International Journal of Innovative Research and Advanced Studies (IJIRAS)
Volume 5 Issue 11, November 2018

ISSN: 2394-4404

Medical Confidentiality Vis A' Vis Consent Of Disclosure: The Role Of The Police And Courts In Nigeria

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Abstract: ***Confidentiality is the seal that binds trust in a doctor-patient relationship. However, the duty a doctor owes is not limited to the peculiar interest of his patient, but extends to the interest of the public in certain situations where the propriety of withholding is inimical to public health and safety. This paper focused on examining the challenges associated with medical confidentiality, while examining circumstances under which the Nigerian police and courts could demand disclosure of patient's medical records in the eye of the appropriate legislation. Though the Freedom of Information Act sets out strict conditions for disclosures, the enforcement of the right of confidentiality is still limited. We concluded that the courts could exercise their powers to compel disclosure where such is unreasonably withheld. The Police are also empowered to demand information from a public health institution where there is an allegation of crime or an attempt to commit crime.***

Keywords: Confidentiality, Consent, Disclosure, Police, Courts, Public Institutions

I. INTRODUCTION

The current global medical practice lends credence to confidentiality in a doctor-patient relationship. We live in a day and age where a patient is free to make choices on disclosing or concealing the status of his/her health. Therefore, the law imposes a duty on the doctor to only disclose information about patients with proper consent obtained. The doctor in practice is not the custodian of medical records based on hospital management structure, but has sufficient knowledge about the patient based on treatment history. Medical records serve many purposes; however, three of these are apposite here. First, they document the history of examination, diagnosis and treatment of a patient (Aderibigbe, 2017, p. 91). Other health professionals in the hospital may be privy to some amount of information where the circumstances warrant. However, this situation may predispose such medical records to disclosure without proper authorisation. Medical records may include computer records and printouts, the progress of treatment of the patient or reports from each visit, diagnosis of any kind including hand notes, correspondence between other health professionals, laboratory tests and x-rays of the patient.

In Nigeria however, the level of awareness regarding confidentiality and obtaining consent before disclosure has not grown. Many patients are still oblivious of their right to withhold or authorize disclosure where the medical Professional is on the verge of breaching such obligation of confidentiality. There may be a contrary view on disclosure with consent where the patient has an injury or illness with legal implications especially as regards to causation. The courts or law enforcement may be involved to request disclosure. At this point the matter becomes a medico-legal case with a duty on the part of the medical practitioner to label

it as medico-legal. The question is to what extent is the law enforcement or court allowed to pry into such information?

Confidentiality is defined by Churchill's Medical Dictionary as the right of a subject to control the disposition of information disclosed during the course of professional relationship and the reciprocal obligation of the professional to ensure that no harm will befall the subject as a result of disclosures of such information. Confidentiality is a set of rules or promise that limits access or places restriction on certain type of information. It is commonly applied to conversation between doctors and patients.

The question arises as to why there is any need for confidentiality in medical practice? Can confidentiality be enforced by the patient? Must the patient necessarily give consent for such information considered private to be exposed/ revealed? How can such consent be obtained when it is refused and in what circumstances? What roles do the Police and courts play in handling issues arising from refusal to disclose or withholding of consent in a serious case under investigation? All these will be dutifully discussed and analysed to properly grasp the paper.

II. SCOPE OF MEDICAL CONFIDENTIALITY

Confidentiality is significant to binding trust between doctors and patients. Without assurances about confidentiality, patients may be reluctant to seek medical attention or to give doctors the information they need in order to provide good care. But appropriate information sharing is essential to the efficient provision of safe, effective care, both for the individual patient and for the wider community of patients.

The medical records of patients' also known as case notes contain the medical history of patients. They are the hand-written files or computerised files that record that health practitioners compose and build up containing information about a patient. In Nigeria, where a large majority of patient records are in hard copies in the form of files, the standard practice is that patients are not authorized to look into or handle their personal record at any stage of their treatment (Aderibigbe, 2017, p. 89). A doctor may not reveal any medical information provided by the patient that is related to his or her treatment. The scope of the doctor's confidentiality even extends to all medical records. The doctor is meant to keep this confidential information even when he has stopped treating the patient. Thus, if the patient dies or stops using the doctor, his confidential medical information continues to be protected. Rule 8(f) of the Code of Medical ethics in Nigeria particularly provides for medical confidentiality thus:

"All communications between the patient and the practitioner made in the course of treatment shall be treated in strict confidence by the practitioner and shall not be divulged unless compelled by law or overriding common good or with the consent of the patient".

The world medical organization declaration in Geneva and International Code on Medical Ethics both instruct the physician to maintain confidentiality even after the patient's death. The original source of a doctor's duty of confidentiality stems from the Hippocratic Oath which states thus:

"Whatever in connection with my professional practice or not in connection with it, I see or hear in the life of men, which ought not to be spoken of, I will not divulge as reckoning that all such should be kept secret".

The role a doctor occupies in receiving patient's information in confidence obliges him to keep such information in confidence which must be protected by law. Patients have the right to expect that information about them be held in confidence by their doctor. Several scholars have over the years evolved theories of confidentiality with different views about the concept.

The *consequentialist theory* of confidentiality protection is to the effect that if a patient is worried about a doctor revealing his information to a third party, such a patient will be inclined to limit the amount of information he or she shares with his or her doctor. The consequentialist line of argument hinges on the assumption that patients would not disclose all their information if they did not trust their doctor to keep secrets (Tamin, 2015, p. 61). As a result, the doctor will be incapable of effectively treating the patient. Beauchamp and Childress (2001) listing the moral justifications for medical confidentiality, namely consequence based arguments however, maintain that consequentialist arguments also support exceptions to the rule of confidentiality, for example, to prevent third party harm.

The *Right based theory* of confidentiality protection opine that patients have the right to control how their medical information is used. The third theory is the *Fidelity-Based theory* of confidentiality which suggests that physicians have an obligation not to disclose information shared with them in their medical role. However, none of these theories suggest that confidentiality should not be breached under certain circumstances.

Informed consent is also vital before a doctor can effectively treat a patient. Such informed consent can be obtained from the patient, members of the patients' family, a close friend or spouse. In the case of *Medical and Dental Practitioners Disciplinary Tribunal v John Okonkwo* where the doctor transfused blood to a patient without informed consent of the patient and her spouse. The blood transfusion was resisted on religious grounds of being against their belief as members of Jehovah witnesses. The doctor was prosecuted for not obtaining informed consent before he decided to carry out the blood transfusion.

In section 14(1)(a) and (2)(a)-(b) of the Freedom of Information Act, privacy is specifically protected where it mandates denial of an application for information maintained with respect to patients and individuals receiving medical care with the exception of individual consent to disclosure. Not all information including medical information is automatically granted legal protection from disclosure under the Freedom of Information Act. The exceptions to this duty of confidentiality are discussed below.

EXCEPTIONS TO THE DUTY OF CONFIDENTIALITY

Physicians delicately walk the line between ethics and law, particularly in the face of statutory obligations to breach the sacred duty of confidentiality-all to prevent violence (Schleiter, 2009, p. 146). Under doctor-patient confidentiality,

doctors are generally prohibited from revealing confidential communications unless they obtain consent from the patient. Where the patient is declared "legally incompetent" in the case of children, then his/her caretaker or guardian can authorize access to medical information. This duty of confidentiality is subject to certain exceptions that are ethically justified because of overriding social considerations such as a patient's threat to inflict serious physical harm on a specific identified person when there is reasonable probability that the patient will carry out the threat. The right of confidentiality can be avoided under some circumstances to wit:

- ✓ *Where it is required by law:* Under section 1 of the Freedom of Information Act, any person can apply for and be allowed access to public records or documents from a public institution or private bodies providing public services. An example of such institution is a hospital. The National Policy on Integrated disease surveillance and response (IDSR) under the Federal Ministry of Health has placed some diseases as priority diseases such as cholera, measles, yellow fever, tuberculosis etc (National Policy on Integrated Disease Surveillance and Response, September 2005). Recently, diseases like Hepatitis B, C and Ebola have become a threat to public health. Therefore, a doctor can disclose the existence of such communicable disease to the surveillance unit of the Federal Ministry of Health without obtaining consent of the patient.
- ✓ *Where there is an order of the court:* By virtue of section 25(1)(a) & (b) of the Freedom of Information Act, where a public institution denies an application for information, or a part thereof on the basis of a provision of the Act, the Court shall order the institution to disclose the information or part thereof to the applicant if the court determines that the institution is not authorized to deny the application for information. Or where the institution is so authorized but the court nevertheless determines that the institution does not have reasonable grounds on which to deny the application.
- ✓ *Where such information is necessary in the interest of the public:* 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. Under section 25(1)(c) of the Freedom of Information Act, the court can order disclosure where it makes a finding that the interest of the public in having the record being made available is greater and more vital than the interest being served if the applicant is denied, in whatever circumstance. Patrick Sawyer the Liberian doctor who came into Nigeria infected with the Ebola disease comes to mind. The actions of the doctor were a threat to public health therefore all the people he came in contact with were quarantined by the Nigerian Ministry of Health to prevent spread of the disease in public interest.

It is trite to say that the Freedom of Information Act under section 27(1) offers protection for any of such disclosure or failure to obtain consent by a public institution from civil or criminal proceedings. section 27(2)(c) states that:

"Nothing contained in the criminal code or official secrets Act shall prejudicially affect any public officer who without authorization, discloses to any person, an information which he reasonably believes to show (c) a substantial and specific danger to public health or safety notwithstanding that such information was not disclosed pursuant to the provision of this Act".

III. ROLE OF THE POLICE IN MEDICAL DISCLOSURE & CONFIDENTIALITY

The police play a vital role of investigation especially where there is a violation of any law and in turn prosecution of an offender upon conclusion of investigation with ample evidence. One of the powers of a police officer according to section 24(1)(a) of the Police Act is the power of arrest without warrant any person whom '*he finds committing any felony, misdemeanour or simple offence, or whom he reasonably suspects of having committed or of being about to commit any felony'*, misdemeanour or breach of the peace. The police can receive a report by a doctor of the existence of a medico-legal case where there is perceived commission of a crime or the police in course of investigation may require certain information necessary for prosecuting a suspect. The police may request such information about a patient from the doctor through the hospital management whether as to mental or physical capacity. A doctor can receive a medico-legal case in any of the three ways –

- ✓ A case is brought by the police for examination and reporting,
- ✓ The person in question was already attended to by a doctor and a medico-legal case was registered in the previous hospital, and the person is now referred for expert management/advice.
- ✓ In the other instances, after history taking and thorough examination, if the doctor feels that the circumstances/ findings of the case are such that registration of the case as an MLC is warranted, he could immediately inform the patient of the same and take his consent for converting the case into MLC. At that given time, the patient may refuse consent, withdraw the consent already given or may even leave the hospital. The doctor has no right to force anything on the patient. The best that should, in his own interest, be done is to carefully document all the findings, note the exact moment at which the consent was withdrawn and inform the nearest police station regarding the same, giving reasons for his actions. At times, the decision may be made easier by the patient himself expressing his intention to register a case against the alleged accused (Harish & Chavali cited by Ali, 2012, p. 7).

Mathiharan, and Patnaik (2005) identified the following cases should be considered as medico-legal and as such the medical officer is "duty-bound" to intimate the police regarding such cases:

- ✓ All cases of injuries and burns–the circumstances of which suggest commission of an offence by somebody. (irrespective of suspicion of foul play)
- ✓ All vehicular, factory or other unnatural accident cases specially when there is a likelihood of patient's death or grievous hurt.
- ✓ Cases of suspected or evident sexual assault.

- ✓ Cases of suspected or evident criminal abortion.
- ✓ Cases of unconsciousness where its cause is not natural or not clear.
- ✓ All cases of suspected or evident poisoning or intoxication.
- ✓ Cases referred from court or otherwise for age estimation.
- ✓ Cases of patient's brought dead with improper history, creating suspicion of an offence.
- ✓ Cases of suspected self-infliction of injuries or attempted suicide.
- ✓ Any other case not falling under the above categories but has legal implications.

It follows that where a doctor in course of his professional duty refuses to disclose to the police the existence or likelihood of a crime, such doctor upon investigation can be charged for a misdemeanour/aiding and abetting the commission of a crime. Section 265(25) of the New York Penal Code makes it a class A misdemeanour for a physician or manager to fail to report a bullet wound, powder burn or other injury resulting from the discharge of a gun or firearm.

In Nigeria, Part G, section 60-62 of the Code on Medical Ethics makes offences such as Abortion and Aiding criminals in Clinics or hospital premises infamous conduct in a professional respect for a medical professional punishable with suspension from practice. Section 518(6) of the Criminal Code also prescribes two (2) years imprisonment for any person who conspires with another to execute any unlawful purpose. Similarly, section 228 of the Criminal Code also stipulates a punishment of imprisonment for Fourteen (14) years for any person (even a doctor) who with intent to procure miscarriage or abortion of a woman whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing or uses force of any kind. This underscores the need for disclosure where a crime is contemplated by the patient. A doctor shares with other citizens the duty to assist in the detection and arrest of a person who has committed a serious crime (Riddell, 1929, p. 44).

A public institution may deny an application for information where it relates to health worker-client privilege (as contained in Section 16(b) Freedom of Information Act). Furthermore, Sections 1(3), 20 and 25 of the Freedom of Information Act is to the effect that, where such applicant is denied the information, such individual or law enforcement can apply to court within 30 days for an order compelling such public institution to disclose information.

IV. ROLE OF THE COURTS IN MEDICAL DISCLOSURE & CONFIDENTIALITY

The court is seen as the final arbiter between disputing parties. As part of its primary objectives, the judiciary is saddled with the responsibility of upholding the tenets of justice and rule of law. With regards to medical confidentiality, the role of the court can be considered in twofold. Firstly, the courts have a duty to protect the patients' right of disclosure and consent. Secondly, the Court is also empowered to order medical disclosures in course of evidence by a doctor/medical practitioner. In fussing the two responsibilities we discover that the court would take into cognisance the patients claim to determine whether unauthorized disclosure of confidential information was properly made by the doctor.

The patient has a right to private life which should not be infringed upon. According to section 36(4)(a) of the 1999 constitution as amended 2012,

"a court or such a tribunal may exclude from its proceedings persons other than the parties thereto or their legal practitioners in the interest of defence, public safety, public order, public morality, the welfare of persons who have not attained the age of eighteen years, the protection of the private lives of the parties or to such extent as it may consider necessary by reason of special circumstances in which publicity would be contrary to the interests of justice".

Section 37 of the 1999 constitution also provides that:

"The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected".

Though the concept of privacy in the constitution is streamlined to communications, it doesn't limit its application in terms of information relevant to a patient.

The protection of confidential information is essential to the trust relationship between health care providers and patients. The courts can enforce such right of the patient in the event of a breach of the duty of confidentiality. Section 23 of the Freedom of Information Act enjoins the court to take precautionary measures when receiving representations ex-parte and while conducting hearings in camera to avoid disclosure by the court or any person of any information or other information which could be obtained under lawful authority. This is indicative of protection of the privacy of litigants especially where non-disclosure of a requested information is the bone of contention.

For a Patient to succeed in an action for breach of confidentiality, such patient must show conclusively two things, namely; that the information given to the doctor was meant to be treated as confidential and that the obligation to keep the information confidential was breached by the doctor (Emiri, 2012, p. 355). Consent is a very important source of litigation in medical practice. His Lordship, Jeffries J of the New Zealand High court in *Duncan v Medical Practitioners Disciplinary Committee* in his judgement stated thus:

"The platform support of a description of medical confidence is to identify the doctor-patient relationship as a fiduciary one. Without trust it would not function properly so as to allow freedom for the patient to disclose all manner of confidences and secrets in the practical certainty they would repose with the doctor. There rests with a doctor a strong ethical obligation to observe strict confidentiality by holding inviolate the confidences and secrets he receives in the course of his professional ministering".

Experience has shown that most of the consents being obtained in Government and private hospitals as well as nursing homes are not legally valid. In most of the cases filed against doctors, it is alleged that either no consent was obtained or a legally invalid consent was obtained (Ali, 2012, p. 7). The law does not permit privilege against disclosure of medical confidences in legal proceedings or litigation (Emiri, 2012, p. 364). In *W v Egdell*, W was detained as a prisoner in

a secure hospital without limit of time as a potential threat to public safety after he shot and killed five people and wounded two others. Ten years after he had been first detained he applied to be transferred to a regional secure unit with a view to his eventual discharge. His solicitor instructed E a consultant to examine W and report on his mental state with a view to using the report to support his client's application at the tribunal. E's report was unfavourable opposing W's transfer, recommending further test and treatment owing to his long-standing interest in fire arms. The doctor sent the report to W's solicitor believing that he will place it before the tribunal. W then withdrew his application for review of his case. The doctor being aware of this development sent a copy of the report to the Medical Director of the hospital where W was detained. The hospital in turn sent a copy to the Secretary of State who in turn forwarded it to the tribunal. Upon discovery that the report was disclosed, W issued a writ to restrain the doctor and other recipients of the report from disclosing or using it and for damages for breach of duty of confidence.

The trial Judge held that there was no breach of confidence because the doctor had the duty to disclose his examination to the appropriate authorities. On Appeal the court upheld the decision of the trial court with the position that a doctor exercising sound professional judgment on the basis of inadequate information and with real risk of consequent danger to the public is entitled to take steps to communicate the grounds of his concern to the appropriate authorities. In probate matters, where there is an application in the court upon the death of a testator, medical records which include evidence of death and circumstances thereto can be applied for by the beneficiaries without necessarily obtaining consent.

Section 253(1) of Evidence Act 2011, allows the court to issue summons or subpoena to either testify or produce books or documents before the court. Also, Section 246 of the Act likewise empowers the court to issue an order to any witness to produce any document to clear up ambiguities or clarify points in dispute. Therefore, in course of proceedings involving the evidence of an expert witness where such case is medico-legal in nature, the rules of court may mandate the party requesting the attendance of such expert to be by application to the court for a summons or subpoena order to compel such a medical professional to either testify (subpoena ad testificandum) or tender a document (subpoena duces tecum) pertaining a patient's personal health information. Such a medical professional would be subjected to cross-examination if he is subpoenaed to testify in court. Under section 219 Evidence Act, a person summoned to produce a document cannot be cross-examined unless he/she is called as a witness. In his testimony, the professional is mandated to disclose information on oath to the best of his knowledge about such a patient. Therefore, he can be charged for perjury (lying under oath) where he discloses false information. Section 102(b) of Evidence Act, 2011, clearly states that a public document includes public records kept in Nigeria of private documents. It is important to note that medical records fall under public records of private documents, therefore a certified true copy of such records must be tendered in court.

Where an application for an order to disclose information is filed in court, the court will order disclosure if there is no authorization for denial of the information, where no reasonable grounds exist for denial even where authorization has been approved and where public interest far outweighs reasons for denial (Section 25(1) (a)-(b) Freedom of Information Act).

V. OBSERVATIONS

It is hereby observed from the foregoing discussions that;

- ✓ The enforcement of the right of confidentiality is still limited, because a patient cannot stop the doctor from disclosing the information to another medical professional, also where the public interest is put into consideration or where an order of the court mandates such disclosure.
- ✓ The rights of the patient which include right to consent, confidentiality among others, have suffered unduly due to patients' inability to recognize them.
- ✓ The doctor is protected where he discloses information relevant for public health and safety especially the existence of a communicable disease to the appropriate authorities without obtaining consent of his patient. For example, Ebola, Tuberculosis, Cholera among others.
- ✓ Discrimination of a patient based on divulging personal medical information to the police or in court is imminent especially where the patient has a communicable disease like HIV/AIDS or Ebola. Such a patient when in custody may be kept separately or quarantined from other inmates.
- ✓ The duty to disclose information in public interest is a moral duty. However, where there is a threat of crime, the duty is not only moral but legal in nature with attendant consequences in event of failure to disclose.
- ✓ A doctor can be prosecuted for failure to disclose serious attempt by his patient to commit a crime.
- ✓ The Freedom of Information Act though not sufficient enough to address current challenges in disclosure and privacy of information is centred on information obtained from public institutions thereby clearly excluding a growing number of privately-owned institutions delivering similar services. Conditions in private institutions/ hospitals may not favour patients due to this obvious lacuna. The Act is therefore in dire need of amendment to accommodate private institutions to secure patients personal records.

VI. RECOMMENDATIONS

We humbly recommend the following:

- ✓ Preservation and supply of Patient record: This is necessary on the part of the hospital management in order to ensure that any request made for medical records, either by the patient/authorized attendant or legal authorities involved, may be duly acknowledged and the documents required are supplied within a reasonable period. This will guide the police or court to know the

medical antecedents of the patient in the event of a crime or health risk.

- ✓ Doctors should be encouraged to disclose medical records of a patient most especially where the nature of job of the patient is one in which he is predisposed to constant contact with the public. For example, law enforcement agents like Police officers, military personnel, doctors in training, pilots among others.
- ✓ Patients who express a desire to commit a crime should be promptly examined by a psychiatrist before a report is lodged with the police for investigation. This is to enable the doctor ascertain the mental state of the patient before handing him over to the police. The patient could be suffering from depression as a result of the disease, like in the case of an AIDS patient who gets to know his/her status and may vow to spread same out of depression.
- ✓ Police officers should be enlightened on the type of investigation to be carried out and how to obtain necessary medical information. A special department in the Police specifically for Forensic investigation and analysis should be introduced to improve the type of investigation carried out in event of a crime by a patient.
- ✓ The court should restrict the enforcement of the right to privacy of patient information and disclosure of same in instances where the non-disclosure would affect the immediate family members of the patient and the public. This is important especially where the disease is communicable in nature.
- ✓ There should be public awareness about the existence of the right of consent and the need to ensure consent is obtained before disclosure by a doctor. Due to most patients' ignorance on the existence of the right to consent, an awareness platform should be created to sensitize these patients in Nigeria.
- ✓ The patient's consent should be put in writing at all times and not received orally to prevent denial of such authority at his/her whims.
- ✓ Court proceedings in which disclosure of personal medical history of patients is likely, such proceedings should be done in camera especially where the patient is a child or else such information could create discriminatory disposition of the public towards such a patient.
- ✓ Section 27(2)(c) of the Freedom of Information Act should be amended to specifically state the conditions under which any vital information the non-disclosure of which can cause danger to public health or safety. Some conditions like depression or on basis of marriage could be considered.

VIII. CONCLUSION

We have examined the inherent duty of confidentiality as imposed by law which a doctor owes his patient as well as the exceptions to disclosure of such information. It is trite that the patient ought to consent to disclosure of his personal medical information as a right to private life. The patient can sue for breach of confidentiality by a doctor where consent is not first had and properly obtained. However, the patient is limited to the extent that such breach of duty of confidentiality is an exception required by law, by an order of court or for public interest and safety.

Where there is a serious threat to the public safety, such information and right to privacy may be invaded subject to the courts or a law in force. The seriousness of the threat could be criminal in nature thereby giving immunity from criminal or civil prosecution to a doctor who exposes such information to a law enforcement agency such as the police. The police in turn are allowed to demand certain information from a doctor concerning a patient in course of their investigations where there is an allegation of crime.

It can be said that the police and courts have a role to play in ensuring public safety while upholding the rule of law as regards disclosure of patient's medical information in the interest of the public and prevention of crime. Therefore, the Legal and ethical duty of the doctor in confidentiality and obtaining patients consent is sacrosanct but subject to the public health and safety.

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