

Informed consent: ethical and legal analysis of a fictional case study

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Introduction

Mrs Jenkins, a 48-year-old professional belly dancer, was due to undergo a laparoscopic sterilisation procedure. She voiced concerns about the risks of needing a large abdominal incision, which would ruin her career, or falling pregnant afterwards, which her and her husband would be unable to cope with. Dr Davies assured her that neither would occur, despite both being established risks. Both complications subsequently arose. In this report, Kantian ethics will be used as a framework to discuss the moral integrity of Dr Davies' actions, focusing specifically on whether his lie was permissible. Following this, the legal implications will be discussed, highlighting that the doctor may be liable for negligence as he did not inform Mrs Jenkins of the risks of the procedure, rendering her consent invalid.

Ethical issues

Deontology is a branch of moral philosophy that focuses on acting from a moral duty.¹ Kantian ethics is a subtype of deontology, named after the 18th century philosopher Immanuel Kant. Central to Kant's theory is his "categorical imperative", which states that we should 'act as if the maxim of your action were to become through your will a universal law'.² When applied to this case, this means that if Dr Davies lied to Mrs Jenkins and thought that his lie was permissible, he must condone all forms of lying and consider them all to be permissible. Kant considers this to be illogical as Dr Davies could subsequently not trust Mrs Jenkins, rendering the doctor-patient relationship useless. Furthermore, if lying to a patient about procedural risks was to become universally acceptable, no one would be able to trust their doctors and may even avoid life-saving treatments due to this distrust.

We should 'act as if the maxim of your action were to become through your will a universal law'!

Given that it would be widely damaging to accept lying as a 'universal law', being honest is, therefore, what Kant categorises as a 'perfect duty'; we are morally obligated to exercise honesty in all situations.³ Conversely, imperfect duties can sometimes be violated.³ Dr Davies' assurance of Mrs Jenkins reflects a duty of beneficence: that of promoting wellbeing or welfare.⁴ However, Kant considers beneficence to be an imperfect duty,⁵ with honesty trumping it. This is because, as aforementioned, Dr Davies could not will lying, even for beneficent reasons, to be universalised. As such, a Kantian evaluation of Dr Davies' assurance indicates that it was immoral because he lied, therefore violating his perfect duty of being honest.

Dr Davies could, however, refute this by utilising Ross' interpretation of moral duties. Ross was a 19th century philosopher who believed that all duties are 'prima facie'. This means that individual duties are compulsory but they can be overridden by opposing duties.⁶ In this case, Dr Davies could contend that his duty to comfort and reassure Mrs Jenkins trumps his duty of honesty. The concept of 'therapeutic privilege'⁷ outlines that 'using lies or deception to preserve the patient's hope, and psychological and moral integrity'⁷ can be acceptable in some circumstances. Dr Davies could contend that he applied this here, and it could be argued on this basis that he acted morally.

Nonetheless, Kantian ethics is based on deontological principles, which categorically distinguish between the right and the good.⁸ In

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other words, what we ought to do versus what action comes from a good motive.⁶ It is acknowledged that Dr Davies could defend his action as morally good if the lie stemmed from a good motive, such as wanting to reassure Mrs Jenkins; however, in this case, it was not the right action. This is because reassuring Mrs Jenkins may help her in the short term, but this action involves both lying to her, thus breaking her trust, and violating her right to an autonomous decision (a decision made independently of external governance). Dr Davies may feel that he did the right thing as he promoted Mrs Jenkins' short-term welfare; however, Kant holds that the ability to reason, not feel, is what makes us able to act morally.⁸ Thus, Dr Davies should recognise that the moral *rightness* of respecting Mrs Jenkins' right to autonomy and being honest trumps the moral *goodness* that may underpin his intentions when he lied to her.

Legal issues

The legal issue at hand pertains to whether, through withholding information regarding the risks of the procedure, Dr Davies acted negligently.^{9,10} In common law, a claim of negligence must satisfy a tripartite test in order to be successful; the claimant must prove, on the balance of probabilities, that they were owed a duty of care by the defendant, that this duty was breached, and that the breach by the defendant was what caused harm to the claimant.¹¹

The relevant duty owed by Dr Davies is that of disclosure. He must gain valid consent from Mrs Jenkins for the procedure, meaning she must have capacity, consent voluntarily, and have an adequate understanding of the risks and benefits.¹² Usually, before a surgical procedure, the patient would have the risks listed to them. In this case, Mrs Jenkins is presumed to have capacity,¹³ but is left unaware of the 'material risks'¹⁴ of the procedure due to Dr Davies' non-disclosure, thus rendering her consent invalid and leaving her unable to make a fully informed, autonomous decision.

'Material risks' are those that Mrs Jenkins would deem significant to her personally.¹⁴ She expresses that she and her husband would not cope with having more children, thus, we can infer that she would likely attach significance to the risk of becoming pregnant after the procedure. Furthermore, she is a belly dancer and specifically asks whether she would need a large incision, thus, it is likely she would also attach significance to the risk of the laparoscopic procedure becoming a laparotomy, leaving her with a large scar. As such, Dr Davies breached his duty to Mrs Jenkins by not disclosing this information to her. The evidence for this breach is further strengthened by the fact that Mrs Jenkins specifically asked for the information. As explained by Lord Bridge in *Sidaway v Board of Governors of the Bethlem Royal Hospital*,¹⁰ Dr Davies must answer Mrs Jenkins' questions regarding the procedure 'both truthfully and as fully as [she] requires'.¹⁰

Without focusing on the test for causation, it is proposed that if Mrs Jenkins could prove that she would have abstained from the procedure if given this information, she might be successful in her claim of negligence against Dr Davies.

Recommendation

In light of this ethical and legal analysis, it is concluded that Dr Davies should have fully informed Mrs Jenkins about the risks of the procedure. His action to reassure her may have reflected moral goodness, but it was not morally right as it breached his duty of honesty and violated Mrs Jenkins' right to autonomy. Furthermore, Dr Davies could be found guilty of negligence as he failed to disclose important risks to Mrs Jenkins, rendering her consent uninformed and invalid.

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