Case Studies: Please Don't Tell!
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Published by: The Hastings Center
Stable URL: http://www.jstor.org/stable/3562362
Accessed: 08/01/2014 16:41

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COMMENTARY

by Leonard Fleck

If there were a home health nurse to care for this patient, presumably there would be no reason to breach confidentiality since the expectation would be that she would follow universal precautions. Of course, universal precautions could be explained to the patient’s sister. In an ideal world this would seem to be a satisfactory response that protects both Carlos’s rights and Consuela’s welfare. But the world is not ideal.

We know that health professionals, who surely ought to have the knowledge that would motivate them to take universal precautions seriously, often fail to take just such precautions. It is easy to imagine that Consuela could be equally casual or careless, especially when she had not been specifically warned that her brother was HIV-infected. Given this possibility, does the physician have a duty to warn that would justify breaching confidentiality? I shall argue that he may not breach confidentiality but he must be reasonably attentive to Consuela’s safety. Ordinarily the conditions that must be met to invoke a duty to warn are: (1) an imminent threat of serious and irreversible harm, (2) no alternative to averting that threat other than this breach of confidentiality, and (3) proportionality between the harm averted by this breach of confidentiality and the harm associated with such a breach. In my judgment, none of these conditions are satisfactorily met.

No one doubts that becoming HIV-infected represents a serious and irreversible harm. But, in reality, is that threat imminent enough to justify breaching confidentiality? If we were talking about two individuals who were going to have sexual intercourse on repeated occasions, then the imminence condition would likely be met. But the patient’s sister will be caring for his wound for only a week or two, and wound care does not by itself involve any exchange of body fluids. If we had two-hundred and forty surgeons operating on two-hundred and forty HIV-infected patients, and if each of those surgeons nicked himself while doing surgery, then the likelihood is that only one of them would become HIV-infected. Using this as a reference point, the likelihood of this young woman seroconverting if her intact skin comes into contact with the blood of this patient is very remote at best.

Moreover in this instance there are alternatives. A frank and serious discussion with Consuela about the need for universal precautions, plus monitored, thorough training in correct wound care, fulfills what I would regard as a reasonable duty to warn in these circumstances. Similar instructions ought to be given to Carlos so that he can monitor her performance. He can be reminded that this is a small price for protecting his confidentiality as well as his sister’s health. It might also be necessary to provide gloves and other such equipment required to observe universal precautions.

We can imagine easily enough that there might be a lapse in conscientiousness on Consuela’s part, that she might come into contact with his blood. But even if this were to happen, the likelihood of her seroconverting is remote at best. This is where proportionality between the harm averted by the breach and the harm associated with it comes in. For if confidentiality were breached and she were informed of his HIV status, this would likely have very serious consequences for Carlos. As a layperson with no professional duty to preserve confidentiality herself, Consuela might inform other family members, which could lead to his being ostracized from the family. And even if she kept the information confidential, she might be too afraid to provide the care for Carlos, who might then end up with no one to care for him.

The right to confidentiality is a right that can be freely waived. The physician could engage Carlos in a frank moral discussion aimed at persuading him that the reasonable and decent thing to do is to inform his sister of his HIV status. Perhaps the physician offers assurances that she would be able to keep that information in strict confidence. The patient agrees. Then what happens? It is easy to imagine that Consuela balks at caring for her brother, for fear of infection.

CASE STUDIES

Please Don’t Tell!

The patient, Carlos R., was a twenty-one-year-old Hispanic male who had suffered gunshot wounds to the abdomen in gang violence. He was uninsured. His stay in the hospital was somewhat shorter than might have been expected, but otherwise unremarkable. It was felt that he could safely complete his recovery at home. Carlos admitted to his attending physician that he was HIV-positive, which was confirmed.

At discharge the attending physician recommended a daily home nursing visit for wound care. However, Medicaid would not fund this nursing visit because a caregiver lived in the home who could adequately provide this care, namely, the patient’s twenty-two-year-old sister Consuela, who in fact was willing to accept this burden. Their mother had died almost ten years ago, and Consuela had been a mother to Carlos and their younger sister since then. Carlos had no objection to Consuela’s providing this care, but he insisted absolutely that she was not to know his HIV status. He had always been on good terms with Consuela, but she did not know he was actively homosexual. His greatest fear, though, was that his father would learn of his homosexual orientation, which is generally looked upon with great disdain by Hispanics.

Would Carlos’s physician be morally justified in breaching patient confidentiality on the grounds that he had a “duty to warn”?
Medicaid would still refuse to pay for home nursing care because a caregiver would still be in the home, albeit a terrified caregiver. Consuela’s response may not be rational, but it is certainly possible. If she were to react in this way it would be an easy “out” to say that it was Carlos who freely agreed to the release of the confidential information so now he’ll just have to live with those consequences. But the matter is really more complex than that. At the very least the physician would have to apprise Carlos of the fact that his sister might divulge his HIV status to some number of other individuals. But if the physician impresses this possibility on Carlos vividly enough, Carlos might be even more reluctant to self-disclose his HIV status to Consuela. In that case the physician is morally obligated to respect that confidentiality.

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COMMENTARY by Marcia Angell

It would be wrong, I believe, to ask this young woman to undertake the nursing care of her brother and not inform her that he is HIV-infected.

The claim of a patient that a doctor hold his secrets in confidence is strong but not absolute. It can be overridden by stronger, competing claims. For example, a doctor would not agree to hold in confidence a diagnosis of rubella, if the patient were planning to be in the presence of a pregnant woman without warning her. Similarly, a doctor would be justified in acting on knowledge that a patient planned to commit a crime. Confidentiality should, of course, be honored when the secret is entirely personal, that is, when it could have no substantial impact on anyone else. On the other hand, when it would pose a major threat to others, the claim of confidentiality must be overridden. Difficulties arise when the competing claims are nearly equal in moral weight.

In this scenario, does Consuela have any claims on the doctor? I believe she does, and that her claims are very compelling. They stem, first, from her right to have information she might consider relevant to her decision to act as her brother’s nurse; and, second, from the health care system’s obligation to warn of a possible risk to her health. I would like to focus first on whether Consuela has a right to information apart from the question of whether there is in fact an appreciable risk. I believe that she has such a right, for three reasons.

First, there is an element of deception in not informing Consuela that her brother is HIV-infected. Most people in her situation would want to know if their “patient” were HIV-infected and would presume that they would be told if that were the case. (I suspect that a private nurse hired in a similar situation would expect to be told—and that she would be.) At some level, perhaps unconsciously, Consuela would assume that Carlos did not have HIV infection because no one said that he did. Thus, in keeping Carlos’s secret, the doctor implicitly deceives Consuela—not a net moral gain, I think.

Second, Consuela has been impressed to provide nursing care in part because the health system is using her to avoid providing a service it would otherwise be responsible for. This fact, I believe, gives the health care system an additional obligation to her, which includes giving her all the information that might bear on her decision to accept this responsibility. It might be argued that the information about her brother’s HIV infection is not relevant, but it is patronizing to make this assumption. She may for any number of reasons, quite apart from the risk of transmission, find it important to know that he is HIV-infected.

Finally, I can’t help feeling that this young woman has already been exploited by her family and that the health care system should not collude in doing so again. We are told that since she was twelve, she has acted as “mother” to a brother only one year younger; presumably simply because she is female, since she is no more a mother than he is. Now she is being asked to be a nurse, as well as a mother, again presumably because she is female. In this context, concerns about the sensibilities of the father or about Carlos’s fear of them are not very compelling, particularly when they are buttressed by stereotypes about Hispanic families. Furthermore, both his father and his sister will almost certainly learn the truth eventually.

What about the risk of transmission from Carlos to Consuela? Many would—wrongly, I believe—base their arguments solely on this question. Insofar as they did, they would have very little to go on. The truth is that no one knows what the risk would be to Consuela. To my knowledge, there have been no studies that would yield data on the point. Most likely the risk would be extremely small, particularly if there were no blood or pus in the wound, but it would be speculative to say how small. We do know that Consuela has no experience with universal precautions and could not be expected to use them diligently with her brother unless she had some sense of why she might be doing so. In any case, the doctor has no right to decide for this young woman that she should assume a risk, even if he believes it would be remote. That is for her to decide. The only judgment she has a right to make is whether she might consider the information that her brother is HIV-infected to be relevant to her decision to nurse him, and I think it is reasonable to assume she might.

There is, I believe, only one ethical way out of this dilemma. The doctor should strongly encourage Carlos to tell his sister that he is HIV-infected or offer to do it for him. She could be asked not to tell their father, and I would see no problem with this. I would have no hesitation in appealing to the fact that Carlos already owes Consuela a great deal. If Carlos insisted that his sister not be told, the doctor should see to it that his nursing needs are met in some other way. In sum, then, I believe the doctor should pass the dilemma to the patient: Carlos can decide to accept Consuela’s generosity—in return for which he must tell her he is HIV-infected (or ask the doctor to tell her)—or he can decide not to tell her and do without her nursing care.

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