ETHICAL AND LEGAL ISSUES IN HEALTHCARE

Duty of care in matters of confidentiality and privacy

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The case of Tatiana Tarasoff denotes a landmark challenge to the absolute nature of confidentiality in healthcare consultations.

In 1969, Ms Tarasoff, a student at the University of California, was stabbed to death by fellow student Prosenjit Poddar. Some months before the killing, Poddar, who had previously had a brief relationship with Tarasoff, told his psychologist, a Dr. Moore, that he planned to kill her. Dr Moore breached confidentiality by alerting the campus police, who detained Poddar but ultimately decided he was not a danger.

After her death, Tarasoff's parents sued for failure to warn Tatiana herself that Poddar posed this threat. At the initial trial court, the case was dismissed as the judge ruled that confidentiality between patient and doctor meant that the doctor only has a duty to the patient, not to third parties.

The Californian Supreme Court over-ruled this decision on the basis that the healthcare professional "bears a duty to use reasonable care to give threatened persons warnings as are essential to avert foreseeable danger". This decision caused such uproar that the Californian Supreme Court reheard the case in 1976, the outcome of which was to determine that if a professional considers a patient presents a serious risk to another there is an obligation to "use reasonable care to protect the intended victim against such danger".

In Ireland, the Data Protection Acts (DPA) have a role in safeguarding an individual's personal data and in placing responsibilities on those persons (such as pharmacists) who process personal data. Key amongst those responsibilities is that the pharmacist may use and disclose data only for those specified, explicit and lawful purposes for which it was obtained from the patient. This 'right to privacy' is enshrined in national and international law, and represents valid and justifiable respect for patient autonomy, professional responsibility to keep an implied promise inherent in the trusting relationship between a pharmacist and a patient, and a desire for positive outcomes of healthcare interactions. While the terms 'privacy' and 'confidentiality' are sometimes used interchangeably, they are not identical. In simple terms, privacy refers to our right to control access to ourselves and to our personal information, whereas the principle of confidentiality provides an assurance that personal information will not be disclosed without consent.

The apparent contradiction between the judgment in the Tarasoff case and the provisions of the DPA simply serves to highlight the dilemma practitioners can face when they seek to meet duty of care responsibilities in the practice of a healthcare profession. The Irish Medical Council guidelines assist practitioners by highlighting circumstances when confidentiality 'may' be breached without risk of charges of professional misconduct, to include circumstances where the doctor is protecting the interests of the patient, protecting the welfare of society or considers it necessary to safeguard the welfare of another individual or patient. The guidelines do not adjudicate on the 'letter of the law' with respect to the DPA.

Pharmacists must meet legal requirements to be registered with the Data Commissioner (supervising pharmacist), and to obtain explicit consent from the patient for use of personal data. However, there are other implications for day-to-day practice which might not be obvious to every practitioner and these merit review.

Data collection must respect the right to privacy – Assuring a patient's privacy when clarifying prescription details requires management of the risk of inadvertently being overheard by other customers during this process. This can happen if working from a computer screen removed from the area where prescriptions are received, unless specific efforts are made to avoid being overheard. Risk management would identify that when a patient is collecting his/her prescription the pharmacist should ask the patient to state his/her address. This is good practice. However the personal nature of a patient's address must be safeguarded and any member of staff likely to be part of this protocol must approach the interaction in a manner respectful of the patient's right to privacy.

Data recording must be accurate – While it is critical that pharmacists document interventions and advice, commentary must be factually accurate and free from any accusation of innuendo or slander. Many years ago I noticed a one-word comment on a patient's file... 'light-fingered'. It transpired that it was an interpretation of an event by a staff member, without proof or clarification, and could certainly have been considered slanderous. The frequency with which notes are now made on patient files could inadvertently lead to similar incidences unless staff members are skilled in data recording. With the advent of advanced services, recording templates must direct the nature of information gathered by pharmacists. In addition, confirmation of the length of time for which records will be kept must be included in the process of collecting data.

Storage of data must be secure – Pharmacists are obliged to make sure personal data is not accessible to anyone other than employees (who will have signed confidentiality clauses) or to others involved in the patient's care. Passwords provide a level of protection for our patients. However there are two areas that merit practical consideration. The first is the increasing use of the Med-1 receipt for tax claims. The 'norm' is that a composite receipt be issued for the entire family or group for which that taxpayer is claiming a rebate. Consider such a request from a patient who has a 17-year-old daughter. This daughter has a prescription for oral contraceptives and the receipt will identify that she has a monthly fill of a prescription at a consistent price bracket. I suspect many pharmacies would provide the tax receipt and therefore be at risk of breaching the requirement to "keep data secure and release it only with the specific request of the patient to whom it relates", unless they obtain specific consent from the patient herself. The second key issue arises when non-employees access the dispensary, thereby potentially affording them the opportunity to view patient files on computer screens, labels, receipts or prescriptions. With the introduction of advanced services, some pharmacies might use a consulting area which is accessed through the dispensary. In other cases, sales representatives may discuss orders within the dispensary area. If this is the case there must be particular attention paid to risks to the protection of privacy inherent in the work-in-progress in any dispensary.

Destruction of data must be assured – As with any organisation, pharmacies must ensure that back-up disks, laptops, fax rolls, printer ribbons, video tapes and all forms of CCTV must be destroyed appropriately before being included in regular waste. However, more specific to pharmacy is that the legislative requirement to hold prescriptions on the premises for two years creates a natural 'retention time' for such records. Many pharmacies shred prescriptions after 30 months and this would appear to be in keeping with the requirement in the DPA to only keep data for as long as it is reasonable (or a requirement) to do so. It is unclear whether the philosophy of keeping prescriptions for longer periods of time is technically in breach of the DPA. It might be justifiable on the basis that, in the event of a claim, the physical prescription would be part of relevant documentation. In addition, if long-term retention of prescriptions creates a need for off-site storage, then further issues arise for

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the pharmacist as data controller of those records.

'Where is your shredder located?' – When I am dispensing I want it right behind me! Those 'blue receipt' (claim form) printers regularly jam so that receipts print off-line and have to be reprinted. These receipts/claim forms identify the patient's name, address and medication. To throw that in the regular waste would result in failure to meet my duty of care to protect that patient's personal data. Likewise when I need to change label details, the 'waste labels' must be destroyed. I could go on *ad infinitum*. Suffice to say that I believe no dispensary ought to operate without a functioning shredder!

Pharmacists have an ethical duty to keep the law. They also have an ethical duty of care. However there are times when the professional duty of care may require a breach of confidentiality. The Medical Council refers to an exemption where the practitioner "considers it necessary to safeguard the welfare of another individual or patient". Consider a situation where prescriptions to treat STIs or HIV are dispensed to a patient, and the patient's partner then requests information on pre-natal folic acid. A further exemption applies to "protecting the welfare of society". Consider a young man, non-compliant with his anti-epileptic medication, who tells you that he has just purchased a car. What are the pharmacist's responsibilities in such cases? It is not in the public interest to encourage defensive practice to the extent that duty of care would be compromised, yet the exercise of professional judgement in such cases would be fraught with uncertainty, regardless of whether or not the interventions were well intentioned and documented appropriately. Guidelines specific to the pharmacy profession are necessary to assist with such practice dilemmas.

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