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Confidentiality of Medical Records- Legal and Ethical Issues

Abstract

Confidentiality of patient's medical records about his health status, medical conditions, diagnosis, treatment and all other information of personal kind are the matter of privacy and important right of a patient. It is the most important aspect of doctor's duty to maintain and ensure secrecy of information which he has gathered from patient in the course of treatment. There are various legal measures to ensure patient's right to confidentiality of medical records and privacy. In cases of medical negligence when question of proof of medical negligence arises against the doctors, they ever show reluctance in producing the medical records in the name of unavailability of record or confidentiality of records, which affects another right of patients that is right to information. Such acts fall under the purview of "deficiency in service" under the Consumer Protection Act and also recognized by courts as to medical negligence. This paper critically examine the concept of maintenance and confidentiality of medical records as well as scope of right to privacy of a patient , doctor's duty about not to disclose patient's personal information and effects of non-disclosing of such records on legal proceeding and proof of negligence in cases of medical negligence.

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Introduction

To cure diseases and keeping man healthy, a distinct branch of science known as medical science has emerged. Almost every man is suffering less or more from diseases, this speaks about the importance and necessity of health sector. Although a close relationship exists between doctor and patient, some conflicts also take place between them and numbers of allegations are raised against doctors, such as mal-practices or negligence *i.e.* breach of duty to take care in course of their practice, failure in maintaining medical records, breach of confidentiality of information obtained from the patient, non disclosure of medical records on demand of the patient etc. This situation makes the relation between doctor-patient bitter and conflicting.

Aim of the Study

This analytical research paper is aimed to analyse medical ethics and practices, legal provisions relating to the issue, judicial approach on maintainability of medical records of a patient, their confidentiality and disclosure, scope of the RTI, Act and the right to privacy in case of medical information of a patient.

Maintainability of Medical Records

Maintenance of medical records has evolved into a science of itself and form an important aspect of the management of a patient. It is important for doctors and hospitals to maintain all records of a patient, properly. The proper medical record helps doctors to prove that the treatment was carried out properly, it helps in the scientific evaluation of patient's profile, in analyzing the treatment results and to plan treatment protocols and sometime for proving the fault of doctors engaged in treatment in cases of medical negligence before the courts. It is the duty of doctors and hospitals to maintain and preserve the medical records for certain specified period under different laws, like the Limitation Act, 1963, Consumer Protection Act, 1986, PNDT Act, 1994, The Clinical Establishments (Registration and Regulation) Act, 2010, the Code of Medical Ethics Regulation, 2002 and the Directorate General of Health Services guidelines. In *Force v. Dr. M. Ganeshwara Rao*[1], court upheld that, it is the bounden duty of the nursing home to record the previous case history of the patient, summery of laboratory reports, sensitive test reports relating to drugs to be given to the patient.

The issue of medical record keeping has been addressed in the Medical Council of India Regulations, 2002 guidelines answering many questions regarding medical records. The important issues that have been addressed under the MCI Regulations, 2002 are as follows-

Para no. 1.3.1 provides, every physician shall maintain the medical records pertaining to his/ her indoor patients for a period of 3 years from the date of commencement of the treatment in a standard proforma laid down by the Medical Council of India.

Para no. 1.3.2 provides, if any request is made for medical records either by the patients/authorised attendant or legal authorities involved, the same may be duly acknowledged and documents shall be issued within the period of 72 hours.

Para no. 1.3.3 provides, a registered medical practitioner shall maintain a Register of Medical Certificates giving full details of certificates issued. When issuing a medical certificate he/she shall always enter the identification marks of the patient and keep a copy of the certificate. He/she shall not omit to record the signature or thumb mark, address and at least one identification mark of the patient on the medical certificates or report.

Para no. 1.3.4 provides, efforts shall be made to computerize medical records for quick retrieval. Medical records may be classified as follows-

1. Records must be given to the patient as a matter of right. Discharge summary, referral notes, and death summary in case of natural death are important documents for the patient. Hence, these have to be given without charge for all including patients who leave against medical advice. The hospital bill cannot be tied up with these sensitive documents that are necessary for continuing patient care. Thus, the above documents cannot be legally refused even when the hospital bills have not been paid.
2. Records may be issued after the patient or authorized attendant fulfills the due requirements as stipulated by a hospital. This requires a formal application to the hospital requesting for the records. It is necessary that the hospital bills are cleared and the necessary processing fee has been paid. The documents in this group include copies of inpatient files, records of diagnostic tests, operation notes, videos, medical certificates, and duplicate copies of lost documents. It is important that the duplicate copies should be marked appropriately. It is not unusual for an unscrupulous patient to use it for multiple insurance claims without the knowledge of the doctor.
3. Records cannot be given to patients without the direction of the Court. The outpatient file, inpatient file, and files of medico-legal cases including autopsy reports cannot be handed over to the patient or relatives without the direction of the Court. But if these medico-legal cases are being referred to another center for management, copies of records could be given. However, X-rays are given only after a written undertaking by the patient or relatives that these will be produced in the Court as and when required.[2]

Confidentiality of Medical Record

Duty to maintain confidentiality of information about patient health, medical condition and all other personal information gathered in course of treatment has its origin in 'Hippocratic Oath', adopted as a guide to conduct and ethics by the medical professionals through out the ages. Hippocrates practiced as physicians between third and first century B.C. Plato a famous Greek philosopher had a philosophical approach to medicine. His manuscripts, the Hippocratic Collection (*Corpus Hipppocracticum*), contained Hippocratic Oath. This provides the duty of doctors regarding confidentiality of patient's information in words, ...whatever in connection with my professional practices, or not in connection with it, I see or hear, in the life of men, which ought not to be spoken of abroad, I will not divulge as reckoning that all such should be kept secret.

The International Code of Medical Ethics lay down as,

> *"A physician shall preserve absolute confidentiality on all he knows about the patient even after his patient died".*

The Declaration of Geneva, adopted by the second General Assembly of the World Medical Association, Geneva, in September, 1948 and as amended thereafter, had guaranteed patient's Right to confidentiality of information about his health and all other personal information with the exception, that the descendents may have a right of access to information that would inform them of their health risk. The Indian Medical Council Act, 1956 which regulates the medical education and professional conduct provides under Section 33, The Council may, with the previous sanction of the Central Government make regulations generally to carry out the purpose of this Act, and without prejudice to the generality of this power, such regulation may provide for as mentioned under section 33 (m) which was introduced by the Medical Council of India (Amendment) Act, 1964'the standards of professional conduct and etiquette and code of ethics to be observed by medical practitioners. Under these provisions, the Code of Medical Ethics has been made by the Medical council of India which provides-

> *'Do not disclose the secrets of a patient that have been learnt in the exercise of your profession. Those may be disclosed only in a court of law under orders of the presiding judge'.*

On the issue of confidentiality of medical records of a patient, doctors owe duty of confidentiality as they received information in fiduciary capacity. Information shared by patient with doctors should not be disclosed, if it will be disclosed would invade the right to privacy. Recently, right to privacy has been upheld by the constitutional bench of the Supreme Court of India in its land mark judgment in *Justice K S Puttaswamy (Retd.) and Anr. v. Union of*

India and Ors[3] as an inalienable fundamental right, resides in Article 21 and other fundamental freedoms contained in Part III of the Constitution of India.

The confidentiality of information relating to patient is protected under some statutory provisions, as well through responsible bodies of opinion of professional practitioners also. For example- the Indian Psychiatric Society formulated Clinical Practice Guidelines for Psychiatrists in India, 2004 provides, revealing medical records can put the safety of others from whom information is obtained at risk. The professionals are required to maintain confidentiality of all verbal, recorded or computer stored material. Psychiatric case record is not exclusively related to a patient rather a significant number of people are involved. So it is neither in the interest of the patient nor of the other person interviewed by a mental health professional to disclose the content. The psychiatric record is created with the understanding by both parties that its purpose is strictly therapeutic and not to be used for legal purposes except under very limited specific circumstance, even after the termination of treatment or death of the patient. It is the moral, ethical and legal duty of a psychiatrist to maintain confidentiality in therapeutic relationship and in compartments with significant other family members in life or after death of the patient because of the sensitive personal and private nature of the information shared with the professional. It is submitted that the concept of 'Compartmentalized Confidentiality' will have to be considered as the basis for exemption of all psychiatry or mental health care records under section 8 (1) (e) of the Right to Information Act, 2005. Section 13(1) of the Mental Health Act, 1987 provides that inspector of psychiatric hospital or nursing home requires keeping confidentiality in relation to personal records of a patient. As per section 38 even a visitor can not be allowed to inspect records of patients[4].

The Supreme Court in *Mr. 'X' v. Hospital 'Z'*[5] case, observed that in doctor-patient relationship, the most important aspect is the doctor's duty of maintaining secrecy, the doctor can not disclose to a person any information regarding his patient, which he has gathered in the course of treatment nor can the doctor disclose to any one else the mode of treatment or the advise given by him to the patient. The court said, the Code of Medical Ethics, carves out an exception to the rule of confidentiality and permits the disclosure in the circumstances enumerated in the judgment under which public interest would override the duty of confidentiality particularly where there is an immediate or future health risk to others. Public interest justifies the disclosure of such information. Dealing with the aspect of privacy, the court observed, disclosure of even true private facts has the tendency to disturb ones tranquility. It may generate many complexes in him and may even lead to psychological problems. He may, thereafter, have a disturbed life all through. In the face of these potentialities, and as already held by this court in its various decisions, the right to privacy is an essential component of right to life envisaged under Article 21 of the Constitution. The right however, is not absolute and may be lawfully restricted for the prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others.

Disclosure of Medical Records on Demand of Patient

The relationship between doctor and patient gives rise to the duty of doctor and hospital to hold information received from patient in confidence. The patient is entitled to reasonable access to examine and receive copy of his/her medical records. It is the primary duty of hospital to maintain and produce patient records on demand by the patient or appropriate judicial bodies. However, it is a primary duty of treating doctor to see that all the documents with regard to management are written properly and signed. An unsigned medical record has no legal validity. The patient and their legal heirs can ask for copies of the treatment records that have to be provided within 72 hours. The hospital can charge a reasonable amount for the administrative purposes including photocopying the documents etc. Failure to provide medical records to patient on proper demand will amount to deficiency in service and negligence.

Non production of medical records is treated as medical negligence, as it was held by the Supreme Court and the National Consumer Commission (NCDRC) in various judgments that, the hospitals and doctors are liable for medical negligence for non-production of medical record.

A health authority as the owner of a patient's medical records, may deny the patient access to them if it is in his best interest to do so, for example, if their disclosure would be detrimental to his health[6]

In *V.P. Santha v Cosmopolitan Hospital Pvt. Ltd.*[7] it was held by the State Commission Kerala, that failure to deliver X-ray films to the patient amounts to deficiency in services on the part of the hospital authority. But now it is the legal obligation on hospital authority as prescribed under Para no. 1.3.2 of the Medical Council of India Regulations 2002 , if any request is made for medical records either by the patients/authorised attendant or legal authorities involved, the same may be duly acknowledged and documents shall be issued within the period of 72 hours.

NCDRC in *Sri Ram Chandra Hospital v. Suryanarayna & Ors (2015)* an appeal against the order of the State Commission, Tamil Nadu remarked very nicely,

> *So, unsurprisingly, the content of medical records may be fundamental to the success of potential medical negligence case. A trained, experienced vigilant person is necessary to ensure this, which although it may be a time-consuming and costly process. Ultimately, the Patient records can help or tarnish a doctor in medical negligence cases...*[8]

Right to Privacy Vis-À-Vis Right to Information and Disclosure of Medical Record on Demand of Third Party

Generally, patient is entitled to obtain his medical records, and the doctors are under this legal obligation to produce medical record on demand of the patient or the appropriate court, it will not amount to violation of the right to privacy. But if it is disclosed to third party, it may be amount to intrusion in patient's right to privacy as enshrined under Article 21 in the Constitution of India. But still position of law on this point is equivocal. The Supreme Court has observed "…Whether right to privacy can be claimed or has been infringed would depend on the facts of the case."[9]

In *X v. Hospital Z* the Supreme Court stated, having regard to the fact that the appellant was found to be HIV Positive, its disclosure to third party with whom the appellant was likely to be married was saved in time by such disclosure, otherwise she would have been infected with the dreadful disease if marriage had taken place and consummated.

The Supreme Court has cleared that, where there is a clash of two fundamental rights, in the instant case, namely, the appellant's right to privacy as a part of right to life, right to privacy and Ms. Y's right to lead a healthy life which is her fundamental right under Article 21 of the Constitution, the right which would advance the public morality or public interest, would alone be enforced through the process of court, for the reason that moral considerations can not be kept at bay and the judges are not expected to sit as mute structure of clay in the hall known as court room, but have to be sensitive.

Right to Privacy and Right to Information now both are well recognized principles in Indian jurisprudence. Now the question arises, whether the medical records considered as matter of ones privacy can be disclosed on demand of third party or is subject to the Right to Information of third person? This question was raised before the Central Information Commission (CIC) in *Ms. Jyoti Jeena v. PIO, Institute of Human Behavior & Allied Science (CIC/KY/A/2014/001348-SA),* in this case appellant through RTI application had sought for copies of all medical record available with Institute of Human Behavior & Allied Science in relation to her husband. Central Public Information Officer (CPIO) replied that information is related to the psychiatric medical information of a person other than the applicant is exempted under section 8 (1) (e) of the RTI Act, 2005. Being unsatisfied with the CPIO's reply, the appellant preferred first appeal. First Appellate Authority stated that the medical record was held by public authority in capacity of fiduciary relationship and belonged to third party. However the first appellate authority ordered the CPIO, that the copies of old medical records of the patient, if brought by the patient at the time of admission, after due verification, be provided to the appellant. In compliance of the First Appellate Authority order, the CPIO furnished the information. Being unsatisfied with the information furnished, the appellant has approached the Central Information Commission in second appeal for complete records.

In proceeding before the Commission, it was revealed that the appellant is a wife, who is seeking information about the medical records of her husband, who alleged to have physically torture her due to his mental illness. The fact of mental illness was not disclosed before marriage. The husband treated at respondent hospital and the record of appellant's husband health were maintained, which she was asking for. During second appeal the CPIO on the side of respondent hospital submitted that Right to Privacy of a patient is part of his Right to life. Hospitals and doctors owe duty of confidentiality as they received information in fiduciary capacity. Information shared by them with doctors should not be disclosed which would invade the right to privacy and some decisions of the Central Information Commission opposed invasion of that right to privacy by disclosure of information.

The Central Information Commission observed, it is duty of CPIO, first appellate authority and the Information Commission to examine the right to life of the appellant and public interest in seeking the enforcement of her right to life which include right to divorce also. If the medical records show that appellant's husband has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind that the appellant can not reasonably be expected to live with her husband, she is entitled to relief from that kind of life through divorce under the personal laws.

Thus, there is a larger public interest in demanding the information about medical record of husband who is treated respondent authority. The Right to Privacy of husband is an essential component of Right to Life under Article 21 of the Constitution. The Supreme Court has rightly stated that, the Right to privacy however is not absolute and may be lawfully restricted for the protection of health or morals or protection of rights and freedoms of others. Hence the appellant has Right to know the disease her husband is suffering from to protect her rights and prevention of cruelty against her. The appellant wife of the person whose medical records she wants to seek makes the plea of privacy of her husband weak. Hence the Commission held that there is a larger public interest that require disclosure of medical records of a patient in spite of matter of privacy as mandated under section 8 (1) (j) of the RTI Act, 2005. And directs the respondent authority to furnish the information about the medical records of appellant's husband to extent she needed to establish disease he was suffering from and to secure divorce under the Hindu Marriage Act, 1955, to prevent crime of cruelty against her.

Justice SK Kaul recently has said in *Justice K S Puttaswamy (Retd.) and Anr.* vs. *Union of India and Ors*[10] *(2017),* "Let the right of privacy, an inherent right, be unequivocally a fundamental right embedded in part-III of the Constitution of India, but subject to the restrictions specified, relatable to that part. This is the call of today."

Conclusion

The present study reveals that beside the duty of utmost medical care to treat the patient,

maintenance of medical records, confidentiality of information collected by the doctors and hospitals during the treatment and ensuring the production of such information on demand of the patient are the most important aspect of doctor's professional duties, which are fixed by law. Information about health of the patient falls under the ambit of right to privacy which is recognized as an inalienable fundamental right of the patient subject to some constitutional restrictions on fundamental rights. Medical records being the personal information of the patient go beyond the domain of right to information of third party. If doctors and hospitals escape from such legal obligations, their act or omission will be considered as breach of professional duty and it will lead to an action for damages against the doctors and hospitals under the law of torts for medical malpractices or negligence, under the law of contract for breach of contractual obligation, under the law of trust for breach of fiduciary obligations, under the consumer protection law for deficiency in service.

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