

Legal Culpability of Dereliction of Privileged Communication

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Abstract

The recent plane crash by a German-wings co-pilot has shocked the whole world. Moreover the revelation by the doctors about his health condition, questions the fundamental basis of confidentiality clause in the Medical ethics. The rash act of the pilot resulted in loss of many lives. There had been many debates on this issue of owing of duty to warn. This is an attempt by the authors to rationally study the legal culpability of the doctors by reviewing the literature and substantiate the boundaries between the medical confidentiality and privileged communication.

Keywords: Professional Secrecy; Privileged Communication; Legal Culpability.

Introduction

The confidential nature of communication between physician and patient is a well-recognized concept in medical ethics. It ensures the need of a patient to be free in his entire communication process with his physician in order to avail effective and sound treatment. The communication follows the Principle of Confidentiality of Medical ethics. They are not expected to divulge the secrets confided to them during the course of medical practice except in few conditions that come under Privileged Communication. But an important issue still remains cryptic in this entire process. The legal culpability of the doctors where the confidentiality causes harm to the society and sometimes results in mass disasters is not typically discussed in literature reviews. The recent crash of German airlines raises very important questions [1].

What we need at this very hour is to ask ourselves several simple but important questions.

1. Whether it is a responsibility that we inform the status of a patient engaged in high risk activity/ profession?
2. Is it appropriate to rely only on patient's version during history taking?
3. Is verifying and mentioning the status of a patient engaged in a high risk profession to his employer our moral duty?
4. Does violation of the duty or failure to warn brings onus of culpability on the treating physicians.

Background

The oath of Hippocrates clearly points the principle of confidentiality.

"And whatsoever I shall see or hear in the course of my profession, as well as outside my profession in my intercourse with men, if it be what should not be published abroad I will never divulge, holding such things to be holy secrets" [2].

Professional secrets are the ones, which a doctor comes to know about his patient in his professional capacity as a physician. Thus every doctor should be cautious to reveal statements confided in him by his patients [3]. How far it is ethical that the component of secrecy outweighs the dangers of the outcome? There is no need stick to conservatism or randomly follow whatever action determines better consequences.

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New York was the first state to enact a physician patient privilege statute in 1828 [4].

For the physician-patient privilege to be applicable in a proceeding, three requisites must be satisfied: (1) The physician-patient relationship must have been established; (2) the communication under inquiry must have been an outcome of that relationship and not merely an outgrowth of a social encounter; and (3) the communication must have been made under confidential circumstances [5].

Privileged communication is the bonafide information given to a concerned person or authority, by a doctor, by virtue of his duty to protect the interest of the society. To be bonafide the information should be given only to the concerned person or authority [6].

The privilege belongs to the patient, not the doctor. This privilege will only cover information given to a doctor for the purposes of obtaining treatment or diagnosis. However, even when an individual's mental or physical condition is in issue, courts generally will construe the waiver.

Patient Litigant exception: When the medical condition is at issue, the physician patient privilege is waived [4].

Public Safety exception: If a physician believes that a patient may be dangerous to others, several state statutes allow him to disregard the patient's privilege and warn the authorities, as well as the victim(s) [4].

Disclosure of information compelled in legal proceedings wherein the patient's criminal behavior is an issue. In controversies arising from the physician-patient relationship such as suits for malpractice or actions for the fee, the privilege does not apply. Where a patient's mental capacity to execute a deed or a will is an issue, the privilege does not apply, and disclosure by the physician may be compelled. There is also no physician-patient privilege in a disciplinary proceeding such as to revoke or suspend a physician's license.

Discussion

We must know the rationale behind professional secrecy is to develop confidence in a patient to consult and trust the medical professionals. Confidentiality relates to matters of professional ethics, privileged communication refers to legal rights, and privacy is a more general term for some of the individual's rights [7]. We know that medical confidentiality is based on ethics rather than law. Then carefully reviewing facts

that the treating psychiatrist completely relied on the patients statement that he was not on flying duty raises some issues to debate. The treating doctor's statement carefully shifts the onus of culpability from as they stated "Had the airlines told doctors he was still flying, they might have felt the need to break their vow of patient confidentiality and inform his employers because he might be a danger to others". Medical records showed that pilot was taking medicine for depression, anxiety disorders and panic attacks and had informed the flight school about an episode of severe depression [1].

Many times the state's need for patient information conflicts with the patient's right of privacy [8]. In *Tarasoff V Regents of University of California* presented a new theory on liability imposed several questions [9].

Was a duty owed if the threats of dangers were not aimed at anyone at particular?

What steps did a psychiatrist or therapist have to take to discharge the duty?

Was a duty to warn still owed if the potential victim was already aware of patient's threat or dangerous propensities? How was the therapist's determination of dangerousness to be judged if the profession itself disclaimed the ability to accurately predict future behavior?

Specific threat to specific victim rule as in *Brady* decision and foreseeable violence created a duty to protect others regardless of the victim was identified or specified as in *Lipari* decision contradicts each other, thereby leaving scope for unambiguity [9, 10, 11].

Even the GMC strictly advises that if, as a member of a board or similar body, you are concerned that a decision would put patients or the health of the wider community at risk of serious harm, you should raise the matter promptly with the chair [12]. These issues need to be debated among professionals and thereby put rational guidelines for determining the scope of Privileged Communication. Whether the treating doctor has any right to entirely rely on the patient provided information or has a duty to enquire the background from the employer if he suspects some harm may be done by the patient during the scope of his employment. Privileged communication is deemed necessary where the treating doctor feels it could be hazardous to lives of people and society at large. The victims need not be identified and specified.

Conclusion

The plane crash took many valuable lives and the

offending pilot was also killed in the incident. The incident may explain the intent of the pilot involved establishing his mens rea or he may have the knowledge of the consequences of his action which can fix his culpability. The truth only emerges after resolution of conflicts regarding the facts and the law. There must be uniform standards to delimit the scope of medical secrecy. There must be parameters for determining the legal culpability of violation of clauses of privileged communication.

Suggestion

This is novice attempt to delineate the facts and more debate is required by the medical and legal experts to arrive at a rational view.

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