THE PROCEEDINGS OF THE MEDICO-LEGAL SOCIETY OF VICTORIA

1960 – 1963

THE PROCEEDINGS OF THE MEDICO-LEGAL SOCIETY OF VICTORIA

During the Years
1960, 1961, 1962 and 1963

Edited by

JOHN T. HUESTON

and

S. E. K. HULME

Vol. IX

BROWN, PRIOR, ANDERSON Pty. Ltd.
MELBOURNE

For circulation among the members of the Medico-Legal Society of Victoria.

Impression limited to 500 copies

Wholly set up and printed in Australia by Brown, Prior, Anderson Pty. Ltd., 430 Little Bourke St., Melbourne, C.1, 1965

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FOREWORD

This ninth volume of the Proceedings of the Medico-Legal Society of Victoria contains most of the papers which were read during the years 1960, 1961, 1962 and one from 1963. Unfortunately some papers have had to be omitted from publication from lack of adequate manuscripts at the time of publication. We regret being unable to include a paper delivered by Dr. Rupert Cross of Oxford during his visit in 1962 but we are still hoping that it may be available for inclusion in the next volume of the Proceedings.

Some discussions have been included in summary, but it has not been possible to append the discussion after every paper in this volume.

The Editors acknowledge responsibility for these summaries.

The death occurred of Dr. Gerald Raleigh Weigall while in office as President of the Society in 1962.

S. E. K. Hulme
John T. Hueston
Honorary Editors.

Melbourne, December, 1964.

PROFESSIONAL SECRECY AS AN ENFORCEABLE OBLIGATION

By K. A. Aickin, Q.C.

Delivered at a Meeting of the Medico-Legal Society held on Saturday, 25th June, 1960, at the British Medical Association Hall, Albert Street, East Melbourne.

SOME years ago my learned friend, Mr. Smithers, read to this Society a paper on the subject of "Professional Privilege, or Can't you keep a Secret?". Tonight I pose the question—"What if you don't?"

At its Annual Meeting held in Edinburgh in July 1959, the British Medical Association reversed a policy which it had previously held very firmly. The following resolution proposed by the Chairman of the Central Ethical Committee was approved—

> "It is a practitioner's obligation to observe strictly the rule of professional secrecy by refraining from disclosing voluntarily without the consent of the patient (save with statutory sanction) to any third party, information which he had learned in his professional relationship with the patient. The complications of modern life sometimes create difficulties for the Doctor in the application of this principle and on certain occasions it may be necessary to acquiesce in some modification. Always, however, the overriding consideration must be the adoption of a line of conduct that will benefit the patient or protect his interests".

A suggestion, with which one may feel some sympathy, that the Council should reconsider this statement on the ground that it is not as clear as it should be, was defeated. An amendment designed to delete the qualification that—

> "on certain occasions it may be necessary to acquiesce in some modification"

was defeated by the narrow majority of 166 to 144. Unfortunately the dispute in the Printing Trade in England which was current at the time of this meeting has deprived us of a full record of the discussion, but it is apparent both from the very brief report in the *British Medical Journal* and from newspaper reports that one

matter which was discussed was whether a Medical Practitioner, on the basis of information obtained in his professional capacity, should take steps to remove a dangerous driver from the road, and a motion that this matter be reviewed by the Council of the B.M.A. was adopted.

This resolution may perhaps be regarded as unsatisfactory for it does no more than state that in certain quite undefined circumstances a Medical Practitioner may as a matter of professional ethics reveal professional secrets. In a sense it may be said that this principle does no more than take one back to the terms of the Hippocratic Oath, which in this respect provided that—

> "Whatsoever in the course of practice I see or hear (or outside my practice in social intercourse) that ought not to be published abroad, I will not divulge but will consider such things as to be holy secrets".

Like so many statements of high moral principle this suffers from the defect that it does not tell you what to do. I am not tonight, however, concerned with the content of the moral or ethical duty, but with the legal consequences of divulging information obtained by a professional man acting in his professional capacity, and with divulging it voluntarily in the sense of otherwise than in Court when on oath in the witness box. Thus I am concerned both with the statement which is volunteered and with that which is made in answer to a query put by some third person. We are, in this Society, concerned primarily with the position of legal and medical practitioners, but some analogies may be found in other professional relationships, and I shall make some brief reference to these; but first, what is the nature of the professional relationship?

In this country the normal relationship between medical practitioner and patient and between legal practitioner and client is still that of contract. The question is whether there is, as part of that contract, an obligation on the practitioner to maintain secrecy as to information which he obtains in the course of acting professionally for the person who consults him. In addition there is the very common instance in which, e.g., a wife is the patient though the account is rendered to and paid by the husband, where the doctor may originally have been consulted by the wife or called in by the husband. This may raise special problems. There are, however, many occasions,

and an increasing number of such occasions, upon which a professional man acts in his professional capacity in relation to persons with whom he is not in any contractual relationship and to whom he cannot be said to owe any contractual duty in the ordinary sense. This is particularly so with regard to the medical profession, but instances affecting the legal profession are, up to the present, rare. Some illustrations with regard to medical practitioners will, I think, be sufficient to indicate the kind of relationships which I have in mind.

There is the medical practitioner who, acting on behalf of a Life Assurance Company, makes a medical examination of a prospective applicant for a policy; or one who, acting for employers, makes a medical examination of employees or applicants for employment.

There are the practitioners who, for the purposes of the Repatriation Acts, examine those entitled to medical services under the Act or those claiming to be entitled to pensions or the like.

There are, in addition, many circumstances arising under the Workers Compensation Acts in which medical practitioners examine persons who are not their patients in the ordinary sense, and in other forms of litigation it is not uncommon for medical practitioners engaged by opposing sides to examine the plaintiff. In these instances the examination is not always undertaken with a view to treatment, and the relationship may not be quite the same in such cases. An outstanding example of course of the non-contractual relationship is the position of an honorary at one of the public hospitals, who there examines and treats large numbers of patients.

But let us look first at the orthodox relationship of the practitioner and patient or client and consider what is the legal duty of the practitioner with regard to information obtained in his professional capacity. It is curious that there are to be found very few reported cases of litigation on this matter. This may be a tribute to the discretion of professional men or a mark of their timorousness as defendants, or it may be due to the difficulty of proving damage; but a consequence is that the law is not very fully developed. It may be useful to begin by excluding from the main discussion the making of defamatory statements. A statement by a medical or a legal practitioner about a patient or client is subject to the ordinary law with regard to defamation. In such

cases there may be circumstances in which a medical practitioner, or a legal practitioner, may be entitled to qualified privilege so as not to be liable if the statement is made without malice in circumstances in which there was a legal or moral duty to make the statement to some person who had a corresponding interest or duty to receive such statement. To this point I shall return at a later stage, but let us suppose that we are dealing with true statements insofar as they relate to facts, and to genuinely held opinions based upon true facts and adequate information.

The reported cases are so few that it is both possible and worthwhile to consider briefly the details of each of them. So far as I have been able to discover there are only five reported decisions of this matter dealing with the medical and legal professions and that covers the reports for Australia, New Zealand, the United Kingdom and the United States and Canada. Of the five such cases, four concern medical practitioners two in Scotland, one in New Zealand and one in the United States) and one concerns a Solicitor (in England). The Scottish cases, in which the identity of the parties is discreetly masked by reporting them as *A. B. v. C. D.*, suffer from the defect, for present purposes, that they dealt with preliminary points, being in effect whether the allegations made were capable of supporting a cause of action and were not dealing with the actual trial of the action in which the facts were ascertained. The first of these was in 1851 (*A.B. v. D.C.*, 14 Dunlop (Court of Sessions) 177.) There the Defendant, at the request of the Plaintiff, examined his child. He formed the view that the child had been conceived before marriage and this view he recorded in a certificate, one copy of which he delivered to the Plaintiff and the other of which he left at the house of the Minister of the local church, of which the Plaintiff had sought to resign as an elder, but the Kirk Session, to which the Minister had referred the Certificate, refused to accept the resignation. They entered the report in their Minutes and declared the Plaintiff no longer an elder nor a member of session. The Defendant said that he had received a note from the Plaintiff's agent in the following terms:—

> "On the part of A.B. I have to request that you will, with Dr. A. examine his infant child this evening as explained by Dr. A."

and he alleged that his belief was that the object of the examination was to enable him to explain to the Minister what the facts

might be. The actual decision was merely to allow certain issues to go for trial. The following statement, however, from the judgment of *Lord Fullerton,* is of interest—

> "The question here is not whether the communications to a medical adviser are privileged—that cannot be maintained, but whether the relation between such an adviser and the person who consults him is or is not one which may imply an obligation of secrecy, forming a proper ground of action if it be violated. It appears to me that it is, and that the present case as stated on the record is one to which the principle may apply. The obligation may not be absolute, it may and must yield to the demands of Justice if disclosure is demanded in a competent Court. It may be modified perhaps in the case alluded to in the argument of the disclosure being conducive to the ends of science, though even there concealment of individuals is usual, but that a medical man consulted in a matter of delicacy of which the disclosure may be most injurious to the feelings and possibly the pecuniary interests of the party consulting, can gratuitously and unnecessarily make it the subject of public communication without incurring any imputation beyond what is called a breach of honour and without the liability to a claim of a redress in a Court of law is a proposition to which when thus broadly laid down I think the Court will hardly give their countenance".

What the ultimate result of the case was, we do not know.

The second Scottish case was in 1904 (*A. B. v. C. D.* 1905 7 F (Court of Session) 72) and in this instance the facts seem somewhat stronger, though curiously enough the law is stated in a much less positive fashion. Here again the point actually dealt with was a preliminary one. The Plaintiff there was a married woman who in 1901 had, because of her husband's treatment of her, left him and gone to live with her father. With a view to an action of separation and the obtaining of maintenance her Solicitors employed the Defendant as her confidential medical adviser in the proposed litigation, and at that time, together with her regular medical attendant, he examined the Plaintiff. The Defendant, however, expressed views to the Plaintiff's Solicitors which made it clear that his opinion was adverse to the Plaintiff with reference to the proposed action. The action was in fact commenced in 1902 and came on for trial in 1903, and at that

time it was proposed by the husband's Solicitors that there should be an examination of the Plaintiff by the husband's medical witnesses, and that that examination should be attended by the Defendant as a prospective witness for the husband. The Plaintiff's Solicitors reminded the Defendant that he had already been consulted by the Plaintiff in the matter of this action and that he had attended the Plaintiff professionally. Notwithstanding this, the Defendant attended, along with the husband's other medical witnesses and he made an examination of the Plaintiff. The Defendant thereafter revealed to the husband and his Solicitors information which he said he had ascertained at the time of his prior examination of the Plaintiff, and showed to them the notes which he had then made. The Defendant then gave evidence on behalf of the husband in the proceedings and included in that evidence statements as to what he had learnt on the occasion of his first examination of the Plaintiff, and produced the notes which were put in evidence. I should perhaps remind you that in Scotland, as in England, there is no statute corresponding to the Victorian legislation under which communications to medical attendants are privileged from disclosure in Court. It was pleaded on behalf of the Plaintiff that the Defendant had wrongfully and in breach of his duty as the Plaintiff's professional adviser or otherwise of the implied terms of his employment with her, disclosed to third parties confidential matters by reason of which the Plaintiff had suffered loss and damage. There was also an allegation of slander, and the questions which the Court has to consider were whether there had been this breach of confidential relationship, and whether there had been defamation. The Court refused to allow the matter to proceed to trial on the issue whether had been a breach of confidential relationship or breach of contract in making the statements to the husband's Solicitors and to the husband, but the reasons given for this decision are of a special and rather unsatisfactory nature. In substance they were that the allegations made did not give particulars of the statements alleged to have been made by the Defendant to the husband's Solicitors and without such particulars it ought not to be permitted to go to trial and that if such particulars were given they would amount to the same pariculars as supported the allegation of defamation, and it would be objectionable to have two causes of action based upon the same statement. It was said—

> "It is evident that information which a medical man obtains as to a patient in his professional capacity is confidential and ought not to be disclosed to others. At the same time it must depend on circumstances whether any disclosure made to others is a wrong for which compensation may be sought by an action of damages in a Court of Law, and it would be necessary that a pursuer proposing to take an issue should be most specific in putting in issue the matters said to have been disclosed of which it is alleged that the disclosure was an actionable wrong".

This statement may refer to the necessity of proving damage but it is not really very helpful, but *Lord Young* makes the following somewhat startling observation:—

> "I cannot think it doubtful that the Defendant acted not only legally but with perfect propriety in giving the husband information of what had passed between him and his wife".

In the United States the one reported case is both more specific and in a sense more satisfactory. The case arose in 1920 in the Supreme Court of Nebraska (*Simonson v. Swenson* 9 A.L.R. 1250). The Plaintiff was working in the town of Oakland, Nebraska, a place to which he was a stranger, and he was staying in a small hotel. He consulted the Defendant, a medical practitioner practising in the town. The Defendant informed him that he believed that he was suffering from venereal disease but that it was impossible to be positive about the matter without making certain tests for which he had no equipment. The Defendant, however, was the physician for the proprietor of the hotel and in fact acted as hotel Doctor when one was needed. He told the Plaintiff that there would be danger of his communicating the disease to others in the hotel if he remained there and requested him to leave the next day, which the Plaintiff promised to do. The following day the Defendant made a professional call on the proprietor of the hotel and then learned that the Plaintiff had not moved out. He thereupon warned the proprietor that he thought the Plaintiff was afflicted with a "contagious disease" and warned her to be careful and to disinfect the bedding. The proprietor acted on this warning and put all the Plaintiff's belongings in the hallway and fumigated his room, so that he was forced to leave. At the trial the evidence did not show whether or not the diagnosis was correct, but there

was evidence that the Defendant's belief was a reasonable one in the circumstances. The law of Nebraska contains a provision similar to Sec. 28 of our *Evidence Act* and it also contains a statutory provision that a licence to practice medicine may be revoked for "unprofessional or dishonourable conduct", which is defined as including the "betrayal of a professional secret to the detriment of a patient". The Court regarded this as imposing on the practitioner a positive duty to the patient, and the Court said—

> "It is often necessary for the patient to give information about himself which would be most embarrassing or harmful to him if given general circulation. This information the physician is bound, not only upon his own professional honour and the ethics of his high profession, to keep secret, but by reason of the affirmative mandate of the statute itself. A wrongful breach of such confidence and the betrayal of such trust would give rise to a civil action for the damages naturally flowing from such wrong. Is such a rule of secrecy then subject to any qualifications or exceptions? A Doctor's duty does not necessarily end with the patient, for on the other hand the malady of his patient may be such that a duty may be owing to the public, and in some cases to other particular individuals. Recognition of that fact is given by the statutes in this State which delegate powers to the State Board of Health and to municipalities generally to acquire reports of, and provide rules of quarantine for diseases which are contagious and dangerous".

After observing that no liability could arise out of compliance with statutory duties of that kind, the Court poses the question—

> "Can the same privilege be extended to him in any instance in the absence of an express legal enactment imposing upon him the strict duty to report?"

The Court then said—

> "No patient can expect that if his malady is found to be of a dangerously contagious nature he can still require it to be kept secret from those to whom, if there were no disclosure, such diseases would be transmitted. The information given to a physician by his patient, though confidential, must it seems to us be given and received subject to the qualification, that if the patient's disease is found to be of a

> dangerous and so highly contagious or infectious a nature that it will necessarily be transmitted to others unless the danger of contagion is disclosed to them, then the physician should in that event, if no other means of protection is possible, be privileged to make so much of a disclosure to such persons as is necessary to prevent the spread of the disease" . . . . . .
>
> " . . . . . In making such disclosure a physician must also be governed by the rules as to qualifiedly privileged communication in slander and libel cases. He must prove that a disclosure was necessary to prevent the spread of disease . . . . . that the communication was to one who it was reasonable to suppose might otherwise be exposed, and that he himself acted in entire good faith with reasonable grounds for his diagnosis and without malice".

It was held that the Defendant satisfied these various requirements and was therefore entitled to succeed. The exception there expressed is of course in very limited terms, but it provides a suggestion that there should be implied into the relationship an exception involving something not unlike qualified privilege in defamation. This is a valuable suggestion and may provide a useful analogy from which to draw the content of such exceptions as do exist.

The one reported case as to a Solicitor (*Taylor v. Blacklow* 1836 3 Bing N.C. 235) does not contain much guidance as to the extent of the exceptions. The Defendant Solicitor acted both for the Plaintiff and for his brother. The Plaintiff asked the Defendant to arrange a loan for him on the security of certain land, and for this purpose he delivered the Title Deeds to the Defendant. The Defendant contemplated that the Plaintiff's brother might lend the money, but on examining the Title Deeds discovered some defects in the Plaintiff's Title, and these defects he then disclosed to the Plaintiff's brother who, on the strength of that information, commenced proceedings against the Plaintiff claiming the land, and the Plaintiff incurred considerable expense in defending his Title. Feeling not unnaturally somewhat incensed against the Solicitor whom he had consulted, he commenced an action for damages and succeeded against the Defendant. It was claimed on behalf of the Defendant that the information which he had communicated would not have been privileged in Court, in the sense that the Solicitor could not have refused to

disclose it in evidence, but the Court held that that was irrelevant. It said—

> "It was clearly the Defendant's duty not to disclose any defect in his client's Title . . . . . there has been therefore a breach of duty on the part of the Defendant attended with temporal injury on the part of the Plaintiff. There is no reason for saying that an action does not lie for such an injury incurred by a breach of duty".

This result is scarcely surprising, and it indicates that the Courts regard Solicitors as being under an enforceable obligation to maintain secrecy as to the information which their clients give them; but it contains no guidance as to whether there are any and if so what qualifications to that duty.

From what kind of professional relationship can we hope to find useful analogies, providing guidance as to the content of the duty resting on medical and legal practitioners? There is of course another profession of learning, which involves confidential relationships and that is the Clergy or Priesthood, but not much guidance can be obtained from there. It is true that Sec. 28 of the *Evidence Act* of the State of Victoria deals not only with medical practitioners but also with the Clergy, and provides that no clergyman of any church or religious denomination shall, without the consent of the person making the confession, divulge in any suit or proceeding whether civil or criminal any confession made "to him in his professional character according to the usage of the church or religious denomination to which he belongs". The question whether any such privilege exists apart from statute has long been a matter of controversy, and no definite answer can be obtained from the authorities such as they are. It is asserted that prior to the Reformation the secrets of the confessional were the subject of privilege in Court, but legal historians differ as to this. However, the relationship between a priest or clergyman and a member of his faith differs substantially and perhaps fundamentally from that between a medical or legal practitioner and his patient or client, in that it cannot be said in any way to be based upon contract. The law of libel would no doubt apply with regard to defamatory statements, but it is hard to see how a civil action could be founded upon a breach by a priest of the formal confessional or of a confidential statement made otherwise than pursuant to ritual confession. It appears that under the Canon law a priest,

i.e. a Catholic priest, who reveals the secrets of the confessional would be liable to excommunication. There does not appear to be any corresponding rule of English ecclesiastical law, even in those branches of the Church of England which observe the confessional properly so called. Whether the prospect of any communication for the offender is as satisfactory to the person whose secrets are revealed as receiving an award in damages may be a matter of speculation, but at all events it does not appear ever to have been the subject of litigation in the Civil Courts.

No doubt accountants are the recipients of much confidential information, but the extent of their obligations does not appear to have been considered by the Court.

The relationship of Banker and customer has been treated by the law as being one of confidence, and the duties of Bankers have been fairly fully worked out by the Courts, and they provide a useful guide to the likely result of proceedings dealing with medical or legal practitioners, for it seems to me unlikely that the Courts would regard their own officers, i.e. the legal profession, as under less stringent duties than Bankers, and again I would myself think it unlikely that the Courts would regard Doctors as privileged to be less discreet than Bankers. In the leading case with regard to Bankers (*Tournier v. National Provincial & Union Bank of England* 1924 1 K.B. 461) the facts were that the Plaintiff was a customer of the Defendant Bank and his account was overdrawn in the princely sum of £9. 8. 6. The Bank had pressed him to pay off the overdraft and he made an arrangement to reduce it by £1 per week. To this arrangement he adhered for three weeks and then failed to make any further reduction. The manager of the relevant branch of the Bank ascertained, in fact from transactions in another account in his own Bank, that a cheque had been drawn in favour of the Plaintiff but had been endorsed over to someone else and not paid into his account. The manager ascertained that the person who had in fact collected the money on the payment of this cheque was a bookmaker. The manager then rang the Plaintiff's employer and had a conversation with two Directors of the company in which he asked for the Plaintiff's private address and told them both the fact that the Plaintiff was indebted to the Bank and said that "we have been able to trace cheques passing from this account to bookmakers, and we are afraid he is mixed up with bookmakers". As a result of this his employers, with whom he was engaged on three months pro-

bation, refused to renew his employment. The verdict in favour of the Bank was set aside because the only question which the trial Judge left to the jury was "was the communication with regard to the Plaintiff's account at the Bank made on a reasonable and proper occasion?" to which the jury answered yes. The Court of Appeal held that this was a quite insufficient direction. The Court held that as to the duty of secrecy—

> "It may be asserted with confidence that the duty is a legal one arising out of contract and that the duty is not absolute but qualified. It is not possible to frame any exhaustive definition of the duty. The most that can be done is to classify the qualifications and to indicate its limits".

Bankes, L. J., said—

> "On principle I think that the qualifications can be classified under four heads—
> (a) where the disclosure is under compulsion by law,
> (b) where there is a duty to the public to disclose,
> (c) where the interests of the Bank require disclosure.
> (d) where the disclosure is made by the express or implied consent of the customer."

As to the second, i.e. the duty to the public, which may be perhaps the most important exception, his Lordship said that "many instances might be given", but unfortunately he fails to give any of them. He says they may be summed up by the statement that there are cases where a higher duty than the private duty is involved as where danger to the State or public duty may supersede the duty of the agent to his principal. It is perhaps a matter for regret that this is not really more precise than the resolution of the British Medical Association or the Hippocratic Oath.

Scrutton, L. J., said—

> "I have no doubt that it is an implied term of a Banker's contract with his customer that the Banker shall not disclose the account nor transactions relating thereto of his customer except in certain circumstances. This duty equally applies in certain other confidential relations such as Counsel or Solicitor and client, or Doctor and patient. Circumstances in which disclosure is allowed are sometimes difficult to state, especially in the case of medical men".

Both he and the third member of the Court stated the relevant exemption in much narrower terms and confined it to the

prevention of fraud, and excluded the fact that it was regarded as in the interests of the customer.

As a result of this, it may perhaps be said that the exceptions to the duty to maintain secrecy are certainly no wider than the defences which would be open in the case of making defamatory statements. That is to say that if a statement by a medical or legal practitioner which were untrue and defamatory were nonetheless the subject of qualified privilege under the law of defamation, then a true statement made in like circumstances might not amount to an actionable breach of an implied term of his contract. On this view the exception would be no wider than to cover cases of a legal, social or moral duty to make the statement to a particular person who had a corresponding interest or duty to receive the statement, and it may well be that the exception is narrower. Indeed, the decision with regard to Bankers suggests that it is narrower. Moreover, one would expect the exception to be much narrower because the rule as to defamation was devised for cases where the defendant is not in any confidential relationship with the plaintiff or under any obligation to him.

It may be convenient at this stage to indicate a number of the circumstances which appear likely to arise in which some form of disclosure is both normal and natural and perhaps inevitable. Thus a medical or legal practitioner may take in a partner who has access to all his records, or he may sell his practice and with it all his records, though in the case of a Solicitor his clients may decide to take their papers away from his successor. It has, however, been held that a trustee in bankruptcy may not sell a bankrupt solicitor's papers nor even his book debts, for that would involve disclosing to others professional secrets which he was bound not to disclose. This may suggest some limitation on the right to dispose of professional records, but it does not appear ever to have been so applied as to prevent the sale of a professional practice. It may, I think, safely be assumed that disclosure of that kind would not give rise to any cause of action, and would not be a breach of any duty owed to the patient. In the ordinary way a Solicitor who is consulted by a client would be free to discuss the client's affairs with his partners and with his clerks, unless there were some specific instructions not to do so, and that I think must be true, not only of present but also of future partners. It may be added, however, that it is very difficult to envisage any circumstances in which disclosure of that kind

would result in damage or loss of any kind to the client or patient. It is worth considering the position of a successor who buys e.g., a medical practice and its records. He is in no contractual relationship with the patients, until in fact they consult him. Clearly his ethical duty is the same from the moment he obtains access to the records, but the foundation for any legal duty is not immediately apparent, and the position must depend in substance on the same considerations as apply to any non-contractual professional relationship.

But what of the non-contractual relationship? So far as legal practitioners are concerned, it seems to me that the Courts would probably take the view that the duty of secrecy attaches to the relationship of Solicitor and client and arises independently of contract. On the other hand, it may perhaps be that the Courts would always be quick to find a contractual relationship where a Solicitor acts as such. Thus it has been held that there is a contractual relationship between an insured person under a motor car accident policy and the Solicitors engaged and paid by the Insurance Company to defend an action brought against him. The decision to which I referred earlier in which a Solicitor was held liable for damage flowing from wrongful disclosure of professional secrets was one in which the reasoning of the Court was not really based upon contract. In the old books (*Comyns Digest* under the heading of Action on the Case for Deceit) it is stated that an action on the case for deceit would lie against a Solicitor who revealed professional secrets, it being as much his duty to act with fidelity as to act with care and skill. That is to say that the action is one in tort rather than in contract and arises out of the professional relationship. This is an unexplored byway of legal history and might enable a basis to be found for a legal obligation where no contract could be said to exist. This may well be of importance in such nationalized schemes as the British National Health Scheme.

It is only in New Zealand that the non-contractual duty has been considered. There in 1958 a case of particular interest and far reaching possibilities arose (*Furniss v. Fitchett* 1958 N.Z.L.R. 398). The Defendant was the medical attendant of the Plaintiff and her husband. Domestic relations were very strained, partly on account of unfounded allegations by the Plaintiff against her husband. In May 1956 the husband said to the Defendant—"You must do something for me—give me a report for my lawyer"—The Defendant then wrote out a report which concluded by

saying of the Plaintiff—"She exhibits symptoms of paranoia and should be given treatment". The Defendant continued to see the Plaintiff professionally until April 1957 when she commenced proceedings against her husband for maintenance and a separation. In these proceedings she was crossexamined by the husband's solicitor who produced and showed to her the Defendant's report. As a result of that she suffered shock and injury to her health. She sued the Doctor and the jury awarded her £250 damages. The question then was whether this verdict could stand. The argument took a somewhat curious course, for no claim was made in contract. The Chief Justice said that he would have thought there was a contract with the patient, even though the husband had paid the fees. He said also that he did not doubt that if it had been put to the jury they would have found that there was an implied term as to secrecy, though one would have supposed that to be a matter for the Court and not the jury. However, in the result the question of contractual right was not dealt with at all. The Chief Justice upheld the Plaintiff's claims as one for the tort of negligence, by an application, or perhaps one should say an extension, of the principle in *Donohue v. Stevenson*. He held that the Defendant Doctor should have foreseen that the contents of his certificate were likely to come to the Plaintiff's knowledge and he knew that if they did they were likely to injure her health. It was the Defendant's duty to take reasonable care to ensure that his views as to her mental condition did not come to her knowledge. In the circumstances the showing of the certificate to the Plaintiff was foreseeable and was the very thing the Doctor was under a duty to avoid. The Chief Justice said that it may be that a duty of care is owed by every professional man, and perhaps others as well, in respect of what he says or writes of another person, if that other person thereby suffers, or is likely to suffer damage, but he did not regard it as necessary to decide that point.

The decision thus did not turn expressly on the obligation of secrecy as such, and was both wider and narrower than the conceptions we have been considering. It does, however, involve a substantial extension of the field of liability.

This decision certainly suggests that there is an enforceable obligation binding professional men as such not to disclose matters coming to their knowledge in the practice of their profession, and that this obligation rests also on those such as Doctors who treat or examine patients otherwise than pursuant

to a contract with the patient. Some such cases are of course plain enough. A Plaintiff who commits himself to medical examination by the Defendant's Doctors does so on the basis that what they learn they will communicate to the Defendant and his advisers (and may give in evidence in Court). But can such Doctors safely publish their discoveries more widely?

I think it may properly be said that they certainly should not, and that it may now also be said they can not safely do so. I think all would agree that in such cases the ethical duty is the same, and it would in such circumstances not be surprising if the Courts were to take the view if occasion should ever arise that the legal duty likewise was the same. In one of the cases to which I referred *Vaughan J.* observed that "the law is never better employed than in enforcing the observance of moral duties". This, though somewhat pompous, is apt enough in the circumstances.

There is in English law and in the law in Australia no right to privacy as such. The position is otherwise in certain States of the United States, and in such jurisdictions it may well be that breaches of professional secrecy such as we have been discussing would give rise to a cause of action based upon invasion of privacy. It has, for example, been held that the publication of an X-Ray photograph of the Plaintiff's abdomen was just as much a breach of privacy as the publication of an ordinary photograph without her consent, and the plaintiff recovered. So also it has been held that a motion picture of an operation may not be published without involving a breach of privacy and giving rise to a cause of action. Whether these particular instances could be brought within the conception that we have been dealing with is perhaps very doubtful, and I would be disposed to think not, but it seems not unlikely that if a cause of action for wrongful disclosure of confidential information could not be supported under any other heading, it would amount to a breach of privacy within the meaning of that cause of action in jurisdictions which recognize it.

It may well be that one of the reasons why there is so little recorded authority upon this matter, is that an essential ingredient of a cause of action in English law, except in a few defined cases, is that the Plaintiff must show that he has suffered damage by the alleged wrongful act of the Defendant. It is not every secret which when disclosed causes damage in the material or financial sense. The man whose crime is revealed may be tried, convicted and imprisoned and may therefore be said to

suffer damage, but that damage flows, not from the revealing of his secret, but from the crime which he committed. There are no doubt many matters which are confidential as between Doctor and patient which the patient would be horrified to think might be made public, but which could not be regarded as the cause of material or monetary damage to the patient. Loss of employment is no doubt an obvious enough example of the kind of damage which might flow from breach of such an obligation, but such things as the loss of a pension or of compensation of which the patient was in receipt but to which he was not in fact entitled, could scarcely be a foundation for a claim for damages. On the other hand, it is not exactly a safe or secure guide to the medical, or even the legal practitioner to be told that it may well be that the patient or client will not suffer any recoverable damage if matters disclosed by him in confidence are made public and that therefore the risk of civil liability is reduced.

The only safe advice which one could offer to a practitioner is, When in doubt, don't; and that in almost every instance there must be at least some doubt.

DR. PENNINGTON in introducing the discussion said that the non-contractual situations did not cause much trouble in practice, for the custom was to require the patient being examined to authorize publication to those concerned. He thought the bigger difficulties were in the contractual cases. It was often necessary to reveal facts concerning one spouse, to the other. The late W. R. Boyd had told him that he would never fail to communicate to one spouse that the other was suffering from venereal disease. Again, what if a doctor should discover that a patient driving a public transport vehicle was medically unfit to do so? He thought there should be some authority to permit notification in such a case.

DR. SPRINGTHORPE recalled that when Mr. R. G. Menzies, K.C., read a paper on this subject many years ago, and the late Dr. Ostermeyer divulged what he had done, and asked Mr. Menzies' view as to what he should do, Mr. Menzies said "I can only advise Dr. Ostermeyer to keep moving.". The speaker had once divulged to the Motor Registration Branch that a patient, whom for years he had been advising to cease driving, was unfit to drive. When the patient's licence was cancelled, he immediately asked Dr. Springthorpe for a certificate to help him get his licence back. The main thing was to act discreetly, and never put it in writing.

DR. G. R. WEIGALL said that Mr. Menzies' answer to Dr. Ostermeyer was "What a question for a man named Ostermeyer to ask a man named Menzies."

DR. SHELTON said that reports of "interesting cases" in medical journals could cause difficulty. A mother of a patient had not long since asked a doctor for a reprint of the doctor's report on her daughter, having been informed by another doctor that a report on her daughter was in that journal.

PROFESSOR DERHAM pointed out that in the New Zealand case mentioned by Mr. Aickin, the doctor's own evidence, that he knew the missive would cause his patient to collapse if she saw it, was a necessary step in the reasoning leading to his liability. Following that decision, New Zealand doctors were privately advised not to tell one spouse if the other was mentally deranged. That advice was too large a conclusion to be drawn from that case, and might be dangerous. Informing one spouse was often necessary, in the other's own protection. The doctor held liable in the New Zealand case knew that the husband wanted the report for use against, not for, the wife.

MR. CONNOR pointed out that if people knew that a visit to a doctor might cause them to lose their driving licence, they might stay away from the doctor. Again, they might attend those doctors known not to communicate disabilities. The functions of the police force and the medical profession ought to be kept very separate.

DR. CRAWCOUR said that as an industrial medical officer he once caused a migrant to be rejected, as he had active tuberculosis. He referred the migrant to the Tuberculosis Clinic. A few days later, he found the migrant awaiting examination at another factory. He again caused the migrant's rejection, and was threatened with litigation, but nothing more was heard of it.

MR. P. D. PHILLIPS said that two kinds of cases seemed to emerge, namely those where disclosure was made for private and personal reasons of an individual, (e.g., husband and wife), and those where disclosure was made for a public reason (e.g., an airline pilot unfit to fly). Mr. Aickin seemed to suggest a solution to both kinds of cases, analogous to qualified privilege in defamation. Surely this was as justified in the public-interest cases as in the private-interest ones? Disclosure to the police, where necsesary, was not for the benefit of the police but of the public. His recollection of the New Zealand case was not the same as Professor

Derham's. His memory of it was that the husband wanted the note for his own protection, if the wife should start litigation. The far-fetched basis of the decision seemed to him to result from the Court's determination not to let the doctor escape because the wife's case had been framed badly. In any event, the doctor's own evidence could not have been the vital thing, because the question was not what the doctor expected, but what a reasonable doctor would have expected. The doctor certainly did not help his case by that evidence, but the same result could have been reached by the evidence of others.

DR. A. KELLY pointed out that the public hospitals file and keep records of private patients, which are made available for analysis and study like those from public wards. He asked whether a private patient whose doctor communicated to the hospital his record of that patient, could claim against the doctor for supplying such records.

DR. C. DICKSON pointed out the very strict statutory provisions regarding communication of the fact that a patient has venereal disease. He asked what was the duty of a doctor where the police inquire if they have treated a patient for a bullet wound. Abortion could also cause difficulty, if it came to a doctor's notice. He asked when was it the doctor's duty to speak, and when to keep silent.

MR. R. A. SMITHERS said that sometimes difficulties arose from a doctor on one side, talking to a doctor on the other side, while a case was still not disposed of in the Court. He stressed that there was a tendency these days, in the supposed interest of the public, to disclose more and more of other persons' confidential affairs. He considered that harm could result if the public believed that their medical affairs were not completely confidential.

MR. K. AICKIN, Q.C.: I am afraid I will only muddy the waters rather further, but a great variety of points have been made by learned, ingenious and bold speakers, and I cannot hope to answer or comment on them all. With regard to what Dr. Pennington said about the obtaining of consents, of course, I think one needs to bear in mind that a man who submits himself to a life insurance doctor must be taken to be doing so in order that the results of the examination will be known to the life insurance company; so also a man who seeks to be employed by an engineering works or any employer submits himself to medical examination by that employer's medical officer, whether

he be a full time employee or a doctor nominated for the purpose, the object of the submission for examination is that the results will be made known to the person for whose benefit the examination is being made. It is not that kind of disclosure which poses the problem, but the duty of that medical officer in relation to disclosures outside the permitted field. Dr. Springthorpe, in his characteristic style, dealt with the practical solution of this, and no doubt those who assidiously refrain from putting their reports in writing are a good deal safer than those who rush into print, but there was one point on which perhaps I might comment and that is his reference to the Victorian legislation. Now that deals, of course, only with disclosure in Court and in civil proceedings. It is an interesting theoretical situation, what the consequences might be of a breach of that obligation. There are two possibilities. The usual rule, of course, is that where a Statute says something shall or shall not be done, and fails to specify a penalty, then doing the forbidden thing is a common law misdemeanour, punishable as such. Another possible line of consequence which I offer to the legal members of the audience is that this is a Statutory duty imposed for the benefit of the patient and that the consequence flows, as it does from regulations about fencing dangerous machinery and so on, that a breach of it, causing damage, is actionable. (Not, of course, that the medical profession is to be equated with dangerous machinery!). Dr. Weigall asked an awkward question that had been asked and not answered long ago. The only answer that I could suggest was that if he had waited a little longer, he might have reached the stage of nationalized medicine and had a person ready to pay the fee, but it is not as good an answer as was given previously. Dr. Shelton asked what was the position of doctors who write a technical paper about a matter which arises in the course of their practice, in the usual fashion, without indicating who the patient is. He referred to an instance in which the identity of the patient became known through some means or other. Well, that kind of problem is one which raises both the theoretical problems with which we have been concerned about disclosure, and the awkward practical one of implicit disclosure, where you do not name an individual, but the identity of the individual becomes clear from the surrounding circumstances. In the ordinary way, all that I could say would be that the anonymity must be preserved if the doctor is to be in a safe position, and providing the patient with a print, no doubt, is

safe enough, because what the patient does with it is his own responsibility; but steps ought, from the practical point of view, to be taken to prevent the identity of the patient being revealed, because to reveal it, even without naming the person in so many words, but making clear who that person is, is just as much revealing it, as saying precisely who he is and where he lives.

Professor Derham referred to the New Zealand case, and if I may say so I don't think I need to add to what Mr. Phillips said in comment on that. I do not think it really turned upon the fact that the doctor acknowledged that he knew that it would cause injury to the plaintiff. It is enough if it were likely to do so, in the ordinary sense; if he ought to have known that it was likely to do so, that would have been enough.

Mr. Connor asked what either the patient and/or the doctor should do where the prospective claimant for compensation takes a fancy to the doctor and wants to make the examination treatment. The doctor must explain to the patient, if he treats him, that all he does for him will be available to the insurance company, and a patient may feel, rightly or wrongly, that he has nothing to hide or lose. The doctor can do no more than say, "I cannot treat you unless you realize that everything I do for you will be known to the insurance company", and if he does that, he must be protected. Dr. Crawcour shows that he knows rule one in these matters and that is, "Know the Judge", but if Dr. Crawcour spent sleepless nights in worrying about what might happen, I feel reasonably sure that his solicitor, if he had consulted him, would not have stayed awake at night. I do not think he was at risk in what happened in his case, because a man who submits himself to a medical examination as part of an application for employment must be taken to do so on the basis that the result of that examination is available to the prospective employer, and if it is made so available, he has nothing to complain about. There is no duty not to do the very thing for which the examination is being conducted.

Mr. Phillips made a number of points on which I might comment briefly. I have not intended to suggest that one might lift the rules of qualified privilege in toto into this branch of the law, but only that they did provide some kind of a useful analogy. It is plain enough, of course, that we are here dealing with a very different relationship from that which normally arises in a case of defamation. A doctor or a lawyer in these circumstances would not be defending his own interest, and

therefore privileged in what he says, but the relationship may sometimes involve what has been called in that field a moral or social duty, either to individuals or to the public at large.

That duty is not as extensive, I think, as is sometimes thought, and with regard to revealing to a husband or wife the medical condition of the other, the analogy of cases in which persons, perhaps well-meaning and perhaps not, have discovered that there is a duty, moral, legal or social, to report the infidelity of one spouse to the other, show that those who do so are apt to do so at their peril.

In the New Zealand case, the medical report was obtained before the litigation was begun, and it was as Mr. Phillips says for contemplated litigation. The husband said, "Give me a report to show to my lawyer", those are the words in the law reports. The litigation did not commence for another year. The husband, or his solicitor, kept this piece of ammunition in cold storage. As to whether the Chief Justice thought it ought to have been framed in contract, I do not really think that is so, because the point was taken by the defence that the plaintiff had not proved any contract, and they said, "Well, it doesn't matter". The Chief Justice said, "I am not going to accept that". The pleadings, as far as one can tell, merely alleged the facts without specifying the cause of action and left it very much up in the air. If he regarded it really as founded in contract there would not have been any obstacle, so far as I can see. I would also agree that the case involves a big jump. Whether it is a jump over the problem of liability for negligent statements, I am not quite so sure. The law with respect to negligent statements has dealt with statements in fact untrue but made negligently, financial reports and the like. This was not making negligently a statement that was untrue. It was the releasing negligently of a statement which was true, and the liability was such to arise not from the making of the statement, but from the making of the statement in such a way that it would come to the knowledge of the plaintiff herself, and in that sense it is a very curious and limited case, but it does involve, I think, a substantial departure from or extension of what one would previously have thought was the duty to take care. It seems a somewhat curious thing that one must take care that one's views should not come to the knowledge of a particular person, but I do not think it is to be solved by reference to the law on negligent statements.

Dr. Kelly raised an interesting practical point about records in public hospitals and intermediate wards. The situation is not as clear as one would hope. The obligation must rest on the hospital authority just as much as on the doctor. A public hospital keeping records of this kind must be under the same kind of obligation to secrecy as an individual doctor keeping records in his own surgery. One can imagine hypothetical cases in which information left in a public hospital in that way about a private patient could come to the knowledge of other persons in the ordinary course of the hospital's administration, and might cause damage to the patient. It is not, of course, very likely, but it is obviously a theoretical possibility at least. Unless the terms of admission into the hospital involve the doctor and/or patient in leaving records there as part of the hospital record system, it is a little difficult to see what would justify a doctor in leaving the records behind. But if, on the other hand, it is part of the terms of admission to hospital that your records go in with the hospital records, there could be no claim. The practical solution probably lies along those lines.

Dr. Dickson raised two problems really. First of all, is there any duty on the doctor to report to the police that a patient has come to him suffering from a bullet wound or a knife wound? But what I have been confining myself to, is there any duty on him not to. Not—is there a duty of a vague public character to assist the police in the detection of crime?—but—is there a duty to the patient not to reveal? They are rather different things. That raised in a very neat way the kind of public duty that Mr. Phillips was referring to. Does the public duty to assist in the detection of crime—not an enforceable duty the failure to do which will result in prosecution, but the kind of vague imprecise moral duty as a member of the community to assist in the detection of crime and the carrying out of the functions of the community as a whole—does that over-ride the ordinary duty to the patient not to reveal? And when revealed without malice and in a *bona fide* performance of the moral duty, does that provide a defence? I myself would be disposed to think that it would be on the outer edges of the area, if it were within it at all. I find some difficulty in seeing why the private duty arising between the two individuals should be over-ridden by something so imprecise and so vague as a duty to the community to assist in the detection of crime. There is just no authority about it.

I do not think anyone can give a dogmatic answer to anyone faced with that problem.

The practical answer might be, of course, that it is very unlikely that damage recognized by the law would flow from reporting some incident and that the doctor might safely do it without feeling that he is likely to be sued as soon as the man recovers sufficiently to consult a solicitor, but it is the somewhat unsatisfactory conclusion that I reached just at the end of my paper itself that the problem may be much reduced by the fact that it is not every kind of professional secrecy which results in monetary damage to the patient when it is revealed, and in the case of a man suffering from a bullet or knife wound, the damage is more likely to be suffered by the person who inflicts the wound than the man on whom it was inflicted, although that is not necessarily so. It is an unsatisfactory answer, I am conscious of that. I do not believe that, as the law stands, it is possible to be more specific. As I indicated, Mr. President, I am afraid I have merely muddied the waters more.