



College of Physicians and Surgeons of British Columbia

Professional Standards and Guidelines

Requests from Defence Lawyers

Preamble

This document is a standard of the Board of the College of Physicians and Surgeons of British Columbia.

College's Position

In all matters involving the patient-physician relationship, the maintenance of patient confidentiality and the importance of seeking patient consent for release or disclosure of information are of paramount importance. Physicians are frequently asked by defence lawyers to provide or discuss information regarding patients who may be involved in a personal injury lawsuit. In such situations, physicians have an ethical and professional obligation to discuss such requests with the patient and/or the patient's lawyer, and to give due consideration to the patient's wishes.

There is legal case authority in British Columbia that the commencement of a personal injury lawsuit constitutes an implied waiver of physician patient confidentiality for medical matters relevant to the lawsuit. However, it is important for physicians to understand that this case authority does not obligate them to discuss their patients' medical information with defence counsel. The College's position is that physicians should review with their patient and/or their patient's lawyer all such requests for information or interviews and, consistent with their ethical responsibilities, give due consideration to the patient's wishes.

Background Information

On December 21, 1995 the Supreme Court of British Columbia, in the case of *Swirski v. Hachey*, addressed the following issues, in the context of civil litigation involving a person's health:

1. Whether defence counsel should be able to interview a plaintiff's physician without this constituting a breach of confidentiality.
2. If such interviews are permitted, what procedure should be followed.

The court decided 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. This does not mean that by bringing a personal injury action, an individual brings into issue every possible medical treatment he or she has experienced. Some medical treatments may be totally irrelevant to the issues in the lawsuit and may be

embarrassing or prejudicial to the plaintiff. The issue of relevance is one for the lawyers in the action to determine and one which should be resolved prior to the physician being involved in any interviews with defence counsel.

The court has stated that in British Columbia, the commencement of an action for damages for personal injuries is a waiver of patient-physician confidentiality for medical matters relevant to and bearing upon matters raised in the action. Such a waiver is, as a matter of law, an implied authorization to the plaintiff's physician for the release of relevant information for the purposes of the litigation.

This means that, in certain circumstances, defence counsel can interview plaintiffs' physicians without this constituting a breach of confidentiality. The court set out the procedure to be followed prior to any such interviews:

1. As is the current common practice, with appropriate patient authorization or court order, medical records will be produced to and reviewed by the plaintiff's lawyers and all relevant documents will, subject to any claim for privilege, be produced to the defendant's lawyer.
2. Defence lawyers will have an opportunity to review the produced records and argue if they feel additional records are relevant or producible.
3. Once the relevant records have been produced and agreed upon, defence counsel will be able to contact the plaintiff's physicians and discuss with them the relevant information, provided the following process is followed:
 - a. Defence counsel must give notice to plaintiff's counsel of their intention to seek informal discussions with the physician;
 - b. The onus is then on plaintiff's counsel to either obtain defence counsel's agreement regarding the conditions under which an interview is to be conducted or to apply to court for restrictions to be placed upon the defendant counsel's right to interview the physician. For example, plaintiff's counsel may seek an agreement or court order that they be allowed to be present at the interview so that they can object to questions regarding irrelevant medical matters. Similarly, plaintiff's counsel and defence counsel may agree that both will be present at the interview.

If the above procedure is followed and no restrictions are imposed by the court on the defendant's right to interview the physician, then defence counsel may seek and proceed to meet with the physician and discuss medical matters relevant to the lawsuit without there being a breach of patient-physician confidentiality. This is because the patient, by starting the lawsuit, has placed his or her health in issue and impliedly authorized the release of relevant information. Accordingly, there is a waiver of patient confidentiality for medical matters relevant to the issues in the lawsuit.

It is important to note that this court decision does not compel physicians to take part in such meetings. Like any other witness, they may or may not do so as they wish and they may impose such conditions on the interviews as they wish.

If physicians do meet with defence counsel, then they must be aware of any medical matters which are still regarded as confidential because of privilege or relevance. For example, if deletions have been made to the records, then care must be taken not to discuss those deleted

areas. This is important because the waiver of confidentiality pertains only to that information relevant to the lawsuit.

If physicians discuss with defence counsel irrelevant matters or matters which are privileged, that would still constitute a breach of confidentiality.

This court decision states that treating physicians are like any other witnesses and can be interviewed by defence counsel without the consent of patients or, in the absence of a court order, provided the procedures set out above have been followed. If a physician participates in such an interview and discusses only matters relevant to the action or which are not privileged, it will not be a breach of patient-physician confidentiality. However, the physician still has the right to decide not to speak to the defence lawyer.

End Notes

¹Swirski v. Hachey, Supreme Court of British Columbia, December 21, 1995

Council Approved February 1997
Updated October 2009