



Review

Cross-border reproductive care for law evasion: should physicians be allowed to help infertility patients evade the law of their own country?



Wannes Van Hoof^{a,*}, Guido Pennings^a, Petra De Sutter^b

^a Bioethics Institute Ghent, Ghent University, Ghent, Belgium

^b Department of Reproductive Medicine, University Hospital Ghent, Ghent, Belgium

ARTICLE INFO

Article history:

Received 21 May 2015

Accepted 19 August 2015

Keywords:

Complicity
Information provision
Reproductive tourism
Pluralism

ABSTRACT

There are fundamental differences between countries with regard to legislation on assisted reproduction. Many infertility patients are looking to evade the law of their own country and make use of reproductive services abroad. The role of the local physician in cross-border reproductive care for law evasion has been characterized as “channeling local patients to foreign medical establishments” and “against the spirit and essence of the law”. The logical view is that by supporting CBRC for law evasion, physicians are essentially supporting immoral behavior. We will tackle this position on two levels. First, we will argue that governments should generally be tolerant toward people with different positions on assisted reproduction. Second, we will show that contributing to cross-border reproductive care for law evasion is not necessarily immoral, because the prima facie wrongness of complicity in law evasion can be outweighed by the fact that physicians should act in the best interest of the patient. Several countries have tried to prevent local physicians from helping patients to make use of reproductive services abroad, but they should rather leave it up to the individual physicians to decide whether or not to support a particular patient.

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Introduction

Cross-border reproductive care (CBRC) is a growing worldwide phenomenon where patients travel across borders to obtain

reproductive treatment abroad [1]. CBRC for law evasion is a frequent phenomenon in Europe. The largest study to date found that more than half of cross-border patients traveled to evade the law of their own country, resulting in a conservative estimate of 15,000 law evading cycles across Europe annually [2]. It is very likely that this number is even higher now. CBRC for law evasion includes patients who go abroad for treatments that are forbidden in their home country (e.g. gamete donation, pre-implantation

* Corresponding author at: Bioethics Institute Ghent, Ghent University, Blandijnberg 2, 9000 Ghent, Belgium. Tel.: +32 92647886; fax: +32 92644187.

E-mail address: wannes.vanhoof@ugent.be (W. Van Hoof).

genetic screening) or people who do not have access to assisted reproductive technologies (ART) who go abroad for reproductive services (e.g. lesbian couples, single women). Traveling to evade identifiable donation policies or to make use of gametes in a country that allows higher compensations for donors can also be considered as forms of CBRC for law evasion.

Within Europe, patients have a right to travel for health care. However, there are fundamental differences between member states with regard to legislation on assisted reproduction. European laws, regulations and case law are supposed to set minimal standards above which individual states are allowed a wide margin of appreciation to deal with assisted reproduction [3]. This legal diversity, combined with regulations about free movement of people and services, creates the perfect background for CBRC for law evasion on a large scale.

The good practice guide for CBRC from the European Society for Human Reproduction and Embryology (ESHRE) recommends cross-border collaboration between physicians. They note at the same time that “the only countries where this may pose a problem is where it is forbidden for doctors to give information about alternatives that are not legal in the country of residence of the patient” [4]. For example, in a letter from the French Ministry of Health, dated 21/12/2012, local physicians are warned that they risk 5 years imprisonment and a fine of €75.000 if they inform patients about the possibility of making use of egg donation abroad, where higher compensations are paid and more donors are available. Before 2011, it was a punishable offence in Germany for a physician to refer a patient abroad for pre-implantation genetic diagnosis (PGD) [5]. In Turkey, any physician who helps patients who go abroad for gamete donation is subject to a punishment of 1–3 years imprisonment [6].

The role of the local physician in CBRC for law evasion has been characterized as “channeling local patients to foreign medical establishments” and “against the spirit and essence of the law” [7]. Intuitively, law evasion is associated with wrong behavior. However, we will argue that it is in the best interest of the patient to have the support of a local physician and that states should allow them to help patients during CBRC for law evasion.

Empirical evidence

Shenfield et al. report that the majority (59.0%) of cross-border infertility patients received some help from their own doctor, for drug prescription (16.7%), cycle monitoring (16.7%) or both (25.6%) [2]. This indicates that many local physicians are helping patients who are having their treatment in a foreign clinic. It also shows that many patients engage in CBRC without the help of a local physician.

A closer look at the data from the 2010 ESHRE study on CBRC (Tables 1 and 2) reveals an interesting pattern. It seems that patients who travel for legal reasons receive help from a local physician more readily than patients who travel for quality of care. The results from the ESHRE study correspond to a qualitative study in the UK regarding the perspectives of health care professionals on

Table 1
General reasons for traveling (%) according to the country of patients' residence.

	Legal reason	Access difficulty	Better quality	Previous failure
France	64.5	12.1	20.6	18.7
Germany	80.2	6.8	32.8	43.5
Italy	70.6	2.6	46.3	26.1
Netherlands	32.2	7.4	53.0	25.5
Norway	71.6	0.0	22.4	16.4
United Kingdom	9.4	34.0	28.3	37.7

Source: Data from the 2010 ESHRE Taskforce study on CBRC [2].

Table 2
Help received from local doctor (%) according to the country of patients' residence.

	No help	Drug prescription	Cycle monitoring	Both
France	21.0	37.0	6.0	36.0
Germany	18.3	9.1	31.7	40.9
Italy	44.7	20.5	10.7	24.2
Netherlands	65.0	19.6	4.2	11.2
Norway	27.1	5.1	37.3	30.5
United Kingdom	54.7	15.1	15.1	15.1

Source: Unpublished data from the 2010 ESHRE Taskforce study on CBRC [2].

CBRC, which indicates that they are sympathetic to the needs of cross-border patients and that they are opposed to any suggestion that governments should prevent CBRC [8]. A more detailed look at the data reveals that even though many German patients seek to evade the prohibition of egg donation and French lesbians are denied access to ART, a high level of medical support was reported in Germany (81.7%) and France (79.0%). A low level of medical support was reported in the Netherlands (35.0%) and the UK (45.3%), countries with permissive ART policies (except with regard to anonymous sperm donation). This suggests that physicians are less willing to help in these countries or that patients are less likely to involve a local physician in their treatment process.

The local physician and the best interest of the patient

Before treatment

The reaction of the French ministry of health to CBRC for law evasion results in a gag rule policy for physicians. A gag rule is a rule that forbids addressing, considering or discussing a particular subject. Limiting the role of the local physician as a source of information in CBRC for law evasion is a gag rule because these physicians may be aware of possibilities abroad and they are in a position to inform their patients, but they are prohibited from doing so. The best known example of a gag rule is the much criticized Mexico City Policy (“global gag rule”), which governed the provision of financial aid by the United States government until 2008 and mandated that NGOs could not receive US funding if they addressed abortion or provided abortion-related care [9]. There are also examples of more direct gag rules in the physician patient relationship. For example, in Florida physicians cannot ask patients about the presence of guns in the home, even when there are indications of depression or domestic violence [10]. In South Dakota, physicians are forced to follow a script when obtaining informed consent for abortion, detailing what they can and cannot say. Regardless of one's attitude toward abortion, such an intrusion in the informed consent process could be considered as a violation of the physician's right to free speech and the woman's due process rights [11]. Ethically speaking, it is not justifiable to intervene in the physician patient relationship, limiting what the physician can or cannot say, unless it can be shown that this limitation is in the best interest of the patient [12,13]. Since it is in the best interest of the patient to be sufficiently informed about treatment options abroad, physicians should be allowed to speak freely.

Withholding relevant information is a clear violation of the principle of autonomy of the patient. It is also an indirect violation of the principle of justice because some people with more means or abilities will find out about the options abroad through other channels while others cannot. In the case of abortion, there have been cases before the European Court of Human Rights (ECtHR) that dealt with the question whether it is justifiable to withhold relevant information from patients because it could lead them to engage in practices that are legally forbidden in the country. In Ireland, for example, publication of information regarding

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