

RULE ON CONFIDENTIALITY AND EVIDENCE IN COURT

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First of all, let me thank the President and your Council for having invited me to speak to you today. The President did not flatter me but I was indeed flattered by the invitation, not only because it came to me but largely because I am the first non-member of the medical profession since lectures started in 1963 to be asked to speak to you at your National Medical Convention.

I see that the Association has on more than one occasion been addressed on medical ethics and this has a link with the topic of your symposium which is on patient's rights of which the right to confidentiality is an important one. The topic to which I will in broad terms confine myself is that of exceptions to the rules on confidentiality when a doctor gives evidence in court.

Every doctor has a duty of confidentiality to his patient but what happens to this duty when he is called upon to give evidence. There are a number of instances where the law obliges a person not to disclose information in court. A prime example of this is the protection of state secrets or "state privilege" as it is known in law. Another is certain types of information received by the police and this includes information leading to the identity of informers. A third which invites comparison is the privilege from disclosure in court of communications between a lawyer and his client made in a professional context.

The first question one should ask is, why is it that communications between lawyers and clients are subject to a near-blanket prohibition from disclosures (subject to one exception), whereas communications between a doctor and patient do not have a similar blanket prohibition.

First, let me state the nature of the privilege between a lawyer and his client. The law in Singapore on this is set out in section 128 of the Evidence Act, which reads as follows:-

- (1) No advocate or solicitor shall, at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate and solicitor by or on behalf of his client, or to state the contents or conditions of any document with which he has become acquainted *in the course and for the purpose of his professional employment*, or to disclose any advice given by him to his client in the course and for the purpose of his professional employment,

Provided that nothing in this section shall protect from disclosure:-

- (a) any such communication made in furtherance of any illegal purpose;
- (b) any fact observed by any advocate or solicitor in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment. [Emphasis added]

It is also specifically provided that the obligation of confidentiality and the privilege applicable continues after the employment has ceased. From the wording of the provision, it will be noted that the privilege is not that of solicitor but that of the client who alone can give express consent for the disclosure of any such communication. It should also be noted that the privilege applies only to information acquired for the purpose of giving or receiving legal professional advice. The lawyer should be consulted professionally and not merely as a friend having legal knowledge.

A doctor owes a duty of confidentiality to his patient. This however, does not apply in the matter of giving evidence. There is no statutory provision dealing with this aspect and the common law applies. I may summarise the situation by quoting to you the material paragraph in Halsbury's Laws:-

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 cases, 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. [Halsbury's Laws, Volume 30 (1980) paragraph 19].

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You will notice that discretion is vested in the judge and this arises if the judge considers that "disclosure would be in breach of some ethical or social value involving the public interest". This is a matter that is extremely difficult to decide and my search of the reported cases in Singapore and Malaysia discloses no instance where this issue has arisen locally.

It has arisen in a number of cases in England. In this context, the public interest is not confined to doctors alone and the leading case in England concerns the National Society for the Prevention of Cruelty of Children (NSPCC). The case is reported and will be found in [1978] AC 171. The facts are relatively simple.

At 4.30 pm one day, someone called an office of the NSPCC. The caller's name and address were given. The caller made a complaint that a 14-month old child was being battered by her mother. As a result of this complaint, an inspector of NSPCC went to the baby's home. He approached the mother extremely tactfully. He presented his card and the mother thought he had come for some charitable purpose for NSPCC.

In response to the inspector's enquiry, she said her baby was very well. He then told her that NSPCC had an allegation that she had been beating her child. She showed the baby to the inspector and the baby looked fine. She even called her own doctor who examined the child and told the inspector that the child was perfect. The mother was naturally very upset and the doctor had to give her a tranquiliser. She continued in a depressive state, consulted a psychiatrist who said that she suffered from a severe degree of clinical depression following the inspector's visit.

The mother wanted to sue the informant and the NSPCC and the case is reported on her efforts to get information on the identity and address of the person who telephoned NSPCC and made the complaint.

It is appropriate here that I refer to the status of NSPCC. The NSPCC was incorporated by Royal Charter about a hundred years ago and is specially authorised by the Secretary of State in statutes like the Children and Young Persons Act to bring proceedings for the welfare and care of children. It receives information that leads to such action and gives an assurance that the information will be treated as confidential and that the names of informants will not be disclosed without the informant's consent. In a pamphlet, it tells the public that immediate action by a member of the public may prevent a child from suffering. In more than 90% of cases on which it receives information, it was found that the child in question was at risk. The NSPCC regards itself as honour-bound to keep the pledge of confidence in order to do NSPCC's work effectively. The NSPCC's fear is that if its officers were to disclose the names of informants, the flow of information would dry up and the suffering of children would increase.

The only issue in this case was whether NSPCC should be compelled to disclose the name of this informant. On this issue, the case went all the way to the House of Lords. The NSPCC succeeded in the High Court, failed in the Court of Appeal and succeeded in House of Lords. In the Court of Appeal, the decision was by a majority of two to one and the dissenting opinion which ultimately prevailed in the House of Lords was that of Lord Denning. He weighed the case by setting out the factors which he put in each side of the balance before he came to a decision on whether or not to compel disclosure by NSPCC. In his excellent phrasology, this is how he put it:-

I proceed to hold the balance in this case. In the scales on the one side I put the reasons why it is in the public interest that the name and address of the informant should be given. There is only one reason which is of any

weight at all. It is that it will assist the mother in her action for damages. It will enable her to bring in the informant as a defendant and to investigate the circumstances in which the information was given. But the weight of this reasoning is diminished by the fact that it is doubtful whether she has a cause of action against the informant. The occasion was, no doubt, a privileged occasion and the mother would have to prove express malice in order to make the informant liable.

In the scales on the other side, I would put the reasons why it is in the public interest that the name and address should not be given. There are several. The first is that the society should be able to continue its good work. If it is to be compelled to disclose the names, its sources of information will dry up. The second is that confidences should be respected. The law should not compel the society to break faith with those who have placed their trust in it. The third is that grave injustice may be done to the informant if he or she is to be the object of resentment by the mother, or harassed by an action for libel or slander, when she is not shown to have done any wrong at all, but has done all for the best.

Weighing these considerations one against the other, I think the balance comes down decisively against the name being disclosed. I find myself in complete agreement with the judge, who put it thus:

"When one looks at the duty which has been laid by Parliament on the defendants, and bears in mind the great public interest that children should not be neglected or ill-treated, in my mind there is no doubt at all that the public interest in protecting the defendants' sources of information overrides the public interest that [the mother] should obtain the information she is seeking in order to obtain legal redress." [Page 192 of the report].

In the House of Lords, there was not full agreement with the views of Lord Denning. Each law lord gave different reasons for coming to conclusions that agreed with the result consequent upon Lord Denning's judgement. One law lord equated the NSPCC's right to withhold an informant's name with the right to the police to withhold an informer's name. Another law lord held that no evidence relevant under the law should be withheld. Another held that Parliament's concern of public interest was the administration of justice which demands that all relevant evidence should be adduced and that it was Parliament and not the courts to give legal recognition to new heads of public policy.

I may well be doing an injustice to the law lords by trying to summarise into one sentence the various reasons they gave for coming to the conclusions that they did. However, I have quoted Lord Denning at length because he enumerates the considerations a judge takes into account when questions like this come out for decision. As a matter of caution, I have to say that in the light of what was said in the House of Lords, there has to be some reservation in total acceptance of what Lord Denning said.

The NSPCC case does not concern doctors but the principle involved and the test to be applied is precisely the test when a doctor asks in court to be excused from answering a question in the course of his giving evidence in a court of law on the ground of confidentiality arising out of the doctor/patient rela-

tionship. This case is comparatively recent and will guide judges if this question arises.

There are some earlier cases on the duty of confidentiality of doctors but these, I do not think, affected the outcome of the NSPCC case.

One is a divorce case. A psychiatrist was subpoenaed to give evidence by a husband who was taking action against his wife and her alleged lover for divorce. In the course of his evidence, the psychiatrist was asked what the wife and her alleged lover told him when the two consulted him. The psychiatrist asked to be excused on the ground of doctor/patient confidentiality. The judge refused the request and the psychiatrist was compelled to answer the questions asked of him. In my view, that decision is in accordance with the law but the case is reported very briefly and the judge's reasons are not recorded.

It is to be noted that the doctor in this case was called to give evidence, not by his patient but by the patient's adversary in court. If the doctor is called to give evidence by his own patient, the patient authorises the doctor to make disclosure of information material to the issues before the court.

The next case I would like to refer to is not one of evidence in court but on disclosure to the police. In England, as in Singapore and Malaysia, there is legislation which compels persons in certain cases to disclose certain information in their possession. Here, there is a legal obligation to make disclosure.

A stolen vehicle was involved in an accident a few days after theft. The driver and passengers hurried away from the scene. On the same day, a doctor treated a man and later at the man's request treated a girl who told the doctor they had been involved in an accident. The doctor treated them and advised them to see the police. He did not obtain their consent to disclose their identities to their police.

There is a provision under English law under which it is a criminal offence not to disclose information in his power to give when such information can identify or lead to the identification of a driver believed to be guilty of certain traffic offences. On the police making a request to the doctor, he declined to identify the driver or give any information that could lead to his identification. He claimed that it was a breach of professional conduct. He was prosecuted and convicted. The case went on review to the High Court.

The judges affirmed the conviction. They approved

the lower court's reliance on the BMA's handbook for the guidance of practitioners and I quote:-

It includes this principle, that a doctor should refrain from disclosing voluntarily to a third party information which he has learned directly or indirectly in his professional relationship with a patient, subject to these, amongst other, exceptions:

- (1) the patient gives his consent to that disclosure;
- (2) the information is required by law.

It may be a matter of some interest, if not of significance, to observe that the British Medical Association's code specifically refers to voluntary disclosure.

In effect, the contractual and professional duty of confidence which arises out of the relationship whether between doctor and patient, lawyer and client, banker and customer, accountant and client cannot override the law of the land which requires disclosure. (Diplock LJ in *Parry-Jones v Law Society* [1969] 1 Ch 1). This is different from asking to be excused from answering questions in court where the principle laid down in the NSPCC case will apply.

In the doctor's case, Lord Widgery CJ said that in evidence in court, a judge in exercising his discretion should also consider the importance of the potential answer to the issues being tried. In other words, will the answer whichever way it goes make much difference to the case? This, however, was before the NSPCC case. In any event, in my view, it is a factor that does not conflict with that decision and can be treated as another element to put in the balance before deciding whether a doctor or other witness who claims confidentiality should be compelled to answer the question asked.

Looked at broadly, it will be difficult, if not impossible, for a doctor to claim that disclosure in court by him of information acquired in the course of professional relationship, a confidential one, with a patient will so adversely affect the public interest as to preclude its disclosure.

Fortunately for doctors, and I suppose for judges, in 99.99% of cases it is the patient himself or herself who requires and consents the disclosure in court of such information.