

Doctors' duties in prescribing on the internet

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The internet provides a way for patients to obtain drugs without their GP knowing.

But what are the e-doctors'

duties in prescribing for patients

with whom they have no real-space

contact – they cannot even see their

patients, let alone physically

examine them?

An English doctor is currently being investigated by the General Medical Council (GMC) for 'supplying prescriptions for anti-impotence and slimming drugs via an internet website'.¹ According to the press report, the doctor was accused of:

- taking no steps to examine patients or

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to ensure that information provided by them was truthful and correct

- failing to inform the patients' GPs about the drugs prescribed
- failing to provide appropriate monitoring or follow up care
- failing to act in the patients' best interests.

The case has apparently been adjourned 'while the doctor's mental health is being assessed' to determine whether he is fit to continue practising.¹

Without commenting on this specific case (which is still under consideration by the GMC), and remembering that the doctor involved is being investigated by the GMC and not being sued, we will consider here the allegations against this doctor in relation to prescribing on the internet, particularly looking at the law and practice in Australia.

Failure to examine patients or to ensure that information provided by them was truthful and correct

A doctor prescribing on the internet will not generally have the opportunity to undertake a physical examination of the patient. The information provided will

generally come from the patient in response to questions from the doctor. Since the doctor does not have the diagnostic advantage of direct observation of the patient, it is imperative that the patient is questioned thoroughly (see Table 1).

The doctor must provide information to the patient about the drug and its 'material risks' as required by the principles stated by the High Court of Australia in *Rogers v. Whitaker*.² A material risk is one that the doctor knows, or should know, that an ordinary patient in this patient's position would be likely to consider significant, or that the particular patient would consider significant.

However, even if the doctor prescribing on the internet takes a careful history and asks the questions expected, that may not be enough to discharge his or her legal obligations in prescribing for the patient. If the doctor fails to detect a relevant factor that would have been observed by a reasonably careful doctor in a face to face consultation (or does not ask questions that would reveal that fact), or fails to provide the information legally required in the circumstances,

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Table 1. Topics to be covered in internet consultations for drug prescription

- The patient's condition
- The patient's family history
- The clinical need for the drug – both as perceived by the patient and as determined by the doctor
- Contraindications to use of the drug
- The patient's level of understanding about the use of the drug
- Problems that may be encountered by the patient on taking the drug
- What the patient should do if there are adverse consequences

he or she cannot rely on the lack of direct contact in defending a negligence allegation. (This is so unless the patient has signed a disclaimer. Such a disclaimer would need to be in specific terms to provide a defence for the doctor because exemption clauses seeking to exempt liability for negligence are strictly construed against the party seeking to rely on them.) All doctors are legally required to comply with the same standard of care – the standard that would be expected of a reasonably competent doctor in treating a patient with the condition in question.

This means that internet-prescribing doctors cannot make up for the lack of direct observation by taking special care in questioning patients about their condition and in broader history taking. One US study indicates that doctors prescribing on the internet do take special care.³ This study compared internet and conventional outpatient prescribing of sildenafil and showed that the internet service provided a much more wide-ranging interrogation of prospective patients than did the conventional service. The study also found that the documentation of information gathered and treatment dispensed was superior among the internet-prescribers.

However, detailed information gathering, although always necessary, is not in itself sufficient to discharge the doctor's duties in prescribing for patients. It is a mistake to think that even the most meticulous questioning can 'make up' for the lack of a physical examination of the patient.

Internet prescribers should consider the medicolegal implications of the lack of real-space contact. Consider the following

condition that the Doctor Global internet medical service provider imposes on patients using its services:⁴

'A consultation is and remains a remote consultation without physical examination and must not be relied upon by you instead of a personal consultation with a qualified health professional. This is particularly so if the health problem continues or where it would be generally considered prudent to seek advice from a

qualified health professional in person.’

This seems to be inconsistent with the general nature of the website as offering clinical consultations and apparently holding itself out as providing medical treatment. It is, therefore, questionable whether such a condition would provide a defence if the internet provider sought to rely on it, particularly in view of the legal principle previously mentioned concerning exemption clauses.

Failure to inform the patients’ GPs about drugs prescribed

The second allegation seems to us more problematic. The very reason that many people approach an internet prescriber for slimming or anti-impotence drugs is that they do not want the GP they usually consult to know about it. If they did not mind their GPs knowing they would go to them directly. The situation is no different from people seeking contraceptive advice

or STD tests from a private clinic. People are entitled to direct to whom their personal information will be disclosed – it is part of their right to autonomy and self-determination. Doctors who reveal patients’ information without their express or implied consent may face disciplinary action and civil litigation. Consent is commonly implied when doctors provide information to other health professionals for the further treatment of the patient, such as in writing a prescription for presentation to a pharmacist, or a referral letter to a specialist. But consent cannot be implied when the circumstances do not suggest it and, in particular, when the patient embargoes disclosure.

For these reasons, we believe that internet-prescribing doctors should not be expected to inform a patient’s GP about the drugs they have prescribed unless they have the patient’s authority to do so. However, the e-doctor should advise patients that it is in their medical interests to tell their GP, or the e-doctor might offer to do this. In any event, the patient’s GP should always ask the patient whether he or she is taking any medication, whether prescribed or not. It is then up to the patient to decide what to tell the doctor.

Failure to provide appropriate monitoring or follow up care

The suggestion that internet-prescribing doctors have a duty to follow up patients is, in our view, related to the issues above. People may want to use the internet service as a one-off addition to their general health care and may not want an ongoing relationship with that doctor. Why should the internet doctor not provide this one-off service? Provided that the doctor thoroughly informs the patient about how to take the drug, its possible side effects and what to do if anything goes wrong, there seems no reason why the doctor should be required to provide personal ongoing monitoring. The choice is up to the patient.

Table 2. Matters to be noted in medical records

- Full personal details of the patient
- Reasons for seeking the drug
- Information provided by the doctor, including contraindications, material risks and steps the patient should take if anything goes wrong
- Where the patient can get further information if necessary
- The opportunity for follow up – provision of information to the patient's GP, further contact by internet

This raises the issue of the e-doctor's duties in relation to record keeping. If the e-doctor is not always required to report to patients' GPs or to monitor and follow up patients, what records should he or she keep – and for how long? We recommend that the same principles should be adopted as in other areas of medical practice (see Table 2). The records should be kept for seven years in NSW (but 25 years for obstetric patients and until age 25 years for children).⁵ In other jurisdictions they should be kept for at least the limitation period: six years in Victoria, WA and the ACT; and three years in Queensland, Tasmania, SA and the NT (starting from the consultation date, or from the 18th birthday of a patient under 18 years of age).

Failure to act in the patients' best interests

An allegation that a doctor should be held accountable for failing to act in a patient's best interests seems to us to go beyond what the law requires. The High Court of Australia said in *Breen v. Williams* that a doctor's duty to a patient is not fiduciary (which would require acting in patients' best interests).⁶ A doctor's duty is to take reasonable care – the standard imposed by the law of tort and negligence. In our view, doctors who take reasonable care in consulting, information giving,

prescribing and record keeping, guided by the points in Tables 1 and 2, should not be saddled with greater responsibilities than doctors who see patients face to face.

Conclusion

Doctors who prescribe for patients on the internet need to be aware of their legal responsibilities and the special pitfalls that may arise from not being able to observe patients face to face and undertake a physical examination. They should pay particular attention to the points noted in Tables 1 and 2. However, provided that they take reasonable care in relation to these matters, we do not think that they are legally required to inform the patient's GP about the consultation and the drugs prescribed. Rather, they should explain to the patient that it may be in the patient's clinical interests to do so.

Series Editor's comment

I have two legal rather than medical observations on this subject.

- The days of *caveat emptor* ('let the buyer beware') are almost gone. Thus the fact that a patient has chosen to use the internet to access a medical service rather than going to see a doctor does not represent acceptance by the patient of personal responsibility for any damage caused by that decision.
- You cannot contract out of a legal liability. The condition the Doctor Global internet medical service imposes on potential customers has about as much meaning as a sign at a car park entrance saying that you park at your own risk. If your car is damaged as a result of the negligence of the car park operator, that sign does not bar recovery of damages.

Medical care at a distance is not new. Most doctors commonly give advice over the telephone. The Royal Flying Doctor Service gives most of its care and advice via two-way radios, not through doctors flying into remote parts of the country to attend to patients. I've given general medical advice on an ABC radio program for

20 years with no legal consequences (yet!). But I have the option to say 'I'm sorry, I cannot give you advice on this, you need to be seen and physically examined by a doctor.' I would be liable, at law, if I did give advice when I knew or should have known that it was unsafe to do so.

The internet has the potential to be a valuable source of health information. In the same way that I sometimes buy CDs through Amazon.com and not a local retailer, there may be some circumstances in which personal health advice can be safely sought – and provided – through the internet. But internet medical providers should not fool themselves: they will be held liable in negligence for harm arising from a service provided when any reasonable doctor would or should have known that the patient needed to be seen and examined. Also, the various State Medical Boards will respond harshly if they form the view that a doctor's decision to provide advice or a prescription 'against reason' was because he or she knew that no payment would be received if the patient was advised to seek a physical consultation. A medical service is a medical service whether given electronically or face to face, and brings the same burdens of professional skill and care, record keeping and so on.

In short, it's not *caveat emptor* but rather *caveat venditor*. MT

References

1. Charter D. Viagra on Net claim. The Times 2001, April 10.
2. *Rogers v. Whitaker* (1992) 175 Commonwealth Law Reports 479.
3. Jones MJ. Internet-based prescription of sildenafil: a 2104-patient series. J Med Internet Res 2001; 3(1): e 2; <http://www.jmir.org/2001/1/e2/index.htm>
4. <http://www.doctorglobal.com/shared/about/termscon.html>
5. Department of Health (NSW). Circular on the disposal of medical records. No 89/13. 1989, February 15.
6. *Breen v. Williams* (1996) 186 Commonwealth Law Reports 71.