

Decision No. 9/99

Reference No. CRT 21/98

IN THE MATTER of the Privacy Act 1993

BETWEEN L

Plaintiff

AND J

Defendant

BEFORE THE COMPLAINTS REVIEW TRIBUNAL

S C Bathgate - Chairperson
W A Abbiss - Member
G P Searancke - Member

HEARING at AUCKLAND on the 31st day of March 1999

APPEARANCES

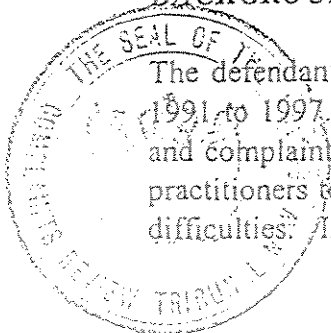
Plaintiff in person
H Waalkens for Defendant
S Pilgrim for Privacy Commissioner

DECISION

The plaintiff in these proceedings has alleged that the defendant committed a breach of a number of the rules of the Health Information Privacy Code 1994. This matter has been the subject of an investigation by the Privacy Commissioner so that, pursuant to s. 83(a) Privacy Act 1993, we are satisfied that we have the jurisdiction to hear and determine these proceedings.

BACKGROUND

The defendant is a general medical practitioner. The plaintiff was her patient from 1991 to 1997. In 1993 the plaintiff began to suffer a number of physical symptoms and complaints which suggested to the defendant and a number of specialist medical practitioners to whom the plaintiff was referred that she was suffering psychosomatic difficulties. In April 1993 the defendant was contacted by a cousin of the plaintiff



who indicated that there was a family history of psychiatric difficulties. This was referred to by the defendant in a referral to a pain clinic which the plaintiff sought, together with the information that the plaintiff denied the existence of a family psychiatric history. At that time the plaintiff was unaware of the cousin's phonecall and she did not see the pain clinic referral. Between 1993 and 1997 the defendant made a number of referrals to other specialists whom the plaintiff wished to consult.

In 1995 the plaintiff was referred to a psychiatrist by a psychologist. The defendant was unaware of the referral until she was contacted by the psychiatrist with a request for the plaintiff's medical notes. After some consultations the psychiatrist diagnosed the plaintiff as suffering chronic delusional disorder. The plaintiff does not accept this diagnosis. She embarked on a series of requests for access to her medical files. The defendant gave her access to her medical file in October 1995 and on numerous occasions since that date. As a result the plaintiff believes that she has not been provided access to all information held by the defendant, that some of the information on the file is inaccurate and that the defendant received from and disclosed information to others without the consent of the plaintiff.

THE LAW

RULE 2 Health Information Privacy Code 1994 provides:

Source of health information

- (1) Where a health agency collects health information, the health agency must collect the information directly from the individual concerned.
- (2) It is not necessary for a health agency to comply with subrule (1) if the agency believes, on reasonable grounds,--
 - (a) That the individual concerned authorises collection of the information from someone else having been made aware of the matters set out in subrule 3(1);
 - (b) That the individual is unable to give his or her authority and the health agency having made the individual's representative aware of the matters set out in subrule (1) collects the information from the representative or the representative authorises collection from someone else;
 - (c) That compliance would:
 - (i) prejudice the interests of the individual concerned;
 - (ii) prejudice the purposes of the collection;
 - (iii) prejudice the safety of any individual
 - (d) That compliance is not reasonably practicable in the circumstances of the particular case
 - (e) That the collection is for the purpose of assembling a family or genetic history of an individual and is collected directly from that individual;
 - (f) That the information is publicly available information;
 - (g) That the information--
 - (i) Will not be used in a form in which the individual concerned is identified; or
 - (ii) Will be used for statistical or research purposes and will not be published in a form that could reasonably be expected to identify the individual concerned;
 - (h) That non-compliance is necessary--



- (i) To avoid prejudice to the maintenance of the law by any public sector agency, including the prevention, detection, investigation, prosecution, and punishment of offences; or
 - (ii) For the enforcement of a law imposing a pecuniary penalty; or
 - (iii) For the protection of the public revenue; or
 - (iv) For the conduct of proceedings before any court or tribunal (being proceedings that have been commenced or are reasonably in contemplation); or
- (i) That the collection of the information is in accordance with an authority granted under section 54 of the Act.

RULE 6(1) Health Information Privacy Code 1994 provides:

Access to personal health information

1. Where a health agency holds health information in such a way that it can readily be retrieved, the individual concerned is entitled:
- (a) to obtain from the agency confirmation of whether or not the agency holds such health information; and
 - (b) to have access to that health information

RULE 8 Health Information Privacy Code 1994 provides:

Accuracy, etc., of health information to be checked before use

1. A health agency that holds health information must not use that information without taking such steps (if any) as are, in the circumstances, reasonable to ensure that, having regard to the purpose for which the information is proposed to be used, the information is accurate, up to date, complete, relevant, and not misleading.
2. This rule applies to health information obtained before or after the commencement of this code.

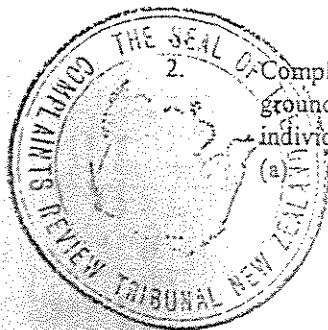
The relevant parts of RULE 11 Health Information Privacy Code 1994 provide:

Limits on disclosure of health information

1. A health agency that holds health information must not disclose the information unless the agency believes, on reasonable grounds:
- (a) that the disclosure is to:
 - (i) the individual concerned; or
 - (ii) the individual's representative...
 - (b) That the disclosure is authorised by:
 - (i) the individual concerned; or
 - (ii) the individual's representative...
 - (c) that the disclosure of the information is one of the purposes in connection with which the information was obtained;

2. Compliance with paragraph (1)(b) is not necessary if the health agency believes in reasonable grounds that it is either not desirable or not practicable to obtain authorisation from the individual concerned and:

- (a) that the disclosure of the information is directly related to one of the purposes in connection with which the information was obtained;



THE HEARING

The plaintiff and the defendant gave evidence.

The plaintiff submitted that the defendant breached Rule 2 of the Health Information Privacy Code by receiving the information about the referral to the psychiatrist from the psychiatrist and not from the plaintiff herself. The defendant also breached Rule 2 by collecting information from the plaintiff's cousin about the family history. She breached Rule 6 by failing to provide full access to the plaintiff's medical file. The defendant breached Rule 8 by failing to verify the accuracy of information sent to the pain clinic, the psychiatrist, ACC, the Medical Council, and the Complaints Assessment Committee which heard and investigated a complaint made by the plaintiff about the psychiatrist. The defendant breached Rule 11 by disclosing information without the plaintiff's consent to the psychiatrist, the pain clinic, a neurologist and a cardiologist.

For the defendant it was submitted that the plaintiff suffers from a chronic paranoid and delusional disorder and that she appears to have no insight into this condition. It is the reason why she cannot accept that she has received all of the information about her in the possession of the defendant. Furthermore, her evidence does not establish that any of the Health Information Privacy Code Rules have been breached: it is clear that the plaintiff believes that she has not been given access to all information sought but equally clear that she has; there was no evidence that any information disclosed to others was inaccurate; alleged disclosures were in fact medical referrals for which there was implied consent; the information from the cousin was unsolicited and was obtained before the Privacy Act came into force. It was further submitted that even if technical breaches of the Rules could be established the plaintiff had failed to show any resulting damage.

For the Privacy Commissioner it was submitted that in order to establish an interference with the plaintiff's privacy she would have to establish damage in respect of any breaches of Rules 2, 8 and 11 but not in respect of Rule 6.

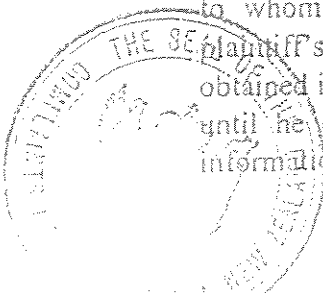
FINDINGS

The plaintiff alleged a number of breaches of the Health Information Privacy Code. In turn our determination of those allegations is as follows.

Rule 2

Collection from psychiatrist

The plaintiff asserts that the defendant collected the information from the psychiatrist to whom the plaintiff had been referred when the psychiatrist requested the plaintiff's medical notes. We do not accept that Rule 2 applies to information obtained in this way. The defendant did not know about the referral to the psychiatrist until he contacted her. She had no reason to collect the information. It was information unsolicited by her. Information which is obtained in an unsolicited way



is not, in our view, information which is collected by an agency within the meaning of Rule 2. We do not therefore accept that the defendant breached Rule 2 when she answered the psychiatrist's request for the plaintiff's medical notes.

Collection from cousin

The plaintiff's cousin made an unsolicited telephone call to the defendant in April 1993 to provide her with some information about the plaintiff's family history. This occurred prior to the commencement of the Privacy Act, on 1 July 1993, and the commencement of the Health Information Privacy Code, on 30 July 1994. It is not therefore covered by either the Act or the Code.

Rule 6

Access to medical file

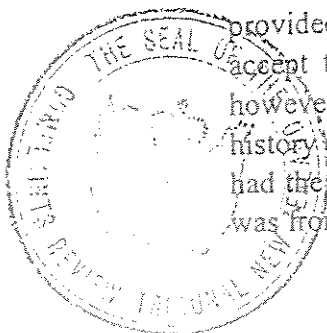
The plaintiff sought access to her medical file in October 1995. The defendant said in evidence that she provided the plaintiff's full medical file to her to read and to obtain such copies of documents as were requested. The plaintiff agreed that she had been provided with the file and that she was given copies of all that she requested. She believes, however, that she has not seen the full file and that some information has been withheld from her. Questioned on this further it became clear that the plaintiff believes that there should be records of information which the defendant denies exist. We preferred the evidence of the defendant on this issue. We accept that the plaintiff has been given all of the information in the possession of the defendant and that she was given this information when she first requested access to it. This includes information which was initially held in the memory of the defendant but which she has, at the request of the plaintiff, subsequently committed to writing.

Rule 8

Verification of accuracy of family history

In a referral letter to the Auckland Hospital Pain Clinic dated 21 April 1993 the defendant referred to the information given by the plaintiff's cousin about a family history of psychiatric illness, together with information indicating that the plaintiff did not accept that there was a family history of psychiatric illness. This letter was included in the file which was copied to the psychiatrist. The plaintiff alleges that both uses of this information constitute breaches of Rule 8.

No evidence was put to us to suggest that either statement was inaccurate: i.e. that the cousin did not provide the information referred to, or that if he did the information provided was different; the plaintiff did not dispute that the statement that she did not accept there was a family history of psychiatric illness was accurate. It is clear, however, that the plaintiff disagrees with the cousin about the extent of the family history of psychiatric illness. That, however, is not the point here. It might have been had the defendant included the information from the cousin without indicating that it was from him, but she did not.



The major difficulty with this allegation as it applies to the referral to the Pain Clinic is that the use to which this information was put occurred prior to 1 July 1993 and 30 July 1994 - the dates of the commencement of the Act and the Code.

The difficulty with the allegation as it applies to the copy for the psychiatrist lies with the purpose for which the letter was copied. It was part of the medical file requested by the psychiatrist. As such it could only be given to the psychiatrist in exactly the same form as it was given to the Pain Clinic. Even if there were inaccuracies in that document which were discovered later, the document itself could not be altered because any alteration to the original document would mislead the later reader as to what information was provided in the original. Any inaccuracy would have to be recorded on a separate document. In this case that was unnecessary because there is no evidence of inaccuracy in the information provided to the Pain Clinic.

For these reasons we are unable to accept that the defendant breached Rule 8 of the Health Information Privacy Code in respect of the letter of referral to the Pain Clinic.

Accuracy of information sent to Accident Compensation Corporation

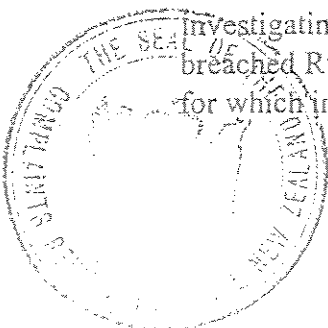
The defendant sent a handwritten letter to ACC in response to a request for information. It was received by ACC on 8 August 1997. The plaintiff's complaint about this letter is that it contains no diagnosis and is therefore inaccurate and in breach of Rule 8. We do not agree. There is no evidence that any of the information contained in the letter is inaccurate, out of date, incomplete, irrelevant or misleading. The fact that it did not contain what the plaintiff now says she wanted it to contain does not render it in breach of Rule 8.

Accuracy of information sent to Medical Council

The defendant was asked for some information by the Medical Council following a complaint lodged by the plaintiff about the psychiatrist. She sent a handwritten letter to the Convenor of the relevant Complaints Assessment Committee dated 15 September 1997. In it she referred to some medication prescribed for the plaintiff. The plaintiff alleges that the list is inaccurate. Cross examination revealed that the list was not inaccurate. This allegation of breach therefore fails.

The letter also contained the following sentence which the plaintiff alleges is irrelevant to the purpose for which information was sought: "*My clinical impression of [the plaintiff] was to spend 1-2 years trying to find a physical organic cause for her various presentations and it wasn't until she saw [the psychiatrist] that a psychiatric diagnosis of paranoid psychosis was made.*"

We do not accept that the provision of this information to a Committee charged with investigating a complaint about the psychiatrist and his management of the plaintiff breached Rule 8. It was accurate, up to date, complete, highly relevant to the purpose for which information was sought from the defendant, and it was not misleading.



Accuracy of information sent to Complaints Assessment Committee

Following a complaint lodged by the plaintiff about the defendant to the Medical Council the defendant was asked to respond to a series of questions in March 1998. She was asked if she had ever withheld any information from the plaintiff and she replied as follows: *"I have NEVER withheld any information from [the plaintiff] re diagnosis, treatment and prescribing drugs. I have never made her case freely available to others but have communicated with specialists."* The plaintiff disagrees with this statement. As we noted above this of itself does not render the information in breach of Rule 8. We accept that this information was accurate, up to date, complete, relevant and not misleading.

In the same letter the defendant denied prescribing prozac for the plaintiff. She said the psychiatrist had prescribed it. In cross examination it became clear that the original prescription was made by the psychiatrist and that the defendant had facilitated repeats of the prescription. We accept, therefore, that the statement that she had not prescribed prozac for the plaintiff was accurate.

For these reasons we do not accept that the letter to the Complaints Assessment Committee breached Rule 8 of the Health Information Privacy Code 1994.

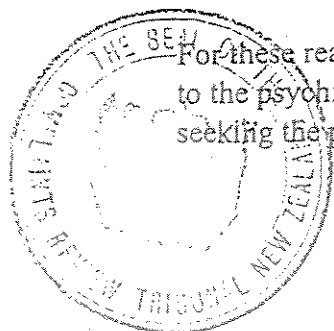
Rule 11

Disclosure of medical file to psychiatrist

The plaintiff alleges that the defendant disclosed her complete medical file to the psychiatrist without her knowledge or consent and that this affected all subsequent medical consultations, treatment and outcomes. The defendant denied disclosing the complete medical file but accepted that she had not obtained the plaintiff's specific consent.

Rule 11 proscribes disclosure of health information to other than the individual concerned without their consent except (inter alia) where the disclosure is directly related to one of the purposes in connection with which the information was obtained. According to the commentary accompanying Rule 11 this includes instances where the information is required for the further treatment of the individual. That is the position in respect of this disclosure. The psychiatrist was clearly unable to carry out any effective treatment of the plaintiff without some information about her medical history. The plaintiff provided him with the name of her G.P. There must have been the clear implication that by asking for this information the psychiatrist would access her medical file, or those parts of it which were relevant to his treatment of her.

For these reasons we do not accept that the defendant breached Rule 11 by responding to the psychiatrist's request for the relevant parts of the plaintiff's medical file without seeking the plaintiff's consent.



Disclosure of psychiatrist's diagnosis to Pain Clinic

In a referral of the plaintiff to the Pain Clinic dated 3 November 1995 the defendant included the information that the plaintiff had been recently seen by the psychiatrist and that his working diagnosis was of depression and delusional paranoia. The plaintiff alleges that this constituted a breach of Rule 11 in that the defendant did not have the plaintiff's consent to include this information.

In our view the inclusion of this information was for the purpose of providing a full and accurate history which is a necessary prerequisite for a referral of this kind. Without it the specialists to whom the plaintiff was referred would have been considerably hampered in the performance of their duties. The referral itself was made with the consent of the plaintiff. As such the disclosure falls within the provisions of Rule 11(1)(c).

For these reasons we do not accept that Rule 11 was breached by the inclusion of the psychiatrist's diagnosis.

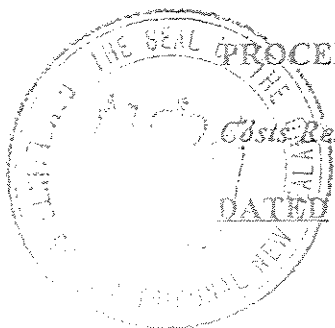
Disclosure of psychiatrist's diagnosis to neurologist

In 1995 the plaintiff sought a referral to a neurologist to whom the defendant had previously referred her. The defendant explained that a letter of referral was not necessary but she then wrote to the neurologist without the plaintiff's knowledge by letter dated 17 November 1995 in which she included the psychiatrist's diagnosis of depressive delusional and paranoid disorder. The plaintiff alleges that this letter constitutes a breach of Rule 11.

It is clear from the letter that it was written at the urging of the psychiatrist. The diagnosis had been recently made and it was information that both the psychiatrist and the defendant believed was necessary for the neurologist to have when he next saw the plaintiff. As such it falls within the exception in Rule 11(2)(a) in that disclosure of the information was directly related to one of the purposes in connection with which the information was obtained. Disclosure was required for the further treatment of the plaintiff. For this reason we are satisfied that no breach of Rule 11 occurred when the defendant wrote that letter to the neurologist.

Disclosure to cardiologist in April 1993

By letter dated 29 April 1993 the defendant disclosed some information about the plaintiff to a cardiologist to whom the plaintiff was referred. This occurred before the commencement of the Privacy Act and the Health Information Privacy Code and for that reason we have no jurisdiction to deal with this allegation.



PROCEEDING DISMISSED

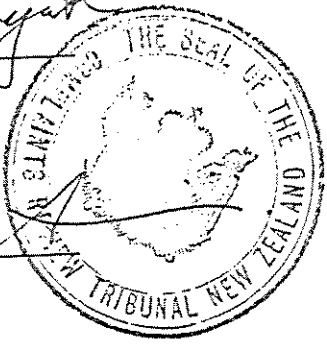
Costs Reserved

DATED at Wellington this 26th day of April,

1999

S C Bathgate
S C Bathgate
Chairperson

W A Abbiss
W A Abbiss
Member



G P Searancke
G P Searancke
Member