

## MEDICAL ALERT

NOVEMBER 2004

FOR FURTHER INFORMATION  
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## Medical Practitioner's Duty to Warn Third Parties

The duty of confidentiality is an important aspect of the medical practitioner-patient relationship. The notion of confidentiality stems from the expectation in patients that private and personal information imparted to medical practitioners during consultation will not be divulged to others or used for purposes other than those for which it was given.

Medical practitioners' duty not to use or disclose medical information without their patient's consent does not stem from the patient's recognised right to privacy. But rather from public interest in maintaining confidentiality to secure public health.

In order for a medical practitioner to be required to breach confidentiality it would need to be established that there is a legal duty owed by the health professional to a third party to disclose certain information for the protection of the third party. A common law duty to warn has not yet been expressly considered by Australian courts.

A medical practitioner may avoid liability for breach of confidence by raising any of the following defences:

- 1. Information not in confidence;**
- 2. A patient's waiver or consent to disclosure;**
- 3. Disclosure pursuant to an order for discovery;**
- 4. Mandatory disclosure required by law;**

The Health Act 1937 (Qld) s 76K provides for the reporting by medical practitioners of suspected cases of child abuse. S 76K(6) states that disclosure of suspected child abuse does not constitute a breach of the law or professional ethics or standards. However, according to s 76K(7) it is an offence to fail to give the notice as required or to give a notice that is knowingly false in a material particular.

The Health Act 1937 (Qld) s 32A requires a medical practitioner who believes a patient may be suffering from a notifiable disease to give notice to the chief executive in a prescribed form. S 49 requires a medical practitioner to preserve and aid in preserving secrecy with regard to all matters, which come to the person's knowledge except in performance of their duties. S 50 provides that a person acting bona fide and without negligence is not subject to liability.

### 1. Disclosure made in the public interest

A review of the "public interest defence" is beyond the scope of this paper. The scope and doctrinal basis of the defence is highly

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controversial and uncertain. However the rationale for the defence is the concept that in some circumstances the public benefit of being informed outweighs the public interest in maintaining confidentiality. The onus in non-government cases on the defendant to show that the “public interest defence” applies. C.f government cases where the government must negative the presumption that it is in the public interest that information belonging to the government be disclosed. Per Mason J in *Commonwealth of Australia v John Fairfax & Sons and Others*.

The following cases focus on a medical practitioner’s duty to warn particularly as it relates to impending harm to third parties.

### UNITED STATES

The foundation case for imposing a duty to warn is: *Tarasoff v Regents of University of California* 551 P 2d 334 (1976)

In this case, Prosenjit Poddar, a graduate student at the University of California, in 1969 informed his psychotherapist, Dr Morre, that he intended to kill an unnamed but identifiable girl (Tatiana Tarasoff) on her return home from holiday in Brazil. When Dr Moore found out that Poddar purchased a gun, he notified the campus police that he intended to arrange for civil commitment of Poddar under a 72-hour emergency psychiatric detention provision of the relevant California statute. Having apparently secured from Poddar a promise that he would avoid Tatiana, the campus police decided not to detain him. After Tatiana’s return from Brazil, Poddar, armed with a pellet gun and a kitchen knife, went to her residence and fatally stabbed her. Tatiana’s parents brought an action for wrongful death against the Regents of the University of California, the campus police and the therapist, claiming, inter alia, damages for “failure to warn of a dangerous patient.”

At first instance the court found the duty to warn was based on three factors:

1. There must be a special relationship;
2. A specified threat must be identified; and
3. An identifiable victim must be in existence.

On appeal the Supreme Court of California held that the psychologists duty of confidentiality to his patient was outweighed by the public interest in safety from violent attack.

*Thompson v County of Ameida*, 614 P.2d 728 (Cal. 1980)

In *Thompson* county officials had become aware of the violent propensities of a juvenile in their care. His violent propensities were directed towards young children. Whin 24 hours of his discharge from custody and release into the care of his mother he had sexually

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assaulted and murdered the five year old child next door.

The California Supreme Court, distinguishing *Tarasoff*, dismissed the case of the child's parents alleging failure to warn them on the basis that (1) there was no direct or continuing relationship between them and the county and (2) that there was no allegation that the child was a foreseeable and readily identifiable target of the juvenile's threats. The justification for not finding a duty was "non-specific threats of harm directed at non specific victims."

**CANADA**

*Smith v Jones* (1999) 132 CCC (3d) 225

By contrast to *Thompson* in the United States the Supreme Court of Canada found that disclosure amounting to a duty to warn may be made not only where a specific individual is identified as the victim but also where the class of victims is clearly identified.

The appellant had been charged with the aggravated sexual assault of a prostitute. Having been referred to a psychiatrist by defence counsel for a forensic assessment, S had described a detailed plan to kidnap, rape and murder a prostitute. The psychiatrist formed the opinion the accused was dangerous and indicated to counsel that it was likely S would commit further offences unless he received sufficient treatment. The accused then pleaded guilty and the matter was remanded for sentencing.

Cory J for the majority, held that the requirement to identify a specific victim was unnecessarily restrictive. To set aside the confidentiality privilege "the Court must find that there is an imminent risk of serious bodily harm or death to an identifiable person or group." Furthermore, it would be sufficient to engage the duty to warn if a class of victims, eg little girls under five living in a specified area, was clearly identified. Such an intention to do harm need not be verbalised but be clearly "made known". However a "general threat of death" or violence to every person in a city or community, or to anyone with whom the person may come into contact was held to be too vague to justify setting aside the privilege.

**NEW ZEALAND**

*Duncan v Medical Practitioners Disciplinary Committee* [1986] 1 NZLR 513

In this case the patient had undergone a triple coronary artery bypass operation. The patient worked as a bus driver, and had obtained a medical certificate from his treating surgeon following the operation

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stating that he was fit to drive. Dr Duncan, who was the patient's general practitioner, formed a different opinion and approached the local police with the view of having the patient's driver's license revoked. Dr Duncan also told other people in the community about the patient's medical condition and warned them not to travel in his bus.

The disciplinary Committee and the courts upheld the patient's complaint. However in obiter, Jeffries J recognises the existence of the public interest exception:

There may be occasions, they are fortunately rare, when a doctor receives information involving a patient that another's life is immediately endangered and urgent action is required. The doctor must then exercise his professional judgement based upon the circumstances, and if he fairly and reasonably believes such a danger exists then he must act unhesitatingly to prevent injury or loss of life even if there is to be a breach of confidentiality." at 521

Jeffries J at 521 also highlighted that disclosure must be confined to "exceptional circumstances," and that the doctor "should discriminate and ensure the recipient [of the information] is a responsible authority."

*Maulo v Hutt Valley Health Corporation* (HC Wellington, CP 212/99, 29 November 2001, Wild J)

A former psychiatric patient, P, killed his girlfriend approximately a year after he had been released into the community by the defendant corporation. On 20 March 1996 he had been transferred to the defendant from another health provider pursuant to an order under s 30 of the Mental Health (Compulsory Assessment and Treatment) Act 1992 after he had harmed himself and attached a policeman at Porirua Hospital. The compulsory treatment order from which he was ultimately discharged had been based on the reports of two clinicians that stated that P posed a serious risk to himself and others. There was no ongoing institutional contact with P following his release. Following a trial for murder he was acquitted on account of insanity.

The plaintiffs – relatives of the deceased – claimed that the defendant should have known of the danger P posed to the "immediate family circle", including the deceased, if he was discharged without a proper clinical assessment into the community. Further the defendant owed a duty not to discharge P without a proper clinical assessment and to warn his immediate family circle. This was on the basis that medical records disclosed that P might be a risk to his immediate family circle, including the deceased and that if the defendant was not aware of the deceased it could have expected P's parents to warn her.

However it was agreed that the defendant did not know the plaintiffs or

the deceased. Furthermore, there was no pleading that the defendant knew or ought to have known that P was a danger to any particular person or, importantly that he had expressed intentions to kill or injure the deceased.

At first instance the claim was dismissed on the basis of the plaintiff's lack of proximity to the defendant and on policy considerations. The High Court rejected the appeal:

### **The duty not to discharge P**

The Court characterised this cause of action as a duty owed by the defendant to the plaintiffs not to discharge P negligently because of the likelihood of his later forming a relationship with the deceased, Ms M, whose children/siblings might suffer psychiatric injury if P were to murder Ms M. Wild J held that there was not a sufficiently proximate relationship between the plaintiffs and the defendant to warrant the imposition of one or more of the duties of care.

### **The duty to warn**

Wild J held:

“It is untenable to impose on the defendant a duty of care to the plaintiffs to warn because third parties (P's immediate family) might have passed the warning on to Ms Maulolo. That seems to me the antithesis of the required proximity.”

Wild J distinguished *Tarasoff* on the basis that Ms M was not a “threatened victim” and had not relationship with P at the time the defendant released P into the community.

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