Medicolegal

Disclosure of medical records in litigation

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In negligence claims against doctors, health authorities, and drug companies medical records provide vital evidence of what went wrong. In such litigation each side must disclose to the other any documents that relate to the matters in issue. Traditionally, this step in the litigation timetable, known as "discovery," has come after the issue of the writ and the close of the pleadings (the written particulars setting out the issues in the case).

In 1970, however, a new concept was introduced into the law—prewrit discovery. This enables anyone contemplating bringing an action for damages for death or personal injury to apply to the court for an order releasing the relevant records before the action has been started. The idea was to help lawyers and medical experts assess better the chances of success before embarking on litigation. The provision has not been popular with health authorities, which regard it as an opportunity for lawyers to engage in "fishing expeditions" in the hope of dredging up grounds for launching a claim.

The court can order the production of documents to the would be litigant himself or to only his legal adviser, or to both legal adviser and medical expert. Only if he has no legal adviser is discovery limited to a medical expert. But to save time and to avoid the cost of a court application solicitors will ask for the records to be released voluntarily. A Department of Health and Social Security (DHSS) circular, HC(82)16, advises authorities to disclose case notes without a court order after consultation with the doctors concerned unless there is some good reason not to do so. Such a reason might relate to the defence against the particular claim or to the grounds for seeking discovery being obviously insubstantial. Health authorities sometimes resist the request, particularly if it is vaguely worded and not specific about the alleged negligence or the particular documents sought. Often, authorities will offer to disclose records to only a medical expert and not to the solicitor and his client, even though the court would order disclosure to the solicitor.

If the request does go to court the rule is that the patient pays both his own and the health authority's costs even if he wins the release of his notes. But an authority that unreasonably refuses to hand over records, forcing a prospective litigant to seek a court order, may be landed with its own costs and in exceptional cases may even have to pay the plaintiff's costs. This happened last year in *Hall v Wandsworth Health Authority*, where Mr Justice Tudor Price said that there was no reasonable excuse for failure to disclose to the solicitor before the court hearing. He added that the failure to disclose even after the court order "showed that the defendants were not approaching the matter with the urgency such litigation demands."

Disclosure for litigation against drug companies

Health authorities may also be asked to produce documents for the purposes of litigation by a patient against a third party—for example, a drug company. In these cases there is often an understandable fear that the records may show possible grounds for action against the authority itself. If the request is turned down the

patient has a right to go to court, though only after a writ has been issued. Health authorities and doctors who have been slow in supplying notes and records for plaintiffs in the litigation over alleged side effects of the non-steroidal anti-inflammatory drug benoxaprofen were warned last month by Mr Justice Hirst that there was a real risk that they would be ordered to pay the entire costs of a court application unless there were special reasons justifying refusal to disclose.

The warning followed a judgment last April, in another case on benoxaprofen, *Walker v Eli Lilly and Company*. Newcastle Health Authority was reluctant to release records unless the plaintiff's solicitors gave an assurance that there would be no proceedings against the authority. The solicitors issued a summons, and the notes were released. Mr Justice Hirst said that where there was no special consideration of confidentiality the court would almost certainly order disclosure. He said that he hoped that health authorities and doctors would respond readily and promptly to any requests for disclosure so that unnecessary expense and delay could be avoided.

Five months later, however, only 150 of the original 650 plaintiffs—there are now some 1300 plaintiffs suing seven defendants, including the Committee on Safety of Medicines and the licensing authority—had had their notes released, with partial disclosure in another 110 cases. Since most plaintiffs are on legal aid and since the health authorities are public bodies, Mr Justice Hirst pointed out, much of the burden of court applications for the release of records would fall on public funds. "I wish therefore urgently to reiterate my previous appeal for full and prompt cooperation by health authorities and medical practitioners with requests for disclosure already made and with imminent similar requests in the new cases; and also to reinforce this appeal with a warning that unless that cooperation is forthcoming formal applications for discovery will inevitably follow, with all the attendant expense."

There is no provision, however, for a court to order a health authority or doctor to release records for the purposes of litigation in the courts of another country. So the 1200 British women who have launched claims against A H Robins, the American manufacturer of the Dalkon Shield, would have had no redress through the courts if health authorities and doctors had refused to hand over their records. One health authority solicitor held out for more than six months, maintaining that it was not his policy to advise his clients to release records for use in American litigation. He eventually relented after two articles in a Sunday newspaper and the judgment of Mr Justice Hirst in the *Walker* case.

The defence societies urge members who are in doubt about how to comply with a request for prewrit discovery of documents to seek their advice. "Documents" includes clinical correspondence, medical and nursing notes, notes and records of any investigation, laboratory reports, and radiographs. But documents that have been prepared for the primary purpose of defending litigation—such as a report to the hospital's legal adviser or the doctor's defence society—are privileged and need not be disclosed. The Court of Appeal decided last year, however, in *Lask v Gloucester Health Authority* that a confidential accident report (which NHS circulars require to be completed by health authorities both for the use of the authority's solicitors in case of litigation and to prevent a repetition of the accident) was not privileged and had to be disclosed since the anticipation of litigation was not its dominant purpose.

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