed by the information. Justification may also exist for not imparting information when the doctor

1 *Bolam v Friern Hospital Management Committee (1957) 1 WLR 582.*

2 *[1985] 1 All ER 643*

3 *(1983) 33 SASR 189*

reasonably judges that a patient's temperament or emotional state is such that he would be unable to make the information a basis for a rational decision."[4] Thus, the Full Court of the Supreme Court of South Australia in *Battersby v Tottman*[5] held it was not unreasonable on the basis of therapeutic privilege for a psychiatrist to withhold information from a patient suffering from a mental illness about the possible side effects of blindness of medication.

Moves toward a less paternalistic approach in the disclosure of information culminated in the landmark case of *Rogers v Whitaker*[6]. In this case, the High Court firmly entrenched a doctor's obligations to provide information to patients, including risks, as part of his or her general duty of care. The court also decided that while treatment standards are a matter upon which expert professional opinion will be important, the question of whether a patient has been given adequate information upon which to decide whether to have the treatment or not is much more a matter to be determined by reference to the circumstances of the case, including the needs of the particular patient. In *Rogers v Whitaker*, the patient's incessant questioning as to possible complications was a key factor in the High Court's decision that the medical practitioner should have disclosed the risk of sympathetic ophthalmia to the patient. The High Court still recognised that the duty to disclose risks was subject to therapeutic privilege. However, it would seem clear that there is now a thin line between sensitivity to a patient's temperament and unacceptable paternalism.

In South Australia, the common law position has been reaffirmed and elaborated upon in the *Consent to Medical Treatment and Palliative Care Act 1995 (SA)* in which a medical practitioner has a statutory duty to explain to a patient "so far as may be practicable and reasonable in the circumstances:

(a) the nature, consequences and risks of proposed medical treatment;

(b) the likely consequences of not undertaking the treatment; and

(c) any alternative treatment or courses of action that might be reasonably considered in the circumstances of the particular case."[7]

Not surprisingly, while the law of negligence (and now statute) has been used to require a reasonable disclosure of risks, there have been similar moves to establish patients' rights to access their own medical records.

In the Canadian case of *McInerney v MacDonald*[8] the appellant practitioner sought to prevent the respondent patient from obtaining access to certain documents received from other doctors and consultants who had previously treated the patient. The court considered the doctor was in fiduciary relationship with the patient and that the trust placed in a doctor by a patient requires a flow of information to operate both ways. The patient was therefore entitled upon request to inspect and

4 *Ibid at p 193 per King C.J*

5 *(1985) 37 SASR 524.*

6 *(1992)175 CLR 479*

7 *See section 15 of that Act*

8 *(1992) 93 DLR (4th) 415*

copy all information in the patient's medical file including records received from other doctors or consultants; once again, the court recognised that a doctor could deny access on the ground of therapeutic privilege. However, the courts noted that this discretion must be closely monitored to ensure that it is exercised on proper principles and not in an arbitrary fashion. The onus is on the doctor to justify any exceptions to the general rule of access.

In England, somewhat conservative recognition of a right to access was given in *R v Mid Glamorgan Family Health Services Authority & Another, ex parte Martin*[9] when the Court of Appeal recognised that a health authority, in common with a private doctor, is under a common law duty to allow an individual access to her medical records except where, in view of potential detriment to her as a result of such access, it is not in her best interest to do so.[10]

In Australia, Freedom of Information legislation has established in most jurisdictions that patients have enforceable rights to access personal information held by public sector agencies, including health care organisations. If the document sought contains information of a medical or psychiatric nature concerning the applicant, and the agency is of the opinion that disclosure may have an adverse effect on the physical or mental health or emotional state of the applicant, access can be given via a registered medical practitioner nominated by the applicant.[11]

In Australia, in the private sector, access to medical records remains at the discretion of the health service or doctor. This at least is the position while the High Court is yet to give its decision on appeal from the NSW Court of Appeal in *Breen v Williams*.[12]

In this case, a woman seeking copies of documents in her medical records to determine whether to join in US actions against the manufacturer of silicone breast implants was held not to have a common law right of access. The court considered that while the doctor/patient relationship may be fiduciary in character, there is nothing to show that a doctor owes a fiduciary duty to grant patients access to their medical records.

The approach taken by the NSW Court of Appeal does appear to be inconsistent with common law trends. Magnusson has described the decision as "spectacularly regressive".[13]

The eagerly awaited High Court decision on appeal will determine whether the moves away from medical paternalism towards patient involvement and autonomy in decision making continue.

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9 (1995) 1 WLR 110

10 See Feenan, "Common Law Access to Medical Records" (1996) 59 The Modern Law Review 101.

11 See for example Freedom of Information Act 1982 (Cth) and Freedom of Information Act 1991 (SA)

12 (1994) 35 NSWLR 522.

13 Magnusson, "A Triumph for Medical Paternalism: Breen v Williams, Fiduciaries, and Patient Access to Medical Records". (1995) 1 Torts Law Journal 27.