

PHYSICIAN-PATIENT PRIVILEGE GETS ITS DAY IN COURT

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In a case of first impression, the New Hampshire Supreme Court determined to resolve the tension between New Hampshire's law governing search warrants and the statutory protection afforded physician-patient communications under New Hampshire law.

In a case titled In Re Search Warrant for Medical Records of C.T., issued on May 6, 2010, Exeter Hospital appealed an order of the Portsmouth District Court that required the Hospital to turn over the medical records of a patient pursuant to a search warrant. As a result of the order, the Hospital found itself in conflict: it had to either turn over the records and violate its obligations to its patients, or refuse to provide the records and face contempt charges.

The Supreme Court affirmed the issuance of the search warrant in this case, but outlined additional procedures to be followed in the future when the State seeks privileged medical records by search warrant.

The Story

Some time before 1:00 a.m. on Wednesday November 19, 2008, a driver, C.T., was involved in a single-car accident in South Hampton. The trooper who arrived at the scene determined that the driver appeared intoxicated. He was taken to the Hospital for further evaluation and treatment, where his blood was drawn in connection with his care. C.T. was subsequently transported to the Rockingham County jail. Later that morning, to permit proper care of C.T.'s medical needs, the Hospital called the jail and advised jail officials that C.T. had a broken ankle.

C.T. was charged with aggravated driving while intoxicated, causing a collision that resulted in "serious bodily injury" (a statutory provision). The trooper obtained a search warrant, citing the need for information related to the broken ankle, which the trooper asserted was "serious bodily injury" under the applicable statute. The search warrant application sought blood

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samples and associated toxicology reports, as well as medical records generated during C.T.'s treatment at the Hospital on the morning of November 19. The district court granted the warrant application.

The trooper served the warrant on the Hospital late that Wednesday night, sometime after 10:00 p.m. The Hospital turned over the blood test and laboratory results but told the trooper that the Hospital normally did not gather medical records at that late hour. The trooper indicated to the attendant that there was no hurry because he did not need the medical records right away. On the following Monday, however, the State filed an ex parte Request for Finding of Contempt and Order to Produce. The Hospital produced the requested records that same day, but also objected to the State's request and moved for an order prohibiting the State from routinely using search warrants to obtain patient medical records.

In response, the District Court ordered the Hospital to comply with the search warrant, but did not grant the State's motion for contempt. At the same time, the Hospital's motion to prohibit the routine use of search warrants to obtain medical records was denied. The Hospital appealed that denial to the Supreme Court in New Hampshire.

The Supreme Court Arguments

In its appeal, the Hospital argued that a search warrant issued ex parte (without notice to other parties) deprives the Hospital and its patients of notice and an opportunity to contest production of such records. It maintains that it has statutory and ethical obligations to safeguard its patients' confidential records.

In addition, the Hospital argued that obtaining search warrants for medical records improperly relieves the State of its obligation to demonstrate a lack of alternative sources for the evidence it seeks. It further contended that an opportunity to object prior to disclosure is critical because relief after the fact, including a ruling that the information is not admissible, is not enough. The damage to the confidential physician-patient relationship would already have been done.

Not so, said the State. In its argument, the State pointed out that a warrant is issued only after an independent magistrate finds probable cause to believe the records contain evidence of a crime. For that reason, and because physicians have a statutory duty to report any injury the physician believes to have been caused by a criminal act, the physician-patient privilege becomes secondary.

The State asserted that because the legislature has not modified either the physician-patient privilege statute or the warrant statute to provide protections for privileged materials sought by a search warrant, privileged materials are no different from other materials subject to production in response to a search warrant. It contended that the procedures governing search warrants are more than sufficient to protect patient confidentiality

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in the criminal prosecution context, and thus, no further protections are required once probable cause has been established.

The Laws

In this case, two statutory issues are in play: the law on search warrants and the physician-patient privilege.

Search Warrants

The issuance of a search warrant requires an objective determination of probable cause by a neutral and detached magistrate. Once that threshold is met, a search warrant is a judge's written order authorizing a law-enforcement officer to conduct a search of a specified place and to seize evidence. In prior decisions, the Supreme Court has stated that to establish probable cause, the magistrate must be given sufficient facts and circumstances to demonstrate a substantial likelihood that the evidence sought will be found in the place to be searched.

Physician-Patient Privilege

New Hampshire's RSA 329:26 states that, except as otherwise provided by law, no physician or surgeon shall be required to disclose privileged communications. This privilege belongs to the patient, not the treating professional.

While the physician-patient privilege statute includes no exception for access to or use of medical records in connection with criminal prosecutions for driving while intoxicated, the statute does specifically provide for the use of certain medical results in connection with such situations. These results include laboratory test results.

The Court's Decision

The Court examined the statutory physician-patient privilege and the law regarding search warrants and stated that the fact that the legislature specifically excepted from the physician-patient privilege certain samples and test results for use in prosecutions of driving while intoxicated charges leads to the related conclusion that the legislature intended to retain the privilege for other medical records in such circumstances.

At the same time, however, the Court also determined, given the legislature's silence as to the treatment due privileged records sought specifically by search warrant, the trial court's order was in accordance with the law governing search warrants. Therefore, the Court affirmed this issuance of this search warrant.

However, in light of the legislative protections afforded the physician-patient privilege, the Court determined that it could not go so far as to abolish the privilege protecting the release of other medical records upon a showing of probable cause (the threshold for obtaining a search

warrant). Although the State argued that the prosecution of felonies is a sufficiently compelling reason to override the physician-patient privilege, the Court noted that this has been true only when disclosure of the privileged information is “essential”. Here, said the Court, the State did not assert essential need for overriding the physician-patient privilege.

In conclusion, the Court went on to issue instructions for execution of a search warrant for privileged medical records in the future:

- Any search warrant for privileged medical records shall order the hospital or medical provider to comply within a reasonable time.
- The provider must produce the records, but under seal for in camera (private) review by the trial court.
- The trial court will then determine the manner by which the affected patient will be provided notice that such records were produced and shall give the patient and hospital or medical provider an opportunity to object to their disclosure.
- If an objection is made, it is the State’s job to demonstrate “essential need” for the information contained in the record. This means that the State must prove that the information is unavailable from another source and, separately, that there is a “compelling justification” for its disclosure.

By setting out these instructions, the Court intends to respect the concerns of hospitals and medical providers and safeguard the physician-patient privilege.

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