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Letter to Editor

Professional confidentiality applicable to psychiatrists

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Summary

Psychiatrists performing activities under the Mental Health Protection Act who in connection with their performance of such activities become aware of information that, if kept confidential, can constitute a threat to the life or health of the patient or other people, are released from the duty to keep such information confidential. In such a case, they have a moral and legal duty to disclose such information to law enforcement authorities and cannot be prosecuted under criminal law for disclosing such confidential information. An attempt to interrogate a physician who files such a report regarding circumstances of which he became aware while performing activities under the Mental Health Protection Act will, however, be illegal. Yet, that leads to disputes and controversies in the medical and legal communities, and, therefore, the issue requires a prompt, uniform interpretation. Due to the expected increase in attempted dyadic deaths (after the Germanwings plane crash,) the problem should be carefully regulated so that psychiatrists know the legal boundaries of dealing with patients – potential suicides.

Key words: psychiatrist, professional confidentiality, Werther effect

The following claim requires a common discussion of the medical and legal communities and the development of a uniform position, which shall also be an interpretation for courts of law: **psychiatrists performing activities under the Mental Health Protection Act are released from the duty to keep confidential everything they become aware of in connection with their performance of such activities if the observance of confidentiality can constitute a threat to the life or health of the patient or other people.**

Following many years of research, the American sociologist David Phillips demonstrated that, after the media publicize a suicide, the number of suicides and

accidents increases, and he called that "imitative suicidal behaviour", also referred to as the Werther Effect [1].

The crash of a Germanwings Airbus A320 on Tuesday, 24 March 2015, was caused by a co-pilot who committed suicide in that way.

A few days later, on Sunday, 29 March 2015, a female passenger of a Warsaw-to-Lublin coach came up to the driver and took hold of the steering wheel. The local media immediately reported that the woman admitted at the inquiry stage that she had had suicidal thoughts. One of the Internet portals wrote that the passenger wanted to take control of the coach and crash it.

When the media had run the story of a gas bottle explosion at about 4.30 a.m. on 30 April 2015 in Słupca, a 60-year-old man committed a suicide in Gorzów Wielkopolski already on 1 May 2015, at about 3.00 p.m. by setting a gas bottle on fire and hanging himself in the cellar of his house. The explosion genuinely endangered the residents of neighbouring houses.

The phenomenon, and its possible adverse effects, were noted, among others, by M. Kaczmarek [2] and E. Marszałkowska-Krześ and S. Krześ [3].

- Why did the co-pilot of Airbus A320 cause a crash of the aeroplane? This is the question that Dr Jerzy Pobocha, a court expert in psychiatry, tried to answer. "Schizophrenia can become visible for the first time at the age of 28. The illness can start with the commitment of a criminal offence. Another possibility is depression, which may lead to the emergence of the idea of an extended suicide. In this case, it was extended to the plane and the people on it," says Dr Jerzy Pobocha [4].

The observations of David Phillips reveal that the Werther effect may persist for many months. Thus, we should consider it very likely that further imitators intending to commit extended suicides will appear. Some may come to the offices of psychiatrists soon.

What should a psychiatrist do when he or she learns, when performing activities under the Mental Health Protection Act, that someone plans an extended suicide, and thus is a real threat to the lives of others? If, performing these activities, the psychiatrist receives reasonable information about a punishable preparation, attempt, or commitment of a criminal offence defined in Article 118, 118a, 120–124, 127, 128, 130, 134, 140, 148, 163, 166, 189, or 252 of the Criminal Code or a terrorist crime and does not immediately notify a law enforcement authority, will he or she be liable to imprisonment for a term of up to three years under Article 240 of the Criminal Code?

This question is relatively easy to answer on the grounds of Article 40.1(3) of the Physician and Dentist Profession Act of 5 December 1995 (*Dziennik Ustaw* 2011, No. 277, Item 1634), under which, while a physician has a duty of confidentiality with regard to information relating to a patient obtained in connection with the performance of his or her profession, this provision does not apply if observing confidentiality may constitute a threat to the lives or health of other people. In other words, a physician has the right, and even a duty, to reveal a medical secret if the life or health of the patient or other people are threatened.

"A physician who, in performing his or her professional activities, receives reasonable information about the commitment of a homicide, is under a legal duty to notify the relevant law enforcement authority under Article 240 §1 of the Criminal Code. There are no obstacles to reading Article 40.2(1) of the Physician and Dentist Profession Act as a reference to all statutory cases of disclosure of medical secrets because the literal interpretation allows it, while teleological factors are not at odds with it" [5].

A cautious claim has been proposed by A. Huk: "A physician is released from the duty of confidentiality if observing the duty may be a threat to the life or health of the patient or other people (Article 40.2(3) of the Act and Article 25 of the Code of Physicians' Ethics) (...) A decision on the disclosure of some information and the scope of such disclosure ultimately depend on the judgment of the physician. The issue is, however, very delicate and may in certain cases lead to serious controversies. The grounds for a physician's decision must, on the one hand, be dependent on a purely medical assessment and, on the other hand, on other factors, related to the patient, his or her lifestyle, conducts, etc. (...) Informing third parties is an exception from the general rule. A danger to others that justifies the abolishment of medical confidentiality must be genuine, not just hypothetical, and confirmed by objective medical evidence" [6].

Both among psychiatrists and among lawyers, there are many proponents of the theory of absolute confidentiality binding psychiatrists. They derive that claim from the provisions of Articles 50 and 52 of the Mental Health Protection Act of 19 August 1994 (*Dziennik Ustaw* 2011, No. 231, Item 1377):

"Article 50. 1. Individuals performing activities under this act are under duty to keep confidential everything of which they become aware in connection with the performance of those activities, pursuant to separate provisions, and also in accordance with the provisions of this chapter.

1. A person falling under Article 1 shall be released from the confidentiality duty in relation to:
   1) a physician caring for a person with mental disorders;
   2) competent state or local government authorities with regard to circumstances that must be revealed for the purposes of the performance of social welfare assistance tasks;
   3) individuals participating in the performance of social welfare assistance activities to the extent that is necessary;
   4) the Internal Security Agency, the Military Counter-Intelligence Service, the Intelligence Agency, the Military Intelligence Service, the Central Anti-Corruption Bureau, the Police, the Military Police, the Border Guard, the Prison Guard, the Government Security Bureau, and their officers authorized in writing to the extent necessary for the performance of inquiries under the classified information protection regulations;
   5) a police officer authorized in writing by the head of a police unit carrying out operational and exploratory activities with regard to searches for, and the identification of people.

Article 52. 1. Individuals who are under a duty of confidentiality under the provisions of this chapter shall not be interrogated as witnesses with regard to the statements of a person in relation to whom activities under this act have been undertaken regarding the commitment by that person of a criminal offence.

2. The prohibition expressed in paragraph 1 above shall apply *mutatis mutandis* to physicians performing the activities of expert witnesses."

- The judgment of the Supreme Court of 20 April 2005 (Ref. I KZP 6/05) should primarily be referred to [7]: "The provision of Article 52.1 of the Mental Health Protection Act of 19 August 1994 (*Dziennik Ustaw* No. 111, Item 535, as amended) concerns every person who performs the activities defined in the act. It establishes an absolute prohibition of evidence and is a *lex specialis* with regard to the provision of Article 180 of the Code of Criminal Procedure, and, consequently, such an individual cannot be interrogated with regard to the circumstances referred to in Article 52.1 even if he or she declares his or her willingness to disclose a professional secret of this kind."

In this judgment, the Supreme Court shared the opinion of Z. Kwiatkowski [8]: "In accordance with the current wording of Article 52 of the Mental Health Protection Act, the prohibition of interrogating individuals referred to therein concerns all statements of a person with regard to whom activities under the act have been undertaken in connection with the commitment of a criminal offense by that person, and not only the person's formal admission to having committed the offence.

In the light of the above provision, both a psychiatrist and other individuals performing activities under the Mental Health Protection Act are released from the denunciation duty under Article 240 §1 of the Criminal Code, with regard to reporting offenses under Articles 118, 127, 128, 130, 134, 140, 148, 163, 166, or 252 of the code to the relevant authority.

Our considerations warrant the claim that the provision of Article 52 of the Mental Health Protection Act establishes an absolute prohibition of using a certain kind of evidence in criminal proceedings and constitutes a *lex specialis* in relation to Article 180 §2 of the Code of Criminal Procedure."

- Among legal commentators, this line is also represented by P. Gałecki, K. Bobińska, and K. Eichstaedt: "The literature claims, in our opinion reasonably, that the legal duty of denunciation under Article 240 of the Criminal Code does not apply, however, to (…) a person under duty to observe psychiatric confidentiality under Article 52.1 in conjunction with Article 50.1 of the Mental Health Protection Act (…) In other words, the duty of psychiatric confidentiality, to the extent referred to in Article 52 of the Mental Health Protection Act, is absolute, meaning that an individual bound by it cannot be released from the obligation to observe it. Neither can such an individual be prosecuted under Article 240§1 of the Criminal Code for failure to disclose a criminal offense referred to therein" [9].

M. Szewczyk similarly excludes the possibility of a psychiatrist being prosecuted for non-denunciation under Article 240 of the Criminal Code. She bases this view on a separate legal arrangement concerning medical confidentiality established in the

Mental Health Protection Act (which is a *lex specialis* in relation to general medical confidentiality regulations) [10].

- However, one should agree with the argumentation of S. Ładoś that "the above view raises serious doubts. It is difficult to assume that the provisions of the Mental Health Protection Act are *leges specialis* in relation to Article 40 of the Physician and Dentist Profession Act. The adoption of a conflict-of-law rule under which the general provisions are to be ruled out in such cases would in practice lead to very serious consequences. For instance, medical confidentiality would have to be observed by a psychiatrist even if that could bring about a threat to the life or health of the patient or other people (the adoption of a special rule would also rule out Article 40.2 of the Physician and Dentist Profession Act). It should thus be assumed that the provisions of the Mental Health Protection Act only supplement the rules in the Physician and Dentist Profession Act. This has to do with the special type of medical treatment used in psychiatry, which requires additional normative regulations, for instance with regard to medical confidentiality. This means that a psychiatrist has the same duties to disclose confidential medical information as any other physician (under Article 40.2 of the Physician and Dentist Profession), and also additional ones (e.g. a duty to provide information to state protection services under Article 50.2(4) of the Mental Health Protection Act).

It should be noted that the adoption of the view that a psychiatrist is subject to special confidentiality rules, instead of the general medical confidentiality rules, would put psychiatrists before a very tough ethical dilemma. It would consist in the duty to remain confidential even in the case of suspecting a very grave crime (e.g. homicide) that a patient may have committed. A psychiatrist would even have to choose between the necessity to protect medical confidentiality and the necessity for the law enforcement authorities to prevent certain offenses that a person with a mental disorder may repeat" [11].

To begin with, it has to be stressed that the actual activity of reporting an offence is something else than completing the official offence report procedure.

As rightly pointed out by K. Dudka, who cited the extensive results of commentators, the source of knowledge about a criminal offense that imposes the duty to institute and conduct an inquiry under Articles 10 and 303 of the Code of Criminal Procedure is very frequently not an officially recorded offence report and the minutes of the interrogation of a witness who reported the criminal offence.

"Although the Code of Criminal Procedure, in Article 303, mentions only one source of information, an offence report, information about an offence may come from a variety of other sources, such as the law enforcement authority's own information, obtained in the course of conducted procedures or other operations with regard to a different matter, or be the result of the offender's self-incrimination or media reports. Especially recently, there has been an increase in the activity of the media with regard to disclosing offenses, in particular of a scandalous nature (e.g. the Łódź ambulance service scandal, the Starachowice scandal, and many others). The different forms of information about offences also include anonymous informa-

tion, i.e. information whose author is unknown and, as pointed out by P. Filipiak, wants to remain unknown" [12].

J. Grajewski [13] also mentions oral, cabled, telephone, or written reports from private individuals as possible source of information about an offence.

A psychiatrist may, thus, report a crime committed or planned by his or her patient without filing witness testimony. In my opinion, a psychiatrist cannot be released from the reporting duty, whether legally or morally.

What is of key significance for these considerations is the undeniable statement that the life of a human being, including that of the potential victim of a psychiatrist's patient, is a good of the highest order, superordinate to the right to confidentiality, which a patient with a mental disorder surely has.

The proponents of the theory of an absolute confidentiality binding the psychiatrist follow an interpretation that puts the personal good of the patient, who is the perpetrator or the potential perpetrator of an offence over his or her victims' right to life.

The basic provision of Article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (*Dziennik Ustaw*1993, No. 61, Item 284) introduces the inviolable rule that every person's right to life is protected by law. The situation of that provision is not accidental either. The right to life is exposed before other human rights; thus, it has an unquestionable priority. In the event of a conflict of various rights, the right to life has an absolute priority.

As rightly reasoned by L. Garlicki, the duty to protect life, introduced in this provision, also refers to threats resulting from the criminal intentions of third parties. The state is not directly responsible for the actions of private individuals, but it must fulfil its positive duties [14].

This means that the law should be enacted and interpreted in such a way that, whenever that is not explicitly stated in an act of parliament, the law should not protect the privacy and confidentiality of a potential offender at the cost of his or her victims.

- The above position, that potential crime victims' right to life should be protected in the first instance, has been repeatedly confirmed by the European Court of Human Rights in its judgments."The State has a positive obligation to take practical preventive measures to protect the individual against others or, in certain special circumstances, against himself" (European Court of Human Rights judgment of 16 October 2008, 5608/05).
- "The State's obligation extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions. Article 2 of the ECHR may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk" (European Court of Human Rights judgments of 3 April 2001, 27229/95; 20 March 2008, 15339/02; and 24 October 2002, 37703/97).
- "The State has an obligation to take appropriate steps to safeguard the lives of those within its jurisdiction" (European Court of Human Rights judgment of 28 March 2000, 22535/93).

J. Bartoszewicz's reasoning is a perfect summary of this portion of the considerations: "Life is the highest value both in the hierarchy of values of the European

Convention on Human Rights and, obviously, on an individual scale. Consequently, no action that threatens life, whether directly or indirectly, can remain unpunished, because ensuring the right to life in a practical and effective way by the State is out of the question if the State has no willingness or determination regarding the attribution of responsibility for life threatening actions" [15].

This remains in obvious harmony with the provisions of the Constitution. According to its Article 7, public authorities function on the basis of, and within the limits of, the law, and the highest law of the Republic of Poland is the Constitution, whose provisions are applied directly unless the Constitution provides otherwise. Under Article 38 of the Constitution, the Republic of Poland ensures the legal protection of the life of every human being. This provision was interpreted by the Constitutional Tribunal in its judgment of 30 September 2008, K 44/07 (*Dziennik Ustaw* 2008, No. 177, Item 1095, p. 9498): "As pointed out by the Constitutional Tribunal in its judgments of 23 March 1999, Ref. K. 2/98, and 8 October 2002, Ref. KK 36/00, in addition to that 'protective' content of the right to life, Article 38 of the Constitution also provides for the obligation of public authorities to undertake positive action to protect life. In the matter Ref. K. 26/96, the Constitutional Tribunal stated that 'The protection of human life cannot be understood as solely the protection of the minimum biological functions necessary for existence but as the guarantee of correct development and the achievement of a normal psychophysical condition appropriate for a given developmental age (life stage).' Therefore, the indicated positive aspect of the right to legal life protection contains the positive obligations of the State, recognized in the judgments of the ECHR and other European constitutional courts. In the context of possible terrorist or military threats or social unrest of a different kind, the right to the legal protection of life also includes the State's obligation to secure the safety of citizens ('obligation to secure', 'freedom from fear', German *Schutzpflichten*)."

The above considerations lead to the conclusion that psychiatrists performing activities under the Mental Health Protection Act who in connection with their performance of such activities become aware of information that, if kept confidential, can constitute a threat to the life or health of the patient or other people are released from the duty to keep such information confidential. In such a case, they have a moral and legal duty to disclose such information to law enforcement authorities and cannot be prosecuted under criminal law for disclosing such confidential information. An attempt to interrogate a physician who files such a report regarding circumstances of which he became aware while performing activities under the Mental Health Protection Act will, however, be illegal.

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