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In most parts of Australia a communication by a person to a doctor is not generally protected from disclosure to a court of law. Exceptions to this general rule exist under the Evidence Acts of Victoria, Tasmania and the Northern Territory.[1] But even in those jurisdictions, medical confidences must be disclosed to criminal courts. In addition, the privilege does not apply in civil proceedings where the sanity of the patient is in issue. All courts seek to avoid invasions of confidential communications. But in point of law, the protection of the patient's medical confidences in Australia rests on shaky ground. It is not so in the United States, where most of the States provide a legally enforceable protection against non-consensual disclosure, even to a court, of a patient's intimate health details. In Australia, if they are relevant to the issues before a court, a doctor must, if so ordered, disclose his patient's confidences whether the patient or doctor wants it or not.

This state of the law is now under fresh scrutiny. The Federal Attorney-General has asked the Australian Law Reform Commission to report upon the law of evidence to be observed in Federal courts in Australia. Until now, generally, those courts have applied the laws of the States in which they happen to be sitting. The search is now on for new rules of evidence that will govern Federal court proceedings. If the United States is any guide, the result of the inquiry may influence reform in State as well as Federal courts. Many issues are raised that will be of interest to doctors who give evidence in courts. The manner in which expert testimony is received, tested and evaluated is an obvious example.

A number of recent events have added an element of urgency to one sub-topic of the Law Reform Commission's inquiry, viz. the scope of professional privilege. These events include the search and seizure of client and patient files in legal and medical practices, a new phenomenon of 'negative search' by which the records of innocent parties are scrutinised to exclude their involvement in alleged criminal dealings[2], and the publication of a comprehensive study of 'the law and medical confidentiality' by the James McGrath Foundation Institute of Law and Medicine in Sydney.[3]

FOR MEDICAL PRIVILEGE

The argument for the extension to patients of a privilege akin to that enjoyed by lawyers' clients are based in part on matters of principle and ethics and in part on the practical consideration of maximising the effectiveness of the doctor/patient relationship:

- The ethical obligation of doctor confidentiality is ancient. It dates back at least to the Hippocratic Oath. Patients give their confidences to doctors upon a reasonable expectation that they will be protected by the law. They do so at a time when they are vulnerable and highly dependent on doctors for help. Perhaps they give little thought then to possible later use in courtrooms. Certainly their overwhelming concern is to get treatment and help.

- Other relationships are currently protected and will not be interfered with by courts, except in the most extreme cases. The relationship of a client and his lawyer or of an informer and the police are no more needing of protection by society than the relationship of a patient and his doctor.

- Unless persons suffering from illness can approach doctors with a lawfully supported right to privacy and confidentiality, they may withhold information or even refrain from seeking treatment. The effective medical treatment of the public is at least as important as the due administration of justice. It should be given equal treatment and protection against non-consensual disclosure to courts.

- Some medical data contains specially sensitive and intimate details, the disclosure of which would positively harm either the subject's medical treatment or his reputation in society.

ARGUMENTS AGAINST A NEW MEDICAL PRIVILEGE

On the other hand, opponents of the grant of a special legal protection for medical confidences have listed a number of considerations which must be weighed by the Law Reform Commission in reaching its conclusions on this issue:

- Courts should generally have access to all relevant facts which will help it to achieve a just resolution of the issues before them. The exceptions which prevent a court thoroughly investigating a relevant issue may reduce its capacity to ascertain the truth and thereby hinder the courts in one of their primary tasks.

- The categories of absolute privilege are few and exist for very long established reasons of public policy. Police informers secure privilege because disclosure of their identity could destroy this source of information and even sometimes endanger the life of the informer. Clients of lawyers secure it so that the very business of adversary litigation may be done. It is claimed, however, that the categories of privilege should not be extended for they impede courts doing the essential task of resolving disputes in society. If courts cannot do this successfully, social tranquility is threatened and this has a significance beyond the particular concerns of individual doctors and patients. This view has had the result that the claims by journalists to a privilege against disclosing sources have recently been rejected by the Supreme Court of the United States, the House of Lords and recent law reform reports.

- Already, it is claimed, there are too many impediments in the way of courts getting at the truth of matters. Extension of another impediment by way of privilege for doctors would lead on to claims by dentists, hospitals and other health providers. It would not finish there. There would be claims by others who receive information in confidence: bankers, insurers, accountants. This could result in a society in which courts were deprived of an important range of critically relevant evidence. In justifying privilege for doctors, it is necessary to distinguish others who receive information in confidence. Yet if they cannot be treated differently, we will be left with a system which results in courts deciding cases on part only of the relevant factual base. That would be bad for society which should not have to depend on whether a party consents to relevant evidence going before the court.

- Finally, critics of the claim for medical privilege point out that although it is available in some states of Australia, it is not available in others. Yet there is no evidence that the lack of an enforceable medical privilege against non-consensual disclosure has diminished the capacity of doctors in some jurisdictions of Australia to receive precisely the same information as their counterparts in those jurisdictions where the privilege exists.

NEED FOR DATA

How do we resolve the conflict between these competing claims, each of which has merit? Some would simply extend to the medical sphere the privilege enjoyed in the legal. Others would confer a broad discretion to weigh the claim for medical confidentiality against the claim for a trial on all relevant facts. Efforts at the Federal level in Canada and the United States to expand privilege to cover confidences shared with a medical practitioner have run into great controversy. When the US Federal Rules of Evidence were adopted in 1975, the problem proved just too great, so that this area of the law was left out of the Federal Code, to be dealt with by differing State laws.[4]

Law reform in Australia should be based on a thorough understanding of the defects in current rules. It will not be enough to approach this issue from the narrow standpoint 'the lawyers secure a privilege, therefore so should we'. The implications of the absence of a legally enforceable privilege should not be exaggerated. Such a privilege does not exist in many Australian jurisdictions yet patients still trust their doctors with the intimate confidences. Courts usually seek to protect confidential information, if this can possibly be done. Even where the privilege exists, it may be over-ridden by the relevance of the facts to criminal or fraudulent conduct. Nevertheless, an important debate remains and it should be resolved by evaluating the community's interest in effective medical treatment when this conflicts with the interest in having courts resolve disputes on the basis of the best available relevant material.

To assist this process of evaluation, the Law Reform Commission has sought the following information to assist it in its inquiry on evidence law reform:

- Cases where doctors have been forced unwillingly to disclose medical confidences with serious consequences for the health care relationship with the patient or for the treatment of the patient.

- Cases where doctors suspect that, and cases where in fact, patients have not disclosed information important for health care, for fear of prosecution, compulsory reporting or subsequent subpoena of the doctor and his records by a court or tribunal.

- Cases where doctors have deliberately not recorded relevant data for fear that medical records may subsequently be subpoenaed by a court or tribunal and disclosure of the relevant confidence would do disproportionate damage to the patient or his treatment.

- Cases in ethnic or other isolated or close-knit patient groups where disclosure, either under compulsory reporting provisions or pursuant to subpoena, has led not merely to embarrassment but to positive harm in the treatment of the patient or positive damage to the practice of the doctor.

Any other observations on reform of the law of evidence with perspectives from the witness box, would assist the Commission to put forward proposals for reform that do not suffer from lawyerly myopia. It will be vital that as we move to reform the laws governing the procedure of our courts, we take into account the views of witnesses, litigants and the consuming public generally. On the specific subject of medical privilege, sound law reform, like sound medical progress, will be based on empirical data.

M.D. KIRBY *

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FOOTNOTES

1. Evidence Act 1958 (Vic), s.28; Evidence Act 1910 (Tas), s.96; Evidence Act 1980 (NT), s.12. See generally Australian Law Reform Commission, Reform of Evidence Law (Discussion Paper No. 16, 1980, 5).

2. See e.g. Crowley v. Murphy, (1981) 34 Australian Law Reports 496.

3. R.H. Woellner, 'The Law and Medical Confidentiality', The James McGrath Foundation, Institute of Law and Medicine, December 1980, mimeo.

4. E.M. Morgan, 'Basic Problems of State and Federal Evidence', 5th ed. (J.B. Weinstein, editor), 115.