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Swirski-type interviews: An ethical dilemma for physicians

The doctor-patient relationship may be jeopardized if physicians do not inform patients before speaking to a third party.

ABSTRACT: In 1995 the Supreme Court of British Columbia ruled that the treating physicians for a plaintiff were free to take part in discussions with counsel for the defence. Recently, another case confirmed that physicians may take part in such discussions without obtaining their patients' permission. While confidentiality between doctors and patients may not be recognized in law, physicians are responsible for maintaining the trust inherent in the doctor-patient relationship. This may require that physicians carefully consider whether to take part in such third-party discussions and that they inform patients in writing when they decide to do so.

Ms Swirski was injured in a motor vehicle accident and subsequently developed epileptic seizures. She was assessed by four neurologists who opined that the seizures resulted from a brain injury. After a period of time, some of the neurologists changed their opinion and were of the view that the seizures were the result of a conversion disorder, a psychiatric condition arising from the accident. Ms Swirski's lawyers did not rely on the reports of the neurologists or put them forward to the court as experts. Instead, they gave notice of their intention to call Ms Swirski's family doctor as an expert witness at trial. Counsel for the defence wished to interview the four neurologists and the matter was placed before the court in *Swirski v. Hachey*.[1]

Mr Justice Wilkinson of the British Columbia Supreme Court held that the defendant's counsel was at liberty to discuss medical matters with Ms Swirski's treating physicians in the absence of Ms Swirski and her counsel. This ruling did not compel Ms Swirski's treating physicians to take part in such discussions, but allowed them to participate in such a meeting subject to conditions set by them. In other words, the Swirski decision allowed for informal discussions between defence counsel and the plaintiff's treating physicians if the physicians were willing to participate.

More recently, in *MacEachern v. Rennie*, Mr Justice Ehrcke affirmed the application of the Swirski decision.[2] In this particular case, a physician (Dr D.) was treating the plaintiff, Ms MacEachern. Her lawyer took the position that as a treating physician, Dr D. owed Ms MacEachern a duty of confidentiality not to divulge her personal information without her consent. In fact, Dr D. met with defence counsel even after receiving a letter from Ms MacEachern's lawyers advising that their client did not wish the meeting to proceed if they were not present. Her lawyers were of the opinion that Dr D. breached his duty of confidentiality to his patient when he spoke with counsel for the defendants in their absence.

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Mr Justice Ehrcke ruled otherwise: "I have found that there was no impropriety in the meeting between Dr D. and counsel for the defendants."

Confidentiality concerns

In the first instance, it must be noted that when our patients commence legal actions, the courts recognize no right to confidentiality or privilege over relevant medical records, particularly when there is an issue of injury or illness before the courts. Many patients and doctors believe that their records are private and confidential. This is not the case in law.

In the Swirski decision, the court held that it is proper for defence counsel to contact the plaintiff's treating physicians and to invite them to an interview. However, the court has not provided guidance for the physicians in terms of protecting the doctor-patient relationship or obtaining consent from the patient for such a meeting.

In the past, doctors approached by defence lawyers for a Swirski-type interview have agreed to these for several reasons, including the following:

- They have misread the Swirski decision and believe they are compelled to attend such an interview.
- They believe that by attending such an interview they will avoid a subpoena and court appearance later.
- They know they may be able to bill medicolegal rates for such a meeting and are responding to this financial incentive.

In my opinion, the above-noted court decisions may jeopardize the relationship between doctors and patients. I would never consider talking to any third party concerning details of my patient's medical file without his or her permission. The Swirski-type interview strikes me as being no different. Even though in Swirski the court allowed such discussions to take place, it is my opinion that doctors should only engage in a medicolegal interview with signed permission from their patients. If I am aware my patient is represented by counsel, I would strongly urge the patient to discuss this entire matter with his or her legal counsel or would request permission to contact the patient's lawyer myself.

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I recognize that these interviews may prove useful for all parties involved, by getting factual material before the courts, but I would only agree to participate in such an interview in the presence of my patient and his or her legal counsel.

There may be some cases in which the physician should engage separate legal counsel to represent him or her and arrange to have fees for such counsel covered by the other parties. Doctors are well advised to seek advice from CMPA.

CMA Code of Ethics

Under the heading "Privacy and Confidentiality," three relevant sections of the CMA Code of Ethics read as follows:

> 31. Protect the personal health information of your patients.
> 35. Disclose your patients' personal health information to third parties only with their consent, or as provided for by law… In such cases take all reasonable steps to inform the patients that the usual requirements for confidentiality will be breached.
> 36. When acting on behalf of a third party, take reasonable steps to ensure that the patient understands the nature and extent of your responsibility to the third party.

It is my opinion that since Swirski allows, but does not compel, interviews with third parties (defence counsel), that section 35 would ethically compel a physician to seek the consent of the patient before proceeding with a Swirski-type interview.

Position of the College of Physicians and Surgeons of British Columbia

The College notes in its *Resource Manual,* under "Requests from Defence Lawyers," that "when a person puts his or her health in issue in litigation, there is an implied waiver of confidentiality with respect to all relevant information pertaining to the matters in issue in the lawsuit."[3] The manual goes on to say that some medical treatments may be totally irrelevant and that the issue of relevance is one for the lawyers in the action to determine. This issue "should be resolved prior to the physician being involved in any interviews with defence counsel." The College's view is that the onus is on the plaintiff's counsel to obtain agreement from defence counsel regarding the conditions for a Swirski-type interview or to apply to court for restrictions to be placed upon the interview. They conclude, "This court decision states that treating physicians are like any other witnesses and can

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be interviewed by defence counsel without the consent of patients."

In a 1996 comment on the Swirski decision in the *College Quarterly*, the College suggests that if you refuse to take part in a medicolegal interview, your patient's lawyer can ask you a series of questions in a letter. If the responses are deemed adequate, that may eliminate the need to have a formal interview; however, if the defence lawyer is unhappy with the responses, he or she may apply to the court for the right to interview you.[4]

In July 2009, I wrote to the College regarding *MacEachern v. Rennie* and they reaffirmed their position as described in the *Resource Manual* and *College Quarterly*.

Protecting the doctor-patient relationship

It is my view that although the Swirski decision allows for interviews between defence counsel and a plaintiff's treating physicians, it is contrary to the CMA Code of Ethics to proceed with such an interview without a patient's written permission. If patients become aware that treating physicians will be meeting with defence counsel and giving potentially damaging expert opinion that will undermine or compromise their legal case, they will rightly lose confidence in the doctor-patient relationship. I understand that confidentiality between doctors and patients is not recognized in law, but it is my view that we have a higher duty to our patients than that which is "allowed" by a court ruling. We have a duty to be advocates and champions for our patients. With this in mind, I suggest the following:

- If you are approached by defence counsel about medical matters concerning your patient, you should not feel obligated to meet with them as a treating physician, although you may choose to do so.
- Before proceeding with any such meeting or discussion, you should obtain written permission from your patient and may wish to discuss this matter with your patient's legal counsel. I would only agree to such a meeting with defence counsel if the patient or the patient's legal counsel were present at the meeting.
- You may wish to consider whether you will answer questions that go beyond the scope of care you provided to your patient, particularly if your answers may be detrimental to your patient.
- Although I have never taken this step, if you are concerned about your legal rights, as distinct from issues concerning your patient, you may wish to call CMPA or engage legal counsel to represent your interests in such an interview.

I offer these recommendations in order to protect our patients' confidentiality in the face of a legal decision that in my view does not fully address the nature of the doctor-patient relationship. It is all well and good for courts to establish rules on matters that are before them, but it is up to physicians to be primarily concerned with the doctor-patient relationship.

Competing interests

None declared.

References

1. *Swirski v. Hachey* (1995), Supreme Court of British Columbia. Vancouver Registry No. B940415. www.courts.gov.bc.ca/jdb-txt/sc/95/18/s95-1808.htm (accessed 6 November 2009).
2. *MacEachern v. Rennie* (2009), BCSC 252. www.courts.gov.bc.ca/jdb-txt/SC/09/06/2009BCSC0652.htm (accessed 6 November 2009).
3. College of Physicians and Surgeons of British Columbia. Resource manual. 1997. www.cpsbc.ca/files/u6/Requests-from-Defence-Lawyers.pdf (accessed 6 November 2009).
4. *Swirski v. Hachey*. College Quarterly 1996;13:6. www.cpsbc.ca/files/u6/1996-summer.pdf (accessed 6 November 2009). BCMJ