Court rules that doctors own private patient records

A 6 September landmark ruling by the Australian High Court says that doctors have legal copyright of their notes on their private patients. The ruling also partially establishes the legal framework for the doctor-patient relationship, and defines the limits of a patient's "right-to-know." Currently, access to medical records by patients under Australian public health care is governed by federal Freedom of Information rules, but access rights for private patients have not been determined previously by the court.

The present case — *Breen v. Williams* — arose from a disagreement between the plaintiff, Julie Breen, and her surgeon, Cholmondeley Williams. Breen wanted copies of her records to file in a Florida (US) court in 1994, so that she could participate in a class action suit against Dow Corning for selling defective breast implants. Williams, one of several surgeons who performed corrective surgery on Breen in the late 1970s, was willing to provide her with the specific information required, but Breen insisted on unrestricted access to her entire file. Under legal advice, Williams declined and

Breen took the case to court. She lost in both the local court and on appeal, and finally went to the High Court.

According to Charlotta Bloomberg, legal counsel to the Australian Medical Association (AMA) in Canberra, Breen had other legal avenues open to her to get the information she needed, but chose instead to make a test case of her desire to see her records. Breen challenged Williams on the following grounds, claiming that (1) she had proprietary right in the information because it was about her, (2) she had an implied right under contract law, because the doctor-patient relationship is regarded as being contractual in Australia, (3) by the same token, she had an implied right under contract law because the doctor-patient relationship is also a fiduciary one — as in Canada and the USA, and (4) there was a movement in Australian law towards "a patient's right to know." The Australian High Court rejected all four of Breen's arguments.

Although Breen is clearly disappointed, the AMA (as well as several medical indemnity organizations, such as the United Medical Defence) agree with the ruling,

and are satisfied that the High Court has chosen to examine each of the claims in detail. "The high court basically said that [Breen] has no property in the information. In fact, property resides with the doctor," Bloomberg says. "He has exclusive rights to deal with those documents, and one of those exclusive rights is to say who looks at them and who copies them."

In addition to private records, the court also ruled on the ownership of different types of medical records (for example, the patient owns test results and probably diagnostic images) and commented on the confidentiality of patient information (all information is confidential, and doctors cannot disclose it without patient consent, except under court order or in a life-threatening emergency).

The court did agree that that the doctor-patient relationship was contractual, but that does not mean that the doctor's private notes are open to the patient's examination. "The doctor has a contractual duty and a duty under the law of negligence, to act with reasonable care and skill," Bloomberg says.

Regarding Breen's contention of a legal

Genetic testing and privacy in Australia

According to a recent study by the Australian Human Rights and Equal Opportunity Commission, employers, health insurance companies, superannuation funds and law enforcement agencies should not have access to results of genetic testing without that person's specific consent. *The Privacy Implications of Genetic Testing*, released by the Privacy Commissioner in September, follows up a 1992 government report on genetic manipulation and examines existing and potential privacy problems in handling personal genetic test results.

Genetic testing is on the increase in Australia, especially in private laboratories, but nobody knows for certain how widespread it is. And, according to the report, "unlike New Zealand and most European Union countries, Australia does not yet have a coherent system of privacy protection that applies to the private sector."

The Commission distinguishes between genetic information that affects only the person being tested and that which may apply to relatives or society in general. Specifically, the report discusses genetic testing in several settings: in a clinical context, as part of scientific research, for the purposes of law enforcement and other legal purposes, for insurance purposes, and in the workplace.

In the clinical context, the Commission reaffirms the right of individuals not to be tested. In a situation where others may be affected by the outcome of the test results, the testing should be done only on the basis of informed consent, which must include information as to how the results will be used. And, finally, the person being tested must have access to that information. The latter point is of particular importance, since in Australian law

(recently upheld by the High Court in *Breen v. Williams*, this page), medical records generated by private clinics and doctors are the property of the doctor and not the patient.

In a scientific research context, the Commission says the guidelines already in place from the National Health and Medical Research Council are generally sufficient, because of the high compliance rate.

As far as using genetic testing in law enforcement is concerned, the Commission comes down strongly against the creation of DNA data banks similar to fingerprinting data banks, on the grounds that compulsory blood collection is an invasion of personal privacy. This is particularly important, as proposals for creating a DNA data bank are currently being discussed by state and federal governments, and are on the agenda of the Australasian Police Ministers' Council. Insurance companies and superannuation funds have the same access to genetic testing as to medical records, but the Commission points out that there are "no explicit standards for the handling of the information or the protection of their members' privacy rights."

In regard to workplace testing, the commission says that, although there is no legislation currently in place to prevent employers from demanding genetic testing records, demand is rare. However, based on the experience of countries like the United States, that will change, and the commission calls for clear legislation to address this issue.

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