

THE LEGAL ASPECTS OF

MEDICAL CONFIDENTIALITY

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The Duty to maintain Professional Confidence

1. The doctor's duty to maintain professional confidence is sacrosanct. This duty is enshrined in both Ethics and the Law.
2. In ethics, we find in the modern version of the Hippocratic Oath introduced by the World Medical Association as the Declaration of Geneva the following statement:

"I will respect the secrets which are confided in me, even after the patient has died."

We find that in the SMC Physician's Pledge the declaration that:-

"I will respect the secrets which are confided in me."

The SMC Ethical Code states in no uncertain terms that:

*"The unauthorised disclosure of information obtained from patients in confidence or in the course of attending to a patient **is an offence**. Patients are entitled to expect that information about themselves or others which a practitioner learns in his professional capacity, will remain confidential".*¹ [Emphasis added]

3. In law, the doctor's duty to maintain confidence is no different from other circumstances in which a duty to maintain confidence exists. The general principle of law may be stated as follows:

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Paragraph 26.

*“... [A] duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others.”*²

4. In law, it is recognised that there are three limiting principles to this duty:

(1) The duty will not arise if the information has entered the “public domain”.

(2) The duty does not apply to useless information or trivia.

(3) The duty may be negated by consent or the public interest.

5. The obligation of confidence extends to all patients, whether they are children, elderly or mentally disabled, although in such cases, an exception may apply (see below). The obligation of confidence remains even when the patient dies.

Public Domain Limitation

6. Broadly speaking, the first limitation means that if the information in question is known to the public at large, the law of confidentiality cannot apply to it. Of course there may be more complex situations where the information is known to some but not all. In this regard, information may be said to be in the public domain which, although not in fact known to the public at large, is accessible by means not involving

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Lord Goff in the *Spycatcher Case* [1990] 1 AC 109 at 281.

the use of information imparted on a confidential basis. The degree of confidentiality is obviously an important factor.

Trivial or Useless Information

7. The second limitation simply put is that confidentiality does not attach to useless information. Therefore if a matter is not such that the preservation of its confidentiality would be thought by a person of ordinary honesty and intelligence to be of any substantial concern to the confider, it is unlikely that a court will attach to it any duty of confidence.
8. One does not expect the above two limitations to apply in the case of a genuine doctor-patient relationship. Information given by a patient to a doctor for the purpose of medical treatment will not be known to the public at large nor will it be trivial or useless.

Consent and other legal Limitations

9. However, as we all know, there are situations that the duty of confidence is negated by the public interest and these situations are often formalised by law. These situations include:
 - (1) Where the patient gives consent.
 - (2) Where information is shared with other doctors, nurses or health professionals participating in caring for the patient.

- (3) Where, on medical grounds, it is undesirable to seek the patient's consent, information may be given in confidence to the patient's family member or close relative.
 - (4) Where, in the doctor's opinion, disclosure of information to some third party other than a family member or close relative would be in the best interests of the patient. However, the doctor must make every effort to obtain the patient's consent and only in exceptional circumstances may the doctor proceed to disclose information without consent.
 - (5) Where it is in the public interest to disclose. However, this is very rare and exceptional.
 - (6) Where, it is necessary for the doctor to protect or defend himself, eg. in disciplinary proceedings.
 - (7) Where a statute requires disclosure.
 - (8) Where it is ordered by the court.
 - (9) Where necessary for the purposes of approved medical research.
10. Situation 1, a case of express consent, is not strictly an exception to the obligation of confidence. Situation 2 can be considered a case of "implied consent" as the patient is deemed to have consented to the disclosure of information to the healthcare team

participating in his treatment in order that they are able to properly treat him. There is usually no difficulty with these two exceptions.

11. Situations 7 and 8 are also usually clear-cut. If a statute imposes a duty on the doctor to disclose confidential information, eg. in cases of infectious diseases, the doctor is obliged to do so, or he may face penal consequences. Similarly, if a court orders the doctor to disclose certain information, he must also comply with the court order or he may be held to be in contempt of court.
12. Some difficulty arises in situations 3, 4 and 5. Situations 3 and 4 deal with disclosure in the interest of the patient. Situation 5 deals with disclosure in the public interest. The difficulty arises in balancing the “interest” in disclosure against the doctor’s obligation of confidence.
13. For the purpose of this lecture, I will highlight some of these exceptions for discussion.

Where Disclosure is in the Patient’s Best Interest

14. Disclosure to a family member or close relative is allowed, and in fact natural, in cases where the patient is incapable of making informed decisions about his own treatment. Examples of such cases are:-
 - a. Where the patient is unconscious, eg. in a coma
 - b. Where the patient is too ill or cannot communicate

- c. Where the patient is a young child, eg. babies and toddlers
 - d. Where the patient is an incompetent adult, eg. a patient with mental illness, or a patient suffering from senility
15. The rationale for disclosure in these cases is that the patient is presumed to have consented to the disclosure to his family or close relative so that they can make informed decisions about his treatment in his best interest.
16. Disclosure to a family member or close relative is also justifiable in cases where it would be undesirable, on medical grounds, to disclose information about the patient's health to him directly, eg. where the patient is in a vulnerable state of mental health such that disclosure to him about his health may put him or others at risk. In such a case, it is appropriate for the doctor to disclose information about the patient's health to his family member or close relative.
17. What about the situation of a child who does not allow the doctor to disclose confidential information to the parents or guardian especially in relation to choice of treatment? The doctor stands in a confidential relationship to every patient of whatever age including a baby. The issue is one of the rights of the parents versus the rights of the child, and it has been resolved by the court in one case³ as follows:
- a. Parental rights exist only for the benefit of the child and these rights diminish gradually as the child acquires the ability to make decisions for himself.

- b. The pace of development will vary from child to child.
 - c. The parental right to decide on the choice of treatment will terminate if and when the child has sufficient understanding and intelligence to enable him or her to understand fully what is involved.
 - d. The doctor's duty is to act in accordance with what he believes to be the patient's best interest. That duty involves satisfying himself whether the patient has a sufficiently mature understanding to have the capacity to consent to the treatment in question. In assessing whether the patient has such capacity and what is in his or her best interests, the doctor must exercise his professional judgement.
 - e. If the doctor is satisfied that the patient has sufficient responsibility to make his or her own judgement, the doctor should respect the patients' confidentiality and should accordingly not disclose information to the parents against the patient's wishes⁴
18. Special considerations may also arise if the doctor has reason to believe that the parent was abusing the child, or neglecting the child, or that disclosure to the parent would for some reason be harmful to the child.

Where Disclosure is in the Public Interest

19. Disclosure of a patient's medical information may be desirable and appropriate in certain circumstances when it is in the public interest. This arises where the doctor has

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Except where the patient is under a disability or in a coma.

reason to believe that the patient's medical condition puts others at risk and disclosure is necessary to protect the public from risk of harm or injury. Examples of such cases are:-

- a. Where a crime has been committed, eg. a doctor treats a patient who had aborted her baby illegally, or a doctor has reason to believe that a patient he treats for a bullet wound is a bank robber who has just been shot.
- b. Where the patient is likely to commit a crime, eg. a patient with mental illness, a patient with a history of violence or abuse.
- c. Where the patient has or is a carrier of an infectious disease or HIV (this has been legislated to a large extent in Singapore).
- d. Where the patient has an illness which may affect certain bodily or motor functions, eg. an epileptic patient who is a bus driver, an alcoholic patient who is a surgeon.
- e. It should be noted that in cases involving the commission or the risk of commission of a crime, the doctor is not under a duty at law to disclose confidential information about the patient's health. The doctor cannot be penalised for abiding by his obligation of confidence to his patient if he chooses not to disclose.

20. The circumstances stated above are not absolute. The doctor must always balance the public interest against his duty to maintain confidentiality. It is only in cases where

the public interest is overwhelming that he can breach his duty of confidence and disclose confidential information about the patient.

21. Even when the circumstances justify disclosure of confidential information, the disclosure can only be made to certain limited classes of persons. Disclosure can only be made to the appropriate authority and not to the public at large.

Precedents

22. There have been no cases in Singapore dealing with the issue of breach of a doctor's duty of confidentiality to his patient. We have therefore looked at the English and Commonwealth cases which are applicable in Singapore law.

- a. In **X v Y**⁵, the names of two doctors being treated for HIV were improperly disclosed to a newspaper. The health authority sought an injunction to restrain the newspaper from publication of this information. The court granted the injunction to restrain the publication as it was of the view that to allow the publication in such an unrestricted form would make a mockery of the law's protection of confidentiality when there was no justifying public interest.
- b. In **W v Edgell**⁶, a prisoner was detained in a secure hospital without limit of time as a potential threat to public safety after he shot and killed 5 people and wounded 2 others. Ten years after, he sought a review of his case for transfer to a regional secure unit. His legal representative obtained a report from an

⁵ (1988) 2 All ER 648.

⁶ (1990) 1 All ER 835, Court of Appeal.

independent psychiatrist which was unfavourable to the prisoner and the application for transfer was aborted. The psychiatrist was afraid that his report would not be made known and that the prison authorities would make a decision without adequate information and hence cause danger to the public. He disclosed a copy of his report to the medical director of the hospital and the Home Office. The court held that his disclosure was justified.

- c. In **Duncan v Medical Practitioners' Disciplinary Committee**⁷, a bus-driver underwent triple coronary by-pass surgery and was subsequently certified fit to drive a bus. However, his general practitioner asked the relevant authorities to withdraw his licence and furthermore warned his passengers of their supposed danger. The doctor was found guilty of professional misconduct. On judicial review, the court upheld the finding of guilt. The court emphasised that confidential information can only be disclosed in exceptional circumstances, and only when the public interest is paramount. The court also emphasised the need of the doctor to discriminate and ensure that the recipient of the information is a responsible authority.
- d. The American courts have gone further and imposed an onerous duty on doctors to warn the public where it is reasonable to foresee danger to the public. In **Tarasoff v Regents of the University of California**⁸, a man who killed a girl had, 2 months earlier, told a psychologist employed at the university of his intention to kill the girl. The university informed the police. The police briefly detained the man, but released him after finding that he appeared to be rational. The parents of the girl brought an action against the

⁷ (1986) 1 NZLR 513, NZ High Court.

⁸ (1976) Sup. 131 Cal Rptr 14, California Supreme Court.

university for failing to warn the girl of the danger, or to take other steps which were reasonably necessary in the circumstances. The American court held that the parents had a cause of action against the university for their negligent failure to protect the girl.

23. It is therefore clear that confidential medical information can only be disclosed in cases of overwhelming public interest and only to a relevant and responsible authority. Even in cases where disclosure has been allowed, the courts have reiterated the sanctity of the duty of confidentiality and the exceptional circumstances where a breach is justified.

Compulsion by Court Order

24. Where a court order requires disclosure of confidential information obtained from the doctor-patient relationship, the doctor must comply with it or he may be held in contempt of court.
25. Similarly, where a doctor is a witness in court proceedings, he must disclose confidential information if required to do so. There is no privilege from disclosure of such confidential information for medical advisors, compared to the legal professional privilege which exists for legal advisors.

Self Protection

26. If a patient sues a doctor or makes a complaint for the purposes of disciplinary proceedings, the doctor may, depending on the nature of the case, need to disclose

confidential information about a patient to protect his own position. He is allowed to do so to defend himself⁹.

27. Additionally, where a complaint is made by a patient about his doctor, the patient may be presumed to have waived confidentiality to the extent necessary for the doctor to defend himself.

Management and Record Keeping

28. Doctors and hospitals have to maintain records. The storing of information would invariably involve other people and this will mean actual or potential loss of secrecy. In addition, information may be stored also for management purposes, e.g. the accounting department of a hospital will in the course of preparing a bill, see the record of the treatment administered to the patient.
29. It may be said that the patient would have impliedly consented to this practice in order for the doctor to manage his practice efficiently for the patient's benefit. However, the doctor retains prime responsibility for the protection of information and he must take steps to ensure, as far as lies in his control, that the records kept by him are protected by an effective security system with adequate procedures to prevent improper disclosures.

Statutory Exceptions

30. The statutory exceptions to the duty of confidentiality have arisen mostly due to the unequivocal overwhelming public interest in these areas. These statutory exceptions

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As in the case of *Duncan v Medical Practitioners' Disciplinary Committee*, see above.

allow disclosure by medical practitioners, and sometimes also extend to other healthcare personnel and government officers. We highlight some of the statutory exceptions below:-

(A) Infectious Diseases Act (Cap.137).

- a. Section 6(1) provides that “Every medical practitioner who has reason to believe or suspect that any person attended or treated by him is suffering from an infectious disease or is a carrier of that disease shall forthwith give notice in the prescribed form to the Director.”
- b. If he fails to notify or furnishes false information, he shall be guilty of an offence. [Section 6(5)].
- c. The persons to be notified and the time and manner of notification are set out in the Infectious Diseases (Notification of Infectious Diseases) Regulations 2001.
- d. Section 25(6) of the said Act provides that “A medical practitioner may disclose information relating to any person whom he reasonably believes to be infected with AIDS or HIV Infection, to the spouse, former spouse or other contact of the infected person, or to a Health Officer for the purpose of making the disclosure to the spouse, former spouse or other contact.”
- e. 3 pre-requisites:-

- 1) He reasonably believes that it is medically appropriate and there is a significant risk of infection to the spouse, former spouse or other contact;
 - 2) He has counselled the infected person regarding the need to inform to the spouse, former spouse or other contact, and he reasonably believes that the infected person will not do so; and
 - 3) He has informed the infected person of his intent to make such disclosure.
- f. Section 25(1) of the said Act provides that "Any person who, in the performance of his functions or duties, is aware or has reasonable grounds for believing that another person has AIDS or HIV Infection or is suffering from a sexually transmitted disease or is a carrier or that disease shall not disclose any information which may identify that person" except in certain prescribed situations.

(B) Factories (Medical Examinations) Regulations (Cap.104, Section 69)

- a. Regulation 4 provides that "No person shall be employed in hazardous occupations unless he has been medically examined by a designated factory doctor and certified fit to work in those occupations." The examinations required will depend on the types of hazardous substances to which the person will be exposed.

- b. Regulation 5 provides that “Every person employed in hazardous occupations shall be periodically examined by a designated factory doctor.”
- c. Regulation 8 provides that: “The results of the medical examination of such persons shall be reported by the designated factory doctor to the employer of such persons. The employer shall when required make available to the Chief Inspector the medical reports for a period of 5 years from the date of any medical examination.”

(C) Immigration Act (Cap.133)

Section 29 provides that “An immigration officer may require any person who wishes to enter Singapore to submit to a medical examination by a Government medical officer” and “The Government medical officer shall submit a copy of the results of the medical examination to the Controller.”

(D) Termination of Pregnancy Regulations (Cap.324)

Regulation 12(1) provides that “Facts and information relating to treatment to terminate a pregnancy may be disclosed by any person who participates in any treatment to terminate a pregnancy or any person who is concerned with the keeping of medical records in connection with treatment to terminate a pregnancy” in certain prescribed situations.

These ‘situations’ include the investigation of offences under this Act or any law relating to abortion by police officers, the prosecution of offences under

this Act or any law relating to abortion by the Attorney-General's Chambers, for purposes of pending criminal proceedings or bona fide research.

(E) Private Hospitals and Medical Clinics Act (Cap.248)

Section 13 provides that “The Director and authorised officer shall not disclose any information contained in any medical record, or which relates to the condition, treatment or diagnosis of any person, unless the disclosure is made for the purpose of enforcing this Act, the Infectious Diseases Act or the Termination of Pregnancy Act, or for disciplinary proceedings.”

(F) Enlistment Act (Cap.93)

Section 8 provides that a Medical Board is to be appointed for the purpose of determining the medical fitness of national servicemen and operationally ready national servicemen who are required to report for a fitness examination.

In Regulation 10 of the **Enlistment Regulations** (Cap.93, Section 33), it is provided that any medical information obtained in such examination shall not be disclosed to any unauthorised person, except that the Chairman of the Medical Board may disclose the information to any doctor acting on behalf of the examinee, and any other authorised person.

The last few statutes relate to exceptions applicable to persons in institutions:

(G) Prisons Regulations (Cap.247, Section 65)

- a. Regulation 60 provides that “The medical officer shall examine every prisoner after admission and make entries into a Register.”
- b. Regulation 61 provides that “The medical officer shall keep careful observation on the mental and physical condition of prisoners awaiting trial on capital charges", and "submit a report to the Public Prosecutor stating whether he has observed any signs of insanity.”
- c. Regulation 64 provides that “The medical officer shall report to the Superintendent any prisoner whose mind appears to be, or is likely to be injuriously affected.”
- d. Regulation 66(2) provides that “The medical officer shall report to the Superintendent where he is of the opinion that the life of any prisoner will be endangered by his continuance in prison, or that any sick person will not survive his sentence, or is totally and permanently unfit for prison discipline.”

(H) Mental Disorders and Treatment Act (Cap.178)

- a. Section 34 provides that “A doctor who has under his care a person believed to be of unsound mind or to require psychiatric treatment, may send the person to a medical officer at a mental hospital for treatment.”
- b. Section 35 provides that “A medical officer at a mental hospital who has examined a person suffering from mental disorder and is of the

opinion that he should be treated as an inpatient at the mental hospital, may sign an order for admission of that person into the mental hospital", in which case the person may be detained for an initial 72 hours.

(I) Misuse of Drugs Act (Cap.185)

- a. Section 34 provides that "The Director may order any person who is reasonably suspected to be a drug addict to be medically examined by a doctor. If, as a result of such medical examination or urine test, it is necessary for the person to be subject to supervision or rehabilitation, the Director may make such the necessary orders for supervision or for treatment or rehabilitation."
- b. Regulation 4 of the **Misuse of Drugs (Approved Institutions and Treatment and Rehabilitation) Regulations (Cap.185, Section 44)** provides that "Every inmate shall be examined by a medical officer upon admission."
- c. Regulation 8 provides that "Any inmate may be required to undergo a medical examination for purpose of ascertaining whether he is suffering from, or is a carrier of any infectious disease" and "The medical officer shall give a report to the Superintendent if the inmate has been so ascertained."

Consequences of a breach of confidence

31. A medical practitioner who breaches his obligation of confidence without just cause may face civil proceedings from the patient, and possibly disciplinary proceedings as well.
32. As the obligation of confidence is owed to the patient, only the patient can bring an action for breach of confidence against the doctor. The possible remedies may be:-
 - a. An injunction to restrain the breach and/or future breaches
 - b. Damages in lieu of an injunction
33. The doctor may also be subject to disciplinary proceedings under the Medical Registration Act (Cap.174) if a complaint is made against him for breach of confidence. The doctor may be found guilty of professional misconduct if he is unable to show that the disclosure of confidential information was made with the patient's consent, or with just cause.

Some Issues to Consider

34. Consider these issues:-
 - i. Genetic test results - Should they be treated like other types of medical information? Can such information be released to, for example, health and life insurers to whom the genetic make-up of a client is of utmost importance? The MOH has clarified that genetic test results should be treated like other types of confidential information obtained from a doctor-patient relationship and should not be disclosed without the patient's consent.

ii. AIDS-infected persons or HIV carriers - Can information about their medical condition be disclosed to their employers? It is expressly provided under the Infectious Diseases Act that such information cannot be disclosed except in the prescribed situations, even if there is a high risk that other persons may be infected with the virus, eg. If the person infected is a surgeon who may cut himself during surgery and infect his patients or other healthcare personnel. How then to protect their fellow workers or others persons who may be exposed to the virus?

iii. What about other contagious diseases, eg. Tuberculosis? Can information about persons diagnosed with these diseases be disclosed to persons at risk? In this case, there is no specific provision that such information cannot be disclosed. Can the public interest then override the duty to maintain confidentiality?

iv. HIV testing on new-born babies of HIV-positive mothers - Can HIV testing be made compulsory, since babies are now routinely screened for a variety of genetic disorders? This will greatly help the early detection and treatment of HIV. However, some HIV-positive mothers cannot or do not want to face up to the disease and refuse HIV testing for their babies. Unfortunately, the duty to maintain confidentiality and respect the patient's right to choose overrides the need to protect the new-born babies from this fatal disease.

Conclusion

35. The doctor has an ethical and legal obligation to maintain the confidence of his patients. Only in exceptional circumstances (as discussed) can the doctor disclose confidential medical information about a patient to others. In some of these cases, the doctor even has an obligation to disclose confidential information, but these arise only when statute or the court imposes such a duty. Where statute or the court imposes such a duty to disclose confidential information, the practitioner is protected against an action for breach of confidence. However, in all other cases, the practitioner must be able to justify his decision to disclose confidential information.