

Confidentiality and death

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Abstract

The duty of confidentiality in the normal doctor-patient relationship is well recognized. However, the duty of confidentiality between the pathologist who performs the autopsy and the requesting authorities and the next-of-kin is not as clearly spelt out. This article discusses the problems faced by the pathologist with regards to hospital and medico-legal autopsies in Malaysia. A proposed ethical guideline is included on how to deal with peculiar issues regarding confidentiality and the pathologist.

Key words: confidentiality, death, autopsy

INTRODUCTION

The doctor's duty to maintain confidentiality is well recognized in the normal doctor-patient relationship. However, the circumstances are different for the pathologist who performs the post-mortem examination. The relationship between the pathologist and deceased is different from the usual doctor-patient relationship. More often than not, the pathologist is not acquainted with the deceased or the next-of-kin during life. No similar duty of care exists between the pathologist and deceased or the next-of-kin as between the doctor and living patient. The situation as regards to confidentiality is not clear in this case. The major textbooks on medical law and ethics do not delve deeply in this particular circumstance.¹

There are two different types of autopsies i.e. the hospital autopsy which is performed with the consent of the next-of-kin and the medico-legal autopsy which is performed upon police or Magistrate authorization. Each type of autopsy raises its own peculiar issues regarding confidentiality.

This article will review the problems of confidentiality the pathologists face in the local environment. Before delving into the plight of the pathologist, we shall take a general look at the issue of confidentiality.

CONFIDENTIALITY IN THE LIVING PATIENT

The role of the doctor with respect to confidentiality in the living patient is well

established having been enshrined in the Hippocratic Oath for the last three thousand years.

".....And that may come to my knowledge in the exercise of my profession or outside of my profession or in daily commerce with men, which ought not to be spread abroad, I will keep secret and will never reveal....."

A modern enunciation of the same principle is found in the International Code of Medical Ethics.³

"....A doctor shall preserve absolute secrecy on all he knows about his patients because of the confidence entrusted in him...."

For medical care to be effective, the doctor has to keep secrets so that the patient feels that he can talk freely and confidentially with the doctor. However, this confidentiality is not absolute. The General Medical Council of Britain⁴ has set down several exceptions:-

- a) with the patient's or his/her legal representative's consent,
- b) when public interest override the patient's own interest,
- c) when required by statute or law (e.g. notification of infectious diseases) or when required by legal process (e.g. during court testimony) or
- d) for the purposes of medical teaching, research or audit.

The nature of this obligation does not lie solely in the moral sphere but has been recognized by the courts in various jurisdictions. The protection of confidentiality is seen as crucial

for two reasons.⁵ First, it is essential if individuals are to feel free to confide in their caregivers. Second, to protect individuals from potential misuse of information such as being deprived of work or participation in social activities.

CONFIDENTIALITY IN THE DEAD PATIENT

The confidential nature of the relationship between the patient and doctor does not end with the demise of the patient. The Declaration of Geneva⁶ states "I will respect the secrets which are confided in me, even after the patient has died". The International Codes of Medical Ethics³ is even more severe in its description: "A physician shall preserve absolute confidentiality on all he knows about his patient even after the patient has died", suggesting that confidentiality is absolute with no compromise or exception. In England, the publication of a book entitled "Churchill", written by Lord Moran, Churchill's physician, caused an uproar. Lord Moran was censured by the General Medical Council for revealing Churchill's medical condition notwithstanding that it was long after the death of the famous Prime Minister of Britain. The local scene has yet to meet with any such problems, but it is foreseeable that such issues may arise in the future. The question raised at this point is whether or not this duty to the dead patient is recognized by the court. The personal nature of the confidential relationship would indicate that the legal duty would not survive death. There can be no harm to the individual personally if information is released after his death. It is therefore contended that although this duty of continued confidentiality is recognized by the profession, it is not legally actionable.

CONFIDENTIALITY AND THE PATHOLOGIST

As mentioned above, there are two types of autopsies. The hospital or pathological autopsy, which requires the consent of next-of-kin, is usually requested by the clinician for the furtherance of knowledge and the purpose of medical audit. The consent is obtained in writing on a standard form, which clearly states the purpose of the autopsy. The autopsy report is no different from any other hospital record. In Britain, access to medical records is governed by the Access to Health Records Act 1990 (for manually stored data) and the Data Protection Act 1984 (for electronically stored data). Both

these acts confer upon the patient, his representative or a proxy in cases of incompetence, a general right to obtain access to information contained in medical records. This right of access is limited to the extent that in the opinion of the record holder, the disclosure of the information would be likely to cause serious harm to the physical or mental health of the patient or of any other individual or was provided by another person who could be identified from that information.' Notwithstanding the fact that there is no similar legislation in Malaysia, the principles set out in the statute may be instructive. If the hospital autopsy report is considered to be in the same genre as an ordinary medical record, the right to access would remain with the authorized representative which in this particular circumstance, is the next-of-kin who consented to the postmortem examination. It is reasonable to assume that the pathologist has a duty of confidentiality to the next-of-kin who consented, which is not unlike the confidentiality that exists between the patient and doctor. The autopsy report may presumably be accessed by the clinician and other relevant medical personnel, but not any party other than that as stated in the consent form unless with the authorized representative's consent.

The medico-legal autopsy is a completely different matter as it is performed at the request of either the police or a Magistrate¹ and any duty of confidentiality would presumably be owed to the requesting party.

It would seem unlikely that the doctor owes any duty to the relative under these circumstances. It is contended that no information can be released to the next-of-kin if the information has a bearing on the case even if potentially useful to the relatives. The argument may be taken a step further to say that because there is no direct relationship between the relatives and the doctor, no information may be released to the relatives under any circumstances. The uncertainty surrounding this issue may prove to be a real problem for the pathologist especially when the information is potentially useful to the next-of-kin. James and Leadbeater⁹ raised the possibility of the pathologist in Britain being censured by the Medical Council in the event that he informs a relative of a possible hypercholesterolaemia condition which exists in the family, thus denying a chance for that relative to obtain insurance coverage!

Paradoxically the pathologist may be sued for *not* releasing such information to the relative, thus denying him the opportunity to take

preventive measures. The now classical case of *Tarasoff v Regents of the University of California (1974)*¹⁰ concerns a psychiatrist whose patient expressed a desire to harm a woman who rejected him. The psychiatrist failed to warn her of the danger and she was subsequently killed by the patient. Her family successfully sued the psychiatrist's employer where the medical centre was found liable for failing to breach the patient's confidence.

Of a particular practical interest are the requests for insurance reports, especially for Personal Accident Insurance. This situation is peculiar to Malaysia as Personal Accident Insurance is not popular in Britain. Here, the pathologist is usually requested to release the autopsy reports for the purposes of insurance. In the case of the hospital autopsy, this does not pose any problem. In the case of a medico-legal autopsy, the situation is slightly more delicate. In most circumstances, these requests for the reports will be made much earlier than the completion of police investigations. Can the pathologist be charged with breach of confidence (by the authorities) for releasing the autopsy reports before the completion of inquiries? The safest course of action would be to ask the permission of the authorities before releasing any report. However, in practice, this is not practical due to the number of requests which is exacerbated by delays in awaiting replies. Such delays add to the trauma of the bereaved family and are unnecessary as the insurance companies do not require all the information contained in the autopsy report.

It is for this reason that the University Hospital Kuala Lumpur created the "Summarised Autopsy Report" which summarizes only the essential information from the autopsy. It is unclear if this absolves the pathologist from any breach of duty. There remains the possibility that there may still be sufficient information in this brief report which may prejudice the inquiry. Nevertheless, it is submitted that this is highly unlikely. The other possible solution is to have preset forms issued by the insurance companies, not unlike those similar for the living patient, thus alleviating the need to release the entire or part of the autopsy report. However, the pathologist has to ensure that the information given does not prejudice the on-going inquiry.

In medico-legal cases involving deaths in hospital, the pathologist normally shares the information obtained with the clinician concerned as part of the learning process. In fact, the clinician is encouraged to attend the

post-mortem examination, both to supply additional information and also to learn from the result of the autopsy. A problem arises if the attending clinician is a potential defendant in a litigious case. Can the clinician still be encouraged to attend the post-mortem examination? Is he entitled to the autopsy findings? There is no clear guideline on this matter locally. The English Coroner Act¹¹ allows attendance by the clinician, although there is no mention as to whether the clinician is entitled to any information derived from the autopsy. This may seriously affect the performance of the post-mortem examination as the clinician's participation is crucial especially in cases involving complex therapeutic procedures.¹² Furthermore, the medicp-legal autopsy is the main type of autopsy performed in this country and there is no denying that there is a wealth of information to be obtained from it.^{13,14}

FORMULATION OF AN ETHICAL GUIDELINE

Release of useful information to the relatives

James and Leadbeatter¹⁵ suggested that a proper legal framework for disclosure of relevant information be set up. However, it is contended that this is not a practical method in Malaysia. The practical way is to release the relevant information to the relatives directly. It is submitted that it is unlikely that the authorities will take any action especially if such information does not influence the outcome of the investigations in the case of medico-legal autopsies.

Release of information for insurance reports

For insurance reports, the same rule as above should be applied. The pathologist will have to make sure that only essential information, adequate for insurance claims be given although it is difficult to judge what is essential information. A full autopsy report, similar to that given to the authorities should be discouraged.

Attendance at the post-mortem examination and release of information to fellow clinicians

Attendance at the post-mortem examination should be encouraged in spite of the clinician being a potential defendant. The Coroner Act in Britain has provisions for attendance by clinicians. While there is no such Act locally, it is very likely the local situation would follow

the principles set out.

There is no harm in giving information to clinicians especially when it is useful for the learning process. In practice, this is usually given orally. However, the pathologist should ensure that only the relevant clinician is given the information although the clinician may communicate this information to another party. The clinician is not entitled to the autopsy report and the pathologist should ensure that it is given to the proper authorities.

Role of professional bodies

It is submitted that the relevant professional bodies (e.g. Malaysian Medical Association or The Malaysian Society of Pathologists) can play an important role in this respect. A set of guidelines or rules pertaining to the disclosure of information should be drawn up. This would serve as the standard of pathology practice accepted by the profession which, while not legally binding, would be likely to be recognised by the courts.

CONCLUSION

At present, there are no guidelines as to who is entitled to the information obtained from post-mortem examinations, especially the medico-legal autopsies. The problems envisaged have not been tested out in our courts. However, it would seem that there is no reason why the pathologist should be censured if he had ensured that the information given is sufficient for the purpose and is given in good faith.

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