

Pre-Action Disclosure and the Duty of Candour

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What are we talking about?



Context, Culture & Rules



Competing principles and Rights



Application to examples

Health records
Investigations and Complaints
Systemic issues
Clinician's personnel file

Context: Statutory routes for access to medical records

1. **GDPR/Data Protection Act 2018:** living patients
2. **Access to Health Records Act 1990:** patient who has died
3. **Access to Medical Reports Act 1988:** access to reports prepared for insurance/employment purposes
4. **Freedom of Information Act 2000**

Definition under Access to Health Records 1990 Act (s1)

A record which—

- (a) consists of **information relating to the physical or mental health of an individual** who can be identified from that information, or from that and other information in the possession of the holder of the record; and
- (b) has been **made by or on behalf of a health professional in connection with the care of that individual**

GDPR/Data Protection Act 2018

- ‘Personal data’: any information relating to an identifiable person who can be directly or indirectly identified, in particular by reference to an identifier, includes health data.
- Emphasis on transparency
- Patients have a **right** to access their own health records, subject to certain safeguards: notably where supplying a patient with information would involve **unreasonably breaching another individual’s confidentiality without their consent.**



Duty of Candour

- Statutory duty: Health and Social Care Act 2008 (Regulated Activities) Regulations 2014
- Joint guidance to professionals by GMC and NMC
- CQC guidance and power to take action for breaches

Duty of Candour: Definition

Registered persons must act in an **open and transparent** way with relevant persons in relation to care and treatment provided to service users in carrying on a regulated activity.

Culture

- **Transparency:**
 - Duty of Candour
 - Professional standards/Good Medical Practice
 - NHS Constitution
- **Proportionality:**
 - Limits on nature and extent of pre-action disclosure

Culture Clashes?



Candour v Safe
Spaces



Transparency v
Fishing Expeditions



Patient's Rights v
Third Party
Confidentiality

Candour v Safe Spaces

Matthew Hill v Information Commissioner [FTT GRC] 2020

- Professional Standards & Duty of Candour provide strong professional and cultural forces which encourage staff to co-operate with any enquiry and work to improve care.
- The Trust's ability to conduct its affairs effectively would not be impaired by public disclosure of the report.

Fishing Limits



- Overriding Objective & Proportionality
- Principles behind CPR Part 31

Pre Action Protocol for the Resolution of Clinical Disputes

2.2 The specific objectives are:

...

(c) to ensure that sufficient medical and other information is disclosed promptly by both parties to enable each to understand the other's perspective and case, and to encourage early resolution or a narrowing of the issues in dispute;

Pre Action Protocol for the Resolution of Clinical Disputes

3.2 Any request for records by the claimant should:

...

(c) include a request for any relevant guidelines, analyses, protocols or policies and any documents created in relation to an adverse incident, notifiable safety incident or complaint.

CPR 31.16: Orders for Disclosure before Action

2-part test:

- a) Jurisdictional
- b) Discretionary

CPR 31.16: Orders for Disclosure before Action

...

- (3) The court may make an order under this rule **only** where—
- (a) the **respondent is likely to be a party** to subsequent proceedings;
 - (b) the **applicant is also likely to be a party** to those proceedings;
 - (c) if proceedings had started, the respondent's duty by way of **standard disclosure**, set out in rule 31.6, would extend to the documents or classes of documents of which the applicant seeks disclosure; and
 - (d) disclosure before proceedings have started is **desirable** in order to—
 - (i) dispose fairly of the anticipated proceedings;
 - (ii) assist the dispute to be resolved without proceedings; or
 - (iii) save costs.
- (4) ...

'Likely' to be a party

- No requirement for the Applicant to establish either that proceedings are likely to be issued / real prospects of success.
- Sufficient to show a prima facie case of entitlement to substantive relief

Standard disclosure: the relevance of 'relevant'?



The Peruvian Guano test is mortally wounded...



Standard disclosure: the relevance of 'relevant'?

CPR 31.6:

Standard disclosure requires a party to disclose only—

(a) the documents on which he relies; and

(b) the documents which—

(i) adversely affect his own case;

(ii) adversely affect another party's case; or

(iii) support another party's case; and

(c) the documents which he is required to disclose by a relevant practice direction.

Relevant – Light

- Avoids background documents
- No mention of “train of enquiry”
- Focus on issues – *Depp v (1) News Group Newspapers* [2020] EWHC 1689 (QB)

Discretion & Burden of Persuasion

- Necessity arguments / Clarity and specificity in the documents sought by way of a pre-action disclosure is important *Snowstar Shipping Ltd v Graig Shipping PLC* [2003] EWHC 1367 (Comm)

v

- Once passed threshold test of relevance, for Respondent to establish disclosure is not necessary *Dunn v Durham County Council* [2012] EWCA Civ. 1654

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- Once the Applicant has established 'relevance':
- The onus is on the Respondent to show why disclosure should **not** be given;
 - The Respondent must prove that denial of disclosure was **strictly necessary**;
 - Balance between Article 6 right to a fair trial against the right of an opponent or non-party to privacy and confidentiality.

Further potential arguments

- Legal Professional Privilege
- Public Interest Immunity
- Third Party Confidentiality

Legal Professional Privilege

- Check dominant purpose – *Lask v Gloucester, CA.*
- Were the documents prepared for the purposes of obtaining legal advice/ in contemplation of litigation?
- LPP does not apply where the purpose is **dual**:
Waugh v British Railways Board [1980] AC 521

Public Interest Immunity

- CPR 31.19 provides procedure where disclosure would damage the public interest.
- Is withholding the documents **necessary** for the proper function of the public service?

Third Party Confidentiality

- Not a standalone ground for withholding disclosure. *Science Research Council v Nasse* [1980] AC 1028 HL
- But relevant to the Court's discretion under CPR 31 (*Dunn v Durham*):
 - Balance 3P's Article 8 rights v Applicant's Article 6 rights
 - Burden on Respondent to show non disclosure necessary

Some examples

Health records

- Definition
- Claimant
- Any Third Parties referred to?
- Third Parties' notes

Investigations/Complaints

- Serious Incident Framework and docs
 - Protocol
 - *Lask v Gloucester*
 - Discloseable

Systemic/Environmental

- Particular pressures on a given day
- Proportionality of search? (CPR 31.7)
- The role of redaction?

Don't forget:

- Does D need a court order?

Clinician's personnel file

- Training, performance, disciplinary, health
- Do they go to the issues in the case?
- Is there a genuine Article 8 issue?

Beware!

No collateral undertaking implied in current pre-action protocol: need to give explicit notice to claimants when giving disclosure, that the disclosure is being given only for use within these intended proceedings.

Pre Action Disclosure Costs

- The usual rule: CPR 46.1(2)
- BUT courts commonly consider arguments raised by Claimants under 46.1(3) to displace the usual rule:

(3) The court may however make a different order, having regard to all the circumstances, including –

(a) the extent to which it was reasonable for the person against whom the order was sought to oppose the application; and

(b) whether the parties to the application have complied with any relevant pre-action protocol.