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RIGHT TO CONFIDENTIALITY VERSUS DUTY TO DISCLOSE IF YOU CAN'T TELL YOUR LAWYER OR DOCTOR, WHO CAN YOU TELL?

Originally published March 2001. Canadian Family Physician. Vol. 47

http://www.cfp.ca/content/49/3/300.full.pdf+html

To receive the appropriate and highest level of professional advice, treatment, and service, communication between solicitors and clients and between physicians and patients must be open, honest, and complete. Such communication exists within a trust-based relationship protected by confidentiality. Consequently, in the conception and pursuit of justice, solicitor-client privilege and the correlating duty of confidentiality are granted the highest level of legal protection.

Originally a rule of evidence established to prevent lawyers from testifying against their clients, solicitor-client confidentiality has legal status as a substantive part of all solicitor-client relationships. Practically, solicitor-client privilege relates to communications between solicitors and their clients and to information gathered on behalf of clients.

DUTY OF CONFIDENTIALITY

As medical professionals are aware, a similar duty of confidentiality exists between physicians and their patients. While not afforded the same level of protection by law as solicitor-client privilege, both health professionals and their patients jealously guard this duty of confidentiality. Hence, the status quo requires that all health professionals maintain a veil of secrecy around their patients. Health-related communications and records exist amid this trust-based relationship and are protected by what is legally termed a duty of confidentiality.

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A breach of this duty occurs when a physician releases health-related information on a patient without the consent of that patient, the consent of his or her representative, or being required by law. According to the *Medicine Act* of 1991[1] and related regulations in the *Regulated Health Professions Act* of 1991,[2] a breach of confidentiality legally qualifies as an act of professional misconduct.

EXCEPTIONS TO THE DUTY

Situations arise within legal and medical realms in which legislatively proclaimed exceptions dictate that a client's or a patient's potentially damning information be disclosed to the appropriate authorities, regardless of confidentiality.

Two exceptions to the duty of confidentiality include the *Child and Family Services Act*,[3] which mandates that a professional with a reasonable belief or suspicion of the existence of child abuse or neglect must inform the Ministry of Community and Social Services or risk professional penalties as well as civil liability for negligence; and the *Health Protection and Promotion Act*,[4] which requires that physicians who diagnose patients with highly contaminating or infectious conditions, such as malaria and tuberculosis, must notify public health authorities in the appropriate jurisdiction. These two exceptions account for the legal confusion in which physicians sometimes find themselves.

> *Although laws governing medical practitioners are similar across the country, they can vary greatly from one jurisdiction to another. Specific answers to questions cannot be given in a national publication. While the information in this article is true in general, it is intended to bring issues to your attention, not to give specific advice. You should con-sult a lawyer if you have specific concerns. Members of the Canadian Medical Protective Association can contact the Association at 1-800-267-6522.*
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> *Readers may submit questions on medicolegal issues by fax to Dr Philip Winkelaar at (613) 725-1300. They will be considered for future Medicolegal Files.*

DUTY TO DISCLOSE

A recent Supreme Court decision, aiming to clarify another exception, appears to have created much more anxiety and ambiguity for the medical profession than it has resolved. This decision, referred to for reasons of

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1 *Medicine Act of 1991*, S.O. 1991, c. 30, as am.

2 *Regulated Health Professions Act of 1991*, S.O. 1991, c. 18, as am.

3 *Child and Family Services Act of 1990*, R.S.O. 1990, c. C.11, as am.

4 *Health Protection and Promotion Act of 1990*, R.S.O. 1990, c. H.7, as am.

confidentiality as *Smith v. Jones*,[5] confuses matters by further threatening the sanctity of solicitor-client privilege and physician-patient confidentiality. The ruling extends and entrenches this exception to confidentiality by imposing a common-law duty to disclose information obtained through solicitor-client and physician-patient communication.

SMITH V. JONES: A CONCERN FOR PUBLIC SAFETY

In *Smith v. Jones*, the Supreme Court held that a clear, serious, and imminent concern for public safety is cause for an exception to the duty of confidentiality. A patient conveyed damning information to a psychiatrist to whom he was referred by his defence lawyer in a criminal trial. In his session with the psychiatrist, "Jones" revealed detailed plans and preparations for torturing and killing young female prostitutes in a certain area of Vancouver, BC. The potential victims were identifiable and in imminent danger of serious bodily harm or death. The court held that a duty of care was owed to these victims, and the psychiatrist had to disclose the confidential information to the appropriate authorities.

Health professionals' concern about a charge of professional misconduct, and the potential for a civil liability lawsuit, arise because the duty to disclose results in a breach of confidentiality. The Supreme Court of Canada held, however, that, because the interests and safety of the public must be protected, this particular breach of confidentiality should be tolerated.

TEST: BREACH V. DISCLOSURE

The Supreme Court clearly stated in *Smith v. Jones* that the scope of the duty to disclose is strictly limited and must arise only in exceptional circumstances, such as when there is an identifiable risk to the public. This particular exception is allowed only when professionals know or discover that a certain person or group of people is in imminent danger of serious bodily harm or death.

Pursuant to *Smith v. Jones*, three factors provide the requisite criteria for distinguishing between a breach of confidentiality and the duty to disclose. Lawyers and physicians must now apply the Supreme Court's established legal test in which all three of these factors must be present at the same time.

- Is there a clear risk to an *identifiable* person or group of people?
- Is there a risk of *serious bodily harm or death*?
- Is the danger *imminent* (ie, close at hand or soon to actually happen)?

ENDANGERING PUBLIC SAFETY

There is an overwhelming practical concern that this ruling, due to patients' and clients' resulting fear of disclosure, will not ensure public safety but, in fact, endanger public safety. Clients might conceal crucial information from their

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5 *Smith v. Jones*, [1999] 1 S.C.R. 455.

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lawyers and thereby miss their opportunity to receive complete and appropriate representation; defence counsel might refrain from referring potentially unbalanced clients for psychiatric treatment and assessment; or patients might conceal from their doctors highly contaminating or infectious conditions before undergoing physical examinations.

These scenarios revolve around the possibility of patients and clients concealing pertinent information to avoid risk of disclosure to responsible authorities. Could the ruling in *Smith v. Jones* have the effect of discouraging clients from seeking the professional help they need and concealing the danger they represent to others?

RECOMMENDATIONS

The Supreme Court of Canada holds that the duty of solicitor-client and physician-patient confidentiality must in exceptional circumstances of public safety yield to the public good. Lawyers and physicians must govern themselves accordingly. They must realize that this court ruling does not result in a carte blanche duty of disclosure, but only when the Supreme Court's legal test is satisfied. Solicitors or physicians must be convinced that clients or patients are going to commit life-threatening acts against identifiable people at specific times and places. If they are uncertain, the *Smith v. Jones* ruling is inapplicable.

CONCLUSION

Solicitors' and physicians' consideration of their ethical and legal obligations must somehow reach an acceptable balance between the duty of confidentiality and the breach inherent in duty to disclose.

As *Smith v. Jones* illustrates, many ethically challenging situations arise for which the law does not provide physicians with the appropriate or necessary legal directives. Physicians are left to determine for themselves when disclosure will or will not result in professional misconduct or civil liability for negligence. Physicians would be wise to consult legal professionals if they have doubts or confusion about whether to maintain patient confidentiality or disclose.

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