WRITTEN QUESTION TO H.M. ATTORNEY GENERAL
BY DEPUTY R.G. LE HÉRISSIER OF ST. SAVIOUR
ANSWER TO BE TABLED ON TUESDAY 29th APRIL 2014

Question

Could H.M. Attorney General outline the circumstances in which confidential medical records are made available to defence lawyers in criminal trials and the circumstances in which they can be revealed in Court and is he satisfied that appropriate safeguards are in place to protect victims in these instances?

Answer

The Deputy asked very similar questions in November 2012. For ease of reference, the Attorney General encloses the relevant passage from Hansard for the sittings on 6th November 2012 and 20th November 2012. The previous answers set out the circumstances in which medical records might need to be disclosed to the defence and the reasons why that is necessary. The written question answers on 20th November, 2012 specifically dealt with the safeguards or protections provided to witnesses. The present situation remains as it was in 29012.

2.2 Deputy R.G. Le Hérissier of St. Saviour of the Attorney General regarding confidential counselling and medical information used in open court:

Under what conditions can confidential counselling and medical information be used in open court and are current procedures consistent with the European Convention on Human Rights and Data Protection legislation?

Mr. T.J. Le Cocq Q.C., H.M. Attorney General:

In any criminal case and other than in exceptional circumstances, the prosecution has an obligation to disclose to the accused any material that might undermine the prosecution's case or support the defence case. In some cases, the confidential medical and other records of a victim or a witness will be relevant to the issues before the court. The prosecution will then seek to obtain and disclose relevant parts of those records to the defence. Normally the person will be asked to consent to their records being obtained for this purpose. In the subsequent court proceedings, the defence can choose to use any relevant material that might reasonably undermine the credibility of a witness. There is a strong presumption in favour of criminal proceedings being heard in public unless, in wholly exceptional circumstances, a court directs otherwise. In any proceedings, the prosecution and the judge will be alert to ensuring that only relevant material is put to a witness. It is open to the media to report accurately what takes place during proceedings. It is left to the media to exercise judgment as to whether it is necessary or appropriate to publicise personal and confidential material about persons in court. As to the E.C.H.R. (European Convention on Human Rights), there will usually be a stronger public interest in safeguarding the rights to a fair trial in public and freedom of expression within the rights of a witness to respect their private and family life. Confidential material will normally only be made available to the defence if the subject has consented or a court has ordered disclosure. The Data Protection Law provides that it is lawful to process data for the purposes of the administration of justice.

2.2.1 Deputy R.G. Le Hérissier:

Could the Attorney General clarify: if somebody enters into a counselling relationship in the belief that it is totally confidential and will not at a later stage of life be revealed, it is permissible that the files, the record of this counselling, can be accessed by the court without the consent of the individual? Can that happen?

The Attorney General:

In the vast majority of cases, a counselling relationship or a medical relationship is one that is afforded the highest measure of confidentiality and it is for that reason that I said that generally only such information will be sought and provided with the consent of the individual concerned. However, there remain circumstances in which it would, in my view, be entirely proper to seek the leave of the court to obtain confidential information. An example might be where the individual is no longer able to give consent, in the case of a child, for example. There will always be very anxious consideration given by the prosecution as to whether it is appropriate to force such information but it is theoretically possible.

2.2.2 Senator S.C. Ferguson:

If the disclosure includes disclosure regarding other parties, thereby undermining the position of the other parties, what redress is there legally?

The Attorney General:

It is important to remember the purpose for which information is obtained and disclosed. It is obtained and disclosed in accordance with the prosecution's obligation to the defence to provide information that may undermine the prosecution case or support the defence case. It is unlikely, I would have thought, that information relating to third parties would normally be the case and it

is only relevant information that needs to be disclosed but if the information relating to a third party is relevant then it will be disclosed in the way that I have set out. As to whatever the redress may be, the disclosure is based upon the requirements of the interests of justice and, in my view, the question of redress does not arise.

2.2.3 Senator S.C. Ferguson:

Right, suppose I am the counsellor and I have been required to disclose information legally through one means or another. Do I then have to say I do not want my name mentioned in connection with this in order to keep… because obviously I do not want to be mentioned in connection with it because of the disclosure requirement? What exactly is the position? Where is the fairness in this?

The Attorney General:

I am sorry, I do not wish to be obtuse, but I do not really understand the question.

Senator S.C. Ferguson:

As a counsellor - you know, Joe Bloggs - I have given counselling to somebody. The record of that is required to be given to the court by the counselee but can I not just knock my name off it because I do not want to be connected with it. I do not want to be connected with the fact that the records are being exposed in court because my reputation as a counsellor will have gone kaput.

The Attorney General:

It is only relevant matters that should be disclosed in court. I do not think it would be permissible to edit whatever information is provided to the prosecution but the prosecution would only disclose relevant information to the defence and the defence should only deploy relevant information in a trial. Accordingly, the names of third parties which are unnecessary should not be deployed in a trial.

2.2.4 Senator S.C. Ferguson:

What redress is there for the third party if their identity has been disclosed?

The Attorney General:

If their identity has been disclosed in a lawful way, there is no redress as such. The court has, of course, power to order restrictions on reporting specific items of information and if a representation is made to the court through the course of the trial, it will obviously take that under consideration but it is impossible to give a hard and fast rule.

2.2.5 Deputy T.M. Pitman of St. Helier:

I fully appreciate, having sat in court, that information has to be disclosed to the defence. However, could the Attorney General advise whether there is not some kind of advice and instruction always given by the court so that the media will not report things that are quite unnecessary? I think it is quite relevant that only one of our organisations reported this type of thing very recently and perhaps that is a comment on the professionalism of that organisation.

The Attorney General:

As far as I am aware, but I cannot be definitive, there is no standard direction given by the court to the media. The court will be alive to the deployment of sensitive and confidential information and might, in the exercise of a discretion, ask the media itself to exercise a discretion but there would not normally be, in my view, any direction to the media other than in particular types of cases.

2.2.6 Deputy R.G. Le Hérissier:

Clearly, this is an enormously difficult balance to achieve and a very, very worrying issue. Could the Attorney General tell the Assembly what steps are being taken to ensure that the right balance is struck so that people do not go into court and that issues from very, very difficult periods, for example, in their early life where, for example, massive intimate information has been given to a counsellor, that these issues, be they a victim, be they a complainant or be they an alleged guilty party, are not going to be brought out to haunt them, I am afraid, in the context of a small community where, as the previous questioner said, news is very easily available?

The Attorney General:

There is, of course, a difficult balance to strike in any of these matters but it is in the interests of justice that information can be deployed that may undermine the credibility of a witness or may be relevant to what goes on in the case itself. The court and counsel are alive to the questions of relevance and, indeed, the question of sensitivity but ultimately if the information is available to the defence, it is open to the defence to deploy it and that is one of the facets of dealing with justice in the open in this jurisdiction.

The Bailiff:

Does the Assembly agree to raise the défaut on the Deputy of Grouville? The défaut is raised.

WRITTEN QUESTION TO H.M. ATTORNEY GENERAL
BY DEPUTY R.G. LE HÉRISSIER OF ST. SAVIOUR
ANSWER TO BE TABLED ON TUESDAY 20th NOVEMBER 2012

Question

What protections, if any, are afforded a complainant who consents to the use of confidential medical or counselling information in a criminal trial?

How are they made fully aware of the implications of agreeing to the use of such information?

Answer

The Attorney General has already answered oral questions relating to this matter on 6th November 2012.

The prosecution has a duty to disclose material that might undermine its case or assist the defence. This duty of disclosure is key to providing a defendant with a fair trial pursuant to Article 6 of Human Rights Law. A failure to discharge this duty can result in an acquittal.

In order to discharge this duty, the prosecution will typically need to review any medical records that may relate to a complainant in order to determine what, if any, of that material undermines it case or assists the defence. The complainant will be informed, when consent is sought, that the material may be disclosed to the defence and used at trial.

The prosecution lawyers will consider the medical records having regard to the disclosure test. If (and only if) the test for disclosure is satisfied, then the prosecution must either provide the documents to the defence or offer no evidence and thereby stop the case.

There are limits to the discussions that can be had with a complainant on this issue. A complainant can be properly informed that the material might be used by the defence during the trial. What the prosecution must not do is highlight particular parts of the medical records to the complainant and warn them as to what questions might be put in cross examination.