BMJ

BMJ 2013;346:f1471 doi: 10.1136/bmj.f1471 (Published 6 March 2013)

VIEWS & REVIEWS

PERSONAL VIEW

Doctors have a duty to breach patient confidentiality to protect others at risk of HIV infection

Balancing the competing duties of maintaining privacy in the doctor-patient relationship with minimising potential harm caused by non-disclosure of HIV status is not always easy, says **Tak Kwong Chan**

Tak Kwong Chan *assistant professor and clinical ethicist, Li Ka Shing Faculty of Medicine, University of Hong Kong*

The theoretical reasons for breaching patient confidentiality to protect a third party from risk of HIV infection are straightforward. On the other hand, Rose J in X *v* Y said that confidentiality is vital to securing public health because infected people cannot be treated and counselled unless they come forward.[1] To resolve the conflict, the confidentiality guidance of the UK General Medical Council provides that "disclosure of personal information about a patient without consent may be justified in the public interest if failure to disclose may expose others to a risk of death or serious harm."[2] As the GMC guidance provides only a guiding principle, the decision to breach confidentiality will continue to present a challenge for physicians.

The legal side is less predictable, given the paucity of UK cases in which a non-patient third party successfully challenged a physician. However, as the European Court has recently held that there should be a legal framework for resolving the conflict between a physician's duty of confidence and a third party's right to physical integrity,[3] the legal duty to protect identifiable third parties could be cast on physicians in the UK in the future.[4]

Consider four clinical situations in which a patient is diagnosed as having HIV infection. Mr A says that he does not have any sexual partners. Mr B refuses to disclose his sexual history. Mr C reveals the identities of his sexual partners, but he explicitly refuses to disclose to them his HIV status. Mr D says that he has disclosed his HIV status to his wife, but he refuses to bring her to the clinic, and you are not sure whether his wife is informed of the risk of infection.

Most of us believe what our patients tell us. Few would assert that the scope of our duty to protect the public from harm would be so wide as to require us to verify Mr A's history. Regarding Mr B's selfish behaviour, although a few might feel morally motivated to search actively for his sexual partners, the law is unlikely to impose a duty being owed to the world at large.[5] Mr C's behaviour is objectionable. Given the known identities of the potential victims, many of us might feel obliged, and the GMC guidance allows us, to inform the authorities or directly approach his sexual partners. Given the legal unpredictability, a similar scenario is likely to be litigated in the UK courts in the future. Mr D's situation would cause difficulty for many of us. Should we trust Mr D or take further steps to make sure that his wife is aware of the risk? Neither the UK law nor the GMC guidance provides a definite answer.

Some argue that the right of confidentiality should be absolute. I do not agree. Even the most extreme liberalist would not dispute that there is always a threshold at which one's freedom has to be interfered with. And that threshold is reached if a third party is potentially at risk of serious harm.[6] Once an individual is found to be HIV positive, as Erin and Harris argued, he or she becomes morally obliged to disclose the HIV status to those who are at risk of infection.[7] Given the moral obligations to disclose their HIV status, HIV positive individuals should not be entitled to confidentiality.

Without assurance of confidentiality, one may argue, patients may be deterred from HIV tests. Granted, Hogben and colleagues showed that partner notification can also effectively increase identification of high risk populations for HIV testing.[8] Indeed, most HIV positive people are willing to disclose their condition to their sexual partners.[9 10] It is unlikely they would refrain from taking an HIV test to avoid disclosure of their HIV status to which they would anyway agree. In light of the uncertain impact of conditional breach of confidentiality on overall HIV transmission, the less evil choice should favour the welfare of a third party at immediate risk of harm over patient confidentiality.

Although HIV is not a notifiable disease under the UK Public Health (Infectious Diseases) Regulations 1988,[11] there are statutory provisions in Australia for doctors to disclose relevant information to the director general when there are reasonable grounds to believe that a person is behaving in such a way that

theo@hku.hk

the health of the public is at risk.[12] The Supreme Court of New South Wales held in the Pd case[13] that the duty to protect a third party could be discharged by relaying relevant information to the Department of Health in accordance with the Public Health Act. With these laws in place, the situations of Mr A, B, C, or D would be easy to deal with.

Until there is a similar legal framework in the UK, physicians have only their moral conscience to determine which course of action to follow. Even perfect mastery of ethical principles does not always mandate a single best solution. The following protocol should reasonably discharge a physician's moral obligations.

Advise the patent about the risk of infecting another person. Persuade the patient to abstain from all sexual behaviour with others without first disclosing his or her status. Persuade the patient to disclose the risk of infection to any identifiable sexual partners at risk of harm. If the patient is willing to disclose the risk, check to make sure that any partners are aware of the risk of being infected. If the patient is unwilling to disclose the risk, tell the patient that you will have a professional duty to do so on his or her behalf. If the patient is still unwilling to disclose the risk, disclose the risk of infection to any identifiable parties either directly or through appropriate authorities.

Competing interests: None declared.

Not commissioned; externally peer reviewed.

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Cite this as: *BMJ* 2013;346:f1471