

**FOIA s.41** – Absolute exemption: confidential information

**FOIA s.44** – Absolute exemption: prohibitions on disclosure

**ECHR art 8** – Right to private life

## ***Pauline Bluck v IC & Epsom and St Helier University NHS Trust***

**EA/2006/0090**

**17<sup>th</sup> September 2007**

### **Cases:**

Ash v McKennitt [2006] EWCA Civ 1714

### **Facts**

The Appellant's daughter had died at a hospital managed by the Trust in 1999. At the time the Appellant was provided with a certain amount of information about the treatment her daughter had received but was not informed of any deficiencies in the standard of care. Approximately 5 years later the Appellant discovered that the Hospital's treatment of her daughter had not been satisfactory, that it had admitted liability for her daughter's death and had reached a settlement with her widower, on behalf of himself and two children of the marriage, under which a substantial compensation payment had been made. She requested information about her daughter's treatment, including her medical records. The Trust declined to disclose the information without the consent of the widower, as next of kin. Consent was refused.

The IC had decided that the health records should not be disclosed because they were subject to an obligation of confidence, which was capable of surviving the death of the person to whom the records related. He concluded that, as an action for breach of confidence could therefore be brought by the personal representative of the deceased person if the information were to be disclosed otherwise than under the FOIA, the absolute exemption provided under s.41 applied. The Trust was joined as a party to the Appeal and argued, in addition, that section 44 applied as disclosure was prohibited under Article 8 of the European Convention on Human Rights.

### **Findings**

#### **Section 41**

The Tribunal rejected the various arguments raised by the Appellant to the effect that the Trust would have a defence to any claim for breach of confidence, with the result that the exemption ought not to apply. These were:

- (a) The Trust would have a defence to a breach of confidence claim because the public interest in disclosure would outweigh the public interest in maintaining confidence. The Tribunal decided that the public interest in being made aware of the quality of hospital treatment did not outweigh the public interest in

maintaining confidentiality, which ensured that patients would feel free to disclose all relevant information about their health to a medical practitioner without fear that it might be made public after the patient's death.

- (b) There could be no detriment to the deceased in the event that the Medical Records were disclosed and that, as this was an essential ingredient of the action for breach of confidence, no claim could be sustained were the Trust to disclose the information other than under FOIA. The Tribunal rejected the argument. In the light of modern case law on confidential information about individuals, including *Ash v McKennitt* (above), the present state of the law was that proof of detriment, in the sense mentioned in some of the earlier case law, was not a necessary ingredient of the cause of action if disclosure would be contrary to an individual's reasonable expectation of maintaining confidentiality in respect of his or her private information.
- (c) A duty of confidence in respect of private information did not survive the death of the individual to whom the duty was owed (a point on which there was, surprisingly, no case law authority) and could not be enforced by a personal representative. Applying general principles the Tribunal decided that the basis of the duty in respect of private information lay in the conscience of the person receiving the confidence i.e the doctors in this case having accepted the obligation of confidence as an essential part of the doctor/patient relationship, it would be unconscionable for them to disclose the information to the public. On that basis the obligation was capable of surviving the death of the confider. Although there was old case law authority suggesting that the obligation of confidence could not be enforced by personal representatives the Tribunal considered that it should be regarded as having been overruled, at least in relation to medical records, by the more recent cases on private information

#### Section 44

The Trust argued that the disclosure of the Medical Records would be prohibited by Article 8 of the European Convention on Human Rights and that the exemption provided for under s.44 therefore applied. However, the Tribunal was not in favour of translating the general principles laid down in Article 8 into the form of specific legal prohibition to which it believed s.44 was intended to apply. If a person was to be prohibited from taking a particular step he must be able to establish clearly whether or not his proposed actions fell within the scope of the prohibition and the Tribunal did not think that the language of Article 8, which is intended to guide public authorities to interpret rights and obligations in a manner that is consistent with an individual's right to a private and family life, is capable of providing that degree of certainty. If it were wrong on that issue it would be necessary for the Tribunal to balance the Article 8 interests of the Appellant against those of the deceased's widow, who objected to disclosure. The Tribunal decided that disclosure would be contrary to the right to privacy of the widower and that the rights of the next of kin should prevail where the rights and wishes of family members differed.

#### **Conclusion**

The Trust would breach the duty of confidence owed to the deceased if it disclosed the Medical Records, other than under the terms of the FOIA, and the breach would be actionable by a personal representative. Accordingly the Medical Records

constituted exempt information for the purposes of FOIA s.41 and should not be disclosed to the Appellant. The exemption under s.44 did not apply.