

Decision No 15 /2001
Reference No. CRT 11/01

IN THE MATTER of the Privacy Act 1993

BETWEEN L

Plaintiff

AND L

Defendant

BEFORE THE COMPLAINTS REVIEW TRIBUNAL

S C Bathgate - Chairperson
P McDonald - Member
L Whiu - Member

HEARING at AUCKLAND on the 28th day of June 2000

APPEARANCES

T McBride for Plaintiff
H Waalkens for Defendant
R Stevens and M Donovan for Privacy Commissioner

DECISION

- [1.] The plaintiff in this proceeding has alleged that the defendant committed a breach of Rule 11 Health Information Privacy Code 1994 by disclosing certain health information about the plaintiff to the plaintiff's husband without the plaintiff's consent. This matter has been the subject of an investigation by the 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

- [2.] The defendant is a specialist obstetrician and gynaecologist. The plaintiff was referred to the defendant in 1988 and the doctor/patient relationship lasted until late 1996. During that time a number of procedures and operations were required to be performed. The plaintiff estimated that she would have seen the defendant at least a hundred times. The defendant described the plaintiff as a difficult but interesting patient in a letter to the plaintiff's general practitioner in 1993. At that time the issue of whether a hysterectomy should be



performed was discussed between the parties and the plaintiff's husband. He was apparently opposed to the idea and talked the plaintiff out of proceeding with the operation shortly before it was due to occur. In September 1996 the plaintiff again decided to proceed with the operation. She did not wish her husband to be involved in the decision making at this time because she did not wish to be talked out of it again. She wrote him a letter about the issue on 14 September 1996. She requested a response from him in writing. She had not received any response from him when she saw the defendant at a consultation on 16 September. They discussed the operation and the plaintiff was booked in for surgery at a private hospital. On or about 23 September the plaintiff left a message with the defendant's nurse confirming that she wished to proceed with the hysterectomy, that her husband still wished to have another baby and that the defendant was not to discuss the matter with him.

[3.] The surgery was booked to proceed on 1 October 1996. The plaintiff completed the admission form for the hospital at the defendant's rooms and it was forwarded to the hospital. She completed next-of-kin details but omitted to complete that part of the form which requested the details of the person to be contacted after the operation. She says that this omission was deliberate because she did not want her husband contacted with details of the operation. She was admitted to the hospital at 10 a.m. Details of the person to be contacted were completed on the hospital admission forms and post surgery contact list. The plaintiff is adamant that this was not on her instruction. She is equally adamant that she discussed her wish that her husband not be contacted with the defendant at about 1 p.m. prior to the surgery. The defendant disputes this and is certain that the only requirement was that there was to be no discussion about the operation prior to it occurring.

[4.] The contact details for the plaintiff (her husband and home telephone number) were included in a contact list which is a list of patients having operations on a particular day. That list is taped to the wall next to the telephone in the operating theatre and enables surgeons to telephone those named as contact persons to advise on the condition of a patient once an operation has been completed. The defendant consulted that list and telephoned the plaintiff's husband to confirm that the operation had been completed. This was a message left on an answer machine. Some time later on the same day it became clear that the plaintiff required further emergency surgery as a result of internal uncontrolled bleeding. Immediately prior to the operation the defendant telephoned the husband to advise of the emergency and to inquire whether he wished to visit the plaintiff because she was very ill. He indicated that he was unable to do so and the defendant asserts that this information was transmitted back to the plaintiff immediately following this telephone call. According to the defendant the plaintiff was devastated by the refusal of her husband to come to her side at this critical time. The emergency procedure was completed and the husband was again contacted by the defendant and advised that blood transfusions had been given. There is dispute about whether the defendant also advised that the plaintiff's right ovary had been removed during the hysterectomy operation.

- [5.] The plaintiff regarded the three telephone calls made by the defendant to her husband as a breach of her express request that he not be contacted. The defendant maintains that no such express requirement was made. The plaintiff laid a complaint with the Privacy Commissioner in February 1997.

THE LAW

- [6.] The relevant parts of Rule 11 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 authorised by:
 - (i) the individual concerned...
 - (e) that the information is information in general terms concerning the presence, location and condition and progress of the patient in a hospital, on the day on which the information is disclosed, and the disclosure is not contrary to the express request of the individual or his or her representative;...

THE HEARING

- [7.] The plaintiff and a friend in whom she confided after she became aware the disclosures had been made gave evidence for the plaintiff. The defendant gave evidence. Two briefs of evidence of staff at the private hospital responsible for the admission of patients were received and read by us. This evidence was called by the defendant. We indicated to the parties that we did not need to hear further from these witnesses because we were not satisfied that there were facts sufficient to form the basis of the plaintiff's case that she had expressly requested that her husband not be contacted at all by the defendant.

FINDINGS

- [8.] We are required to determine whether there was an express request or direction to the defendant not to disclose any health information at all to the plaintiff's husband. We also have to be satisfied that the information that the plaintiff alleged was disclosed was in fact disclosed. As we indicated to the parties at the hearing those are findings of fact which must be established in order to found a breach of Rule 11. After we are satisfied that a breach of an information privacy principle has occurred we can consider whether an interference with the plaintiff's privacy occurred and whether there should be any remedies awarded.

Breach of Rule 11

After hearing the evidence of the plaintiff and the defendant we were unable to determine the precise nature of the information disclosed (apart from the



current condition and progress of the plaintiff following the two procedures) because the defendant could not remember in precise terms what she told the husband and the husband was not called to give evidence about the information he received.

[10.] We were also not satisfied, on the balance of probabilities, that there was an express request or direction to the defendant not to disclose any health information at all to the husband for the reasons which follow.

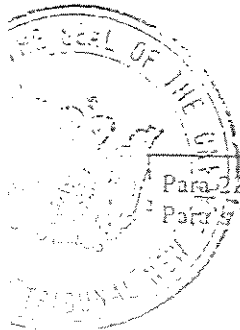
[11.] We think the critical conversation between the parties on this issue is that which occurred at about 1 p.m. 1 October 1996 prior to the first operation. The plaintiff's recollection of this meeting is that she told the defendant that her husband "*is having nothing to do with this, he is not to be involved*"¹. The defendant's recollection is that she received no instruction that she was not to contact the husband as was her usual practice following the operation:

*"She did not give me any instruction that I was not to contact her husband, as usual, following her surgery. She has had several previous operations under my care. She is aware of my practice of always phoning her husband if he is nominated as a contact person and providing him with details of her surgery. [The plaintiff] has never hesitated to give me specific instructions of an unusual nature if she wishes me to deviate from my usual practice. She is emphatic and definite about her wishes and desires at every occasion. It is my common practise to carefully document anything unusual that she has instructed me to do or not to do as I have always been particularly careful in her case. [She] was my only surgical patient that day. If she had instructed me not to phone her husband there would have been no possibility of me having forgotten it. Nor would I overlook or disregard it. The interval between me seeing her for a last preoperative talk and my first call to [the husband] was in the order of 2 hours. I have no reason to think that she wished me to depart from my usual practice of informing her husband of her condition and progress."*²

[12.] The defendant regards the documentation completed by the hospital staff as reinforcing this recollection of her contact with the plaintiff on that day. Had the plaintiff told the staff that there was to be no contact with the husband that request would have been recorded and documented as 'no contact' and the contact list which contains the names and telephone numbers of the contact persons for those having surgery would not have contained any reference to the husband and his telephone number. There is furthermore no reference to this request or requirement in any of the hospital records concerning the plaintiff or this particular day despite the plaintiff's assertions that she informed two different nurses of this request on 1 October 1996.

[13.] After the defendant telephoned the husband to advise him that an urgent clinical problem had developed and he indicated that he could not immediately come to the hospital to see the plaintiff the defendant relayed this message back to the plaintiff:

I returned straight away to [the plaintiff's] room to tell her that I had rung her husband and I conveyed the news to her that he was not able to come to the hospital in view of his child care responsibilities. I remember her reaction to me telling her that and she was quite sad and upset that he was not coming in to see her. She was coherent and able to receive and impart



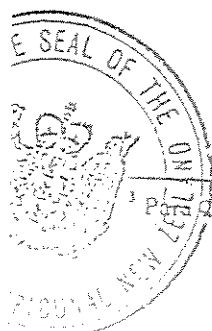
*information and she did not at any time then or during her period of her stay in hospital, query why I had telephoned her husband. Nor did she say that I was not to do so again."*³

[14.] We had the opportunity to see and hear both the plaintiff and the defendant. We had no reason to disbelieve the defendant's evidence. It was evidence consistent with the records kept by others. We have no doubt that the plaintiff genuinely believes that she issued an instruction that her husband was not to be contacted. We do not accept, however, that this instruction was communicated in clear and unequivocal terms to the defendant. We think the prohibition as understood by the defendant and observed (because there was no contact between the husband and the defendant before the operation) was on discussing whether the operation should proceed. Whether that prohibition has been converted to a much wider prohibition in the plaintiff's mind subsequently or whether there was a simple miscommunication between the parties is a moot point. The plaintiff regards the refusal by the husband to visit her after being asked to do so by the defendant as spelling the end of her marriage (the parties separated in May 2000) and believes that had the defendant not telephoned him he would not have been put in the position of refusing to visit her. It is possible that the devastation that resulted from that refusal has affected the plaintiff's recall of the instructions she issued prior to the operation. It is also possible that she genuinely believed that she had properly communicated her wishes.

[15.] The other reason why we are reluctant to accept the existence of this orally expressed instruction is highlighted by the possibility that there was a miscommunication between the parties. Oral communication between individuals subject to recall some time later is a shaky basis for establishing the precise nature of that which was communicated. There is enough known about the psychology of communication and memory to establish that what one person thought they were transmitting is not necessarily what the other participant received. There are all kinds of explanations for this with which we need not now concern ourselves, but suffice it to say that we are wary of accepting, as the basis of an allegation of a breach of the Privacy Act, something that was said and recorded in no other way than by the speaker's and recipient's memories. Allegations of breaches of the Privacy Act are serious matters. If they are the subject of proceedings such as these they involve the expenditure of a great deal of time, money and stress for the parties. They are not to be undertaken lightly. If there is dispute about the information (or directions/instructions) at issue and it is not in some recorded form we will continue to experience difficulty accepting allegations of what was said without there being some other corroboration of those statements.

[16.] We have made this point before:

We take the view that this definition [of what constitutes personal information for the purposes of the Privacy Act] carries within it the specific implication that the information the subject of any issue raised by the Act is itself known, accepted or understood in very precise terms. This will generally not pose a problem where the information at issue is recorded in some way. There is, however a difficulty when the precise nature of the personal information is not known, accepted, or understood in precise terms. That is a difficulty which is likely to



arise in respect of personal information which is not recorded but which is held in the memory of an individual.⁴

- [17.] In this case we have accepted that the hospital records tend to corroborate the defendant's evidence about the nature of the instruction from the plaintiff.
- [18.] For these reasons we regard the telephone calls to the plaintiff's husband as coming within the exceptions to Rule 11 – either because they were authorised by the plaintiff via the provision of contact details to the defendant by the hospital staff (Rule 11(1)(b)(i)) or because there was no express prohibition on disclosing general information about the plaintiff's condition and progress and that was the kind of information disclosed during the telephone calls. (Rule 11(1)(e))

Interference with Privacy of Plaintiff

- [19.] In the event that we are wrong about the existence of a breach of Rule 11 we have considered whether the damage that the plaintiff claims resulted from these telephone calls could result in a finding that an interference with her privacy occurred. The major difficulty we would have with making that finding lies with the evidence of the plaintiff. She was clear in her evidence that her decision to leave her marriage in May 2000 (some three and a half years afterwards) in large part resulted from the damage done by the telephone calls of 1 October 1996. She said that she left the marriage because her husband still wished to pursue the idea of having more children and because he failed to visit her on the night of 1 October after having been appraised of her condition. She maintains that if he hadn't received the advice about her condition he would not have needed to make the choice about whether to visit her.
- [20.] We do not accept that this is damage that can be sheeted home to the defendant. She was not responsible for the husband's decision not to visit. The fact that she gave him the opportunity to make the choice whether to visit does not mean that she should be regarded as in any way responsible for the choice he made.
- [21.] For this reason we do not accept that even if a breach of Rule 11 could be established we could find that there had been an interference with the privacy of the plaintiff.

PROCEEDING DISMISSED AND COSTS RESERVED

DATED at Wellington this 26th day of JULY, 2001



S C Bathgate
Chairperson

* P McDonald *
P McDonald
Member

* L Whiu *
L Whiu
Member