



DUTY OF CONFIDENTIALITY AND DUTY OF OPENNESS IN HEALTH LAW OF UKRAINE AND THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

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Чабан О. Обов'язок зберігати відомості про стан здоров'я конфіденційними та обов'язок надання інформації про стан здоров'я пацієнту в Україні та Сполученому Королівстві Великої Британії та Північної Ірландії.

Стаття присвячена аналізу двох обов'язків: зберігати інформацію про стан здоров'я конфіденційною та надавати інформацію про стан здоров'я пацієнта; проведено порівняльний аналіз зазначених обов'язків в законодавстві України та Сполученого Королівства Великої Британії та Північної Ірландії; розроблено пропозиції щодо доповнення існуючого законодавства України з метою приведення його у відповідність до найкращих європейських практик та гуманістичних цінностей.

Ключові слова: біоетика, обов'язок конфіденційності, право на інформацію, медичне право, приватність, розкриття інформації, порушення конфіденційності, баланс прав

Ethical rules and principals play vital role in any profession as they form a ground for professional codes and later even for legal norms. Ethics in medicine is especially important as medical profession deals with the individuals, their health and the health of the nations in general.

A lot of researchers and practitioners devoted important part of their scientific works to the ethical issues in medicine and in particular to the confidentiality issues in health care system. As examples of this researches we would like to refer to the article of J. De Bord, W. Burke and D. M. Dudzinski, who give a general overview of confidentiality issue, analyze the influence of privacy on public health, examine cases when confidentiality can be legally broken [1], M. Beech who scrutinizes cases when the dilemmas might arise between the necessity to maintain the patient's confidentiality and the ne-

cessity to open it in the research «Confidentiality in health care: conflicting legal and ethical issues» [2], S. Vekovshynina, V. Kulinichenko, N. Kovalenko who examine the evolution of such ethics rules and duties as confidentiality and respect for autonomy from the time of the Hippocratic Oath to the modern days [3].

This article and my dissertation research in general was influenced a lot by expert views in the sphere of bioethics of Oksana Kashyntseva who paid important attention to the issues of influence of ethical and legal norms on the legitimacy of the scientific result in the sphere of biomedical research [4], to the ethics and patent law in health care in Ukraine etc. [5].

Dame F. Caldicott report — review of information sharing to ensure and to find a balance between the protection of patient information and the use and sharing of information to improve the patient care had a significant impact on our sci-



entific position too [6]. In terms of philosophical and theoretical grounds and «support» for our research we have analysed the works of G. W. F. Hegel, J. Bentham, L. Portes «A la recherche d'une éthique médicale», T. Beauchamp and J. Childress, P. Lambert «Le secret professionnel», M. Wilpart, S. Denis, A. Maitrot de la Motte et al.

As the ethical issues of use and sharing information are so often discussed, reviewed and analyzed, in our article we pay our attention to the duty of confidentiality and duty of openness in medical profession exclusively in Ukraine and in the United Kingdom of Great Britain and Northern Ireland (hereinafter — the UK). The comparative approach is chosen to learn what kind of legal norms regulating the said duties exist in the law of the mentioned countries, to show how differently and or similarly the duties are regulated in the precedent and continental legal systems and to clarify the importance of the right balance of the duties to the medical profession and to the human being and health care in general. The objective of this article is also to seek how Ukrainian law may be amended in order to meet the best European practice and values.

To begin our research we are referring to one of the oldest binding document for medical professionals in history — the Hippocratic Oath and international norms regulating the duties under the question.

The Hippocratic Oath is known for its confidentiality duty imposed on the doctors: «And whatever I see or hear in peoples lives during the treatment, or even outside the treatment, that ought not be made public, I will pass over in silence, considering such things to be reserved secrets» [7]. Later the above mentioned duty becomes one of the important elements of professional ethics and incorporated into the Ethical Professional codes as well as into the legal norms. But, in the said Oath the approach is quiet paternalistic [8], as the physician decides

himself what is better for the patient; so, the principle of patient autonomy and balance of different rights of the person are absent in this document.

The other paper proclaiming the duty of confidentiality is the WMA International Code of Medical Ethics adopted by the 3rd General Assembly of the World Medical Association, London, in October 1949. In conformity with the said Code a physician shall respect a patient's right to confidentiality. But in contrast to the Hippocratic Oath this privacy is not absolute as the Code defines ethical to disclose confidential information when the patient consents to it or when there is a real and imminent threat of harm to the patient or to others and this threat can be only removed by a breach of confidentiality [9].

In more recent WMA document - Declaration of Lisbon on the Rights of the Patient adopted by the 34th World Medical Assembly, Lisbon, Portugal in September/October 1981 we find a sort of definition what kind of health information shall be treated as secret. So, in conformity with the said Declaration all identifiable information about a patient's health status, medical condition, diagnosis, prognosis and treatment and all other information of a person kind must be kept confidential, even after death. And all identifiable patient data must be protected [10].

In the Universal Declaration of Human Rights we find general obligations to safe the privacy of the person and to respect the honor and reputation (art. 12) [11]. As health data may include all kind of private information including information on family life, and as health data is so sensitive that it may influence on person's reputation and even good name — honor, the cited article and document in general shall be treated as ground and basis for national detailed regulations of health data confidentiality duty.

Despite the number of International norms and Codes, the national law of each country while incorporating the



said international general rules has its own peculiarities in regulating the said sphere of social relations. This article concentrates on the overview of the Ukrainian and the UK law as examples of how national legislators regulate the duty of confidentiality and the duty of openness, their differences.

The duty of confidentiality is regulated in the Ukrainian law by Constitution as Fundamental Law, by Civil law and Procedure, by Criminal law and procedure and by special laws and norms such as «the Fundamentals of legislation of Ukraine on health care», «Oath of a doctor» etc.

Thus, in the article 32 of the Constitution of Ukraine like in the Universal Declaration of Human Rights we find a general obligation to safe the privacy of the person and the rules for the collection, storage, use and dissemination of confidential information about a person [12]. More explicit obligation to keep health data as confidential information is imposed by the article 286 of the Civil Code of Ukraine; under the said legal norm a natural person shall have the right to health secrecy, to the secrecy of the fact of addressing for medical aid, to the confidentiality of the diagnosis and information received during medical examination. Moreover, a natural person shall be obliged to refrain from dissemination of the above indicated information which she/he got to know in the process of performing his/her functions or from other sources [13]. The article 40 of «The Fundamentals of legislation of Ukraine on health care» stipulates the obligation of medical staff and other persons who happen to learn the health information during their professional activity to keep the said information confidential except the express cases when the said information can be disclosed in conformity with the law of Ukraine [14]. «Oath of a doctor», enacted by the Order of President of Ukraine on the 15th of June 1992, № 349 bounds a doctor with medical secret and with medical obligation to comply with

the rules of professional ethics in general; in addition, under the said document the doctor has no right to hide the truth from the patient except cases when the truth may be harmful for the patient [15]. As additional step to guarantee the professional secret, the legislator introduces certain restrictions to the list of the persons who can be examined as witness in civil and criminal procedure. In the Civil Procedural Code of Ukraine, the article 51 stipulates that persons obliged by law to keep in secret information that had entrusted to them in connection with their official or professional status are not entitled to examination as witness [16]. The Code of Criminal Procedure of Ukraine explicitly defines professionals such as doctors, psychologists as persons who can not be examined as witness about what came to their knowledge in the discharge of professional activities unless the person who entrusted them such information has released them from the duty to keep professional secret (article 69) [17].

Furthermore, the Criminal Code of Ukraine stipulates punishment for illegal disclosure of the confidential information. The example of it is the article 145 of the Criminal Code of Ukraine stating that the willful disclosure of the confidential information by a person to whom it was available in connection with his/her professional or official duties, where such disclosure caused any grave consequences, — shall be punished by a fine up to 50 tax-free minimum incomes, or community service for a term up to 240 hours, or deprivation of the right to occupy certain position or engage in certain activities for a term up to three years, or correctional labor for a term of up to two years. Moreover, in conformity with the article 132 of the Criminal Code of Ukraine disclosure by a medical officer, an auxiliary employee who obtained the information without authorization, or a member of medical profession — of information on medical examination for HIV, or any other incurable contagious disease dangerous to the person's life, or



AIDS and its results that became known to them in connection with their official or professional duties, — shall be punished by a fine of 50–100 tax-free minimum incomes, or community service for a term up to 240 hours, or correctional labor for a term up to two years, with or without deprivation of the right to occupy positions or engage in certain activities for a term up to three years [18].

As for the duty of openness, in the Ukrainian medical law there are some statements that bind the medical professionals with the duty of being open with the patients. These are the article 285 of the Civil Code of Ukraine, the article 39 of «The Fundamentals of legislation of Ukraine on health care», the «Oath of a doctor» etc. Nevertheless, it goes about the duty of a doctor to be sincere with the patient mainly on the diagnosis. For instance, the article 285 of the Civil Code of Ukraine gives the right to the natural person of age to reliable and complete information on the state of his/her health, including access to the relevant medical documents concerning his/her health. But even this right is not absolute — in case the information about the illness of a natural person may aggravate his/her state of health or may ruin the process of treatment, medical staff shall have the right to provide incomplete information about the state of health of the person and to limit access to certain medical documents. This is in our opinion quiet arguable statement and may give in some circumstances too much of power over the patient. Moreover, in the Ukrainian law, the duty of openness in contrast to the duty of candour implemented in the UK, covers the duty of medical professional to provide the patient with all relevant information on the patients' health, but it does not explicitly cover the duty of medical staff to notify a patient on the mistakes made by the said professional or other incidents that may occur in the process of treatment including breach of the health secrecy or probability that the health data confidentiality might be broken.

The duty of candour in the UK was initially offered by Robert Francis QC, Chairman of the Inquiry into Mid Staffordshire NHS Foundation Trust. [19]. As a result of discussions of pros and contras of the said implementation, the duty of candour became bounding for all registered providers since 1 April 2015 in UK. Thus under the Regulation 20 of the Health and Social Care Act 2008 (Regulated Activities) 2014: A health service body must act in an open and transparent way with relevant persons in relation to care and treatment provided to service users in carrying on a regulated activity. As soon as reasonably practicable after becoming aware that a notifiable safety incident has occurred a health service body must notify the relevant person that the incident has occurred, and provide reasonable support to the relevant person in relation to the incident, including when giving such notification. The said notification must — be given in person by one or more representatives of the health service body, provide an account, which to the best of the health service body's knowledge is true, of all the facts the health service body knows about the incident as at the date of the notification, advise the relevant person what further enquiries into the incident the health service body believes are appropriate, include an apology, and be recorded in a written record which is kept securely by the health service body. To avoid the misinterpretation of the terms, the said Regulation provides such definitions as «apology», «moderate harm», «moderate increase in treatment», «notifiable safety incident», «severe harm», «prolonged psychological harm», «relevant person» etc. [20]. In conformity with the said duty the breach or possible breach of confidentiality shall be advised and notified. We find this kind of obligation imposed on the medical professionals as highly progressive and human oriented as on the one hand it is an additional guarantee for keeping the health data accurately and with all



due responsibility, and on the other hand, it is a fair tool to control the physician-patient communications, relations and confidentiality-ethics compliance.

As for the duty of confidentiality, in addition to the precedents, it is mainly regulated in UK by The Data Protection Act 1998 that governs rights for the individuals who are alive to access their own records, and that defines physical or mental health or condition as «sensitive personal data» [21], by The Access to Health Records Act 1990 that defines rights of access to the health records of the deceased patient [22], and by the Medical Reports Act 1988 stipulating the right for individuals to have access to reports, relating to themselves that are done by medical professionals for insurance and employment purposes [23].

So, this brief overview of the UK law in the mentioned aspects shows that, on the one hand, it is very structured; and, on the other hand, it forms coherent system respecting the balance. As it is impossible to seek confidence of patient without keeping the health data confidential and at the same time it is highly important to know how to share the health

information with other medical staff in order to provide the high quality medical services and medical treatment; how to advise openly and in a correct way a patient on diagnosis and other health relevant information, the grain of truth shall be found in the equilibrium of the different rights. As we see in Ukraine there is sufficient quantity of legal norms to regulate the duty of confidentiality and duty of openness, but they are not composing an integrated system — each particular duty is governed separately. Moreover, in our opinion the duty of openness in Ukraine shall be expanded. And keeping in mind that Ukrainian law has features mainly of continental legal system, and tends to the explicit regulation and dogmatism, the Ukrainian patient in addition to the existing norms shall have explicit right to be notified of the medical incident that occurred or may occur including the breach of confidentiality. To implement this, the article 285 of the Civil Code of Ukraine as well as other relevant norms shall be amended with the above mentioned statements. ♦

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Чабан Е. Обязанность сохранять сведения о состоянии здоровья конфиденциальными и обязанность предоставлять информацию о состоянии здоровья пациента в медицинском праве Украины и Объединенного Королевства Великобритании и Северной Ирландии. Статья посвящена анализу двух обязанностей: сохранение сведений о состоянии здоровья конфиденциальными и предоставление информации о состоянии здоровья пациенту; сравнительному изучению указанных обязанностей в законодательстве Украины и законодательстве Объединенного Королевства Великобритании и Северной Ирландии; разработке модификаций украинского законодательства с целью приведения его в соответствие с наилучшими европейскими практиками и гуманистическими ценностями.

Ключевые слова: Биоэтика, обязанность сохранения конфиденциальности сведений о состоянии здоровья, обязанность предоставления информации о состоянии здоровья пациенту, медицинское право, приватность, раскрытие информации, нарушение конфиденциальности, баланс прав

Chaban O. Duty of confidentiality and duty of openness in health law of Ukraine and the United Kingdom of Great Britain and Northern Ireland. This article is dedicated to the analysis of the duty of confidentiality and duty of openness in the health law of Ukraine and the UK, to the comparative examination of the principle of balance of different duties and rights implemented and used in the above mentioned countries; to the elaboration of amendments to the health law of Ukraine in order to make it meeting the best European practice and human right values.

Key words: Bioethics, duty of confidentiality, duty of openness, health law, privacy, disclosure, breach of confidentiality, balance of different rights