The APLA Update

APLA

Australian Plaintiff Lawyers' Association (APLA) Inc.

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Editorial

Welcome to issue No. 4 of the APLA Update. As you will see we have extended our case note section, as this is a very practical way of exchanging information. If you have worked on a case recently that you believe could assist APLA members please fax details to the APLA office on **(02) 262 6935**. We can always use more article and case notes.

As reported last issue, a number of APLA members attended the meeting to adopt APLA's constitution, and I can now report that we are officially incorporated. Full details of office bearers are listed on page 2.

I am also delighted to announce that State branches in both Queensland and South Australia have been constituted. Interstate contacts are listed on page 16. Branches in New South Wales and Victoria are soon to be established.(please contact Anne Purcell for details of the state branches)

The APLA National Executive and State Convenors have also been active recently in apposing further restrictions on juries in civil matters and encouraging the introduction of contingency fees.Many plaintiffs' rights have been eroded in the last ten years with little objection from the legal community. APLA has the perfect opportunity to take up the case for plaintiffs and help safeguard their rights and expand their access to justice.

Articles

My Body: My Medical Records

By: Vera Kulkoff & Gideon Boas, Cashman & Partners Solicitors.

The General public would be astounded to learn that the second half of the above statement is not reflected at law. Whilst your body is your property, medical information on your body is treated as the property of your doctor.

The only way patients can access their medical records from private practitioners is to, in effect, commence litigation and force their production by filing and serving subpoenas on the doctors. This has the affect of not only unnecessarily clogging our court registries but of also adding to the ever increasing costs of justice. Subpoenas must be prepared by lawyers. Filing fees must be paid to the Courts.

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Service must be arranged on the doctors and service fees paid. Return dates must be fixed by Courts and attendances made to call on the subpoenas and seek access.

Surely, in today's society, with its growing emphasis on accountability and access to information such a position can no longer be tolerated. The Freedom of Information legislation is a direct reflection of this trend. Doctors can no longer hide behind paternalistic notions of "it is in the best interests of the patient". The tide must turn and allow common sense to prevail.

On 17 May, 1994 two women commenced proceedings against their doctors on behalf of themselves and in a representative capacity on behalf of all women who have consulted with or been treated by the doctors in respect of silicone gel breast implants. These two doctors, like so many others, have persistently refused to grant patients access to their medical records. The proceedings have been expedited and a hearing has been fixed for September this year.

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The Public Interest Advocacy Centre has filed a notice to appear on behalf of the Consumers' Health Forum of Australia, and the Health Issues Centre as amicus curae.

The Summonses seek to establish the existence of any one or more of the following legal rights, which would guarantee these and future patients automatic access to their medical records:

(a) a proprietary right and interest in information contained in their medical records; and/or

(b) a contractual right based on an implied term that patients are entitled to the information contained in their medical records; and/or

(c) a right which stems from a fiduciary relationship which exists between the patient and the doctor whereby the doctor holds information contained in the medical records relating to the patient in trust for the benefit of the patient; and/or

(d) a right based on the general duty of care of disclosure owed by the doctor to the patient, which extends to the provision of information regarding thepatient's treatment both before and after such treatment has been administered.

In the recent Canadian decision of *Mclnerny v MacDonald* the Supreme Court held:

"in the absence of regulatory legislation, the patient is entitled, upon request, to inspect and copy all information in the patient's medical file which the physician considered in administering advice or treatment" (*[1992] 137 MR 35, at 59*)

This decision is significant in terms of how it sets out a patient's rights and discusses the philosophical and practical reasons for the doctor/patient relationship being characterised as fiduciary in nature, and why that duty extends to a patient's right of access to her medical records.

United States law appears to support the Canadian approach. The English position is, at best, arguable and there is no Australian law directly on point.

Yet, it is stated in the Australian Health and Medical Law Reporter that:

"it is a generally held legal view that, when a record of a patient's treatment is made, it is made to assist the treating doctors or other health professional in that treatment. As such, it is an "aide memoir" created not for the patient's use but for the treating health professional's use. Hence, the health record is held by the health professional or the health facility when the treatment is provided within that facility and the patient is a patient of that facility" (CCH Service, para. 27-860)

A number of English cases are cited purportedly in support of this generally stated principle of law. (*Leicestershire County Council v Michael Faraday and Partners Limited* (1941) 2 KB 205; *Chantery Marin(a firm)* v *Martin[1953] 3 WLR 459).* However, on a closer review of the cases, the frequently asserted proposition that medical records prepared by a practitioner are owned by that practitioner and the patient has no right of access, appears to be an overstatement of the law. To elevate persuasive English authority, which is some 40 years old and not even specifically on point to a "generally held legal view" in Australia is a bold proposition indeed. (N.B. although the *Chantery Martin* has been followed in Australia (once in the High Court on an unrelated issue and once in the NSW Court of Appeal) the ruling could just as well be applied to the proposition that the doctor owes a duty to her patient to disclose all medical records prepared on that patient's behalf, or indeed that the patient owns those records. See *Wentworth v De Montford and ors* (1988)15 NSWLR 348.)

It appears that the current state of Australian law is premised on assumptions perpetrated by academics and the medical profession. It is a premise that cannot and should not survive close legal scrutiny. These two Australian women have invited the Supreme Court of New South Wales to determine the issue. Guidelines and policy circulars such as the Health Commission of New South Wales' "Confidentiality of Health Records in Hospitals and Community Health Services" and the Australian Medical Association's "Guidelines on a Patient's Access to Records Concerning Their Medical Treatment", which restrict the release of medical records, may be considered by the Court but do not constitute legal precedent. As can be expected, such guidelines do nothing to champion the rights of patients to their medical records.

This is an important issue going to fundamental questions of patient self-determination and the right of access to information which affects the individual's health and well being. It is of general concern to the broad community and for this reason the Public Interest Advocacy Centre has sought leave to join the proceedings which are ostensibly test cases.

It is high time the medical profession paid heed to the following words of Ryan J.A. of the Canadian Court of Appeal in McInerny:

"We live in a mobile society with a growing emphasis on access to information. This claim to information is simply one facet of a many sided repository of rights aimed at self-determination insisted upon by Canadians today. To hold otherwise would plunge the judgement making power of whether or not to grant access into a sea of subjective decisions." (Ryan J.A. (1990) at 439).

"Of primary significance is the fact that the records consist of information that is highly private and personal to the individual. It is information that goes to the personal integrity and autonomy of the patient." (*La Forest J.(1993) at 45*)

In his judgment La Forest J. refers to an article by H Beattie ("The Consumers Right of Access to Health Care Records" (*1986) 3; 4 Just Cause 3, at page 3.*), in which it is stated that paternalistic assumptions such as "the best interests of the patient" may have carried more weight in an era where a