

## IS THERE PROPERTY IN EXPERT MEDICAL WITNESSES?

*A paper by Robert James McLachlan, solicitor*

1. The issues involved in Care Proceedings frequently touch upon the psychological or psychiatric condition of a parent or other important person involved in the life or lives of the children. Frequently, medical reports are produced by those parties from treating medical practitioners to support or provide information about that condition and frequently to support an application that the child or children be returned to that parent or other important person.
2. The often used phrase in litigation is that there is no property in witnesses. This has led to the perception that if such a witness is identified in a report filed, then there is no difficulty for another party seeking to speak directly to that witness and asking questions about the contents of the report and other information touching upon it. That position is undoubted in respect of non-expert witnesses but does it apply to medical professionals who have been qualified and identified in the manner referred to above.
3. In Kadian –v- Richards (2004) NSWSC 382, Justice Campbell in the Supreme Court was called upon to consider that issue in respect of a professional negligence claim. While the matter must be viewed in light of the context in which it was considered, it is suggested that Justice Campbell's judgment is apposite to proceedings in care matters. While the proceedings before Justice Campbell were effected by the Evidence Act, it broadly touched upon a wider professional obligation of confidentiality which he found could only be waived by the patient. It is submitted that the provisions of Section 93(3) does not avoid the necessity of considering the principles the case raises.
4. In that case a party to the proceedings had filed medical reports from a treating medical practitioner. The other party had sought to speak to that doctor. A formal request was made to the other party's lawyers. They declined to do so except on the condition of specific questions being proffered in writing. That offer was declined and the matter taken to the Court to see whether there was any prohibition in respect of a direct communication as was sought.
5. While there was an acknowledgement of the confidentiality between the practitioner and the patient, it was submitted, not unnaturally, that that confidentiality had been waived by a medical report being produced and filed in the proceedings. It was effectively said there had been a waiver and reference was made to similar principles of waiver of Legal Professional Privilege which had been commented upon by the High Court in AG for the Northern Territory –v- Maurice and others (161 CLR 475).
6. The Court considered a detailed line of authorities in England, Canada and Australia. It also considered provisions of legislation touching upon confidentiality and privacy. This article does not intend to explore all the matters raised in that judgment. It is recommended to those that read this article as a judgment that should be read in its entirety.
7. It is suggested that for the purposes of the issue raised at the commencement of this article that the principles arising from that case establish, that in care proceedings as in general civil law proceedings, the following principles would appear to apply:-
  - (a) There is a general principle of confidentiality whereby a doctor is not under a duty to voluntarily disclose information without the consent of his or her patient.
  - (b) The general principle in (a) is subject to exception which would appear to include:-
    - (i) If the disclosure was not made it could endanger the lives or health of others;

- (ii) There had been some form of fraud or other gross dishonesty;
  - (iii) The information is required at a time where there is knowledge of an actual or reasonably believed breach of the criminal law;
  - (iv) A statute requires certain types of information to be disclosed.
8. The exceptions in (b)(i) and (iv) would appear to arise in care proceedings. There is an obligation on a practitioner to disclose arising from the statutory obligation under Section 27.
9. It is clear that the obligation of mandatory reporting applies where there is a clear disclosure of information impacting upon the actual or potential care of children. This simply requires a report to be provided to the Help Line. Subject to the exceptions noted but most importantly the waiver of anonymity, the name of the reporter cannot be provided and the mere fact of the report does not give a right to seek to ask questions of that person. The Department's right to make enquiries would largely appear to be limited to matters impacting upon the care of the child and be matters that would specifically arise from the mandatory report. It would not allow a Legal Officer for the Department, it is suggested, to ring the doctor up at a later point of time to make general enquiries about the contents of a report that a party had filed.
10. Therefore, is a doctor who files a report is "fair game" for enquiries by other parties. The answer would appear to be no. The consideration of authorities both in Australia, England and Canada lead the Court to conclude that even where a person sues a medical practitioner not all confidentiality is waived.
11. In Kadian –v- Richards ante the Court was persuaded that, absent consent from the patient, there is no waiver of confidentiality by a report being published in the proceedings. The Court was substantially persuaded to the view that it reached because it found that there were various means by which another party could find out much of the information. These included as relevant to care proceedings:-
- (a) Subpoenaing all of the records of the treating doctor.
  - (b) The treating doctor attending to give evidence.
12. Practitioners in the care jurisdiction, including those appearing for the Director General, should be aware that absent the consent of the party whose doctor provides a report there is no right to contact that doctor to discuss matters relevant to that party. Such an action could be tantamount to professional misconduct. It should not be undertaken without prior notice to the legal practitioner for the party who has filed the medical report to see whether an objection is taken. If it is, then it is suggested no further enquiry can be made except through the process of cross- examination or through the process of subpoenaing records and inspecting them in the usual course.

