

# The Legal Aspects of Medical Confidentiality

Reported by  
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## Editor's Note:

Mr Philip Fong spoke on "The Legal Aspects of Medical Confidentiality" during the SMA Seminar on Bioethics & Health Law held on 13 September 2001 at Tan Tock Seng Hospital. The powerpoint presentation and handouts are available online at <http://www.sma.org.sg/whatsnew/ethicslaw2001.html>

Mr Fong was called to the Singapore Bar in 1995 and is currently a partner with Harry Elias Partnership. He practises in the areas of civil and criminal litigation.

## THE DUTY TO MAINTAIN PROFESSIONAL CONFIDENCE

On the issue of the doctor's duty to maintain professional confidence, Mr Philip Fong said that this was enshrined in both ethics and law. In ethics, this is found in the SMC Physician's Pledge and the SMC Ethical Code. In law, the doctor's duty to maintain confidence is no different from other circumstances in which a duty to maintain confidence exists. In addition, 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.

Mr Fong also said, "The obligation of confidence extends to all patients, whether they are children, elderly or mentally disabled, although in such cases, an exception may apply. The obligation of confidence remains even when the patient dies."

## LIMITING PRINCIPLES

The first limitation means that if the information is known to the public, the law of confidentiality cannot apply. In complex situations where the information is known to some but not all, 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 the use of information imparted on a confidential basis.

The second limitation is that confidentiality does not attach to useless information. In 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.

Mr Fong explained the third limitation as situations where the duty of confidence is negated by consent given by the patient or public interest, and added that 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.

He pointed out the difficulties that could arise 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."

## WHERE DISCLOSURE IS IN THE PATIENT'S BEST INTEREST

Mr Fong went on to give examples of

cases when disclosure to a family member or close relative is allowed viz. where the patient is unconscious, e.g. in a coma, too ill or cannot communicate, is a young child, e.g. babies and toddlers, or is an incompetent adult, e.g. a patient with mental illness, or a patient suffering from senility.

He added that "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, e.g. 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....."

"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....."

"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

Speaking on the issue of public interest, Mr Fong said that "This arises where the doctor has 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, e.g. 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, e.g. 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, e.g. 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."

Mr Fong stressed that "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."

Moreover, disclosure can only be made to the appropriate authority and not to the public at large.

#### COMPULSION BY COURT ORDER

"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," Mr Fong said.

"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

Mr Fong added that "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 himself."

"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

The storing of information involves other people and this will mean loss of secrecy. In addition, information may be stored for management purposes, e.g. billing a patient for treatment received.

Although 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, Mr Fong cautioned that "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

There are statutory exceptions which allow disclosure by medical practitioners, and sometimes also extend to other healthcare personnel and government officers. The list given by Mr Fong included:

- a. Infectious Diseases Act (Cap.137)
- b. Factories (Medical Examinations) Regulations (Cap.104, Section 69)
- c. Immigration Act (Cap.133)
- d. Termination of Pregnancy Regulations (Cap.324)
- e. Private Hospitals and Medical Clinics Act (Cap.248)
- f. Enlistment Act (Cap.93)
- g. Prisons Regulations (Cap.247, Section 65)
- h. Mental Disorders and Treatment Act (Cap.178)
- i. Misuse of Drugs Act (Cap.185)

#### CONSEQUENCES OF A BREACH OF CONFIDENCE

Mr Fong explained that "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".

Additionally, "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

Some current issues were also discussed:

- 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?
- 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.
- iii. What about other contagious diseases, e.g. Tuberculosis?
- iv. HIV testing on new-born babies of HIV-positive mothers - 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.

#### CONCLUSION

In summing up the session, Mr Fong said that "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." ■