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<tbody>
<tr>
<td><strong>Author(s)</strong></td>
<td>Kaan, ST</td>
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<tr>
<td><strong>Citation</strong></td>
<td>The 2016 Conference on &quot;Precision Medicine: Legal and Ethical Challenges&quot;, The University of Hong Kong, Hong Kong, 7-8 April 2016.</td>
</tr>
<tr>
<td><strong>Issued Date</strong></td>
<td>2016</td>
</tr>
<tr>
<td><strong>URL</strong></td>
<td><a href="http://hdl.handle.net/10722/235341">http://hdl.handle.net/10722/235341</a></td>
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Genetic Information and the Family: The Future of the Duty of Disclosure & The Limits of Confidentiality

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Overview

★ Work in progress on several disparate themes
★ But in common - whether future technology will force a change of current paradigms in first-party relationships between physician-patient, and researcher-subject:
  ★ Disclosure in the physician-patient relationship
  ★ The limits of the duty of care of physicians in relation to holdings of genetic data
  ★ Any different for researchers?
★ And in third-party relationships:
  ★ Is there a duty to warn 3rd parties?
★ Implications for the future development of medical confidentiality
The Liability of Physicians

- The Agreement
  - Easy to sequence
  - But hard to interpret ...
  - ... and expensive.
  - So prudence dictates contractual limitation
  - Unknowns and current technological limits favour the physician - causation
  - But can contract override tort? Especially where physical harm / injury / death in issue?
The Liability of Physicians

- Disclosure
  - Used to be simple.
  - But not after *Montgomery* Lanarkshire Health Board [2015] UKSC 11
  - *Bolam* shaken and restricted – duty of disclosure brought in line with Australian, NZ, Canadian approaches – logical refresh necessitated by rise of autonomy principle
  - But other substantive changes under the hood may have greater impact down the road? – *Montgomery*: ‘doctor’s advisory role involves dialogue’ [90]
The Liability of Physicians

- Disclosure
  - Continuing dialogue: if duty no longer liminal, what are its limits?
  - A glass very darkly for now: but 10 years down the road, technology makes possible and commonplace analyses not possible now
  - And give rise to new professional standards of prudence / good practice / SoPs
  - Will it be a defence in 10 years time, if automated periodic screening of electronic medical and genetic records become routine – like screening for computer viruses is now?
The Liability of Physicians

- Dialogue

- But this is just the ground floor? With advent of cheap sequencing, inevitable that WGS becomes universal first / basic procedure (like asking for family history is now)

- Problem: Genomic data is qualitatively different from other clinical data, which are essentially snapshots of physiological function at particular point in time, may be predictively unreliable, subject to false negatives / positives, open to interpretation. But your book of life is definitive.

- What is not possible / reliable / known now will in the future be otherwise
And of Researchers & Data Holders

- And data holders?
- And researchers? Current refuge in arguments will fail in the future because of the certain and immutable nature of WGS data – it will be the same book read by clinicians
- Beyond WGS: epigenetics and human microbiomics
- Cautionary tale for data holders: in future, access and control of genetic data may come with legal responsibilities that blur the liability lines between physicians, researchers and data holders
- *Montgomery* still stuck on paradigm of a one-to-one physician-patient relationship in the law, but completely unreal in the context of HMOs, insurers, employers paying health benefits, the NHS?
And of Researchers & Data Holders

- As in medical negligence in England (and followers of *Bolam*), the liability battleground may shift to a reconsideration of the principles of causation and remoteness – where English common law has showed no reluctance in reworking liability in cases where physical harm or disease is in issue (*e.g.* Fairchild v Glenhaven, Chester v Afshar)

- But the law would also have to review its fundamental approach to the duty of care in negligence of parties other than physicians having a hand in the care of patients – and of their genetic data. Coming up ...
Third Parties

- Do third parties have a right to be warned of genetic vulnerabilities?
- Current English law on medical confidentiality premised on AG v Guardian No 2, W v Egdell, X v Bedfordshire CC etc – confidentiality not a legal privilege, a bare presumption in the public interest (not private interest) aimed at fostering full disclosure by patient to benefit of patient
- American developments such as Tarasoff v UCLA studiously ignored – liability for not disclosing threat of harm to 3P
Third Parties

- But main difference: genetic threats are not external threats – they are inherent threats in every sense of the word
- They are also shared
- But first shot across bow: ABC v St George’s Healthcare Trust [2015] EWHC 1394 (QB)
- No doubt first of many. Huntington’s - incremental approach to duty of care in Caparo v Dickman [1990] 2 AC 605 insisted on
- Claimant in ABC had to demonstrate that her claim could fit into an existing category of duty of care – or that her case was of that kind that merited an incremental expansion of an existing category – unlike previous Anns v Merton approach
Third Parties

- Current approach therefore denies possibility of entirely new categories – at odds with reality?
- But Caparo and its ilk deal with claims for pure economic loss – product of judicial concern for commercial certainty? – underlying policy considerations for the ‘closed categories’ approach in Caparo does not fit reality well
- Ethical codes around the world (GMC, HKMA etc) recognize that exceptions to confidentiality duty may be made on grounds of public safety, prevention of crime etc
- Is an inherent genetic risk to health or life any different?
- One difficulty: the right not to know
Third Parties

- Relational information: as healthcare IT systems move towards large-scale integration, what kind of liabilities may emerge from mere fact of possession or holding of information of many related persons?
- Working backwards: good to warn if we spot patterns in segment of general population, but as both segment and general population size decreases? What point does demands of privacy come into play?
- Shared information: Essential problem with genetic information is that it is by definition shared information – it is not wholly your own.
- What common rights have groups of related individuals to this shared inheritance (which may be of commercial value)?
Third Parties

- What restrictions on individual rights if common shared rights of group is accepted?
- Return of benefits? Echoes of HUGO Ethics Committee - Statement on Benefit Sharing
- Consider: X., one of two identical twins, ‘donates’ his entire genome to science. What rights has Y. his identical twin?
- Do current legal privacy paradigms premised on individual rights fit well with biological reality?
The Point of Privacy

- Nosy relatives and over-eager clinicians and researchers may be the least of your problems in the future: privacy laws have never deterred rogue states (and state entities), terrorists, criminals – and most of all commercial interests – from acquiring desirable or useful personal information.
- The law is going to find it hard to catch up with future technology that allows sequencing from the tiniest traces of yourself.
- The danger is that privacy paradigms for the future is driven by such concerns rather than the ultimate *raison d’être* for the concept of privacy: dignity and *welfare* of the individual.
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