



Confidentiality in the Age of HIV/Aids –A Legal Perspective

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ABSTRACT

'In the Anglophone legal tradition , the right to confidentiality is most persuasively described in deriving from right to privacy , which in turn stems from the right to dignity and autonomy 1. As a separate juridical concept, the right to privacy received its foundational academic analysis more than a century ago. In England and wales, while judicial enforcement of informational confidentiality is highly elaborated the notion of privacy as a separately enforceable the legal right is still question. The concept of privacy is under pinned by two powerful ideas. The first is every human being Is intrinsically entitled to some personal autonomy. Autonomy means the right to make decisions about and or oneself, this encompasses "A protected field of decision making within which the individual is free from the meddling of others" . The second is the belief that respecting individuals' autonomy and thus their privacy is a" necessary condition for human flourishing".

1. Introduction

The professional licensing laws of some states require that physicians and health care providers maintain the confidentiality of information they obtain in the course of treating their patients. Consequently, physicians and other health care providers may be found to be engaging in professional misconduct if they improperly release confidential information.

Hospitals and other facilities making unauthorized disclosures may be civilly liable where the applicable licensing statute or regulation prohibits disclosure of confidential information concerning patients. Accrediting bodies impose similar duties that require facilities to keep medical information confidential. Improper disclosure of a patient's medical record may jeopardize a facility's accreditation. Established precedent gives the state very broad powers to protect the public health .Nevertheless ,constitutional law developments over the past quarters century have placed restrains on the use of the state authority in the public health field ,including requirements of the process and the use of the least restrictive alternative to achieve the state's legitimate purposes. Legislation that specifically addresses AIDS is subject to scrutiny in light of thee constitutional developments.

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2. Public health police power

Public health statues are enacted in accordance with specific powers invested in government .Federal public health legislation has been based on a broad interpretation of the constitutional clauses that direct the federal government to provide for the general welfare and regulate interstate and foreign commerce. Pursuant to the welfare clause, the federal government has established the United State Public Health Service (PHS)and the United States Centers for Disease control (CDC).

The public health powers of a state are extremely broad, drawing on the inherent powers of sovereignty, and are not limited to the explicit constitutional provisions. Police power is inherent in the exercise of sovereignty and extends to all public needs, such as the right to pass laws that are reasonably necessary for the protection and preservation of the peace, safety, health, morality and general welfare of citizens. States have delegated, through constitutional

provisions, part of their broad power over matters of public health to country and municipal levels of government. The scope of a country's or city's public health authority is dependent on the delegates of the power by the state.

The subject matter that has been dealt with through exercise of the police power in pursuit of the public health has been very extensive. The courts have upheld as valid the exercise of state power in almost any matter arguably related to the public health. These include exercises of the state's power to examine, treat and quarantine in the case of contagious disease.

Compulsory medical examination and treatment have upheld. For example, courts have approved requirements of vaccination prior to school attendance; state statutes providing for compulsory examination of people applying for a marriage license; pre-employment testing for contagious diseases in occupations where the person will be dealing with the public;

Privacy is a fundamental value for everyone in a society which prizes freedom and individuals, not just for those with something shameful or immoral to hide. On the other hand, the force of speaking of a right to privacy is not to say that is absolute, but only to say there is a strong moral presumption in favor of privacy. The concept of privacy necessarily constrains the power of the state. But it can also be argued that it is essential to the effective operation of the democratic state.

The diverse values privacy protects has led to the distinction being formulated between the freedom "to make certain important decisions about what happens to one's own body ("autonomy privacy") and the "right to keep personal information private" ("information privacy"). The right to privacy finds recognition in international law article 17 of the international law covenant on civil and political rights (1966) provides that "No one shall be subjected to arbitrary or unlawful interference with the privacy." In India, privacy has long received explicit recognition as a fundamental right. The supreme court of India has recently affirmed that the right to privacy is an "essential component" of the right to life envisaged by article 21 of the Indian constitution. The court held that the right is not absolute.

3. Confidentiality in Medical Context

In the medical context, confidentiality is often said to find its most ancient reflection in the oath formulated by Hippocrates in ancient Greece some 2400 years. This requires doctors to treat information acquired from a patient in a professional capacity as "sacred secrets", about which they must "keep silence". But there is in fact evidence that the concept was first formally enshrined in the Indian subcontinent, nearly 500 years before Hippocrates and that Hippocratic oath antecedents in other ancient civilizations. In a work written in Sanskrit presumed to be from about 800 BC Brahmin priests were advised to carry out their medical practices by concentrating only on the treatment of a patient when they entered a house and not divulging information about the sick person to anyone else. In ancient Egypt also, the priest's medical men were under strict oaths to retain the secrets given to him in confidence. The worshipped in the temples of Isis and Serapis, a healer of the sick and also of their son, home who was usually called Harpocrates by the Greeks and pictured held with his thumb held to his mouth. The name for medicine, *are mutra* (dumb art) is used in Roman poetry by Virgil in Aeneid XII. The Pythagorean school in Greece so which medical men especially belonged, considered silence as one of the most important virtues.

The supreme court in India has recently endorsed the principle of medical confidentiality as deriving from the classical conceptions of the right to privacy. "Doctors are morally and ethically bound to maintain confidentiality. In such a situation, public disclosure of even true private facts may amount to an invasion of the right to privacy which may sometimes lead to the clash of one person's "right to be let alone" with another person's right to be informed.

Disclosure of true private facts has the tendency to disturb a person's tranquility. It may generate many complexes in him and he may, thereafter have a disturbed life all through.

4. Confidentiality in the Age of HIV/AIDS

A physician patient relationship is fiduciary and requires confidentiality. The physician is not expected to divulge information about his patient. This right to withhold information is not absolute since a physician may be required to inform health authorities about certain diseases in the larger interests of society. Also a physician may be required to give information in the interests of justice by a court of law. Police authorities cannot force information from a physician about his patient except when ordered in a court of judge or magistrate to assist the cause of justice.

The HIV/AIDS epidemic has brought with it profound re-examination of the practical implications of the principle of confidentiality and of the tenets of medical ethics generally. This has triggered intense public and academic debate. This is because infection with HIV engages, in an acute form, the conflict between the individual's rights to limit knowledge of his or her health status, and pressure to divulge that knowledge to others. Infection with the virus is life long, incurable and, for those without access to the newest anti-viral combination therapies, probably fatal. It is therefore of great importance to anyone to attempt to avoid risk of exposure to infection, and to know if such a risk has nevertheless occurred.

5. Confidential health records and court orders

Health care providers may be required to release medical record information pursuant to subpoena or court order. However, the question of what medical records in various contexts are open to discovery has been a matter of a great deal of litigation.

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The importance of confidentiality for the protection of public health was emphasized in the extremely far-sighted judgment of *Rose J*, who stated in the long run, preservation of confidentiality is the only way of securing public health, otherwise doctors will be discredited as a source of education, for future patients 'will not come forward if doctors are going to squeal on them'. Consequently, confidentiality is vital to secure public as well as private health, for unless those infected come forward they cannot be counselled and self-treatment does not provide the best care. Opportunistic infections such as shortness of breath and signs of disease in the nervous system (including dementia for HIV encephalopathy) are better detected and responded to by observation, investigation and management in hospital.

However, in UK one of the exceptions provided under N.B. AIDS CONTROL ACT 1987 is disclosure in public interest. In *THE case of AAG v. Guardian Newspapers Ltd (no.2)* it was stated by Lord Goff, "There is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favors disclosure".

6. Aids confidentiality legislation and regulations

A number of states have passed laws specifically protecting the confidentiality of HIV test results and AIDS diagnoses. Under federal law, certain federal institutions including the CDC, are required to assure the suppliers of research information that any material that is supplied will not be used for any purpose other than that for which it has been supplied for any purpose other than that for which it has been supplied unless the institution or individual supplying the information has consented to further release of the supplied information.

7. Confidentiality in India –Grey in India

In India the premier authority on the issue of confidentiality is the decision of justice Saghir Ahmed in the case of Dr X v. Hospital Z, unfortunately, however, the decision fails to lay down a comprehensive code in which a doctor is to conduct his/herself in such a state.

The debate about the limits of confidentiality has received added impetus from the recent decision of the supreme court of India Dr X V. Hospital Z. The nature of the action appears to have been a claim for illegal disclosure of HIV status by a hospital. The illegality asserted derived, according to the judgment, from the duty of confidentiality “as applicable to persons in the medical profession” the right to marry “which forms the pivot of the decision was, it is averred, never properly before the court at all.

8. Accidental potential exposures

Some states permit disclosure of an individual's HIV test results to members of specified groups when there has been an accidental exposure to body fluids or tissue that may permit transmission of HIV. A number of states require notification of ambulance personnel and emergency medical technicians that they have transported or treated an HIV infected person.

9. Confidentiality vis a vis blood donor

The issue of donor rights is a hornet's nest. What about the rights of an HIV positive donor vis-a-vis the health of an HIV negative patient? what of the rights of the donor who may test positive for HIV but may remain ignorant of her/his HIV status? this is indeed a tricky area.

A single positive ELISA screening test for HIV is sufficient to determine unsustainability of blood for transfusion. However, to determine conclusive HIV positive status? This test has to be followed by a confirmatory test. A donor who tests positive at the ELISA I stage may test negative at the confirmatory test stage. If the tests positive that the confirmatory test, then HIV positive status is confirmed, ethically speaking, it would be the bounden duty of the blood bank to contact the donor, who has performed the public service of donating blood, if he/she tests positive for HIV at the ELISA test stage. Thereafter the donor would require guidance and counselling, both before and after the confirmatory test. However existing facilities and resources in India are so meagre that the logistics of following up with donors who had positive for diseases are just too complex to grapple with.

Hence ethical considerations do not get to govern the status of blood banks which continues to remain ambiguous as the NACO policy merely directs blood banks to discard the blood without informing the donor. Resources are considered in too short a supply to conduct the confirmatory test. This clearly has adverse effects with respect to controlling the spread of the virus and treatment of the donor who is ignorant about his/her status. It seems that the policy makers themselves consider identification of HIV positive people a low priority to control the spread of the virus.

The supreme court held that the general rule is to maintain confidentiality but the rule is not absolute. the confidentiality of the patient /donor can be breached in favor of a public interest or duty. Therefore confidentiality can be breached to inform the prospective partner of the HIV positive status of the donor/patient. this overrides the international code of medical ethics” where a physician shall preserve absolute confidentiality on all he knows about his patient even after the patient has died”.

However with the outbreak of AIDS so endemic proportion the wisdom of his rule can be questioned. After all, the people who may have been injected by the patient also have a right to know. also they make decisions to prevent the spread of the disease. by refraining from sexual intercourse in a manner that they may transmit the disease, bearing children and breast feeding.

However, the issue cannot be looked at in isolation. there is a flip side to informing the donor of his/her status. The decision in Mr X can lead to a serious consequence if the onus is placed on blood banks to inform the donor of his/her status, this leads into a tangle of ethico- legal issues. should the donor be informed that the blood that he she donates will be tested for hiv/? should the test results be disclosed to the donor or to any other persons who would risk

acquiring the disease through such donor would it become mandatory for the blood bank to inform, say the spouse of the HIV positive donor should confidentiality be breached in a donor blood bank relationship? These issues are of vital importance and quite distinct from related concerns about allocation of personnel the chances of false positive and false negative tests and infrastructure to address counseling of donors/spouses. etc.

10. Conclusion

In India, where a severe paucity of blood supply exists, where counselling facilities are barely available, for blood banks to trace the donor and inform him /her of his/her possible positive status would mean heavy investment and expenditure in installing facilities and services. In most places in rural India, wherever 70 percent of the population lives, blood testing and storage facilities are virtually nonexistent. There is also a high incidence of maternal mortality with 20 to 25 percent of deaths related to pregnancy and Childbirth. The health care system in rural India is either totally absent or terribly rudimentary. Blood banks are not available blood is simply cross-matched and directly transferred to the patient. Even though rapid test kits for HIV testing are available today, they are unreliable and not commonly used. This results in high transmission levels through untested blood. In urban areas too, due to high incidence of professional blood donors and donors from high risk groups, there is a high incidence of transfusion-related diseases through blood and blood products.

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