

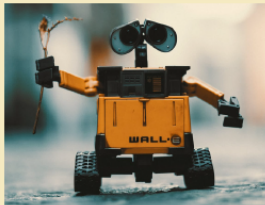


FACULTY OF LAW, UNIVERSITY OF MALAYA

**CELEST**



CENTRE FOR LAW AND ETHICS IN SCIENCE AND TECHNOLOGY



## IN THIS ISSUE

### Featured Article

In this month's newsletter, Dr Mohammad Firdaus Abdul Aziz discusses the application of telemedicine in light of the Coronavirus (Covid-19) pandemic and the protection for patients' privacy and confidentiality in Malaysia.

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## News

Congratulations to our members on the following publications:

**Mohammad Ershadul Karim.** (2020). Cyber Law in Bangladesh. The Netherlands. Wolters Kluwer.

**Ho and Kaur.** (Sep 2020). Parental Rights, Best Interests and Significant Harms: Singapore and Malaysia perspectives on Medical Decision-Making on Behalf of Children. In Imogen Goold, Cressida Auckland and Jonathan Herring (Eds). Medical Decision-Making on Behalf of Young Children: A Comparative Perspective, Bloomsbury Academic.

**Sharon Kaur and Mohammad Firdaus Bin Abdul Aziz** (together with a number of Malaysian bioethicists) worked on and were signatories to the document “Towards an Ethical Response to Covid-19 in Malaysia” in response to the Covid-19 pandemic. This group is also working with the University of Malaya library, (Faculty of Medicine) and have a resource page for Clinical Ethics in Covid-19 at <https://umlibguides.um.edu.my/covid19ethics>.

**Tay, P.S.** (2020). The Impact of the Personal Data Protection Act 2010 on Data Analytics in the Retail Industry (accepted for publication in the Malayan Law Journal).

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## Events

- **28 February 2020**

CELEST hosted a screening of the webinar by Dr Voo Teck Chuan on “Ethics of Research in Response to an Infectious Disease Outbreak : From SARS-COV to COVID19” at the Conference Room, Faculty of Law, University of Malaya.

- **16 April 2020**

Dr Sharon Kaur spoke on "Some reflections on liability for Artificial Intelligence in Healthcare in Asia ", to the WHO Expert Group on Ethics/Governance of AI and Health. Virtual meeting: Developing WHO Guidance on Ethics; Governance of Artificial Intelligence for Health.

- **22 April 2020**

Dr Sharon Kaur spoke on “Reflections on the role of ethics during the Covid-19 pandemic”, COVID-19 Live Webinar Series, Weill-Cornell Medicine Qatar, Continuing Professional Development.

## ***Telemedicine in Malaysia during Covid-19 pandemic: assessing legal protection for patient's privacy***

***By Mohammad Firdaus Abdul Aziz, DPhil  
Faculty of Law, University of Malaya***



### *Author's Biography*

*Dr Mohammad Firdaus Abdul Aziz is currently a Senior Lecturer at the Faculty of Law, University of Malaya. He joined the faculty in 2016 after completing his doctoral study at the Centre for Health, Law and Emerging Technologies, Oxford University. His research interest is in the area of law and ethics of emerging sciences. Currently, he is working on the ethical and legal issues surrounding human biobanking, human stem cell research and therapy, and genetically modified organism. He is also a trainer for UNESCO's Ethics Teachers' Training Course (ETTC) and has been involved in a number of courses in Oman, Indonesia, The Philippines, and Fiji.*

## Introduction

*During a global outbreak such as the current Covid-19 pandemic, healthcare professionals are not only inundated with patients but are also faced with unprecedented ethical conundrums. With the rising number of patients affected by the virus along with patients suffering from other illnesses that require immediate attention, many hospitals across the globe have overreached their capacity.*

*Frontline healthcare workers put their lives at risk every day because of physical contact with affected patients. In view of the risks of transmission and depending on the circumstances they are in, they might need to shift from their usual method of delivering medical care.*

*From a patient-centred care, they now need to find the balance between the interest of the public at large and individuals' needs. Many countries including Malaysia have imposed movement restriction order. Some hospitals may have to restrict their admission and appointment process; whereby only emergency cases can be accepted. Non-emergency surgeries and other medical services are postponed until a later point in time when the situation improves.*

*Given the scarce supply of personal protection equipment and test kits, this restriction on admission and appointment is vital so that the healthcare workers can utilise the limited lifesaving resources to care for patients with emergency cases.*

*Nevertheless, it is also important to recognise that there are people with acute illnesses and chronic problems, who need access to medical care and they should be given access to the necessary medical service, as and when needed.*

*During this critical period, healthcare providers (especially family physicians) and their patients would benefit from alternatives which technology can offer to enable smooth continued medical care.*

*'Telemedicine' as an alternative option to continue providing medical service for patients through virtual consultations is certainly promising. The Malaysian Medical Council, in its guidelines, defines 'telemedicine' as 'a medical service provided remotely via information and communication technology'. This type of medical service does not involve 'physical contact and does not necessarily involve long distances.' [1]*

***Frontline healthcare workers put their lives at risk every day because of physical contact with affected patients. In view of the risks of transmission and depending on the circumstances they are in, they might need to shift from their usual method of delivering medical care.***



Such approach is in line with global effort to break the chain of the virus transmission. In addition, the Telemedicine Act 1997, defines 'telemedicine' as 'the practice of medicine using audio, visual and data communications.' [2] It is to be noted that the Act has not yet been enforced despite the long passage of time.

### **The benefits of telemedicine**

This technology offers tremendous benefits for both patients and physicians especially during a pandemic, where patients have very limited access to hospitals.

By deploying telemedicine, patients will be able to seek medical advice without having to be physically present in a hospital, where there is always a risk of contracting virus, especially if the hospital is designated as a screening centre, and if the patients live in a red zone where the risk of transmission is also high.

During a restricted movement order or lockdown, patients will not have to worry about logistics and put themselves at risk. They can have access to their physicians from the comfort of their homes.

***The use of telemedicine obliterates the risk of virus transmission and, at the same time, enables physicians to continue to fulfil their duty of care by attending to patients with chronic or acute medical conditions virtually.***

As frontliners, physicians are already experiencing burnout with the overflow of patients at hospitals. Physicians and other healthcare workers are not just treating a flood of critically ill patients during the pandemic, but they are also risking their lives. Hundreds of healthcare workers are killed by this pandemic worldwide.

As of April 2020, more than 9,000 healthcare workers in the USA are infected and 27 of them were killed from the infection, as reported by the US Centers for Disease Control and Prevention. [3] Al Jazeera reported around 100 Italian doctors have died after contracting the virus. [4]

The use of telemedicine obliterates the risk of virus transmission and, at the same time, enables physicians to continue to fulfil their duty of care by attending to patients with chronic or acute medical conditions virtually.

This technological approach is also useful for clinics that do not have access to Covid-19 test kits and full personal protective equipment because it enables the clinics to keep operating instead of the physicians ceasing to attend to their patients completely.

In this way, healthcare professionals can still manage and treat acute illnesses or chronic problems in an effort to keep these patients clear of unnecessary emergency room visits and hospitalisations. However, it is important to note that this approach should be limited to situations representing a continuation of care, whereby there is already an established patient-doctor relationship.

*For obvious reasons, it should not be extended to a person who has not registered with the physician. Nonetheless, it does not stop physicians from providing advice on wellness virtually. But it is important for the physicians to clearly state that the consultation is only meant for providing advice on wellness instead of a medical service. [5]*

*An important question that arises from the use of telemedicine is the protection of patients' privacy and confidentiality. Closely related to this is the issue of the physicians' responsibility in respecting patients' privacy and confidentiality when they offer medical service through telemedicine.*

***Both ethically and legally, when a patient discloses his or her private or personal information to a physician, it is the duty of the physician to ensure that the information will not be disclosed to any unauthorised individuals without the patient's consent.***

### **Patient's privacy and confidentiality**

*The principle of privacy and confidentiality is one of the fundamental principles in medical ethics and law. Privacy promotes the right of an individual to decide which information should be disclosed. The principle of confidentiality promotes the right of an individual to keep his or her personal information from being disclosed without sufficient reason.*

*This principle is further underpinned by the principle of autonomy, whereby a patient has the right to decide and has the control over the use of and accessibility to his personal information. Any disclosure of one's personal information must be subject to his or her consent.*

*Both ethically and legally, when a patient discloses his or her private or personal information to a physician, it is the duty of the physician to ensure that the information will not be disclosed to any unauthorised individuals without the patient's consent. The need to respect this principle is crucial because it will safeguard the trust that patients have towards their physicians.*

*The trust is key to patient-doctor relationship as it helps ensure that patients will be truthful in providing the necessary information needed by the physician when rendering proper treatment.*

*Without this trust, patients will not be comfortable in providing the right or truthful information and consequently, it will jeopardise the medical care provided. It is also important for patients to place confidence in their physicians before they are willing to be honest with their physicians.*

## **Legal position of privacy and confidentiality**

Article 9 of the Universal Declaration on Bioethics and Human Rights stipulates:

*'[T]he privacy of the persons concerned and the confidentiality of their personal information should be respected. To the greatest extent possible, such information should not be used or disclosed for purposes other than those for which it was collected or consented to, consistent with international law, in particular international human rights law.'* [6]

Confidentiality is recognised as a basic human right that should be enjoyed by every human being. Such a principle has been affirmed in *Ashworth Security Hospital v MGN Ltd*, whereby Lord Phillips ruled that:

*'... there is an abiding obligation of confidentiality as between doctor and patient, and in my view when a patient enters a hospital for treatment, whether he be a model citizen or murderer, he is entitled to be confident that details about his condition and treatment remain between himself and those who treat him ...'* [7]

Nevertheless, it is worth noting that the patient's right to confidentiality is not absolute and this has been clearly addressed in law. From a legal perspective, it is not illegal for physicians to disclose a patient's confidential information to another healthcare provider if such a need arises for medical care purposes.

*Confidentiality is recognised as a basic human right that should be enjoyed by every human being...Nevertheless, it is worth noting that the patient's right to confidentiality is not absolute...*

Also, disclosure is permitted if there is a court order requiring physicians to disclose information for police investigation, and if the disclosure is in the best interest of the public at large. However, the disclosure needs to be kept to the minimum necessary to achieve the purpose of the disclosure.

It is also worth mentioning some of the legal bases of confidentiality especially in the area of medical law. If there is a breach of confidentiality, this could result in

- (i) a breach of contract, whereby the physician could infringe his or her professional contract of employment;
- (ii) a tort of negligence, whereby it is part of the notion of reasonable care for physicians to keep their patients' personal information confidential and not reveal it without reasonable reasons;
- (iii) a breach of statutory obligation especially when personal information is protected by the law of the land such as the Malaysian Personal Data Protection Act 2010;

(iv) a physician could be guilty of criminal offence if it involves stealing or selling property such as electronic or paper-based medical record or even an x-ray film that contains personal information; and

(v) a breach of basic human rights that is protected by international human rights law.

### **Legal position of privacy and confidentiality in Malaysia**

The Malaysian Federal Constitution does not expressly provide for the right to privacy and confidentiality. Nonetheless, this right is provided in other statutes such as the Penal Code [8] and the Personal Data Protection Act 2010. [9]

In the context of a doctor and patient relationship, section 107 of the Private Health Care Facilities and Services Act 1998 explicitly states that it is the responsibility of healthcare providers i.e. physicians to protect patients' privacy, confidentiality of information and access to patients' medical reports and records.

However, section 115 of the same Act provides for some situations where patients' personal information can be disclosed. These are as follows:

- (i) on the ground of public interest;
- (ii) if it is in connection with the administration or any proceedings under the Act;
- (iii) if the information is needed to facilitate professional disciplinary proceedings involving a health profession;

(iv) if the information is needed by other healthcare providers involved in any healthcare service provided to the patient; and

(v) with the consent of the patient or authorised individual to make the decision on behalf of the patient. [10]

The exemption for disclosure is also reiterated by the Malaysian Medical Council Confidentiality Guidelines 2008. The Guidelines similarly provide that a physician can disclose personal information if it is required by law; the patient consents; or it is justified in the public interest. [11]

This shows that the confidentiality of patients' personal information is protected by the existing laws and industry guidelines in Malaysia. One could then question whether a physician owes his or her patient the same duty during a pandemic when medical service is given via telemedicine.

Protecting patients' privacy and confidentiality remains part of a physician's duty even during a pandemic. The Telemedicine Act 1997 states 'that all existing confidentiality protection apply to any information about the patient obtained or disclosed in the course of the telemedicine interaction' and 'that any image or information communicated or used during or resulting from telemedicine interaction which can be identified as being that of or about the patient will not be disseminated to any researcher or any other person without the consent of the patient.' [12]



*This provision is in harmony with the other statutory provisions and guidelines that emphasise on patients' consent if there is a need for a disclosure. In addition, the Malaysian Prevention and Control of Infectious Diseases Act 1988 only allows the disclosure to be made to other healthcare workers who are involved in caring for the patients and to notify the public health authority as part of the required procedure to monitor disease transmission in the community. [13]*

### **Guidance by Malaysian Medical Council on Virtual Consultation**

*It can be said that most physicians are not familiar with the use of telemedicine and may not be aware of the legal requirements. During this critical time in Malaysia, the Malaysian Medical Council has introduced an advisory document providing guidance to physicians in the country on the best practices when providing virtual medical service. The document highlights specific advice for physicians to fulfil before they carry out any medical service virtually. They need to:*

- *undergo adequate training to acquire competency;*
- *observe all the ethical and legal requirements such as informed consent, which is a fundamental principle in medical ethics and also a legal principle enshrined in international laws;*

- *confirm patient's identity and also to inform patients of the physician's identity and registration of practice status before continuing with the consultation;*
- *inform patient and obtain the patient's approval if there are other parties involved and provide the patient with the identity of the other parties, as well as document the arrangement in the consultation record; and*
- *take adequate precautions in making sure that the digital platform or technologies used by both parties are secured in terms of its privacy system and of acceptable accreditation standards. [14]*

*When carrying out this service, physicians should consider the adequacy of the virtual assessment and be upfront with patients with regard to the limitations of this service as well as the possible privacy issues. Physicians also need to use their discretion if patients need to be seen in person and be aware of any situation that will require them to be in communication with other facilities and colleagues.*

*Given the use of telemedicine is not well established in this country, it is important for physicians to take adequate liability protection. In so doing, it is important for physicians to comply with the Malaysian Medical Council Code of Professional Conduct and ensure proper documentation of the virtual consultation. [15]*

## Conclusion

*The above demonstrates that even in an unprecedented situation, the application of virtual medical service / consultation needs to be in line with the existing laws. Regardless of whether the medical consultation is conducted in person or over a network or through audio/video facility, physicians need to always uphold their duty to protect patients' personal information. In so far as patients' privacy is concerned, the current legal framework in Malaysia does provide guiding rules for physicians to carry out telemedicine ethically and legally.*

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## References

1. Malaysian Medical Council Advisory on Virtual Consultation (during the Covid-19 Pandemic) 2020.
2. Telemedicine Act 1997, section 2.
3. Jillian Mock, Psychological Trauma Is The Next Crisis for Coronavirus Health Workers, Scientific American. 28 April 2020 available at <https://www.scientificamerican.com/article/psychological-trauma-is-the-next-crisis-for-coronavirus-health-workers/>.
4. Aljazeera, 'One Hundred Italian doctors have died of coronavirus'. 10 April 2020 available at <https://www.aljazeera.com/news/2020/04/italian-doctors-died-coronavirus-200409211435347.html>.
5. Malaysian Medical Council Advisory on Virtual Consultation (during the Covid-19 Pandemic) 2020.
6. Universal Declaration on Bioethics and Human Rights, article 9.
7. Ashworth Security Hospital v MGN Ltd [2002] 4 All ER 193.
8. Penal Code (Act 574), section 509.
9. Personal Data and Protection Act 2010, sections 32 and 48.
10. Private Healthcare Facilities and Services Act 1998, sections 107 and 115.
11. Malaysian Medical Council Confidentiality Guidelines 2008, paragraphs 15-20, 34-48.
12. Telemedicine Act 1997, section 5(c)(d).
13. Prevention and Control of Infectious Diseases Act 1988, section 10(2).
14. Malaysian Medical Council Advisory on Virtual Consultation (during the Covid-19 Pandemic) 2020.
15. Ibid.

## Acknowledgement

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