CHAPTER 6

PATIENT'S RIGHT TO PRIVACY AND MEDICAL CONFIDENTIALITY

6.1 INTRODUCTION

The doctor-patient relationship is based upon trust. For proper diagnosis and treatment it is essential that in the course of treatment a patient discloses truthfully to the physician about his illness. This may sometimes involve disclosure of personal and sensitive information to the doctors. A patient expects that the private information disclosed to a doctor will remain confidential. This duty has its foundations that dates back to thousands of years in the Hippocratic Oath and provides the basis for modern medical ethics.

In the modern day most of the information acquired by physician is recorded and preserved at the hospitals and these medical records are no doubt regarded as the property of the hospital by law. Moreover, the duty to preserve confidentiality of one's patients, which arises from the ethical principle of beneficence, is not absolute.[1] There are circumstances in which medical professionals are encouraged or even required to report their observations or patient test results to third parties, sometimes law enforcement officials, in which such a breach of duty has come to be seen as acceptable.[2] Of late, the medical community, the courts, and society have been struggling in particular with whether the breach of the duty of confidentiality by a physician is permissible or to be encouraged.

The chapter firstly, examines the concept of privacy. Secondly, it demonstrates the ethical and legal justification for protecting patient confidentiality. After having established a right to medical confidentiality, the chapter looks into the numerous exceptions to the right which exist due to the need to balance an individual's privacy against competing social needs. Finally, even though medical records are considered as an exclusive property of hospital or health care institutions; patient's right to gain access to their medical records is also discussed.

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1 See for example, American Medical Association's Code of Medical Ethics. Principle IV of the code states that a physician 'shall safeguard patient confidences within the constraints of the law'.

2 See, *Tarasoff* v *Regents of the Univ. of Cal.*, 551 P.2d 334 (Cal. 1976).

6.2 PRIVACY – UNDERSTANDING THE CONCEPT

In the modern world we see unprecedented advances in technology which generate and fuel privacy related fears in the minds of common man.[3] Therefore, before understanding the concept of privacy in the medical context it is very important to understand and consider thoroughly the relevance of the term 'privacy' in the lives of a common man.

Privacy has been hailed as 'an integral part of our humanity', the 'heart of our liberty'[4], and 'the beginning of all freedom'[5]. Privacy however, is a value so complex, so entangled in competing and contradictory dimensions, so engorged with various and distinct meanings, that sometimes it becomes despair to usefully address it. 'Privacy' has been used as the key term for a plethora of debates of a wide range of issues, from right to abortion to unreasonable searches of premises, from unauthorized taking of photographs to the disclosure of secret documents. Though the word privacy is used almost everywhere, it is an uphill task to explain what privacy really entails. As Arthur Miller notes that privacy is 'difficult to define because it is exasperatingly vague and evanescent'.[6]

Generally, privacy must be viewed as the bundle of interests that individuals have in their personal sphere free from interference from others.[7] In the words of Roger Clarke privacy has psychological, sociological, economic and political

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3 M Abrams, 'Privacy, Security and Economic Growth in an Emerging Digital Economy' Paper presented at Privacy Symposium, Institute of Law China Academy of Social Science, 7 June 2006, quoted in *Australian law reform commission*,vol.1, Report 108, May 2008, viewed 10th Nov 2013, www.alrc.gov.au.

4 See, *Vickery* v *Nova Scotia Supreme Court (Prothonotary)* [1991] 1 SCR 671, 687. This case questions whether media have a right to inspect, copy, and broadcast exhibits filed in court proceedings, including those read out or displayed in open court? The applicant sought the permission to have access to have taped confession filed and shown in the proceedings. The majority decision, written by Stevenson J. on behalf of six justices, held that the media was not entitled to view and copy the tapes. It held that the privacy interests of the accused, by that point deemed an innocent party, outweighed the public's interest in the exhibit. Allowing members of the public to attend trials is sufficient to fulfill the open court principle.

5 Daniel J. Solove, *Understanding Privacy*, Harvard University Press, London (2008), p.1; See also, R Gavison, "Privacy and the Limits of Law", 89 *Yale Law Journal* 421(1980), p. 465.

6 Daniel J. Solove, "Conceptualizing Privacy", 90 *California Law Review* 1087 (2002), p.1088.

7 See, R Clarke, *What's 'Privacy'?*, Prepared for a Workshop at the Australian Law Reform Commission, July 2006, viewed 5th Nov 2013, http://www.rogerclarke.com/DV/Privacy.html. According to him, privacy is a 'right' in a legal sense, but, for definitional purposes, the word 'interest' may be more accurate. As per legal jurisprudence a right is always an interest, even if not all interests are accorded the status of legal rights.

dimensions.[8] Moreover, according to William Blackstone, the law has 'so particular and tender a regard to the immunity of a man's house that it stiles it his castle, and will never suffer it to be violated with impunity'.[9] The modern legal academic discussion of the topic began with the seminal paper by Warren and Brandies.[10] According to them privacy is the most comprehensive of rights and the right most valued by civilized men.[11]

The international community accords privacy the status of a human right through key documents like Universal Declaration of Human Rights which

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8 See, generally, Australian law reform commission, vol.1, report 108, May 2008, viewed 10th Nov 2013, www.alrc.gov.au. Psychologically people need private space in public as well as behind closed doors; sociologically people expect to behave freely and mingle socially without the threat of being observed; economically people always are in need to innovate to make their lives better and improve their standard of living and lastly politically people must be able to think, argue and act to develop their overall personality without interference from government or society as this is very essential in a democratic society. See also, E Barendt, "Privacy and Freedom of Speech", in A Kenyon and M Richardson (eds), *New Dimensions in Privacy Law: International and Comparative Perspectives*, Cambridge University Press (2006), pp. 30-1

9 4 William Blackstone, "Commentaries On The Laws Of England", (1769), p. 168 quoted in Daniel J. Solove, Marc Rotenberg, & Paul M. Schwartz, *Information Privacy Law*, 2nd ed., Aspen Publishing (2006). p. 4.

10 S Warren and L Brandeis, "The Right to Privacy", 4 *Harvard Law Review* 193 (1890).

11 Id. One must note here that even before this article, there were instances where privacy has been accorded a well recognised status and even attempts by the judiciary to make it as a 'right'. See for e.g., *Prince Albert* v *Strange* [1849] EWHC Ch J20, viewed 13th Nov 2013, http://www.bailii.org/ew/cases/EWHC/Ch/1849/J20.html.See also in, A Kenyon and M Richardson, *New Dimensions in Privacy Law: International and Comparative Perspectives*, Cambridge University Press (2006), pp. 30-1. In the above mentioned case the defendant was a publisher who had obtained copies of private etchings of the Royal Family which was kept at home. The publisher had got them from an employee of a printer to whom Prince Albert had entrusted the plates. It is true that at the time right to privacy was not explicitly recognised, it was argued on behalf of Queen Victoria and Prince Albert that they had a right to keep private art they had created for their personal enjoyment. The court ruled in favour of Queen Victoria and Prince Albert and held that the publication of these etchings invaded the Royal Family's right to privacy, in the sense of a right to control one's possessions and enjoy them and went on to say that every man has a right to judge whether he will make them public or allow them only to be seen by his friends.
The modern concern for the protection of privacy can be attributed primarily to a change in the nature and magnitude of threats to privacy, due to advances in the technology of surveillance and the recording, storage, and retrieval of information, tabloid journalism and also a 'tendency to put old claims in new terms' and the growth of the internet in the early 90's. These changes have made it either impossible or extremely costly for individuals to protect the same level of privacy that was once enjoyed. See, R Gavison, "Privacy and the Limits of Law", 89 *Yale Law Journal* 421, (1980), pp. 465,466. See also, D Lindsay, "An Exploration of the Conceptual Basis of Privacy and the Implications for the Future of Australian Privacy Law" 29 *Melbourne University Law Review* 131(2005), pp. 135–36; A Samuels, "Privacy: Statutorily Definable?", 17 *Statute Law Review* 115(1996); L Introna, "Privacy and the Computer: Why We Need Privacy in the Information Society", 28 *Metaphilosophy* 259 (1997).

specifically protects territorial and communication privacy[12] and the ICCPR[13]. The right to privacy is also dealt with in various other international instruments, such as the United Nations Convention on the Rights of the Child,[14] and the United Nations Convention on Migrant Workers.[15]

On a regional level, European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950[16], Charter of Fundamental Rights of the European Union, 2000[17], American Convention on Human Rights, 1969[18] and the American

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12 Article 12 provides: No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

13 Art 17 provides as follows:
(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. (2) Everyone has the right to the protection of the law against such interference or attacks.

14 Art 16 of the United Nations Convention on the Rights of the Child, 1989 provides:
1. No child shall be subject to arbitrary or unlawful interference with his or her privacy, home or correspondence, nor to unlawful attacks on his or her honour and reputation. 2. The child has the right to the protection of the law against such interference or attacks.

15 Art 14 states: No migrant worker or member of his or her family shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home, correspondence or other communications, or to unlawful attacks on his or her honour and reputation. Each migrant worker and member of his or her family shall have the right to the protection of the law against such interference or attacks.

16 Article 8 states:
(1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health of morals, or for the protection of the rights and freedoms of others.

17 Articles 7 states: **Respect for private and family life**-Everyone has the right to respect for his or her private and family life, home and communications.
Article 8 states: **Protection of personal data**
1. Everyone has the right to the protection of personal data concerning him or her. 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. 3. Compliance with these rules shall be subject to control by an independent authority.

18 Article 11. **Right to Privacy**
1. Everyone has the right to have his honor respected and his dignity recognized.
2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.
3. Everyone has the right to the protection of the law against such interference or attacks.
Article 14. **Right of Reply**
1. Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish.
2. The correction or reply shall not in any case remit other legal liabilities that may have been incurred.
3. For the effective protection of honor and reputation, every publisher, and every newspaper, motion picture, radio, and television company, shall have a person responsible who is not protected by immunities or special privileges.

Declaration on Rights and Duties of Mankind, 1948[19] contain provisions similar to those in the Universal Declaration and International Covenant and recognize right to privacy. Furthermore, the European Commission of Human Rights and the European Court of Human Rights constituted under the European Convention of Human Rights have been active in the enforcement of right to privacy and have consistently viewed Article 8's protection expansively and interpreted the restrictions narrowly.[20]

Interestingly privacy is not a universal concept. For example, the African Charter on Human and People's Rights does not include any protection for a right to privacy. Also, until recently right to privacy was not explicitly guaranteed through any constitutional provision.[21] However, in 2007, the Constitution of Thailand explicitly recognized right to privacy under s.35.[22] Though, in the western society and other

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19 Article V states: **Right to protection of honor, personal reputation, and private and family life.** Every person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life.
Article IX states: **Right to inviolability of the home.**
Every person has the right to the inviolability of his home.
Article X states: **Right to the inviolability and transmission of correspondence.**
Every person has the right to the inviolability and transmission of his correspondence.

20 Strossen N "Recent United States and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis" 41 *Hastings Law Journal* 805 (1990).

21 *Paul* v *Davis*, 424 U.S. 693, (1976), pp. 712-13. In this case a police chief issued list of persons to shop owners who were considered to be shoplifters. The respondent found his name in the list and claimed that thereby his reputation in the society has been injured. The court held that the respondent was not deprived of any liberty or property interests protected by the Due Process Clause. However, the Supreme Court went on to state that 'zones of privacy may be created by . . specific constitutional guarantees, thereby imposing limits upon government power'.

22 Constitution of the Kingdom of Thailand 2007, viewed 13th Nov 2013, http://www.asianlii.org/th/legis/const/2007/1.html, s.35 states:
A person's family rights, dignity, reputation and the right of privacy shall be protected.
The assertion or circulation of a statement or picture in any manner whatsoever to the public, which violates or affects a person's family rights, dignity, reputation or the right of privacy, shall not be made except for the case which is beneficial to the public. Personal data of a person shall be protected from the seeking of unlawful benefit as provided by the law. Constitution also provides the liberty of communication by lawful means. Disclosure of communication between persons shall be protected through s.36 of the Constitution which states that: A person shall enjoy the liberty of communication by lawful means. The censorship, detention or disclosure of communication between persons including any other act disclosing a statement in the communication between shall not be made except by virtue of the provisions of the law specifically enacted for security of the State or maintaining public order or good morals. In Thailand, privacy is also protected through ordinary law, such as criminal law. s. 323 Criminal Procedure Code law is very important in the context of medical confidentiality. The law makes it a criminal offence for a member of the health care profession to fail to maintain medical confidentiality For e.g., Section.323 states that: Whoever, knows or acquires a private secret of another person by reason of his functions as a competent official or his profession as a medical practitioner, pharmacist, druggist,midwife, nursing attendant, priest, advocate, lawyer or auditor, or by reason of being anassistant in such profession, and then discloses such private secret in a manner likely to cause injury to any person, shall be punished with imprisonment not exceeding six months or fined not exceeding one thousand Baht, or both.

countries like India, with the active help of judiciary, the concept of privacy is accepted as a fundamental right, but its precise meaning remains open for debate.

The U.S. Supreme Court for the first time explicitly recognized a Constitutional right to privacy in *Griswold* v *Connecticut*[23] and held that it had a 'natural rights' foundation.[24] In this case, the Court struck down a State law prohibiting the possession, sale, and distribution of contraceptives to married couples arguing that the Fourteenth Amendment's liberty clause forbade the State from engaging in conduct such as search of marital bedrooms for evidence of illicit contraceptives that was inconsistent with a government formed on the concept of ordered liberty. In *Roe* v *Wade*[25] the court further affirmed and expanded the right of privacy to include a woman's right to have an abortion. The decision in this case shows that right of privacy was settling into the liberty component of the Due Process Clause. Further, the Court in *Washington* v *Glucksberg*[26] discussed and affirmed in principle the idea that right of privacy are 'fundamental rights'.

Under the Indian Constitutional law, the right to privacy is implicitly guaranteed by Article 21 of the Constitution.[27] Since 1960s, the Indian judiciary, and the Supreme Court in particular, has dealt with the issue of privacy, both as a fundamental right under the Constitution and as a common law right.[28] But it refrained from defining the concept in iron-clad terms. Instead the Courts preferred

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23 381 U.S. 479 (1965).

24 Id. p.486.

25 410 U.S. 113 (1973). Roe, a pregnant single woman, brought suit challenging the constitutionality of the Texas abortion laws. These laws made it a crime to obtain or attempt an abortion except on medical advice to save life of the mother. The Court ruled that a right to privacy under the due process clause of the 14th Amendment extended to a woman's decision to have an abortion, but that right must be balanced against the State's two legitimate interests in regulating abortions: protecting prenatal life and protecting women's health.

26 521 U.S. 702 (1997), 721. Dr. Harold Glucksberg challenged Washington's Natural Death Act which banned assisted suicide and claimed that assisted suicide was a liberty interest protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The Court held that because assisted-suicide is not a fundamental liberty interest, it was not protected under the 14th Amendment.

27 *R. Rajagopal* v *State of T.N.*, (1994) 6 SCC 632.

28 Though there is no specific statute protecting privacy however, there are provisions in various statutes which addresses this right. For example, Section 26 of the India Post Office Act 1898; Section 5(2) of the Telegraph Act 1885; Section 69 of the Information Technology Act 2008 Section 122 of the Evidence Act, etc. There are also a few statutory provisions contained in the Code of Criminal Procedure Section 327(1), the Indecent Representation of Women (Prohibition) Act, 1980 (Sections 3 and 4), the Medical Termination of Pregnancy Act, 1971 Section 7(1)(c), the Hindu Marriage Act, 1955 (Section 22), the Special Marriages Act, 1954 (Section 33), the Children Act, 1960 (Section 36), and the Juvenile Justice Act, 1986 (Section 36), all of which seek to protect women and children from unwarranted publicity.

to have it evolve on a case by case basis. As Justice Mathew in *Govind* v *State of Madhya Pradesh*[29] stated:

> too broad a definition of privacy will raise serious questions about the propriety of judicial reliance on a right that is not explicit in the Constitution. The right to privacy will, therefore, necessarily, have to go through a process of case by case development. Therefore, even assuming, that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute. It must be subject to restriction on the basis of compelling public interest.

The Allahabad High Court in *Nihal Chand* v *Bhagwan Dei*[30] took a step when it recognized an independent existence of the right to privacy as emerging from the customs and traditions of the people besides being a statutory right. It observed that 'the right to privacy based on social custom....is different from a right to privacy based on natural modesty and human morality, the latter is not confined to any class, creed, colour or race and it is a birth right of every human being and is sacred and should be observed. The right should not be exercised in an oppressive way'.[31] The concept of privacy as a fundamental right was first evolved in 1964 in the case of *Kharak Singh* v *State of Uttar Pradesh*[32]. In this case, the petitioner was charged and tried for committing dacoity and he was subjected by the police to domiciliary visits and surveillance. While determining the validity of such visits and surveillance by the police, the apex court examined whether the right to privacy formed a part of personal liberty. The court observed that personal liberty is a compendium of rights that go to make up the personal liberty of an individual and that the right to life in Art. 21 of our Constitution is similar to that of Fourteenth and Fifteenth Amendments to the US Constitution. Interestingly, it was, the minority view expressed by Justice Subba Rao in the above decision that laid the foundations for the development of the law in India. Justice Subba Rao held:

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29 AIR 1975 SC 1378.

30 *B. Nihal Chand* v *Mt. Bhagwan Dei*, AIR 1935 All 1002. In this case the plaintiff claimed for the closing of a newly constructed door which had been opened by the defendant in his house on the side of the sahan and rooms of the plaintiff on the ground that it invaded the plaintiff's right of privacy.

31 Id.

32 AIR 1963 SC 1295.

> the right to personal liberty takes in not only a right to be free from restrictions placed on his movements, but also free from encroachments on his private life. It is true our Constitution does not expressly declare a right to privacy as a fundamental right but the said right is an essential ingredient of personal liberty. Every democratic country sanctifies domestic life; it is expected to give him rest, physical happiness, peace of mind and security. In the last resort, a person's house, where he lives with his family, is his 'castle' it is his rampart against encroachment on his personal liberty.

This judicial decision, especially Justice Subba Rao's observations, paved the way for later elaborations on the right to privacy under Article 21. For instance, in *R. M. Malkani* v *State of Maharashtra*[33], the Supreme Court held that the telephonic conversation of an innocent citizen will be protected by Courts against wrongful or high handed interference. However, the court went on to state that the above said protection is not extended to the guilty citizen against the efforts of the police to vindicate the law and prevent corruption among public servants.[34] Similarly, in *People's Union for Civil Liberties* v *Union of India*[35], the Supreme Court went on to hold that telephone-tapping would, infract Article 21 of the Constitution of India unless it is permitted under the procedure established by law. The Supreme Court, for the first time discussed right to privacy in the context of the freedom of the press in *R. Rajagopal* v *State of T.N.*[36] popularly known as 'Autoshanker case'. In this case the court held that a citizen has a right to safeguard privacy of his own, his family, marriage, procreation, motherhood, childbearing and education among other matters. No one can publish anything concerning the above matters without his consent whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right of the individual concerned and would be liable in an action for damages. However, position may be differed if the person

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33 AIR 1973 SC 157. The petitioner's voice had been recorded in the course of a telephonic conversation where he was attempting to blackmail. He asserted in his defence that such conversation cannot be admitted under the provisions of Indian Evidence Act and his right to privacy under Article 21 had been violated.

34 Id.

35 AIR 1997 SC 568.

36 1994 SCC (6) 632.

voluntarily puts into controversy or voluntarily invites or raises a controversy.[37] In *State of Maharashtra* v *Madhulkar Narain*[38], the court went on to state that 'right to privacy' is available even to a woman of easy virtue and no one can invade her privacy.

The above discussion of judicial decisions of both U.S. and India shows that privacy-related issues have cropped up in a variety of cases ranging from child rearing, procreation, marriage, and termination of medical treatment, police surveillance, biographical films, abortion to telephone-tapping to the right of confidentiality of an HIV-infected person. Thus, it is extremely challenging despite the best efforts of legal scholars to define a fluid concept like privacy because it touches almost every aspect of a person and society to one degree or another and the term 'privacy' confounds attempts at delivering a universal definition.[39] As the Australian Law Reform Commission[40] notes that 'the very term "privacy" is one fraught with difficulty as the concept is an elusive one and the commission describes

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37 This rule is subject to an exception that if any publication is based on public record including court record it will be unobjectionable. If a matter becomes a matter of public record, the right to privacy no longer exists and it becomes a legitimate subject for comment by press and media among others. Again, an exception must be carved out of this rule in the interests of decency in cases where female who is victim of a sexual assault, kidnapping, abduction or a like offence should not further be subjected to the indignity of her name and the incident being published in press or media. The second exception is that the right to privacy or the remedy of action for damage is simply not available to public officials as long as the criticism concerns the discharge of their public duties; not even when the publication is based on untrue fact and statements unless the official can establish that the statement had been made with reckless disregard of truth. All that the alleged condemner needs to do is to prove that he has written after reasonable verification of facts.

38 AIR 1991 SC 207. A police Inspector visited the house of one Banubai in uniform and demanded to have sexual intercourse with her. On refusing he tried to have her by force. She raised a hue and cry. When he was prosecuted he told the court that she was a lady of easy virtue and therefore her evidence was not to be relied. The court rejected the argument of the applicant and held him liable for violating her right to privacy under Art. 21.

39 See eg, A Samuels, "Privacy: Statutorily Definable?" 17 *Statute Law Review* 115 (1996). See also, R Gavison, "Privacy and the Limits of Law" 89 *Yale Law Journal* 421(1980), 424. R.Gavison tries to understand the term firstly, in the form of a 'status' i.e., privacy as a right, a claim, a form of control. Secondly, he relates privacy to information, to autonomy, to personal identity, to physical access. The word 'privacy' is a very complex term and it is difficult to give an exact definition encompassing all the underlying situations to which it refers. This is easily understood when one starts trying to thoroughly analyze the meaning given in dictionaries, definition given by jurists in important case laws and also many of the well known authors explanation of the concept. See also, Daniel J. Solove, *Understanding Privacy*, Harvard University Press, London (2008), ix. According to him privacy is a 'plurality of different things and that the quest for a singular essence of privacy leads to a dead end. There is no overarching conception of privacy—it must be mapped like terrain, by painstakingly studying the landscape. In my initial years of studying the only way to do so would be to become fully immersed in the issues'.

40 Australian law reform commission, vol.1, Report 108, may 2008, available at www.alrc.gov.au.

that the privacy can be divided into a number of related and separate concepts like information privacy, bodily privacy, privacy of communications and territorial privacy. Moreover, Prof. J Thomas McCarthy has noted 'like the emotive word 'freedom', 'privacy' means so many different things to so many different people that it has lost any precise legal connotation that it might once have had'.[41] For example, Warren & Brandeis defined privacy as 'right to be alone'.[42] Schoeman defined privacy as 'the right to determine what personal information is communicated to others' or 'the control an individual has over information about himself or herself'[43]. On the other hand, Garfinkel argues that 'privacy is about self-possession, autonomy, and integrity'.[44]

A doubt that may arise is as to how one may relate privacy to autonomy? It is to be understood that autonomy is located within one portion of this right because as mentioned above one of the constitutionally protected areas of privacy is that of private decisions. Thus, right to privacy is not the liberty i.e, right to make and act on private decisions; it includes the claim which means a right that others not interfere with these private decisions, for any such interference would be an invasion of a protected area of privacy.[45] According to Wellman[46], this direct and essential connection between privacy and autonomy is not properly recognized by the courts. As one finds that the expression 'a private decision' is conspicuous by its absence from the opinions in the privacy cases. For example, even in *Roe v Wade*[47] the argument was not that a decision to undergo abortion is constitutionally protected because it is a private decision, but that it is encompassed by the right to privacy because it involves the exercise of one of the fundamental liberties recognized in the US Constitution. Hence, the emphasis is upon how fundamental, not how personal

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41 D Solove, "A Taxonomy of Privacy" 3 *University of Pennsylvania Law Review* 477 (2006), 479. see also, M Abrams, 'Privacy, Security and Economic Growth in an Emerging Digital Economy', paper presented at Privacy Symposium, Institute of Law China Academy of Social Science, 7 June 2006, p.18.

42 S Warren, L Brandeis, "The Right to Privacy" 4 *Harvard Law Review* 193 (1890).

43 F. D. Schoeman, *Philosophical Dimensions of Privacy*, Cambridge University Press (1984), p.22

44 See generally, S. Garfinkel, *Database Nation: The Death of the Privacy in the* 21*st Century*, O'Reilly & Associates, USA (2001).

45 See generally, Wellman C, *An Approach to Rights*, Kluwer Academic Dordrecht (1997), p.185.

46 Id.

47 410 U.S. 113 (1973).

and private, the decision is.[48] In *People's Union for Civil Liberties* v *Union of India*[49], Kuldip Singh J argued privacy 'as a concept may be too broad and moralistic to define it judicially. Whether right to privacy can be claimed or has been infringed in given case would depend on the facts of the said case'.

Interestingly, according to James Whitman[50], there is no such thing as privacy.[51] In support of his argument he states that English, American, French and German have different approaches to the concept of '*privacy*'. For e.g., American privacy is more concerned with personal liberty[52], while Europeans give more attention to the concept of human dignity. He brings to our attention that 'privacy' is culturally biased and this is proven by the fact that in European countries it is recognized as a fundamental human right and in Asia this is only an emerging concept. So, according to him, what works in one region may not work in other part of the globe as it is basically culturally biased. However, Lord Mustill, in *R* v

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48 Id.

49 AIR (1997) 1 SCC 301, 311.

50 J Whitman, "The Two Western Cultures of Privacy: Dignity v Liberty" 113 *Yale Law Journal* 1151 (2004), pp. 1161,1221; M Abrams, 'Privacy, Security and Economic Growth in an Emerging Digital Economy', paper presented at Privacy Symposium, Institute of Law China Academy of Social Science, 7 June 2006, p.18. See also, R Bruyer, "Privacy: A Review and Critique of the Literature" 43 *Alberta Law Review* 553(2006), p.569.

51 It is to be noted that for several decades Australian High Court's decision in *Victoria Park Racing and Recreation Grounds Pty Ltd* v *Taylor* (1937) 58 CLR 479, was cited as authority for the proposition that there was no common law right to privacy. The common belief till then was that the privacy was protected only in matters, such as trespass to land (see for example, *TCN Channel Nine Pty Ltd* v *Anning* (2002) 54 NSWLR 333, 344 per Spigelman CJ.), defamation (See for example, *John Fairfax Publications Pty Ltd* v *Hitchcock* (2007) 70 NSWLR 484,515.), and breach of confidence (see for example, *Australian Football League* v *The Age Co Ltd* (2006) 15 VR 419.).

52 Frank A. Riddick, "Privacy in the Context of Health Care", Report of The Council On Ethical And Judicial Affairs, American Medical Association (2001), p.1. In United States, privacy is linked to freedom from intrusion by State or other individuals. It also is understood to refer to a domain of personal decisions about important matters. In less legalistic forms, privacy can be viewed as a necessary condition for maintaining intimate relationships that entail respect and trust, such as love or friendship. the statutory definition focuses on an individual's right to control personal information. see e.g., Federal Privacy Act of 1974, 5 U.S.C. § 552a (1982).

Broadcasting Standards Commission ex parte BBC[53], attempted to define the essence of privacy as follows:

> to my mind the privacy of a human being denotes at the same time the personal 'space' in which the individual is free to be itself, and also the carapace, or shell, or umbrella, or whatever other metaphor is preferred, which protects that space from intrusion. An infringement of privacy is an affront to the personality, which is damaged both by the violation and by the demonstration that the personal space is not inviolate.

Though, one finds it difficult to give a universally acceptable definition for privacy one cannot deny the fact that this right is of importance for every individual to possess and retain a sense of self worth both individually and as a member of society.[54] Also, with the Web revolution and the emergence of data mining, privacy concerns have posed technical challenges fundamentally different from those that occurred before the information era. In the information technology era, privacy refers to the right of users to conceal their personal information and have some

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[53] *R* v *Broadcasting Standards Commission ex parte BBC* [2001] QB 885. See also, Daniel J. Solove, "I've Got Nothing to Hide and Other Misunderstandings of Privacy", 44 *San Diego L. Rev.* 745 (2007). Solove introduces a new approach to the idea of privacy that requires the reader to abandon the traditional ways in which privacy has been considered; Daniel J. Solove, *Understanding Privacy*, Harvard University Press, Cambridge (2008), p.257. Solove is known internationally as an expert on issues of privacy. Prof.Daniel J. Solove has worked diligently to answer and provide a structured framework to define privacy. While Solove has not completely answered the question of what is privacy, he has provided a much deeper understanding of what privacy is and what is at stake if privacy continues to erode. Daniel J. Solove states:
The concept of privacy encompasses many ideas relating to the proper and improper use and abuse of information about people within society. Privacy is what protects information and allows individuals within society to have a "personal bubble". Solove's general belief on the value of privacy is best expressed when he states, "society involves a great deal of friction and we are constantly clashing with each other. Part of what makes a society a good place in which to live is the extent to which it allows people freedom from the intrusiveness of others. A society without privacy protection would be suffocation, and it might not be a place in which most would want to live. Privacy issues can be solved by balancing privacy conflicts against other fundamental rights such as free speech and security. He also astutely points out that not all privacy interests are equal. He further explains that privacy as an abstract theory does not offer the workable answers that could be expunged in direct and candid conservations about why privacy interests are more important or less important than other rights and how they can be reconciled with one another. The approach avoids the vagueness of privacy theories that rely on words such as "personhood" and "intimacy".

[54] *Vickery* v *Nova Scotia Supreme Court (Prothonotary)* [1991] 1 SCR 671, 687. per Cory J. see also, Elizabeth Wicks, *Human Rights and Healthcare*, Hart Publishing, Oregon (2007), p.120. According to Wicks, whatever view of the concept is adopted, it is clear that the protection of personal information is a central aspect of privacy.

degree of control over the use of any personal information disclosed to others.[55] In sum, privacy must be viewed as the bundle of interests that individuals have in their personal sphere free from interference from others.[56]

Autonomy is the underlying concept of modern human rights law and therefore privacy occupies a central role in ensuring that individuals have the freedom from State interference so as to give their other rights like right to life, dignity, liberty, freedom of expression and religion etc. a meaning.[57] It is this aspect which is of vital significance to medical confidentiality. Before discussing medical confidentiality[58] it is also necessary to understand 'the difference between right to privacy and right to have confidential information protected' The law imposes a number of requirements in order for a cause of action to arise for breach of confidence, and these criteria mean that, for example, press photographers owe no duty of confidence unless the photography takes place in 'confidential circumstances', or there had been a prior agreement not to publish. If neither of these applies, only a right to privacy can offer protection from publication. In another example, a private diary dropped in a public place and found by a passer-by would be protected by a duty of confidence.[59] This has led some commentators to argue that the rationale has moved from the protection of confidences to the protection of privacy[60] and that any distinction between a duty of confidence and a tort of privacy has vanished.[61]

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55 See generally, M. Ackerman, L. Cranor, and J. Reagle, "Privacy in E-Commerce: Examining User Scenarios and Privacy Preferences" in *Proc. of the ACM Conference on Electronic Commerce*, Denver, Colorado, USA (1999), pp. 1-8.

56 See example, R Clarke, *What's 'Privacy'?* Australian National University (2004), viewed 14th Nov 2013, www.anu.edu.au/people/ Roger.Clarke/DV/Privacy.html. According to him, privacy is a 'right' in a legal sense, but, for definitional purposes, the word 'interest' may be more accurate. As per legal jurisprudence a right is always an interest, even if not all interests are accorded the status of legal rights.

57 Elizabeth Wicks, *Human Rights and Healthcare*, Hart Publishing, Oregon (2007), p.119.

58 The BMA defines confidentiality as the principle of keeping secure and secret from others, information given by or about an individual in the course of a professional relationship.

59 *A-G* v *Guardian Newspapers* [2001] 1 All ER 991.Duty of confidence arises when confidential information comes to the knowledge of a person….in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others.

60 See, for example, J Loughrey, "Medical Information, Confidence and a Child's Right to Privacy" 23 *LS* 510 (2003), p.516.

61 Elizabeth Wicks, *Human Rights and Healthcare*, Hart Publishing, Oregon (2007), p.122.

6.3. PRIVACY IN THE MEDICAL CONTEXT

As mentioned in the previous chapters physician-patient relationship is fiduciary in nature. Therefore, undoubtedly privacy must be viewed as a key governing principle of the patient-physician relationship. Patients are required to share information sometimes utmost personal with their physicians to facilitate correct diagnosis and treatment so as to avoid adverse drug prescriptions and further complications in their physical health. Also, a 'rights-based' approach might regard the duty of keeping confidences as a respect for the right to privacy.[62] According to Johnson[63] the three important elements for maintaining confidentiality are patient's autonomy; doctor's integrity; and the consequences for the future relationship. Therefore, Clegg[64] rightly argues:

> The doctor's consulting-room should be as sacrosanct as the priest's confessional. The whole of the art and science of medicine is based on the intimate personal relationship between patient and doctor, and to this it always returns, however scientific medicine becomes and whatever the great and undeniable benefits society receives from the application of social and preventive medicine.

Further, both deontological and teleological reasoning can be used to justify the existence of a duty of confidence between patients and doctors. The consequentialist argues that optimum medical care and protection can be provided to patient if a doctor is able to provide a sense of emotional and personal assurance that his medical information will not be disclosed so that a patient never finds himself in an embarrassing position while talking to the physician about his illness.[65] Doctors

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62 Marc Stauch, Kay Wheat, John Tingle, *Sourcebook on Medical Law*, 2nd edn., Cavendish Publishing Limited, London (2002), p.242;For example, U.K. Medical Research Council's guidance on confidentiality states:
> Respect for private life is a human right, and the ability to discuss information in confidence with others is rightly valued. Keeping control over facts about one's self can have an important role in a person's sense of security, freedom of action, and self-respect.

63 Johnson, AG, *Pathways in Medical Ethics*, Edward Arnold (1990), pp 74-75**.**

64 HA Clegg, "Professional Ethics", in M Davidson (ed), *Medical Ethics*, A Guide to Students and Practitioners London (1957), p.44.

65 Marc Stauch, Kay Wheat, John Tingle, *Sourcebook on Medical Law*, 2nd edn., Cavendish Publishing Limited, London (2002),p.242

routinely ask a series of questions about bodily functions that people would not dream of discussing with anyone else. As Raanan Gillon[66]notes:

> When a patient's medical problems may relate to genitourinary functions a doctor may need to know about that patient's sexual activities, sometimes in detail. When a patient's problems are psychological a doctor may need to know in great detail about the patient's experiences, ideas and feelings, relationships past and present, even in some contexts about the person's imaginings and fantasies.
>
> Such intrusive medical inquiries are based not on prurience or mere inquisitiveness but on the pursuit of information that is of potential assistance to the doctor in treating and helping the patient. Nonetheless many patients are unlikely to pass on this information unless they have some assurances of confidentiality.

Hence, according to consequentialist, justification for the duty of medical confidentiality is people's better health, welfare, the general good and overall happiness.[67] The language of the public interest defence has a strong utilitarian flavor. The utilitarian view is particularly appropriate to confidentiality as it will readily admit that the duty is not absolute and can be breached in certain circumstances. It would be argued that the breach is justified when the utility of disclosure outweighs the utility produced by keeping the confidences. As will be seen, the only legal justification at common law for disclosure is either that the patient has consented, or that it is in the public interest to disclose. [68] According to deontological theorists it is the duty rather than purpose which is the fundamental concept of ethics.[69] At the end, both utilitarians and deontologists alike as a means to some morally desirable end calls for the general welfare, respect for people's autonomy, and respect for their privacy.[70]

Confidentiality is beneficial for individual patients and for society as a whole. For example, in the context of transmittable diseases, especially sexually transmittable diseases, so long as the patient continues to trust his or her doctor the doctor will be able to educate and influence the patient in ways that can reduce the

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66 'Confidentiality' in Helga Kuhse and Peter Singer (eds), *A Companion to Bioethics*, Blackwell, Oxford (1998), pp.425-31.

67 Gillon, R, *Philosophical Medical Ethics*, John Wiley, Chichester (1986), p.108.

68 *AG* v *Guardian Newspapers (No 2)*, [1990] AC 109, p.282.

69 Gillon, R, *Philosophical Medical Ethics*, John Wiley, Chichester (1986), p.108.

70 Id.

likelihood of the disease being passed on to other members of the community. As soon as confidentiality is broken the trusting relationship is likely to be undermined and the opportunity to help reduce the spread of disease is lost.[71] On the other hand, if a patient confides in his doctor that he has committed a very serious crime, such as child abuse, should the doctor inform the police or keep the information as confidential and similarly in the case of drug use? Here, no one will deny that there is a clear public interest for paedophiles and drug users to willingly come forward to seek help. Thus, Emily Jackson strongly argues that 'working out whether disclosure is justified in a particular case will often involve a complex balancing exercise between competing interests'.[72]

6.3.1 Ethical Obligation

A doctor's duty to respect his or her patients' confidentiality has its origin in the first code of medical ethics. The Hippocratic Oath[73], states that:

> What I may see or hear in the course of the treatment or even outside of the treatment in regard to the life of men, which on no account one must spread abroad, I will keep to myself holding such things shameful to be spoken about.

This concept of confidentiality, which underpins medical care, has withstood the test of time. This is obvious by the fact that the patient confidentiality receives unqualified protection in the modern version of the Oath i.e., at the International level, the Declaration of Geneva[74]:

> I will respect the secrets which are confided in me, even after the patient has died.

The International Code of Medical Ethics also states:

> A doctor shall preserve absolute secrecy on all he knows about his patients because of the confidence entrusted in him.

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71 'Confidentiality' in Helga Kuhse and Peter Singer (eds), *A Companion to Bioethics*, Blackwell: Oxford (1998), pp.425-31.

72 Emily Jackson, *Medical Law, Text, Cases and Materials*, 2nd edn., Oxford University Press (2010), p.392.

73 Charles J. Sykes, *The Attack on Personal Rights-At Home, At Work, On-Line, and in Court*, St. Martin's Griffin, New York (1999), p. 98.

74 Declaration of Geneva, viewed 23rd June 2012,http://www.mma.org.my/Portals/0/Declaration%20of%20Geneva.pdf.

In India, the above undertaking is repeated in the Indian Medical Council (Professional conduct, Etiquette and Ethics) Regulations, 2002. The Medical Council of India's Code of Ethics Regulations protects patient confidentiality by stating that the physician 'shall not disclose the secrets of a patient that have been learnt in the exercise of his or her profession except in a court of law under orders of the Presiding Judge; in circumstances where there is a serious and identified risk to a specific person and or community; or in case of notifiable diseases'.[75] In addition to the treating doctors, administrators and the public information officer of a healthcare institution are also ethically required not to disclose health information of a patient.[76] Similarly, according to Indian Council of Medical Research (ICMR) guidelines for biomedical research on human participants, researchers must maintain the confidentiality of their subjects' health and other personal information, especially as the promise of preserving confidentiality is appropriately part of the informed consent agreement.[77]

Angus H Ferguson[78] in his thesis notes that 'lack of research on history of medical confidentiality generally gives the impression to the public that, medical confidentiality has been a relatively unchallenged feature of medical practice'. Therefore, writers are always forced to depend on Hippocratic Oath or some judicial rulings in order to place current challenges to medical confidentiality into some historical context.[79] However, questions relating to preserving the confidentiality of patients can no longer be resolved by simply referring to the above codes, as it requires rational, careful analysis of changing conditions.[80] In the modern era,

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75 Regulation 7.14 of Indian Medical Council (Professional conduct, Etiquette and Ethics) Regulations, 2002.

76 Id.

77 **Ethical Guidelines for Biomedical Research on Human Participants- Principle IV. Principles of privacy and confidentiality** whereby the identity and records of the human participants of the research or experiment are as far as possible kept confidential; and that no details about identity of said human participants, which would result in the disclosure of their identity, are disclosed without valid scientific and legal reasons which may be essential for the purposes of therapeutics or other interventions, without the specific consent in writing of the human participant concerned, or someone authorized on their behalf; and after ensuring that the said human participant does not suffer from any form of hardship, discrimination or stigmatization as a consequence of having participated in the research or experiment.

78 Angus H Ferguson, *Should a Doctor tell? Medical Confidentiality in Interwar England and Scotland*, University of Glasgow, thesis submitted for Doctor of Philosophy, 2005, viewed 25th Nov 2013, http://theses.gla.ac.uk/3150/

79 JV McHale, *Medical Confidentiality and Legal Privilege*, Routledge, London, (1993), p.13.

80 Peter de Cruz, *Comparative Healthcare Law*, Cavendish Publishing Limited, London, 2001, p.47.

patient's relationship is not just confined to his physician. There are now networks of doctors, nurses and other healthcare professionals involved in care. As Brody[81] notes 'there is also a need for patient records to which many people must have access, as part of the care 'team' and the need to communicate information to insurance companies or new employers; and there is the computerization of records. No wonder there is a need for an analysis of 'what it is, why it is basic to the physician relationship, as well as a sense of its limits'. As with most matters relating to law and ethics, rules on confidentiality need to keep abreast of current developments, and the rapidity of technological change, therefore general guidance cannot supply definitive solutions to all problems or all unexpected situations that might arise in the course of doctor-patient relationship.[82] As Peter de Cruz[83] argues 'general guidance cannot supply definitive solutions to all problems or all situations that might arise in the course of a doctor-patient relationship'. As with most matters relating to law and ethics, rules on confidentiality need to keep abreast of current developments, and the rapidity of technological change.

6.3.2. Legal Obligation

6.3.2.1. *Common Law*

Stemming originally from confidential relationships such as marriages and business relations a duty of confidence did find protection in common law.[84] The modern English law of confidence stems from the judgment in *Prince Albert* v *Strange*[85], where Lord Cottenham, restrained the defendant from publishing a catalogue of private etchings made by Queen Victoria and Prince Albert. The requirements for breach of confidence were laid down in *Coco* v *A N Clark*[86], where Megarry J developed an influential tri-partite analysis of the essential ingredients of

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81 Brody, H, "The physician-patient relationship", in R. M. Veatch ed., *Medical Ethics*, Bartlett publishers, Boston: Jones (1989), p.83.

82 Id. p. 49. It is to be noted that interpretations may and will often change with time and changing social values and situations. Moreover, genetic testing and new communications technology present fresh challenges to the duty of confidentiality.

83 Peter de Cruz, *Comparative Healthcare Law*, Cavendish Publishing Limited, London (2001), p.49.

84 Wicks, Elizabeth, *Human Rights and Healthcare*, Hart Publishing, Oregon (2007), pp.121-22.

85 *Prince Albert* v *Strange* (1848) 1 Mac. & G. 25.

86 *Coco* v *A N Clark* [1969] RPC 41. Coco entered into negotiation with AN Clark to develop a moped. After some time, Clark elected not to develop moped with Coco and instead chose to develop it independently. Coco became suspicious that Clark was using some of his designs for the new moped. He therefore applied for an injunction. The court found that Coco had failed to establish that the similarities between the two mopeds were achieved by the use of information provided him to AN Clark, hence injunction cannot be given.

the cause of action for breach of confidence: the information in question must have the necessary quality of confidence; the information must be imparted in circumstances importing an obligation of confidence; and there must be an unauthorized use of the information to the confider's detriment. According to this threefold test, legal protection would only be provided for personal information where the confider and the discloser of the information are in a relationship of confidence.[87] While this was originally developed for business purposes, over the time it has been expanded to cover almost any situation involving secrets, including cases falling under misuse of private information. Therefore, in *Spycatcher*[88] case, Lord Goff set out a broader test in which the focus moved from the relationship of confidence to the nature of the information and the confidant's knowledge:

> a duty of confidence arises when confidential information comes to the knowledge of a person… in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others.

Similarly, in *A* v *B (a company)*[89], Lord Woolf stated that a duty of confidence will arise whenever the party subject to the duty is in a situation where he either knows or ought to know that the other person can reasonably expect his privacy to be protected. The imposition of the obligation thus, does not depend as such on a pre-existing relationship between the parties. It is both the nature of the information and the circumstances in which it was disclosed that create the duty of confidentiality.[90] Further, in *Douglas* v *Hello*[91], Sedley LJ said that the law no longer needs to construct an artificial relationship of confidence in order to protect a person's privacy. This was affirmed by *Venables* v *News Group Newspapers*[92] where the President of the Family Division noted that a duty of confidence could arise independently of any relationship between the parties and therefore, the court could restrain publication of personal information regardless of the circumstances in which

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87 Wicks, Elizabeth, *Human Rights and Healthcare*, Hart Publishing, Oregon (2007), p.122.
88 *A-G* v *Guardian Newspapers* [1990] 1 AC 109, p.281.
89 [2002] 2 All ER 545, 554.
90 Emily Jackson, *Medical Law, Text, Cases and Materials*, 2nd edn., Oxford University Press (2010), p.354.
91 *Douglas* v *Hello* [2001] QB 967.
92 [2001] 1 All ER 908, 933.

it was obtained. Accordingly, a private diary dropped in a public place and found by a passer-by would be protected by a duty of confidence.[93]

There has been some uncertainty as to the jurisdictional basis for the obligation of confidence.[94] The judges in *Attorney-General* v *Guardian Newspapers (No 2)*[95] has made it clear that the basis for the obligation of confidence lays in the law of equity. Emily Jackson[96] too notes, 'the origins of the legal duty of confidence lies in the equitable jurisdiction of the Chancery Division to grant injunctions in order to prevent the infringement of legal and equitable rights'. Further, Lord Bingham in *AG* v *Guardian Newspapers (No.2)* [97] explained that the duty of confidence arises from an obligation of conscience:

> The cases show that the duty of confidence does not depend on any contract, express or implied, between the parties. If it did, it would follow on ordinary principles that strangers to the contract would not be bound. But the duty 'depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it'…A third party coming into possession of confidential information is accordingly liable to be restrained from publishing it if he knows the information to be confidential and the circumstances are such as to impose upon him an obligation in good conscience not to publish….Like most heads of equitable jurisdiction, its rational basis does not lie in proprietary right. It lies in the notion of an obligation of conscience arising from the circumstances in or through which the information was communicated or obtained.

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93 *A-G* v *Guardian Newspapers* [1990] 1 AC 109, p.282.

94 *Morrison* v *Moat*, 9 Hare, 241, 255 (1951). While deciding a suit for an injunction to restrain the use of a secret medical compound, Sir George James Turner, V.C., said:
That the court has exercised jurisdiction in cases of this nature does not, I think, admit of any question. Different grounds have indeed been assigned for the exercise of that jurisdiction. In some cases it has been referred to property, in others to contract, and in others, again, it has been treated as founded upon trust or confidence, - meaning, as I conceive, that the court fastens the obligation on the conscience of the party, and enforces it against him in the same manner as it enforces against a party to whom a benefit is given, the obligation of performing a promise on the faith of which the benefit has been conferred; but upon whatever grounds the jurisdiction is founded, the authorities leave no doubt as to the exercise of it.

95 [1990] 1 AC 109.

96 Emily Jackson, *Medical Law, Text, Cases and Materials*, Oxford University Press, 2nd edn. (2010), p.354.

97 1988 3 All ER 545, pp.215-16. See also, *Ashworth Security Hospital* v *MGN Ltd*,[2000] 1 WLR 515, 527, where Lord Phillips MR stated :
It is well settled 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.

Hence, the question that arises is as to what gives rise to an enforceable duty of confidentiality? The nature of this obligation which applies to all confidential information and not only to medicine was discussed by the Court of Appeal in *A-G* v *Guardian Newspapers Ltd (No 2)*[98] also known as *Spycatcher* case, in which it was affirmed that there was a public interest in a legally enforceable protection of confidences received under notice of confidentiality. Moreover, the obligation may be imposed by an express or implied term of contract or can even exist independently of any contract on the basis of an independent equitable principle of confidence.[99] In *Ashworth Security Hospital* v *MGN Ltd*[100], Lord Phillips MR held that there is an inherent obligation of confidentiality between doctor and patient and 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.

A threefold test was laid down in *Stephens* v *Avery*[101] for establishing a breach of the duty of keeping patient's confidential information, which necessitates that the information in question must have the necessary quality of confidence; the information must be imparted in circumstances importing an obligation of confidence; and there must be an unauthorized use of the information to the confider's detriment. To determine whether the circumstances of communication are confidential, McInerney J, in *Mense* v *Milenkovic*[102] expressed that there must be an objective test. This approach was clearly expressed in following words:

> If the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realized that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose on him the equitable obligation of confidence.

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98 (1988) 3 All ER 545. An example of a utilitarian approach may be found in this case when Lord Goff said that 'although there is a public interest in preserving confidences which should be preserved and protected by the law, nevertheless, that public interest may be outweighed by some other countervailing public interest which favours disclosure'.

99 [1988] 3 All ER 545, 639, per Lord Keith.

100 [2000] 1 WLR 515, 527.

101 (1988) 2 All ER 477. The plaintiff and the defendants were close friends and used to share all secrets. The defendants passed on to these secrets to editors and publishers of a newspaper, which included details of the defendant's sexual conduct. The plaintiff brought an action against the defendant claiming damages. See also, *Coco* v *A N Clark* [1969] RPC 41.

102 [1973] VR 784, p.801. see also, *A* v *B (A Company)* [2002] 2 All ER 545.Lord Wolf CJ stated that:
A duty of confidence will arise whenever the party subject to the duty is in a situation where he either knows or ought to know that the other person can reasonably expect his privacy to be protected.

Therefore, equity may impose an obligation of confidence upon a defendant having regard to not only what the defendant knew, but to what he ought to have known in all the relevant circumstances.[103] In other words even if the revelation did not itself harm a particular person, if it could be said to have caused a public harm, for example, to lead to a lack of trust in doctors, this could be sufficient to justify protecting the information in equity.[104] But according to the opinion of Lord Goff in *Spycatcher* case[105], the nature of information and the confidant's knowledge is more important than the relationship of confider's. As he strongly argues:

> A duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others.

6.3.2.2. *Human Rights*

The unauthorized disclosure of medical information is a human rights issue has been clearly established by the European Court of Human Rights. The European Convention on Human Rights, incorporated into English law by the Human Rights Act 1998 protects right to a 'private life' under Art 8.[106] This Article impliedly protects patient's interest in privacy and medical confidentiality apart from the 'right to respect for private and family life'. However, Article 8 is not an absolute right, and is qualified by Article 8(2). Article 8 (2) makes it clear that rights can be limited provided they are prescribed by the law and are necessary in a democratic society for a number of specified aims, including the rights and freedoms of others, the prevention of crime and the protection of health and morals. Therefore, at the core of

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103 J A Devereux, *Australian Medical Law*, 3rd edition, Routledge-Cavendish, New York (2007), p.949.

104 *Ashworth* v *MGN Ltd* [2001] 1 All ER 991.

105 *A-G* v *Guardian Newspapers* [1990] 1 AC 109, p 281. The facts in this case involved Peter Wright, a former member of the British security services, who was subject to the Official Secrets Act 1911. He wrote his memoirs about his time in the security service, and the book was published, first in Australia. The British Government immediately acted to ban the book in the UK. However, the book continued to be available legally in Scotland as well as overseas, and some English newspapers published the articles from the book.

106 Article 8(1) states: Everyone has the right to respect for his private and family life, his home and his correspondence.
Article 8(2) states: There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 8's protection is the prevention of arbitrary interference by public authorities and the Court has been reluctant to present a comprehensive definition, as it is not 'possible or necessary to attempt an exhaustive definition of the notion of private life'.[107] It is clear, however, that a broad range of privacy interests are encompassed within Article 8's protection, including an individual's relations with others,[108] physical and moral integrity,[109] personal integrity,[110] legal recognition of gender,[111] and sexuality,[112] as well as the more obvious aspects of personal information.[113] It is difficult for individuals to establish that any disclosure of their medical records constitutes a *prima facie* violation of Article 8. The principal obstacle to a successful claim is that it has often been possible for public authorities to establish that disclosure is justifiable under Article 8(2). In *MS* v *Sweden*[114] , the applicant's claim for industrial injury compensation led to her medical records, including sensitive information about termination of pregnancy, being forwarded to the social insurance office without her knowledge. The European Court confirmed that disclosure of confidential information as an interference with the applicant's Article 8(1) rights but it was justified under Article 8(2) on the grounds of protecting the economic well being of the country, because the medical information was relevant to the granting of public funds.[115]

In *Z* v *Finland*[116], for example, Z was married to someone who had been charged with a number of sexual offences. He was HIV positive, and in order to find out when he became aware of his HIV status, the police sought and gained access to Z's

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107 *Niemietz* v *Germany* 16 EHRR 97, Para 29.

108 Id.

109 *Costello-Roberts* v *United Kingdom* (1993) Series A, No 247.

110 *Burghartz* v *Switzerland* (1994), 18 EHRR 101.

111 *Goodwin* v *United Kingdom* (2002) 35 EHRR 18.

112 *Smith* v *United Kingdom* (2000) 29 EHRR 493.

113 *Leander* v *Sweden* (1987) 9 EHRR 433.

114 (1997) 45 BMLR 133. In this case, a clinic disclosed the patient's records to the Social Insurance Office which was considering her claim for compensation under the Industry Injury Insurance Act for an injury to her back she claimed had occurred at work.

115 Id.

116 (1997) 25 EHRR 371. The facts were as follows. Mrs. Z was the wife of a man who had been accused of attempted manslaughter by raping his victims and knowingly infecting them with HIV virus. For evidential purposes, it was necessary to obtain evidence from Mrs. Z's doctors and to obtain her medical records. The court limited the confidentiality of the trial record to 10 years, and in its judgment the court disclosed Mrs. Z's identity. It was common ground that there had been a violation of Mrs. Z's rights under Art 8; the issue for the European Court to decide was whether this could be justified under Art 8(2). It was accepted that the court action was 'in accordance with the law' so the issue was whether it was 'necessary in a democratic society'.

medical records. The ECHR held that seizing Z's medical records and ordering her doctors to give evidence did not amount to a violation of Article 8 because although a patient has an important interest in protecting the confidentiality of his or her medical records, that interest may be outweighed by the Government's interest in investigating and prosecuting a crime. However, the European Court of Human Rights stated:

> The protection of personal data, not least medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the Convention…. Without such protection, those in need of medical assistance may be deterred from revealing such information of a personal and intimate nature as may be necessary in order to receive appropriate treatment and, even, from seeking such assistance, thereby endangering their own health and in the case of transmissible diseases, that of the community[117].

Similarly, in *Stone* v *South East Coast SHA*[118], the murderer Michael Stone requested the court not to give permission for publication of his homicide inquiry, as it contained considerable details about his medical treatment which he wanted to keep as confidential. Davis J while acknowledging his right to privacy under Article 8, held that in this case there is no legal justification for protecting Mr. Stone's right to privacy, as the inquiry, and all publicity, have arisen out of Mr. Stone's own criminal acts. Also, a great deal of information about his treatment was already in the public domain. Though, previous publication of private information in the public domain does not mean that an individual necessarily loses his right to privacy in respect of a proposal to put yet more such material in the public domain. But, restricting his right to privacy was relevant in the balancing exercise and to the issue of proportionality: and in this case the previous disclosure in the public domain has already been very extensive. There are instances where the court has to balance two different competing interests of the need for a fair trial and a patient's right to confidentiality. In *R (on the application of B)* v *Stafford Combined Court*[119] the petitioner, was a 14-year-old girl who was the main prosecution witness in the trial of defendant, who was accused and subsequently convicted of sexually abusing her. W's legal team sought access to her psychiatric records, as they considered it

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117 Id.
118 [2006] EWHC 1668 (Admin).
119 [2006] EWHC 1645 (Admn)

relevant to establish her credibility as a witness. At first instance, the judge had held that the interest in a fair trial was more important than the patient's interests in the confidentiality of her medical records, and ordered disclosure. After an intervention by the Official Solicitor, the Judge, who was anxious not to delay the trial, invited B to attend court. There were no arrangement or opportunity for her to be represented, and she agreed reluctantly to disclosure, because she could not face the prospect of the trial being delayed. May LJ sharply criticized Judge's conduct, and found that the Court had breached B's right under Article 8 as a public authority and held that legal procedure in the light of Article 8 requires in the present case that B should have been given notice of the application for the witness summons, and also an opportunity to make representations.[120] B was not given due notice or that opportunity, so the interference with her rights was not capable of being necessary within Article 8(2).[121] Hence, her rights were infringed and the court acted unlawfully in a way which was incompatible with her Convention rights.

In addition to Article 8(2)'s qualification of the right to privacy, Article 8 has to be put into the balance with Article 10[122], the right to freedom of expression, and section 12 of the Human Rights Act, which specifies that, 'the court must have particular regard to the importance of the Convention's right to freedom of expression'.[123] This right is of particular relevance to the media and their freedom to publish. In *A* v *B (a company)*[124] Woolf CJ stated that when courts are looking into any publication of confidential information made by the media, the concept of free press has to be acknowledged and so any interference with it has to be justified.[125]The first real signs of a reconciliation of Article 8 and the common law on confidence came in the 2001 case of *Douglas v Hello*[126] when the wedding photographs from the private wedding of Michael Douglas and Catherine Zeta Jones were taken by a freelance photographer and sold to the Hello magazine without the consent of the bride and groom, Sedley LJ said that the law no longer needs to

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120 Id.
121 Id.
122 Article 10 provides that everyone has the right to freedom of expression, including the right to receive and impart information.
123 Emily Jackson, *Medical Law, Text, Cases and Materials*, 2nd edn, Oxford University Press (2010), p.358.
124 [2002] 2 All ER 545,at p.552
125 Id.
126 [2001] 2 All ER 289.

construct an artificial relationship of confidence in order to protect a person's privacy .Consequently, the courts stated that 'if freedom of expression is to be impeded,…it must be on cogent grounds recognized by law'. [127] Similarly, in *Venables* v *News Group Newspapers Ltd*[128] Butler-Sloss P[129] stated that:

> In the light of s.12 of the 1998 Act and Art 10(1) of the Convention, which together give an enhanced importance to freedom of expression and consequently to the right of the press to publish…. There is no doubt, therefore, that Parliament has placed great emphasis upon the importance of Art.10 and the protection of freedom of expression, inter alia for the press and for the media.

Therefore, the judge held that it is necessary to place the right of confidence above the right of the media to publish freely, information about the accused and gave lifelong injunction to protect the identities of both. The need to balance the interests protected by Articles 8 and 10 in the context of patient information arose in *Campbell* v *MGN Ltd*[130]. The House of Lords had to determine whether the press's freedom to publish information about the model Naomi Campbell's treatment for drug addiction should take priority over her right to privacy. An important issue on which the court gave emphasis in this case was whether there was a public interest, including freedom of the press which justified the infringement. The court decided that the taking of photographs and publication of the story was in breach of confidence. Baroness Hale[131], while recognizing that, 'information about a person's health and treatment for ill-health is both private and confidential and it stems not

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127 Id, at p.324. Section 12(4) states that 'the court must have particular regard to the importance of the Convention right to freedom of expression'.

128 [2001] 1 All ER 908. Jon Venables and Robert Thompson were convicted of murder when they were minors. When the claimants reached the age of majority the court granted them parole. Their case had attracted wide media and public attention and the court' s grant of injunction not to disclose the identities of murders were remained only till they were minors. Both of them feared for their privacy as the press was continuously keeping great interest in the developments of this particular case. So they sought injunction from the court that their identities should not be disclosed to the media. The main issue before the court was that the whether there is jurisdiction to grant an injunction in respect of an adult to protect his identity and also the applicability of the convention as this is a private proceedings and court is a public authority.

129 Id. p.919.

130 [2004] All ER 995. Ms Campbell accepted that the newspaper had been entitled, in the public interest, to disclose the information that she was a drug addict and that she was receiving treatment for her addiction, because she had previously falsely and publicly stated that she was not a drug addict. But she claimed that the details of her attendance at Narcotics Anonymous, and accompanying photographs, amounted to a breach of her privacy and claimed damages for breach of confidence and compensation under the Data Protection Act 1998.

131 Id ,para 145.

only from the confidentiality of the doctor-patient relationship but from the nature of the information itself'; strongly went ahead with the statement that:

> not every statement about a person's health will carry the badge of confidentiality or risk doing harm to that person's physical or moral integrity. The privacy interest in the fact that a public figure has a cold or a broken leg is unlikely to be strong enough to justify restricting the press's freedom to report it. What harm could it possibly do? Sometimes there will be other justifications for publishing, especially where the information is relevant to the capacity of a public figure to do the job. But that is not this case there was, as the judge found, a risk that publication would do harm. The risk of harm is what matters at this stage, rather than the proof that actual harm has occurred. People trying to recover from drug addiction need considerable dedication and commitment, along with constant reinforcement from those around them. That is why organizations like NA were set up and why they can do so much good. Blundering in when matters are acknowledged to be at a 'fragile' stage may do great harm.[132]

Hence, there is a balancing exercise between the right to respect for private life under the ECHR, Article 8 and the right to freedom of expression under Article 10. The *Campbell* case also involved careful consideration of the Data Protection Act, 1998 with the Court of Appeal giving its first judgment on the statute. The Court of Appeal in this case took the view that the formulation of a law protecting personal privacy has run in parallel with the development of the law of data protection and it is to be expected that the two areas will draw closer together.[133] In *H* v *Associated Newspapers*[134], a newspaper applied successfully for relaxation of an injunction preventing it from publishing any information about a healthcare worker with HIV/AIDS. In spite of opposition from the health authority to the publication of any details, the injunction was amended to allow publication of limited information including the claimant's area of specialization, and to allow the newspaper to solicit information, but not to publish details likely to identify either the healthcare worker or his patients. Lord Phillips[135] while rejecting the contention of health authority held that

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132 Id. para 157.
133 [2004] 2 All ER 991,1038.
134 [2002] EWCA Civ 195.
135 Id. para 41.

> ... that the Court had jurisdiction to grant an injunction to prevent an interference with one of the fundamental human rights, where no breach of a duty owed under our private law was made out. We would view with concern any attempt to invoke the power of the Court to grant an injunction restraining freedom of expression merely on the ground that release of the information would give rise to administrative problems and a drain on resources. Such consequences are the price which has to be paid, from time to time, for freedom of expression in a democratic society.

The court in the above case made its finding on the basis of strong and genuine public interest grounds. Munby J, stated in *A HA* v *X*[136], disclosure of confidential information should be subject to strict express conditions and it must be comparable to the safeguards accepted by the European Court of Human Rights in *Z* v *Finland*[137] and *MS* v *Sweden*[138]. The safeguards required for protection of confidentiality of patients will no doubt depend upon particular circumstances. The court's approach in *Z* v *Finland*[139] and *MS* v *Sweden*[140] suggests, however, that typically the requirement for maintaining confidentiality is that the maintenance of the confidentiality of the documents themselves i.e., the documents should not be read into the public record or otherwise put into the public domain; the minimum public disclosure of any information derived from the documents; and the protection of the patient's anonymity, if not in perpetuity then at any rate for a very long time indeed.[141] In conclusion, I agree with Andrew Grubb[142] when he says that Article 10 ECHR considerations will weigh heavily in the balance against Article 8 privacy considerations. Further, the above discussions of case-laws demonstrate, clearly that the balance is being struck on a case-by-case basis and freedom of expression is not always the trump card. This is made clear in the words of Dame Butler Sloss[143]:

> the common law continues to evolve, as it has done for centuries, and it is being given considerable impetus to do so by the implementation of the convention into our domestic law.

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136 [2001] 61 BMLR 22.
137 (1997) 25 EHRR 371.
138 (1997) 45 BMLR 133.
139 (1997) 25 EHRR 371.
140 (1997) 45 BMLR 133.
141 Id. p.39.
142 Andrew Grubb, *Principles of Medical Law*, 2nd edition, Oxford University Press, New York (2004), p.606.
143 *Venables* v *News Group Newspapers Ltd* [212] 1 All ER 908, p.932.

The right to privacy which lies at the heart of an action for breach of confidence has to be balanced against the right of the media to impart information to the public. And the right of the media to impart information to the public has to be balanced in its turn against the respect that must be given to private life. While talking about the balancing exercise between right to privacy of an individual and the right of the media to impart information to the public I agree with B.P. Jeevan Reddy, J judgement in *R.Raj Gopal* v *State of T.N*[144] delivered by the Indian Supreme Court. The Court held that 'it is the right to be let alone and a citizen has the right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. No one can publish anything concerning the above matters without his consent whether truthful or otherwise and whether laudatory or critical. Exception may be made if a person voluntarily thrusts himself into a controversy or any of these matters becomes public part of public records or relates to an action of public officials concerning the discharge of his official duty'.[145]

Emily Jackson[146] argues 'medical information will be the sort of information which is treated as confidential, and the doctor-patient relationship is plainly one in which duty of confidence exists'. In *Attorney General* v *Guardian Newspapers Ltd and others (2)*[147], Lord Goff stated a duty of confidence arises when someone knows, or ought to know, that the information he or she has acquired is confidential. Also, it is both the nature of the information and the circumstances in which it was disclosed that create the duty of confidentiality[148] and one must remember that the only legal justification at common law for disclosure of confidential information is that either the patient has consented, or that it is in the public interest to disclose.[149] Interestingly, the factors that give rise to a duty of confidentiality are thus both vague and somewhat question-begging. All these principles would apply in a

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144 1994 SCC (6) 632.

145 Id.

146 Emily Jackson, *Medical Law, Text, Cases and Materials,* 2nd edn, Oxford University Press, (2010), p.354.

147 *Attorney General* v *Guardian Newspapers Ltd and others* (2) [1988] 3 ALL ER 545, pp. 660-61, per Lord Goff.

148 Emily Jackson, *Medical Law, Text, Cases and Materials*, 2nd edn, Oxford University Press, (2010), p.354. see also, *A-G* v *Guardian Newspapers* [1990] 1 AC 109, 281.

149 *AG* v *Guardian Newspapers* (No 2) [1990] AC 109, 282, per Lord Goff.

medical context and prove to be useful for sustaining the relationship, where the duty of discretion has been endorsed judicially by the courts effectively.

6.4. MEDICAL CONFIDENTIALITY AND THE LAW

Do doctors have an absolute duty to keep confidential everything that is imparted to them by their patients? Such secrecy certainly seems to be demanded by the Hippocratic Oath. The qualification, however, in the Hippocratic Oath[150] is: 'whatever ... I see or hear which ought not to be spoken of abroad, I will not divulge ...' which implies that some form of disclosure is permissible. The same implication may be read into the Declaration of Geneva where a doctor undertakes to '... respect the secrets which are confided in me even after a patient has died'.[151] The word 'respect' used in the declaration again shows that there is no strict duty to maintain confidential relationship between a physician and patient. Hence, it can be said that duty to maintain a confidential relationship between a physician and a patient is not mandatory and at times a doctor might be justified in disclosing certain information to the public.

British Medical Association in 1920 through a resolution urged its members to fight to keep confidential what they learnt in their consulting rooms.[152] Doctors opposed to this view immediately made their voices heard. According to them, contagious and venereal diseases had to be reported in the interests of the general public. It should be presumed by the patients that any disease which comes under the list of contagious would be reported and a doctor cannot be made liable for the same. In other words the patient, in coming to a doctor, impliedly gives his or her consent to such disclosure. From the late nineteenth century State started to have a particular interest in the public health and directed doctors to notify the local authorities about cases of infectious diseases.[153] As venereal disease was widespread during this period and combating it was the immediate need of the State, it went on to advertise that all

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150 See, Hippocratic Oath, viewed 18th June 2013, http://weill.cornell.edu/deans/pdf/hippocratic_oath.pdf.

151 Declaration of Geneva adopted by the General Assembly of World Medical Association at Geneva Switzerland, September 1948, viewed 17th Jan 2013, http://www.mma.org.my/Portals/0/Declaration%20of%20Geneva.pdf.

152 Angus McLaren, "Privileged Communications: Medical Confidentiality in Late Victorian Britain", 37 *Medical History*129 (1993).

153 It must be mentioned here that the first half of 19th century was witnessing world wars so Britain not only needed its citizens to be capable enough to contribute to its economic growth but it was forced to have a strengthened armed force to fight with its enemies.

the information will be kept confidential.[154] Societal changes also required doctors to give testimony in courts as there was a sharp rise in divorce cases.[155] This led the public to believe that the State had started to have its control over the private affairs of an individual thereby affecting their right to privacy. As Robert George Hogarth[156] in his presidential address to the BMA rightly pointed out that 'the State is beginning to assert its regulative powers in departments of social and even family life from which hitherto it has held aloof, and its justification will always be that the interests of public health override the personal interest of the individual'.

In *Hunter* v *Mann*[157] Boreham J considered the question of whether a doctor owed an obligation of confidence to his patients and concluded that:

> In common with other professional men,… the doctor is under a duty not to disclose voluntarily, without the consent of his patient, information which he, the doctor, has gained in his professional capacity.

The celebrated case of *Kitson* v *Playfair*[158] demonstrates that it was not left alone to medicine to police its duties, but was dictated to by its old rival, the legal profession. It must be specifically mentioned here that the case does not live up to its reputation of having been particularly significant in refining the medico-legal definition of privileged communication.[159] Justice Hawkins stated that doctors might have their own rules regarding confidentiality, but they could not impose them on others; in the end the courts would decide.[160] Justice Hawkins, however, refused to instruct the jury on whether or not a doctor who gratuitously revealed a patient's secret was making an illegitimate breach of confidence.[161] Hence, the issue of privileged communication was left unsettled.[162] The legal discussion of medical privilege began in Britain in 1776 when a surgeon initially refused to testify regarding the

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154 R Phillips, *Putting Asunder. A History of Divorce in Western Society*, Cambridge University Press, SA (1988), 516-17.

155 Id.

156 Robert George Hogarth's, "Presidential address to the BMA", as cited in the 2 *BMJ* 146 (1926).

157 [1974] QB 767,772.

158 *Kitson* v *Playfair* (1896) in A McLaren, "Privileged Communications: Medical confidentiality in late Victorian Britain", 37 *Med Hist.* 129 (1993), p.130.

159 The fact that he was a doctor was legally not essential to the plaintiff's case and he was sued not for breaking confidence, but for libel and slander.

160 Angus McLaren, "Privileged Communications: Medical Confidentiality in Late Victorian Britain", 37 *Medical History* 129 (1993), p.138.

161 Id.

162 Id.

Duchess of Kingston's bigamy. In *Duchess of Kingston's Trial* a doctor was called as a witness and was asked whether he knew, from information obtained from either of the two parties, that they were married. The doctor objected to answering any questions which would have breached the confidential relationship between himself and his patients.[163] Lord Mansfield eventually forced the physician to give evidence, ruling that doctors could be compelled in court to divulge their patients' confidences.[164] According to him, 'words exchanged in doctors' consulting rooms were not specifically privileged; even confidences imparted to priests were only privileged by tradition'.[165] The *Duchess of Kingston's Trial*[166] in 1776 was the first reported English case recognizing that no such privilege existed at common law. The common law, therefore, does not recognize an evidentiary privilege relating to confidential communications between medical doctors and their patients. These two early judicial decisions points to the fact that it is law, not medicine, which determined the boundaries of confidentiality. In North America the State of New York in 1828, as part of a public health campaign, launched the first departure from the common law rule by instituting a statute protecting the privilege of medical communications. [167] At the turn of the century the discussion of privileged communication took place within the context of rising public preoccupation with venereal disease, declining fertility, and changing sex roles.

Courts do not generally encourage a breach of professional confidence and have actually expressed disapproval at doctors volunteering medical

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163 Lord Mansfield stated:
> If all your Lordships will acquiesce, [the doctor] will understand that it is your judgment and opinion, that a surgeon has no privilege, where it is a material question, in a civil or criminal cause, to know whether parties were married, or whether a child was born, to say that his introduction to the parties was in the course of his profession, and in that way he came to the knowledge of it...If a surgeon was voluntarily to reveal these secrets, to be sure, he would be guilty of a breach of honour, and of great indiscretion; but to give that information to a court of justice, which by the law of the land he is bound to do, will never be imputed to him as any discretion whatever.

164 R. Vasher Rodgers Jr., *The Law and Medical men*, Carswell, Toronto (1884), p. 93.

165 Angus McLaren, "Privileged Communications: Medical Confidentiality in Late Victorian Britain", 37 *Medical History* 129 (1993), p.138.

166 *Duchess of Kingston's Trial* (1776) 20 How St Tr 573.

167 New York Times, 6 April 1896, p. 4, quoted in Angus McLaren, "Privileged Communications: Medical Confidentiality in Late Victorian Britain", 37 *Medical History* 129 (1993), p.138. The New York Privilege Statute of 1828 provided that: 'no person authorized to practise physic or surgery shall be allowed to disclose any information which he may have acquired in attending a patient in a professional character and which information was necessary for him to prescribe for such a patient as a physician or to do any act for him as a surgeon'. By the end of the century, sixteen other states in U.S. followed suit.

evidence which is of a confidential nature. In *Hunter* v *Mann*[168], Lord Widgery C J[169] stated:

> If a doctor giving evidence in court is asked a question which he finds embarrassing because it involves him talking about things which he would normally regard as confidential, he can seek the protection of the judge and ask the judge if it is necessary for him to answer. The judge, by virtue of the overriding discretion to control his court which all English judges have, can, if he thinks fit, tell the doctor that he need not answer the question. Whether or not the judge would take that line, of course, depends largely on the importance of the potential answer to the issues being tried.

Thus, if a health professional is called to court in a case as a witness and is asked about confidential information then he or she may be permitted to decline to answer the question on the basis that it would involve breaking confidence. If doctor's evidence is relevant to the issues before the court, the doctor will be compelled to give the evidence and it would be a contempt of court by the professional not to provide the information.[170] Although doctors are under a general ethical obligation not to reveal confidential medical information they are not obliged by their code of ethics to maintain such confidences in the face of a court order to the contrary. However, in Tasmania[171], Victoria[172] and the Northern

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168 Id.

169 [1974] 1 QB 767,775. For further example, see *R* v *St Lawrence's Hospital Statutory Visitors, ex parte Pritchard* [1953] 1 WLR 1158, 1165-1166.

170 The Law Reform Commission of Western Australia, Professional Privilege for Confidential Communications, Project No. 90, Discussion Paper (1991), para 5.4, viewed 4th Dec 2013, http://www.lrc.justice.wa.gov.au/_files/P90-DP.pdf.

171 s.96 **Communications to clergymen and medical men.**
(2) No physician or surgeon shall, without the consent of his patient, divulge in any civil proceeding (unless the sanity of the patient he the matter in dispute) any communication made to him in his professional character by such patient, and necessary to enable him to prescribe or act for such patient. (3) Nothing in this section shall protect any communication made for any criminal purpose, or prejudice the right to give in evidence any statement or representation at any time made to or by a physician or surgeon or about the effecting by any person of an insurance on the life of himself or any other person.

172 s.28 **Confessions to doctors**
(2) No physician or surgeon shall without the consent of his patient divulge in any civil suit action or proceeding or an investigation by a Complaints Investigator under the Accident Compensation Act 1985 any information which he has acquired in attending the patient and which was necessary to enable him to prescribe or act for the patient
(3) Where a patient has died, no physician or surgeon shall without the consent of the legal personal representative or spouse of the deceased patient or a child of the deceased patient divulge in any civil suit action or proceeding any information which the physician or surgeon has acquired in attending the patient and which was necessary to enable the physician or surgeon to prescribe or act for the patient.

Territory[173] such a privilege has been created by statute. Although a doctor's ethical duty to maintain confidentiality is considered extremely important within the medical profession, medical ethics permit doctors to breach confidences in a number of situations in addition to where a doctor, as a witness, is required during judicial proceedings to breach a confidence. Doctors might also be able to breach confidence without fear of falling foul of their ethical responsibilities in the following circumstances: consent (express or implied); statutory reporting; and public interest. In *AB* v *Glasgow and West of Scotland Blood Transfusion Service*[174] a Scottish court refused to require a doctor to name a donor who had supplied infected blood as part of a blood donation. The concern about the impact of discouraging blood donation was held to outweigh the importance of the information for the case.

When a doctor receives information from the patient in the course of a professional relationship he is supposed to maintain confidentiality. Information which is directly communicated by the patient, and information to which the doctor is privy by reason of his position, for example diagnostic test results, would be regarded as confidential.[175] Similarly, information which is communicated to the doctor by a third party who is aware of the doctor's professional relationship with the patient might be subject to an obligation of confidence.[176] But, what if doctors are given information when they are not acting in their professional capacity? It is generally thought that if a doctor is given private information as a doctor it must be kept confidential.[177] The difficulty however, is in determining whether or not the information has the necessary quality of confidence. Suppose if a person at a party takes a doctor aside and asks for some medical advice then what the person says to physician should be kept confidential. But if the doctor is given information, not as a

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173 s.12 **Medical privilege**
(2) A medical practitioner shall not, without the consent of his or her patient, divulge in any civil proceeding (unless the sanity of the patient is the matter in dispute) any communication made to him or her in his or her professional character by the patient, and necessary to enable him or her to prescribe or act for the patient.
(3) Nothing in this section shall protect any communication made for any criminal purpose, or prejudice the right to give in evidence any statement or representation at any time made to or by a medical practitioner in or about the effecting by any person of an insurance on the life of himself or herself or any other person.

174 (1989) 15 BMLR 91.

175 Andrew Grubb, *Principles of Medical Law*, 2nd edn., Oxford University Press, New York (2004), p. 558.

176 Id.

177 Kennedy I, Grubb A., *Medical Law*, Butterworths, London (2000), p.1062.

doctor, but as a piece of gossip between friends, for example, he or she is told a neighbour is having an affair this will not necessarily attract confidentiality, but may do so if it is the kind of information which a reasonable person would expect to be kept confidential.[178] Some commentators argue that if the neighbour, or the person telling the doctor, was a patient of his or hers that would change the issue and the information would then become confidential.[179] According to Andrew Grubb[180] 'any information about a patient which the doctor receives should be subject to an obligation of confidence in order to maintain the essential relationship of trust upon which the effective provision of medical treatment depends'.

The health care practitioner's duty of confidence extends not only to information acquired directly from the patient, but also to information acquired from other persons in the practitioner's capacity as a health care provider.[181] Doctor's duty of care to his patient includes a duty not to give to a third party a certificate as to his patient's condition, if he can reasonably foresee that the certificate might come to the patient's knowledge, and if he can reasonably foresee that it was likely to cause his patient physical harm.[182]

6.4.1. Information in Public Domain

Confidentiality is lost if the information becomes public. Suppose, a patient has revealed his or her medical condition to the press, there can be no complaint if the doctor subsequently reveals that same information.[183] In *A-G* v *Guardian Newspapers Ltd (No 2)*[184] an issue for the court to decide was whether information which has been made widely available had the necessary quality of confidence such that the confidant still had an obligation to maintain confidentiality. The court held that the principle of confidentiality only applies to information to the extent that it is

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178 Id.

179 Id.

180 Andrew Grubb, *Principles of Medical Law*, 2nd edn., Oxford University Press, New York (2004), p. 558

181 J.A.Devereux, *Australian Medical Law*, 3rd edn., Cavendish Publishing (2007), p. 949.

182 *Furness* v *Fitchett* [1958] NZLR 396. per Barraclough CJ.

183 *Douglas* v *Hello!* [2001] 1 WLR 992.

184 (1988) 3 All ER 545. An example of a utilitarian approach may be found in this case when Lord Goff said that 'although there is a public interest in preserving confidences which should be preserved and protected by the law, nevertheless, that public interest may be outweighed by some other countervailing public interest which favours disclosure'.

confidential.[185] Also, the information which has already been communicated to the world cannot be subjected to a right of confidentiality.[186] That means once the information has entered into the public domain, which is generally accessible, the principle of confidentiality can have no application to it. In certain circumstances a court might also recognize a continuing obligation of confidence in respect of information in the public domain where it would be unconscionable to allow the party to make use of information in the circumstances.[187]Moreover, it will always be a question of degree whether the information is sufficiently broadly disseminated that it can be said to have lost its confidential character.[188]However, one must note that the protection is available if the information has been passed only to a part of the public.[189] In *R* v *Department of Health, ex parte Source Informatics Ltd*[190] the Court of Appeal rejected the argument that a patient owns his or her medical information and can therefore bring a property claim if the information is revealed to others. Also, one must remember that confidence will only be breached if an unauthorized person sees it, therefore, the law does not stress that the information has to be made public for confidentiality to be breached.[191]

6.4.2. Confidentiality and the Family

Situations often arise where a doctor must decide whether disclosure of information to the patient's family members is acceptable? It is here that the interface between law and pragmatism reflects many of the essential difficulties of medical law. What is a doctor to do, say, when faced with a distressed spouse of a terminally ill patient? If the patient has informed the doctor that he does not wish any form of disclosure to the spouse, then although any subsequent conversations with that spouse may be difficult, it is quite clear that the doctor must refuse to discuss his patient's medical condition. However, in the absence of an express request on the part of the patient, under what principle does the doctor justify

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185 Id.

186 Id.

187 Andrew Grubb, *Principles of Medical Law*, 2nd edn., Oxford University Press, New York (2004), p.559.

188 Id.

189 Laing, Judith, and Grubb, Andrew "Confidentiality and Medical Records" in Andrew Grubb (eds) *Principles of Medical Law*, Oxford University Press (2004), pp.558-559.

190 [2000] 1 All ER 786. As part of knowing the prescribing habits of general practitioners, S Ltd asked pharmacists to provide certain information concerning the names of general practitioners and the quantity of drugs that they prescribe, but not the name of patients.

191 Id, p.260.

discussing the patient's medical condition with relatives of the patient? In the case of *Re S*[192], it was held that blood ties conferred no right to determine the course of treatment or care, and this would surely extend to the acquisition of confidential information. It seems that the law does not sanction such disclosure, unless one can argue that there is some form of implied or tacit consent. Conditions may, however, be different if secrecy creates real danger for other members of the family. For example, what if one spouse or partner is suffering from a sexually transmissible disease which he or she is unwilling to disclose to other? Clearly, the first step is a frank discussion with the affected person, which might include seeking consent to disclosure. Should this turn out unsatisfactorily, however, and should there remain a serious and identifiable risk to a specific person, the medical council and courts would certainly support the practitioner who took steps to ensure that the individual was informed of the risk. This would apply whether or not the individual at risk was also the doctor's patient.[193] In another instance, where a wife who seeks termination of pregnancy without her husband's knowledge, there can be little doubt that the doctor is firmly bound by his duty of confidentiality to his or her patient. Both legally and ethically, pregnancy is regarded as being such an intimate matter for the pregnant woman that her husband or partner has no intrinsic right to interfere in its management, despite the fact that he has an equal genetic relationship to the child within the uterus.[194] A conscientious practitioner, however, may feel that a wife seeking sterilization on the same terms should not be allowed to make a decision unilaterally. The doctor's first responsibility in such situations may well be to attempt to convince his or her patient that this should be a joint decision. According to McLean and Mason[195], 'if a doctor fails in his attempt the answer does not lie in

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192 *Re S (Hospital Orders: Court's Jurisdiction)* [1995] 3 All ER 290. S, a Norwegian citizen suffered serious stroke while in England where he was staying with one Miss. A. Miss A was entrusted with the care of S. But his wife and son wanted him to be back in Norway for further treatment. However, Miss A, the care taker of S sought a declaration that S's wife and son should not be allowed to remove him to Norwary.

193 McLean, SAM, Mason, JK, *Legal and Ethical Aspects of Healthcare*, Greenwich Medical Media Limited (2003), p.37.

194 *Paton* v *British Pregnancy Advisory Service Trustees* [1979] 1 QB 276. The plaintiff, William Paton applied for an injunction to restrain the British Pregnancy Advisory Service and his estranged wife from causing or permitting an abortion to be carried out on his wife. The Court held that a husband, who had applied for an injunction to stop his estranged wife and a service provider, from having an abortion and providing abortion services respectively, could not by law stop his wife from having a lawful abortion, or the service provider from providing such services.

195 McLean, SAM, Mason, JK, *Legal and Ethical Aspects of Healthcare*, Greenwich Medical Media Limited (2003), p.37.

breach of confidentiality which, in the absence of danger, could seldom, if ever be justified'.

6.4.3. Confidentiality and Children

The child's right to confidentiality is but one aspect of the wider problem of his or her right to consent to medical treatment as a whole.[196] Both consent and confidentiality in respect of children are dealt by House of Lords in *Gillick* v *West Norfolk and Wisbech Area Health Authority*[197]. It was clearly established in this case that children who have reached an age of sufficient maturity will in certain circumstances have the right to keep information about their medical treatment from their parents. In addition to being assured of the child's full understanding, the doctor must make every effort to persuade him or her to inform his or her parents of what was happening, or to allow him or her to do so, before undertaking his or her medical management in the face of his or her parents' ignorance. The general principles enunciated in *Gillick* were revisited in *R (on the application of Axon)* v *Secretary of State for Health*.[198] In 2004, the Department of Health issued guidance to health care professionals on giving advice and treatment to people under the age of sixteen on sexual matters, including contraception, sexually transmitted diseases and abortion. The guidance provided that in cases where the young person was able to understand the advice and its implications but could not be persuaded to notify his or her parents or let the medical professional notify them, then such advice would remain confidential as long as the young person's physical or mental health would not be likely to suffer and the provision of the advice or treatment was in his or her best interests. The guidance also recommended that doctors follow the criteria set out by Lord Fraser in *Gillick*. The applicant parent in this case sought judicial review on the basis that the guidance was unlawful because children under the age of 16 were not owed the same duty of confidentiality as those over 16, and that there was a breach of Art 8 of the European Convention that protects private life. Silber J held that there could not be any exception to the duty of confidence owed to a young person as suggested by the applicant.[199] It was important to recognize that, on the

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196 This is discussed in the previous chapter in detail.
197 [1985] 1 All ER 533.
198 [2006] EWHC 37.
199 Id.

whole, a parent was the best person for guiding and advising a young person under the age of 16, that parents had a duty to protect their children, and that secrecy was destructive of family life, but it was also the case that those factors do not override the duty of confidentiality owed. In consequence there was no infringement of the Art. 8(1) rights of a young person's parents, and even if there was, such interference could be justified under Art. 8(2)[200]. In support of his judgment Silber J[201] argued:

> This application raises a tension between two important principles of which the first is that a competent young person under sixteen years of age (who is able to understand all aspects of any advice, including its consequences) is an autonomous person, who first should be allowed to make decisions about his or her own health and second is entitled to confidentiality about such decisions even vis-a-vis his or her parents. The second principle is that a parent of a young person has a responsibility for that young person's health and moral welfare with the consequence that he or she should be informed if a medical professional is considering providing advice and treatment on sexual matters to that young person so that the parent could then advise and assist the young person. There is also a significant public policy dimension because there is evidence that without the guarantee of confidentiality, some of these young people might not seek advice or treatment from medical professionals on sexual matters with potentially disturbing consequences…
>
> The very basis and nature of the information which a doctor or a medical professional receives relating to the sexual and reproductive health of any patient of whatever age deserves the highest degree of confidentiality and this factor undermines the existence of a limitation on the duty of disclosure…

In case of very young child a fully informed parent must be allowed to be proxy to consent to treatment. Also, the principle of beneficence requires that necessary or beneficial medical treatment is provided to minors who are unable to authorize it themselves. Nevertheless, when the minor is mature, and has acquired mental competency to consent, an informed parent may represent a threat.[202]

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200 Article 8(2) states: There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

201 Id.

202 Elizabeth Wicks, *Human Rights and Healthcare*, Hart Publishing, Oregon (2007), p.132.

6.4.4. Incompetent Adults

It is always in the patient's best interests to respect his or her confidences, unless one or more of the circumstances exist in which confidence can be breached lawfully in respect of a capable adult patient. In case of incompetent patients doctors must consult with people who are involved in their care about their wishes and relevant values and beliefs.[203]

6.4.5. Deceased Patients

The Hippocratic Oath binds a doctor to keep medical confidences even after death, but it is not clear whether there is any legal obligation to keep confidences after the death of the person to whom the duty is owed.[204] The common law is not clear as to the existence of doctor-patient relationship of confidence even after the death of a patient. However, ethically, it seems clear that if harm can be caused to relatives by any disclosure then such disclosure should be prohibited, subject to their being no countervailing ethical factor.[205]English law is short of authority on the protection of information about the dead. In *Bluck* v *Information Commissioner and Epsom & St Helier University NHS Trust*[206] the mother of a woman who died of negligent treatment sought deceased woman's medical records from a hospital under the Freedom of Information Act. The hospital refused to disclose without consent from the widower, as the dead woman's next of kin. The Information Tribunal held that the hospital owed a continuing duty of confidence to the dead woman which was actionable by her next of kin after her death. In *Lewis* v *Secretary of State for Health*[207], Jessica Berg explains the importance of maintaining confidentiality in the following words:

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203 See, chapter 5 for detailed discussion.

204 Marc Stauch, Kay Wheat, John Tingle, *Sourcebook on Medical Law*, 2nd edn., Cavendish Publishing Limited, London (2002), p.231.

205 Id.

206 (2007) 98 BMLR 1.

207 [2008] EWHC 2196 (QB). An inquiry was done to find out whether there was a removal of tissue for analysis from individuals who had worked in the nuclear industry and died between 1962 and 1991. To assist the inquiry, the medical practitioner and custodian of the relevant medical records, Dr Lewis, was asked to disclose documents concerning the deceased workers. Mr. Lewis was willing to agree to the request but was concerned that doing so would breach his own duty of confidentiality and that of the doctors consulted while the persons were still alive. He therefore sought the direction from the court as to disclosure. Foskett J authorized disclosure of the material sought by the inquiry on the basis of wide public interest.

> Blood relatives of the deceased have an interest in controlling information that has implications for their own health and thus identity. Although the interests of blood relatives in maintaining confidentiality may not supersede the individual's right to control his or her medical information during life, they may well be given greater weight or at least be less likely to be outweighed after that person has died. Second, there are more nebulous interests of third parties in preventing the disclosure of confidential information. The dead live on in the memories of the living. Harms to the memory of the deceased may entail very real harms to people now living who have an interest in preserving the original memory, such as relatives or close friends of the deceased.

6.5. DUTY OF HOSPITALS

It is usually assumed that the duty of confidentiality is owed to the patient, rather than to the hospital treating the patient. However, the hospitals too might have an important interest in ensuring the confidentiality of its patient's records. Critics feel that modern administrative technology requires every possibility of patients' records being circulated among non-medical professionals who too are employed in the hospital along with the medical professionals. As a result, it has been suggested by JK Mason *et al*[208] that institutions should take over custodianship of confidences and thus impose an overall standard of duty on all who work in, for example, the hospital.[209] Arguably, this standard has now been met both at common law[210] and through statutes.[211]

In certain instances, the patient himself will be interested in making public his medical records. This was the case in *Ashworth Hospital Authority v Mirror Group Newspapers* (MGN) Ltd[212], the Mirror newspaper had published information

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208 JK Mason, RA McCall Smith, GT Laurie, *Law and Medical Ethics*, 6th edition, Lexis Nexis, Butterworths, UK (2002), p.240.

209 Id.

210 For example, *A-G* v *Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 imposes a duty on all those to protect confidentiality who receives confidential information in circumstances which objectively and reasonably import a duty of confidence. Communications in a hospital must surely be a paradigm example of this. See also, *Lee* v *South West Thames RHA* [1985] 2 All ER 385. In this case an infant suffered brain damage due to treatment in a hospital. Disclosure of reports for obtaining legal advice was refused on grounds that it is covered under legal professional privilege. However, in *Re HIV Haemophiliac Litigation* (1990) 140 NLJ 1349 the Court of Appeal held that hospital reports prepared as part of normal administrative routine would not be covered under the requirement of protection of confidentiality and, therefore, it is subject to disclosure.

211 For e.g., The Data Protection Act, 1998, UK.

212 [2001] 1 All ER 991.

on the medical treatment of Ian Brady, popularly known as Moors murderers. Ian Brady himself was keen to publicize what he perceived to be his ill treatment, and had himself attempted to put information about his treatment into the public domain through media campaign. On appeal, the House of Lords decided that the security of medical records was of such overriding importance that it was essential that the person who had disclosed them to the newspaper was identified and punished, even if the patient himself did not object to the disclosure. The argument that information obtained was too trivial to be protected by confidentiality was rejected; on the basis that confidentiality contained a subjective element. In other words, a person would be entitled to regard a piece of medical information about them as sensitive, even if most people would not regard it as particularly private. Of course if the information revealed is not particularly damaging, there is unlikely to be a legal remedy of any significance, even if technically there is a breach of confidence. The professional guidance is not in agreement with this observation. [213] For example, the GMC guidelines state that 'patients have right to expect that information about them will be held in confidence by their doctors'.[214]

6.6. EXCEPTIONS

It is clear that a doctor owes a duty of confidentiality to his patients and that a breach of that duty will be an interference with the patient's right to respect for private life, competing societal interests will often justify both the breach of duty and the interference with a patient's rights. The legal duty to respect confidentiality is not absolute and is subject to modification. An analysis of the cases which have shaped and delimited the law in this area shows that importance is laid on the public interest; the individual's private interest is given comparatively little prominence. For instance, in *Roe* v *Wade*[215], the U. S. Supreme Court acknowledged that the doctor-patient relationship is one which evokes constitutional right of privacy. But the right is not absolute and must be weighed against the State or federal interest at stake. Similarly, in *Whalen* v *Roe*[216] , a group of physicians joined patients in a lawsuit challenging the constitutionality of a New York statute that required

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213 Jonathan Herring, *Medical Law and Ethics*, 3rd edn, Oxford University Press (2010), p.227.
214 GMC Guidelines, 2009, viewed 8th Dec 2013, http://www.gmc-uk.org/guidance/ethical_guidance/confidentiality.asp.
215 410 U. S. 113 (1973).
216 429 U.S. 589 (1977).

physicians to report to state authorities the identities of patients receiving Schedule II drugs. The physicians alleged that such information was protected by the doctor-patient confidentiality, while the patients alleged that such disclosure was an invasion of their constitutional right to privacy. The Supreme Court did not disagree with the lower court's finding that the intimate nature of a patient's concern about his bodily ills and the medication he takes is protected by the constitutional right to privacy. However, the high court concluded after balancing the state's interests that requiring such disclosures to representatives of the State having responsibility for the health of the community, does not automatically amount to an impermissible invasion of privacy.

6.6.1. Disclosure with Consent

Disclosure of confidential information with the confider's consent will not amount to a breach of confidence as there is no unauthorized disclosure. If the patient explicitly consents to the disclosure of information, then plainly the doctor is no longer under a duty of non-disclosure.[217] In *C* v *C*[218], both parties to divorce proceedings had requested the respondent's doctor to disclose information about his venereal disease, and it was held that disclosure in such circumstances could not amount to a breach of confidence. Difficulty arises in the case of implied consent to disclosure. The British Medical Association's Confidentiality Toolkit[219] suggests that in the absence of evidence to the contrary, patients are normally considered to have given implied consent for the use of their information by health professionals. It is essential that health professionals share only what is necessary and relevant for patient care on a 'need to know basis'.

Medicine is now practiced as a team effort and medical records are routinely shared within healthcare team. Confidential information, therefore, is likely to be available not just to doctors but also to nurses, administrators, social workers and many others. It would be absurd to suggest that the physician should obtain specific consent every time he wanted to discuss a case with his team. According to McLean

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217 Emily Jackson, *Medical Law, Text, Cases and Materials*, 2nd edn., Oxford University Press (2010), p.371.

218 [1946] 1 All ER 562.

219 Confidentiality and Disclosure of Health Information Tool Kit, BMA (2008), viewed 24th December 2013, www.bma.org.uk.

and Mason[220] 'the patient will probably understand this intuitively and his or her understanding will be based on trust that the principal person has instructed his or her staff on 'hospital' or 'practice' professional ethics'. This trust is backed up by the fact that the medical and nursing staff, together with members of the professions allied to medicine is governed by professional councils who, at the end of the day retain disciplinary powers over their members.[221] In certain instances a doctor might seek an opinion from another doctor who might not be a member of his team or be associated with the hospital. In such cases it is doubtful if the doctor who mentions concern about a patient to a colleague is guilty of breach of confidence because it is a recognizable aspect of patient care.[222] However, such conversation should be conducted privately and only necessary information should be disclosed.[223] Recent developments in information technology mean that even more people will now be privy to confidential patient information. For example, the computerized patient records could be accessed by innumerable persons without the knowledge of the patient. Recently, there has been a plan by the UK government to create a centralized medical records system for the NHS which would allow health professionals and patient anywhere in the country to access confidential medical data.[224] An opt-out option too is available to patients but only in relation to the 'Summary Care Record', which includes all major illnesses, allergies and prescriptions for access in an emergency and not in relation to the detailed medical records to be stored on the system. In the absence of an opt-out, consent for the storage of personal data will merely be presumed. The details of the scheme are still being worked out and campaigns to counter the threat to medical confidentiality are gaining support. There is no doubt that the development of a centralized, computerized medical records system poses a huge threat to the privacy rights of all NHS patients and there is every possibility of information being passed or sold to so called technology and data markets.[225]In *Ashworth Hospital Authority* v

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220 McLean, SAM, Mason, JK, *Legal and Ethical Aspects of Healthcare*, Greenwich Medical Limited, London (2003), p. 34.

221 Id.

222 Id.

223 Id.

224 See J Carvel, 'Ministers to Put Patients' Details on Central Database Despite Objections', *The Guardian*, 2 November 2006.

225 Rebecca Smith, "All patients to be given online access to medical records", *The Telegraph*, 01 Dec 2011, viewed 24th December, 2013, http://www.telegraph.co.uk/health/healthnews/8926055/All-patients-to-be-given-online-access-to-medical-records.html.

Mirror Group Newspapers[226], the defendant newspaper disclosed details and extracts of medical files of Moors murderer Ian Brady after obtaining print out from Ashworth's computer database (PACIS). There is a presumption that patient has given his or her implied consent to circulation of information within a healthcare team. It is vital, therefore, that the GMC's advice on this issue is followed. The guidelines clearly state that patients are made aware that personal information about them will be shared within the healthcare team unless they object and that any such objection will be respected.[227] Similarly, UK's Department of Health[228] states:

> Patients generally have the right to object to the use and disclosure of confidential information that identifies them, and need to be made aware of this right. Sometimes, if patients choose to prohibit information being disclosed to other health professionals involved in providing care, it might mean that the care that can be provided is limited and, in extremely rare circumstances, that it is not possible to provide certain treatment options. Patients must be informed if their decisions about disclosure have implications for the provision of care or treatment…[229]
>
> Where patients have been informed of
>
> (a) the use and disclosure of their information associated with their healthcare; and
>
> (b) the choices that they have and the implications of choosing to limit how information may be used or shared:
>
> then explicit consent is not usually required for information disclosures needed to provide that healthcare. Even so, opportunities to check that patients understand what may happen and are content should be taken.[230]

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226 [2001] 1 WLR 515.

227 Confidentiality: Protecting and Providing Information (GMC: London, 2004), para 10, viewed 24th December 2013, available at www.gmc-uk.org/ standards/default.htm.
10. Most people understand and accept that information must be shared within the health care team in order to provide their care. You should make sure that patients are aware that personal information about them will be shared within the health care team, unless they object, and of the reasons for this. It is particularly important to check that patients understand what will be disclosed if you need to share identifiable information with anyone employed by another organization or agency who is contributing to their care. You must respect the wishes of any patient who objects to particular information being shared with others providing care, except where this would put others at risk of death or serious harm.

228 Confidentiality: NHS Code of Practice (DH: London, 2003). viewed 24th Dec, 2013, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/200146/Confidentiality_-_NHS_Code_of_Practice.pdf.

229 Id. Code of Practice 14.

230 Id. Code of Practice 15.

Suppose a patient undergoes a medical examination requested by a third party, such as an employer, could it be said that she impliedly consents to the disclosure of the medical report to that third party? In *Kapadia* v *London Borough of Lambeth*[231] the Court of Appeal in obiter dicta suggested that the patient's consent to disclosure can be implied from her agreement to undergo the examination. This was a case in which an employee who was claiming that he had been discriminated against on the grounds of disability had refused to consent to the disclosure of a medical report to his employer, without first seeing the report. According to Pill LJ, by consenting to being examined on behalf of the employers the claimant was consenting to the disclosure to the employers of a report resulting from that examination. Thus, having agreed to the examination, the employee's further consent to the report's disclosure was not required.

6.6.2. Disclosure in the Public Interest

The most important exception to the duty of confidentiality is where the public interest in disclosure of information outweighs the public interest in protecting patient confidentiality. One obvious example is the necessity of reporting of cases of infectious disease. In *A- G* v *Guardian Newspapers Ltd (No.2)*[232], Lord Goff stated:

> It is that, although the basis of the law's protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure. This limitation may apply, as the judge pointed out, to all types of confidential information. It is this limiting principle which may require a court to carry out a balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure.

It is possible to envisage countless examples of revelation of medical information for the public good, for example, the publication of information about new drugs and treatments and breakthroughs in medical research may be in the public good. Release of information about the dangers to public health, for example, an outbreak of illness caused by contaminated materials, would, of course, always be

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231 (2005) 57 BMLR 170.
232 [1988] 3 WLR 776, 807.

in the public good, the public health authorities would be under a positive duty to do this. However, in most of these cases, there would be no need to name identifiable individuals, so there would be no breach of confidentiality. Nevertheless, if circumstances were such that individuals had to be named, for example, a patient at large suffering from a highly dangerous and contagious disease, identification may be necessary. In *Woolgar* v *Chief Constable of Sussex Police*[233], the Court of Appeal had to decide whether police records could be disclosed to a regulatory body. The appellant was a registered nurse and the former matron of a nursing home. She had been investigated by the police following the death of a patient at the home. There were no criminal charges brought, but these, and other matters, were referred to the United Kingdom Central Council for Nursing, Midwifery and Health Visiting (UKCC), which was the regulatory and disciplinary body for the nursing, midwifery and health visiting professions. The normal practice was that if there has been a police investigation before the UKCC became involved, the UKCC would contact the police, and with the consent of those who have made statements, obtain copies of those statements. The nurse refused permission for her statement to be released. The court accepted that the statement was confidential on the basis that, if no charges were brought, the person making it is entitled to rely upon it remaining undisclosed. However, the court also decided that there was a sufficiently strong countervailing interest in the release of the statement.[234]

Some compulsory disclosures are however, less easy to justify. For example, the statutory reporting of cases of drug addiction or termination of pregnancy as these do have little or no impact on public health and is imposed mostly for administrative reasons.[235] There are instances where the public health interest is very strong but reporting is not demanded by law. For example, it is the responsibility of the driver of a public vehicle who holds a valid license to report any health problems from which he suffer to the concerned authorities. If a driver refuses to disclose it is the duty of the doctor to either persuade the patient to report or obtain the patient's consent to disclosure. Moreover, a doctor is required to perform balancing exercise

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233 [1999] Lloyd's Rep Med 335.

234 UKCC replaced by the Nursing and Midwifery Council (NMC).

235 McLean, SAM, Mason, JK, *Legal and Ethical Aspects of Healthcare*, Greenwich Medical Limited, London (2003), p. 40.

in such circumstances and must be guided by three important principles.[236] First, disclosure must be limited either to the authority nominated by statute or otherwise 'with a need to know'.[237] Secondly, the doctor should have made a genuine attempt to persuade the patient to report the matter.[238] And finally, disclosure must be justifiable to the medical council.[239] As Emily Jackson argues 'the public interest in protecting confidentiality is considerable, only weighty countervailing considerations should be allowed to override the doctor's prima facie duty of confidence, and disclosures should always be kept to the minimum'.[240]

6.6.3. Public Safety

The threat to public safety justifies the disclosure of confidential information and breach of confidence will be condoned. In *W* v *Egdell*[241], W was detained in a hospital for public safety after having shot and killed five people in an indiscriminate display of violence. W applied to mental health review tribunal for a conditional discharge. His legal representatives secured a report from an independent consultant psychiatrist whose report conflicted substantially with that of W's own medical advisers and he recommended further investigation of this conflict. Dr. Egdell was of opinion that attention should be given to the fact that W has confessed that he had a continuing and long-standing interest in explosives, which apparently had not been noted in other reports. W subsequently withdrew his application for conditional discharge and his solicitors refused to forward Dr Egdell's report. W was, however, due for routine review of his detention and Egdell becoming aware that his report would not be included in the patient's notes, feared that decisions would be taken on inadequate information with consequent danger to the public. Dr Egdell therefore, sent a copy of his report to the hospital and also pressed for a copy to be sent to the Home Office to be considered by those responsible for reviewing W's case. W alleged that this action was in breach of Dr Egdell's duty of confidence. The court held that the law recognizes an important public interest in maintaining professional duties of confidence but that the law

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236 Id.
237 Id.
238 Id.
239 Id.
240 Emily Jackson, *Medical Law, Text, Cases and Materials*, 2nd edn., Oxford University Press (2010), p.374.
241 [1990] 1 All ER 833.

treats such duties not as absolute but as liable to be overridden where there is held to be a stronger public interest in disclosure.[242] Bingham LJ further opined:

> It has never been doubted that the circumstances here were such as to impose on Dr Egdell a duty of confidence owed to W. He could not lawfully sell the contents of his report to a newspaper… nor could he discuss the case in a learned article or in his memoirs or in gossiping with friends, unless he took appropriate steps to conceal the identity of W. It is not in issue that a duty of confidence existed. The breach of such a duty is, however, in any case, dependent on the circumstances…The decided cases establish that (1) that the law recognizes an important public interest in maintaining professional duties of confidence, but (2) that the law treats such duties not as absolute, but as liable to be overridden where there is held to be a stronger public interest in disclosure.

The implication, therefore, was that, in the exceptional circumstances, with the potential danger to the public still present, the duty could be breached. While the balancing exercise in *W* v *Egdell*[243] was relatively straightforward, other situations may be less clear-cut. What if the patient has never actually harmed anyone, but has violent thoughts or fantasies? In such instances, there would be no legal obligation to warn the person at risk but that, should the doctor do so, the breach of confidentiality would be regarded as justified.[244] In *Tarasoff* v *Regents of the University of California*[245], Justice Trobriner stated:

> When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger…We conclude that the public policy favoring protection of the confidential character of patient-psychotherapist communications must yield to the extent to which disclosure is essential to avert danger to others. The protective privilege ends where the public peril begins.

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242 Id. pp.852-53.

243 [1990] 1 All ER 833.

244 Sheila McLean, Mason JK, *Legal and Ethical Aspects of Healthcare*, Greenwich Medical Media, London (2003), p.42.

245 551 P 2d 334 (Cal 1976). The patient had confided in a university psychotherapist that he intended to harm T, a fellow student who had rejected his advances. The therapist informed the University police, but did not inform T herself, whom the patient subsequently murdered. The California Supreme Court held that the University's employee was under a duty to protect T by disclosing these threats to her.

While there is a public interest in preventing a patient harming someone, routine disclosure in such circumstances might make patients reluctant to share information about their fantasies with their psychiatrists, which in turn makes it more likely that their underlying problems will remain untreated.[246] Similar difficulties arise in relation to communicable diseases. Sexually transmitted diseases are not new to the medico-legal arena. But HIV and AIDS can be set apart for several reasons. Their concerns attract greater sympathy as people who are found to be HIV-positive may be disadvantaged in a number of practical ways. As these diseases are currently incurable, its specific sexual connotation together with its serious association with drug addiction and lastly it opens its door to social stigmatization.[247] Yet, there are also social concerns to be considered, the public health dimension has to be taken into account. The dilemma here is whether relaxation of the confidentiality rule would lead to failure to seek advice and treatment and hence to the spread of the disease, or whether the imposition of absolute secrecy improperly denies others the opportunity to avoid the risk of exposure to infection or the benefits of early therapy where exposure has occurred.[248] The law on confidentiality requires that a balance must be struck between the patient's right to privacy and confidentiality and any tangible threat to a third party. An effort must be made by the physician to persuade the patient to disclose the information himself. According to Boyd[249], 'if the patient still refuses to disclose his HIV status to a sexual partner at risk of infection, and if that partner is not another patient of the doctor to whom he owes a duty of care, the most effective means of protecting everyone may be, for the doctor to maintain confidentiality and seek to influence his patient to behave responsibly'. In *X* v *Y*[250] the court while prohibiting the tabloid newspaper from identifying the two HIV positive doctors, considered the evidence regarding transmission of HIV from doctor

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246 Emily Jackson, *Medical Law, Text, Cases and Materials*, 2nd edn., Oxford University Press (2010), p.376.

247 Mason JK, McCall Smith, Laurie GT, *Law and Medical Ethics*, 6th edn., Lexis Nexis, UK (2003), p. 248.

248 D Wilkinson, *et al*, "Short Course Antiretroviral Regimens to Reduce Maternal Transmission of HIV", 318 *BMJ* 479 (1999).

249 Boyd KM, "HIV Infection and AIDS: The Ethics of Medical Confidentiality", 18 *J Med Eth* 173 (1992).

250 [1988] 2 All ER 648. A national newspaper acquired and published, in breach of confidence from a health authority employee, details regarding two general practitioners who developed AIDS but were continuing to practise. The health authority sought an injunction to stop further publication of the doctors' and patients' names. The newspaper argued that the public at large and doctors' patients in particular, had an interest in knowing that doctors were HIV positive.

to patient where the doctor had received proper counseling about safe practice. The court concluded that the risk to patients was negligible and there were greater risks from the possibility that, if they could not rely on confidential treatment, people with AIDS, or who feared they might have AIDS, would not seek medical help. In granting the injunction, the Rose J remarked that:

> …preservation of confidentiality is the only way of securing public health; otherwise doctors will be discredited as a source of education, for future individual patients will not come forward if doctors are going to squeal on them. Consequently, confidentiality is vital to secure public as well as private health, for unless those infected come forward they cannot be counselled and self-treatment does not provide the best care…

The decision in *X* v *Y*[251] and *W* v *Egdell*[252] do not mean that a doctor may never disclose that a patient has AIDS, or that he may always disclose findings about a patient's health.[253] As Brazier notes, 'in each case, the powerful interest in maintaining confidentiality must be balanced against the danger ensuing if confidentiality is not breached. Only where there is clear and significant risk of the patient causing harm to others which cannot be abated by any other means may confidence be breached…For disclosure to be lawful, there must be an overwhelming public interest in disclosure'. In *Mr. 'X'* v *Hospital 'Z'*[254], the Supreme Court of India has allowed a hospital to inform the patient's future spouse about his HIV positive status. Also, s.269[255] and s.270[256] of IPC makes it as an offence and prescribes punishment for those whose negligent and malignant act is responsible to spread infection of disease dangerous to life. Hence, the right of an individual to confidentiality as contemplated by statute, case law and professional

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251 [1988] 2 All ER 648.

252 [1990] 1 All ER 833.

253 Brazier, M, *Medicine, Patients and the Law*, 2nd edn., Penguin (1992), p. 55.

254 (1998) 8 SCC 296.

255 s.269, IPC. **Negligent act likely to spread infection of disease dangerous to life**- Whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

256 s. 270, IPC. **Malignant act likely to spread infection of disease dangerous to life -** whoever malignantly does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

guidance may be overruled by society's interest in disclosure. As Scott[257] notes, 'the law of confidence, like the law of negligence and the law of nuisance, requires a balance to be struck. The balance will, on both sides, involve public and private interests'.

6.6.4. Freedom of the Press

The courts have also declared their hand in weighing the balance between a strongly supported public policy in favour of freedom of the press against the need for loyalty and confidentiality with particular reference to AIDS patients' hospital records.[258] In *X* v *Y*,[259] a newspaper discovered through a hospital employee that two doctors had been treated for AIDS. The hospital attempted to obtain an injunction preventing the newspaper from disclosing the confidential information. The newspaper argued that disclosure was necessary to stimulate a public debate. While recognizing the need for public debate, the court held that this need was outweighed by the guarantee of confidentiality which was necessary to ensure that AIDS sufferers were not discouraged from using the healthcare services. Hence, the court undertook a balancing exercise and stated that on the one hand, there are public interests in having a free press and an informed public debate; on the other, it is in the public interest that actual or potential AIDS sufferers should be able to resort to hospitals without fear of their identity being revealed, that those owing duties of confidence in their employment should be loyal and should not disclose confidential matters.[260] Also, no one should be allowed to use information extracted in breach of confidence from hospital records even if disclosure of the particular information may not give rise to immediate apparent harm.[261] A similar approach was taken in *H (a healthcare worker)* v *Associated Newspapers Ltd*[262], where a dentist who had been diagnosed as HIV-positive was granted an injunction preventing a newspaper from publicly identifying either him or the health authority he worked for.

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257 Scott, R, "Introduction", in Clarke, L (ed), *Confidentiality and the Law*, LLP (1990), p.xxii.
258 Mason JK, McCall Smith, Laurie GT, *Law and Medical Ethics*, 6th edn., Lexis Nexis, UK (2003), p.249.
259 [1988] 2 All ER 648.
260 Id. p.660.
261 Id.
262 [2002] EWCA Civ 195.

In *Campbell* v *Mirror Group Newspapers*[263] , the focus was upon balancing of Convention rights of privacy and free speech. In this case, Naomi Campbell, the supermodel, brought a breach of confidence action against MGN Limited's newspaper, the 'Mirror' in respect of the publication of details of her drug therapy and photographs of her leaving a clinic. The claimant accepted that there was a legitimate public interest in disclosing that she was a drug addict and thereby correcting a false impression given by her claims that she was not, and also in the fact that she was being treated for her addiction. The House of Lords, however, found in her favour by a balancing exercise in respect of Article 8, the right to respect for private life and Article 10, the right to freedom of expression. The principles derived from *Campbell* were further explained in *Murray* v *Express Newspapers plc*[264], in which Sir Anthony Clarke MR confirmed that when balancing Article 8 and Article 10, the Court has to consider the matter in two stages. First, whether there is a reasonable expectation of privacy? This is an objective question 'which takes account of all the circumstances of the case'. The test is 'what a reasonable person of ordinary sensibilities would feel if he or she was placed in the same position as the claimant and faced with the same publicity'. If and only if the question is answered in favour of the claimant does the Court go on to the second stage, and ask: 'whether in all the circumstances the interest of the owner of the information must yield to the right of freedom of expression conferred on the publisher by Art 10?' As Tugendhat J pointed out in *Goodwin* v *News Group Newspapers Ltd*[265], the right to respect for private life embraces not only 'unwanted

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263 [2004] 2 All ER 995.

264 [2007] EWHC 1908 (Ch). D took photograph of C, the infant son of the writer J.K. Rowling, being pushed by his father down an Edinburgh street in a buggy with his mother walking alongside. The photograph was taken covertly using a long range lens and was later published in the Sunday Express. C (by his parents as litigation friends) issued proceedings against the publisher of the Sunday Express and D for breach of privacy under the Data Protection Act 1998. C's claims for breach of privacy under the DPA 1998 were struck out.

265 [2011] EWHC 1437 (QB). On 1 June 2011 the defendant, News Group Newspapers Ltd ("NGN"), applied to vary the interim injunction, to permit it to identify the woman with whom he had had an affair while he was Chief Executive of the Royal Bank of Scotland ("RBS"). She was represented as an interested party and was referred to by the initials "VBN". NGN did not seek to report sexual or salacious details about the relationship but, in particular, sought to publish VBN's name and job description at RBS.The basis of the application was that there was a "public interest" in the disclosure of the information. The application succeeded in part: the injunction was varied to permit disclosure by NGN of the job description of VBN, but not disclosure of her name.

access to private information but also unwanted access to or intrusion into one's … personal space'.

6.6.5. The Administration of Justice

In the administration of justice there can be conflicts between public interest in the protection of confidential information and the public interest in parties being able to seek disclosure of confidential communications to assist the presentation of their own cases and to assist the court in adjudication.[266] The question as to how far documents discovered in the course of legal proceedings may subsequently be published was considered in *Distillers (Biochemicals) Ltd.* v *Times Newspapers Ltd*.[267] The case concerned with the proceedings brought by those injured by the drug thalidomide and need for certain disclosure of information in documents. One of the claimants' expert advisers entered into an agreement with the defendants to sell them the documentary information. The claimant company sought an injunction to prevent publication. The injunction was granted on the basis that those who disclosed documents were entitled to the court's protection against any use of the documents otherwise than in the action in which they were discussed. Talbot J[268] said:

> Whilst, as I have said, the public have a great interest in the thalidomide story (and it is a matter of public interest), and any light thrown onto this matter to obviate any such thing happening again is welcome, nevertheless the defendants have not persuaded me that such use as they proposed to make of the documents which they possess is of greater advantage to the public than the public's interest in the need for the proper administer of justice, to protect the confidentiality of discovery of documents. I would go further and say that I doubt very much whether there is sufficient in the use which the defendants have proposed to raise a public interest which overcomes the plaintiff's private right to the confidentiality of their documents. In any event I consider that the plaintiffs have established their right (this is not really disputed) and have an arguable case for its protection by an injunction.

To refer back to the 'public good' justification, it is clear from this case that the court found that the proper administration of justice outweighed any public interest

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[266] Marc Stauch, Kay Wheat, John Tingle, *Sourcebook on Medical Law*, 2nd edn., Cavendish Publishing Limited, London (2002), p.224.
[267] [1975] QB 613.
[268] Id. p.625.

in knowing about the history of the drug thalidomide. Although it is clear that doctors have no immunity from the normal processes of disclosure in court proceedings, in *Hunter* v *Mann*[269] it was said by Lord Widgery that a doctor who did not wish to answer a question in court because it would involve confidential issues, may point this out to the judge, who should advise as to whether it is necessary to answer the question.

6.6.6. Anonymised Data

Access to patient information is essential to train medical staff, conduct clinical research and carry out audits of patient care. While disclosing information for research purposes it is essential that a proper balancing exercise is done. The balancing exercise, however, does not just involve looking at the harm that might be averted by disclosure, but it also involves taking into account the relative importance of respecting patient confidentiality in the particular case.[270] For example, where the identification of someone with HIV might result from disclosure, the public interest in keeping that information private is considerable, but where the disclosure involves the use of medical records in an epidemiological study with no intention to disclose the patient's identity, or to feed any information back to her, the public interest in maintaining secrecy is reduced, and perhaps will be more readily outweighed by the public interest in improved health care provision.[271] In *R* v *Department of Health, ex parte Source Informatics*[272], the Court of Appeal was asked to rule on the legality of disclosing anonymised prescribing data to a firm that wished to sell them to pharmaceutical companies to assist in the marketing of their products. Pharmacists had been asked to provide details of general practitioners prescribing habits, and all data were stripped of patient identifiers before being passed on. The Department of Health advised GPs and pharmacists that participating in such a scheme would be a breach of confidence even if the information disclosed was anonymised. Source Informatics sought declaratory relief against this advice. The Court of Appeal held that there could be no breach of confidentiality because

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269 [1974] 1 QB 767.

270 Emily Jackson, *Medical Law, Text, Cases and Materials*, 2nd edn., Oxford University Press (2010), p.381.

271 Id.

272 [2000] 1 All ER 786.

'the concern of the law here is to protect the confider's personal privacy'.[273] The Court of Appeal shifted the basis of the duty of confidence from a public interest issue to a question of fairness of use. The anonymisation of data prior to its disclosure was held to remove any possibility of unfair treatment of the patients and, therefore, there was held to be no breach of confidence. The judgment, therefore, suggests that the concealment of the confider's identity is sufficient to secure protection of patient's privacy[274] and this conclusion had been subject to much criticism. As Mason *et al*[275] notes, 'in so doing, other fundamental issues are ignored, including the role of consent in legitimizing the uses of information, the concept of reasonable expectations of use and, ultimately, the importance of maintaining a prima facie respect for confidences'. There is however, a stronger public interest justification in case of disclosure of information for medical research purposes than in respect of commercial interests.[276] It removed the public interest requirement from the equation, and this is particularly disturbing because it also led the court to ignore the wider and long term impact of its decision on the generality of public interest in maintaining confidences.[277] Moreover, patients are in an inherently vulnerable position when they disclose personal information to health professionals and the Court of Appeal judgement in this case is insensitive to that vulnerability and shows little respect for patient autonomy.[278] In *Common Services Agency* v *Scottish Information Commissioner*[279], the disclosure of information relating to the incidence of childhood leukemia in particular neighborhoods was refused by the Common Services Agency, citing a high risk of identification due to the low incidence of individuals suffering from the condition in those areas. The House of Lords held that the anonymised information should be sufficiently de-personalized before disclosure, remitting the application to the Information Commissioner for consideration in view of the above decision.

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273 Id. p.797.
274 Id.
275 JK Mason, RA McCall Smith, GT Laurie, *Law and Medical Ethics*, Lexis Nexis, Butterworths, UK, 6th edition (2002), p. 259.
276 Elizabeth Wicks, *Human Rights and Healthcare*, Hart Publishing, Oregon (2007), p.135.
277 JK Mason, RA McCall Smith, GT Laurie, *Law and Medical Ethics*, Lexis Nexis, Butterworths, UK, 6th edition (2002), p. 259.
278 D Beyleveld and E Histed, "Betrayal of Confidence in the Court of Appeal", 4 *Med Law Int* 277 (2000), p.303.
279 (2008) UKHL 47.

In U.S. State law and standards promulgated by accreditation agencies such as the Joint Commission permit disclosure of confidential patient information under certain conditions.[280] Several State statutes permit the release of confidential patient information to qualified personnel for the purpose of conducting scientific research, audits, program evaluations, official surveys, education, and quality control activities, without patient authorization.[281] In addition, the Joint Commission says that clinical and administrative data can be aggregated and analyzed to support decisions, track trends over time, make comparisons within the organization and among organizations, and improve performance.[282]

6.6.7. Statutory Exceptions

No immunity is granted to the doctor when a statutory duty is imposed on a physician to provide information. There are number of statutes which create specific exceptions to the duty of confidentiality. For example, in UK, the Public Health (Control of Diseases) Act, 1984 permits a registered medical practitioner who suspects or has become aware that a patient is suffering from a notifiable disease or food poisoning, to disclose the patient's name, age, sex, and address to the proper officer of the local authority. But recently, statutory disclosures are showing signs of encroachment on traditional values. The original requirements for reporting by the doctor of infectious disease are clearly directed to the good of society. However, compulsory notification for statistical purposes or for the protection of individuals by the state is acknowledged by the citizens cautiously. Despite occasional protests at interference, most people do accept such regulations. For example, in India, the RTI Act, 2005 establishes the right of citizens to 'inspection of works, documents, records; taking notes, extracts or certified copies of documents or records held by public authorities, which include any body owned, controlled, or substantially

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280 See, Joint Commission, 1997 Accreditation Manual for Preferred Provider Organizations, Standard IM.2; National Committee for Quality Assurance, Standards for the Certification of Physician Organizations, Standard PO 2(1997); Joint Commission, 1997 Hospital Accreditation Manual, Standard IM.2.3.

281 See, e.g., R.I.Gen.Laws s. 5-37.3-4(b)(3); CAL.CIV.CODE s.56.10.

282 Joint Commission, 1997 Hospital Accreditation Manual, Standard IM.8 through IM 8.1.12; Joint Commission, 1997 Accreditation Manual for Preferred Provider Organizations, Standard IM.4 through IM 4.3.

financed by the appropriate government .[283] These provisions raise the question, whether the right to information extends to the right to obtain personal medical information generated within government hospitals and research projects, as well as who may have access to such information under the Act? As there are stiff penalties prescribed under the RTI Act if an institutionally designated PIO does not comply with a legitimate request for information, some PIOs may be concerned about the legitimacy or consequences of refusing requests by third parties for the confidential information of patients or research subjects.[284] Moreover, when the PIO is a physician, he or she might be appropriately concerned that the RTI Act could require a breach of the professional duty of confidentiality.[285] A reading of the Act makes it clear that the statute generally does not threaten the confidentiality of the doctor-patient or researcher-subject relationship. The Act clearly states that the disclosure of personal information of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individuals should not be disclosed .[286] In addition, the statute clearly stipulates that the information available to a person in his fiduciary relationship- such as the relationship of a physician or researcher with a patient or subject should not be disclosed unless a competent authority is satisfied that the larger public interest warrants the disclosure of such information.[287] Thus, the Act does not grant others the right to request information about an individual that is generated within fiduciary relationships, even if the doctor or researcher is a government employee and the medical or research record is housed in a government institution, unless public interests outweigh the individual's interest in the privacy of the information. Moreover, the RTI Act was designed to promote transparency in government, not to permit the invasion of the privacy of individuals who use government hospitals or who altruistically participate in government-funded research. In *Arjesh Kumar*

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283 See, Right to Information Act, 2005, viewed, 24th Dec 2013, http://rti.gov.in/rti-act.pdf. Under the Act, information is understood to mean 'any material in any form including records, documents, memos, e-mails, opinions, advice, press releases, circulars, orders, log books, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by public authority under any other law for the time being in force but does not include 'file noting'.

284 N N Mishra , Lisa S Parker, V L Nimgaonkar, S N Deshpande, "Privacy and the Right to Information Act, 2005", 4 *Indian Journal of Medical Ethics* 158 (2008), 159.

285 Id.

286 See, s.8 (1) (j).

287 See, s.8 (1) (e).

Madhok v *Centre for Fingerprinting & Diagnostics*[288], the Central Information Commission (CIC) specifically upheld that information regarding the purpose and results of medical testing was exempted from disclosure under the RTI Act because it was, as the PIO had initially determined, 'personal information, the disclosure of which has no relationship to any public activity or interest, would cause unwarranted invasion of privacy of the individual'.[289] Further, the party seeking the test results in this case did not allege a public interest in the information, but a genuine right to seek it as the estranged parent of the patient. The CIC in this case, however, provides little guidance in deciding what would constitute a relevant and overriding public interest. In *Shailesh Gandhi* v *Dean, Sir J J Hospital, Mumbai*[290], the Maharashtra State Information Commission (SIC) directed a PIO to comply with an RTI Act request for the medical record of a prominent former public official who had been incarcerated. It was suspected that the incarcerated individual used his political clout to falsify medical symptoms and served the majority of his one-month sentence in a hospital rather than in prison. The RTI request was filed in the public interest of exposing corruption in the political or penal system. [291] Traditionally, protection of the health and safety of specific individuals or the public from serious risks is the most justifiable interpretation of a public interest to permit breaching patient confidentiality. But, the judgement in this case departed from the traditional interpretation of what constitutes an overriding public interest that may outweigh patients' interests in confidentiality. Similarly, in *Shri G.R. Rawal* v *Director General of Income Tax (Investigation)*[292], the Central Information Commission while discussing the ambit of s.8(1)(j) of the Right to Information Act, 2005, which excludes disclosure of 'personal information' in response to an application held that the exclusionary rule would not apply where the larger public interest justifies disclosure. Since public records could include hospital records, prison records, and

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288 *Arjesh Kumar Madhok* v *Centre for Fingerprinting & Diagnostics* (CDFD), Ministry of Science and Technology, Hyderabad, Appeal No. CIC/WB/A/2007/00008 (2007), viewed 24th Dec 2013, http://cic.gov.in/CIC-Orders/Decision_26102007_06.pdf.

289 Id.

290 *Shailesh Gandhi* v *Dean, Sir J J Hospital, Mumbai,* Appeal No. 2006/406A/02 2007, viewed 19th Dec 2013, http:// sic.maharashtra.gov.in/files/upload/mumbai/hearings%20of%20april %202007.pdf.

291 Id.

292 *Shri G.R. Rawal* v *Director General of Income Tax (Investigation),* Appeal No. CIC/AT/A/2007/00490, viewed 19th Dec 2013, http://www.rti.india.gov.in/cic_decisions/ Decision_05032008_01.pdf.

any other information collected by a state body, the ruling in the above mentioned case may have the effect of bypassing any authorization requirement of collecting patient data already contained in public records. It is important, therefore, that a comprehensive data protection law is enacted in India to regulate the flow of information in the hands of the State.

6.7. REMEDIES

6.7.1. Injunction

Injunctions, developed by the system of equity, are court orders on an individual or group, requiring that they either do something or stop doing something. If a patient discovers an impending breach of confidence, then he or she can apply for an injunction to prevent disclosure. It is important to remember that the injunction is a discretionary remedy and, in the context of breach of confidence, if the information is already in the public domain, there will be no purpose served by an order preventing further publication.[293] An injunction at the final trial of the action will rarely be granted if there has been no interim injunction when the proceedings are first issued, because if there has been no prior prevention of publication, then by the time of trial, the information will either be well and truly in the public domain, or no longer worth suppressing.[294] The interim injunction therefore is the key weapon in a breach of confidence action. It means that publication will be prevented for what may be a long time before trial. The basis upon which such relief would be granted was set out in *American Cyanamid Co* v *Ethicon Ltd*.[295] , and is generally known as 'the balance of convenience test', where the court has to decide whether either party will suffer irreparable harm and, if both will suffer, who will suffer the most.

6.7.2. Damages

The award of damages is the basic remedy in the common law system, where a defendant is required to pay money to compensate a successful claimant. An obligation to respect patient's privacy emerges from the contractual relationship

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293 *AG* v *Guardian Newspapers* (No.2) 1990 AC 109.

294 Marc Stauch, Kay Wheat, John Tingle, *Sourcebook on Medical Law*, 2nd edn., Cavendish Publishing Limited, London (2002), p.232.

295 [1975] AC 396.

between the patient and the health care practitioner. JK Mason *et al*[296] endorsed a form of contractual obligation which, it is thought, would promote the individual patient's autonomy. In *Reynolds* v *Health First Medical Group*[297] it was held that in a contractual relationship between doctor and patient if a breach is committed by the doctor, the patient is entitled to compensation. And in the case of an action in the tort for negligence on the part of disclosure by the doctor the obligation of confidence must be proved by a duty of care and the breach caused actionable damage. However, the mentioned requirement is inapplicable to the release of patient information as it may not cause damage which can be regarded as actionable damage in negligence to the patient. This means a breach of contract claim can successfully be argued only where there is a breach of the health care professional's contract of employment but not in the case of a patient.[298] But the general view is that the court *may* find an 'implied contract' between the patient and the doctor.[299]

An alternative basis for the duty of confidentiality at common law would be to characterize it as an aspect of the doctor's duty of care.[300] A doctor who discloses information which should have been kept private may not have acted as a reasonable doctor, and the patient might therefore be able to bring an action in negligence. This will only be possible, however, if the patient has suffered some sort of damage as a result of the negligent disclosure: an example might be being turned down for insurance coverage. More commonly, the 'harm' that results from a breach of confidentiality will be less tangible, and an action in tort much less promising.[301] For example, if the only harm is the patient's distress. Usually, it is not possible to recover damages for injury to feelings or reputation, but there are exceptions to this rule, such as damages for defamation. The case of *Furniss* v *Fitchett*[302] is instructive in this regard. Dr Fitchett gave a letter about a patient, saying that she exhibited

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296 JK Mason, RA McCall Smith, GT Laurie, *Law and Medical Ethics*, Lexis Nexis, Butterworths, UK, 6th edition (2002), p.240.

297 [2000] Lloyd's Rep. Med. 240.

298 See generally, Jonathan Herring, *Medical Law and Ethics*, 3rd edition, Oxford university press, NY (2010), p.215.; see also, J A Devereux, *Australian Medical Law*, 3rd edition, Routledge-Cavendish, New York (2007), p.947. It is rare to find an explicit term of contract guaranteeing the patient's confidences; this can be inferred only impliedly. see also, *Thake* v *Maurice* [1986] QB 644; *Eyre* v *Measday* [1986] 1 All E.R. 488.

299 *W* v *Egdell* [1990] 1 All ER 835. This was supported by counsel in *W* v *Egdell* that confidentiality was based not only on equitable grounds but also on an 'implied contract'.

300 Id. p.355.

301 Id.

302 [1958] NZLR 396.

signs of paranoia, to her husband, whose lawyer produced it in open court during separation proceedings. The doctor was held liable for damages in respect of the nervous shock sustained by his patient as a result of his negligence. Thus, enforcement of the duty may lead to not only damages for the breach of confidence per se, but also liability for any consequential losses which might flow.[303]

In certain circumstances breach of confidence may be justified, however, it may still be actionable if the disclosure goes further than that which is necessary. For example, the revelation that a woman is HIV positive may occasionally be justified. A doctor who, at the same time, points out that this was discovered in the course of an abortion procedure will be in breach of confidence.[304] However, additional information may be revealed if it is necessary by way of explanation. In most States in Australia, legislation requires confidentiality on the part of healthcare practitioners employed by the State.[305]

In a recent decision by The European Court of Human Rights in *Mosley* v *The United Kingdom*[306], the court observed that 'no sum of money awarded after disclosure of private material can afford a remedy nor can it effectively compensate for a breach of privacy'. As such, it is often the case that Courts will grant injunctions preventing the disclosure of information before a trial as a preventive measure.

6.8. ACCESS TO MEDICAL RECORDS

Medical records generally include patient's medical prognosis, including details of past and present medical care, medical and other opinions about the patient's physical and mental condition, together with other information which may be relevant to any doctor treating the patient.[307] Good clinical care practice imposes a duty upon the doctor that they keep accurate and

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303 J. A.Devereux, *Australian Medical Law*, 3rd edn., Cavendish Publishing, New York (2007), p. 949.

304 Marc Stauch, Kay Wheat, John Tingle, *Sourcebook on Medical Law*, 2nd edn., Cavendish Publishing Limited, London (2002), p.231.

305 The Health Administration Act, 1982, NSW, The Health Act 1937, Queensland, The South Australian Health Commission Act 1976, The Health Services Act 1988, Victoria etc.

306 [2011] ECHR 774.

307 Andrew Grubb, *Principles of Medical Law*, 2nd edn, Oxford University Press, New York, 2004, p.620. The record includes the decisions made by the doctor, information given to patients and any treatment administered.

contemporaneous patient records.[308] As a general rule, the medical record is a confidential document and access to it is limited.[309]

Developments in medicine have reduced dependence on the family doctor's discretion to protect the patient's personal information. Vast changes in medical technology, the advent of third-party payment, government participation in medical care, and computerization of record-keeping systems have expanded the amount, type and accessibility of health data available about an individual.[310]These factors have also increased the frequency of requests for medical records by individuals, private institutions and government bodies. Health records may be sought for a variety of purposes like, law enforcement, civil and criminal legal actions, public health evaluation including epidemiologic and occupational health research, third-party payment

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[308] Id. see, The Indian Medical Council (Professional conduct, Etiquette and Ethics) Regulations, 2002.
Regulation 1.3- **Maintenance of medical records :**
1.3.1 Every physician shall maintain the medical records pertaining to his or her indoor patients for a period of three years from the date of commencement of the treatment in a standard proforma laid down by the Medical Council of India.
1.3.2. If any request is made for medical records either by the patients or authorized attendant or legal authorities involved, the same may be duly acknowledged and documents shall be issued within the period of seventy-two hours.
1.3.3 A Registered medical practitioner shall maintain a Register of Medical Certificates giving full details of certificates issued. When issuing a medical certificate he or she shall always enter the identification marks of the patient and keep a copy of the certificate. He or she shall not omit to record the signature and or thumb mark, address and at least one identification mark of the patient on the medical certificates or report. The medical certificate shall be prepared as in Appendix 2.
1.3.4 Efforts shall be made to computerize medical records for quick retrieval.

[309] William H. Roach, *Medical Records and the Law*, 2nd ed., The Aspen Health Law Center (1994), p.95. It states that access to medical record should be limited to patient or authorized representative, attending physician, and other hospital staff members possessing legitimate interests in record.

[310] Boyer, "Computerized Medical Records and the Right to Privacy: The Emerging Federal Response", 25 *Buffalo L. Rev* 37 (1975). Public concern over the protection of personal privacy has risen almost exponentially with the growth of our ability to store and rapidly transmit vast amounts of data. Not too many years ago, personal privacy was protected rather nicely by the cost and practical difficulties associated with storing and handling paper records. Modern data processing advances have changed all of that. Computerized medical information has caused much concern because of the ease with which it may be retrieved and shared. Computers and telecommunications technology combined have caused a virtual explosion in the ability of people to manage information. As it has become easier to deal with information, more and more people have found new ways to use records that were once too cumbersome to store, handle and utilize.

employments credit-rating, and for use by other health care providers.[311] As Lawrence Gostin[312] notes:

> Only a few generations ago, physicians kept minimal written records about their patients. Physicians usually knew their patients and did not see a need to maintain extensive written reminders of patients' clinical histories. Today, the quantity of health records and the nature of the data they contain have increased substantially. The health records of patients, therefore, contain significant amounts of sensitive information that are available for inspection by many others….

The requirements of medical records in all jurisdictions may differ slightly, but all carry the same basic message that every record must give the patient's and doctor's identities, contain relevant legal documents, necessary patient information, as well as information concerning therapy, discharge, and follow-up as appropriate. The reasons why patients may want to see their records, vary. Scholars contend that it is a restriction of legal rights, and is contrary to social policy, to deny a person access to his or her medical records.[313] In *McInerney* v *MacDonald*[314] the Canadian Supreme Court while accepting that the medical records are the property of the physician, institution, or clinic which compiled them, held that the relationship between doctor and patient casts on the doctor a fiduciary duty to provide patient with access to his or her medical records and hence, patients have a general right of access to the information in their record. As La Forest J stated:

> The trust-like 'beneficial interest' of the patient in information indicates that, as a general rule, he or she should have a right of access to the information and that the physician should have a corresponding obligation to provide it. The patient's interest being in the information, it follows that the information continues when that information is

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311 Carole M. Cleaver, "Privacy Rights in Medical Records", 13 *Fordham Urban Law Journal* 165 (1984), pp.165-167.

312 Lawrence Gostin, "Health Informational Privacy", 80 *Cornell Law Review* 451 (1995).

313 Ellen Klugman, "Toward a Uniform Right to Medical Records: A Proposal for a Model Patient Access and Information Practices Statute", 30 *UCLA L. Rev*. 1349 (1983).

314 [1992] 2 S.C.R. 138. In this case a patient made a request to her doctor for copies of the contents of her complete medical file. The doctor delivered copies of all notes, memoranda and reports she had prepared herself but refused to produce copies of consultants' reports and records she had received from other physicians who had previously treated the patient, stating that they were the property of those physicians and that it would be unethical for her to release them. She suggested to her patient that she contact the other physicians for release of their records. The Canadian Supreme Court found on these facts that the patient had a common law right of access to her medical records, including those compiled by doctors other than Dr. McInerney.

> conveyed to another doctor who then becomes subject to the duty to afford the patient access to that information.

The court however, held that patient's right of access is not absolute. Hence, when a physician reasonably believes there is a significant likelihood of a substantial adverse effect on the patient's physical, mental, or emotional health, or harm to a third party, that information or part of the medical record does not require it to be disclosed.[315] However, in *Breen* v *Williams*[316], the High Court of Australia held that there is no fiduciary duty which gives rise to a duty upon physician to give access to or permit the copying of patient's medical records. As Dawson and Toohey JJ noted it is 'the law of negligence and contract which governs the duty of a doctor towards a patient. This leaves no need, or even room, for the imposition of fiduciary obligations'.[317] Hence, in Australia, patient's right of access to medical records does not exist other than the right to access publicly held records.[318]The first English decision to deal with the question of a common law right of access to medical records was in *R* v *Mid Glamorgan Family Health Services Authority, ex p Martin*[319], where the English Court of Appeal held that a doctor or a health authority, as the owner of a patient's medical records, was entitled to deny the patient access to them if it was in his best interests to do so, if for example their disclosure would be detrimental to the patient's health. In *R* v *Department of Health, ex parte Source Informatics Ltd*[320] as part of knowing the prescribing habits of general practitioners, S Ltd asked pharmacists to provide certain information concerning the names of general practitioners and the quantity of drugs that they

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315 Id.

316 (1996) 186 CLR 71. The appellant had undergone breast implants. Dr. Williams had not performed the operation, but had performed a bilateral capsulotomy for the compression of capsule which had developed since the earlier procedure . After some years the appellant noticed a lump under her left breast which was thought to be leakage of silicone gel . This was removed by another medical practitioner. The appellant became involved in litigation against Dow Corning Corporation. The US District Court for the Northern District of Alabama in 1994 excluded Australian litigants from a proposed global settlement of the Dow Corning case, but afforded them an opportunity to 'opt in'. To do so required the claimant to file with the Court copies of any medical records in support of a claim. Ms. Breen's appeal was dismissed.

317 Id. p.782.

318 Id.

319 [1995] 1 All ER 356. The plaintiff suffered from psychiatric problems for which he received treatment in a hospital. He sought disclosure of his medical records in order to find out more information about specific incidents which had happened in his past. His repeated request for access was refused and thus he sought judicial review of the decision of health authorities.

320 [2000] 1 All ER 786. As part of knowing the prescribing habits of general practitioners, S Ltd asked pharmacists to provide certain information concerning the names of general practitioners and the quantity of drugs that they prescribe, but not the name of patients.

prescribe, but not the name of patients. The Court of Appeal rejected the argument that a patient owns his or her medical information and can therefore bring a property claim if the information is revealed to others and further held that the law was concerned only to protect the confider's privacy. However, in the United States, there is a growing trend towards recognizing patients' right to have access to their own medical records. For example, in *Emmett* v *Eastern Dispensary and Casualty Hospital*[321], it was held that physician has duty of disclosure based upon fiduciary relationship between physician and patient. In *Cannell* v *Medical and Surgical Clinic*[322], the court found that the fiduciary qualities of the physician-patient relationship require the provider to disclose medical data to the patient or agent upon request, and that the patient need not engage in legal proceedings to attain higher status in order to receive such information. In *Wallace* v *University Hospitals of Cleveland*[323], the Court of Common Pleas of Ohio reaffirmed the axiom that hospital records are the property of the hospital. Nevertheless, the court held that the patient has a property right to the information contained in the record and is, therefore, entitled to a copy of the record.[324] On appeal, the court limited the right of access to those records which, when left to the hospital's discretion, were proper to copy under the circumstances of the case, keeping in mind 'the beneficial interest of the plaintiff and the general purpose for which such records or any part thereof were kept and maintained **....'**[325]**.** In *Pyramid Life Insurance Co.* v *Masonic Hosp. Ass'n. of Payne County,*[326] the court declared that the keeper of the records does not have the right to possess and use the information contained therein to the exclusion of the patient, her representative, or those standing in her shoes. Thereby, the patient can inspect and copy the records without resorting to litigation. The Court acknowledged a privacy interest in medical records in both *Whalen* and *Planned Parenthood* decision. In *Whalen* v *Roe*[327], the Court analyzed the constitutionality of a New York statute which required records of all prescriptions for certain dangerous drugs to be filed with the State Health Department. The record was required to contain the

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321 396 F.2d 931 (D.C. Cir. 1967).
322 *Cannel* v *Medical & Surgical Clinic*, 315 N.E.2d 278 (I11.Ct.App.1974).
323 164 N.E.2d 917.at 918.
324 Id.
325 170 N.E.2d at 261.
326 191 F. Supp. 51, 54 (W.D. Okla. 1961).
327 429 U.S. 589 (1977).

name, address and age of patients obtaining the drugs, as well as the prescribing physician, dispensing pharmacy, and the drug and dosage prescribed. The appellants contended that the statute invaded patients' privacy by deterring those who legitimately needed such drugs from seeking treatment to avoid being stigmatized in public records as drug addicts. The Court disagreed, finding that the statute did not interfere sufficiently with either interest to violate patients' constitutional rights. Similarly, in *Planned Parenthood of Missouri* v *Danforth*[328], the Court found that Missouri abortion-recording laws did not violate women's privacy interests since: women could still make abortion decisions without governmental interference; the recording requirements would not interfere with the physician-patient relationship; the records would be useful in maternal health issues; and the recording requirements would respect a patient's privacy rights. However, it is acknowledged that deterring drug abuse and preserving maternal health outweigh privacy interests. Most case law arising under the state acts deals with determining whether a private interest in confidentiality outweighs the public interest in disclosure. In *Child Protection Group* v *Cline*[329], for example, while authorizing release of a bus driver's psychiatric records to parents of school children, the West Virginia court outlined five factors for determining whether release of personal information under the State Freedom of Information Act would constitute an unreasonable invasion of privacy. The factors were, whether disclosure would result in a substantial invasion of privacy, and, if so, how serious the potential consequences would be; whether the extent or value of the public interest and the purpose or object of individuals seeking the information justify disclosure; whether the information was available from other sources; whether the information was given with an expectation of confidentiality; and whether it is possible to mould relief to limit the invasion of privacy. Courts have therefore, recognized that a patient has the right to access health information, such as a copy of medical records or an interpretation of an X-ray, even though the patient might not have a right to possess original medical records or an X-ray negative.[330] In the absence of statutory or regulatory authority, a few courts have held that a medical record is hospital property in which the patient has a limited

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328 428 U.S. 52 (1976).
329 350 S.E.2d 541.
330 See *Cannell* v *Medical & Surgical Clinic*, 315 N.E.2d 278(3d Dist. 1974), *McGarry* v *JA Mercier Co.*, 262 N.W.296(Mich.1935.).

property interest. In an Oklahoma case[331], for instance, a patient's health insurer sought access to the hospital records for the purpose of settling an insurance claim where the patient had authorized disclosure. The court recognized that the 'records maintained by the hospital pertaining to care and treatment of patients and to expenses incurred by patients…were the property of the hospital'. However, the court did grant access to the insurer because the patient in this case had authorized disclosure.[332] While a patient may have a statutory interest in information contained in the medical record, there is no independent constitutional right to such information.[333] In a New York case,[334] a former mental patient writing a book about her experiences was denied access to her medical records by her treating hospitals. At trial, the patient argued that the hospitals had violated her federal constitutional rights. The district court ruled that the hospitals' withholding of information did not violate any of the patient's rights, including her right to information as a corollary to her right of free speech, her right of privacy, her freedom from unreasonable searches and seizures of property, or deprivation of her property without due process of law. In affirming the district court opinion, the court of appeals refused to recognize that psychiatric patients have a constitutionally protected property interest in the direct and unrestricted access to their records.

Discussing the issue of privacy of medical records in India, the Supreme Court in *Mr. 'X'* v *Hospital 'Z'*[335] ruled that while medical records are considered to be private, doctors and hospitals could make exceptions in certain cases where the non-disclosure of medical information could endanger the lives of other citizens, in this case the wife. The case discussed the scope of a blood donor's right to privacy of his medical records. The respondent hospital in this case had disclosed, without the permission of the blood donor, the fact that the blood donor was diagnosed as being a HIV patient. Due to this disclosure by the hospital, the lady who was to have been married to the blood donor had broken off her engagement and the donor was subject to social ostracism.

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331 *Pyramid Life Ins. Co.* v *Masonic Hosp. Ass'n of Payne County*, 191 F. Supp. 51 (W.D.Okla.1961).

332 Id.

333 William H.Roach, *Medical Records and the Law*, 3rd edn., Aspen Publication, Maryland (1998), p.90.

334 *Gotkin* v *Miller*, 379 F.Supp.859(E.D.N.Y.1974).

335 AIR 1999 SC 495.

Statutes now address the issue of a patient's right to access to his or her medical records. For example, England enacted Access to Health Records Act 1990, which gives a *prima facie* right of access to health records by the individuals to whom the records pertain.[336] The Access to Health Records Act, 1990, came into existence as a result of the decision of the European Court of Human Rights in *Gaskin* v *UK*[337]. The Records Act, however, contains several exceptions to the right of access, one of which is that access to records made before the commencement of the Records Act shall not be given. The Access to Medical Reports Act 1988, which came into force on 1st January 1989, gives patients the right to seek certain medical reports prepared about them for employment or insurance purposes.[338] The right of access conferred by the Act is a right to inspect or be supplied with a copy of the report.[339] The Act provides that the employer or insurance company must obtain the individual's consent when it seeks the report, and that the individual may at that time make his consent conditional upon being given access to the report prior to the supply to the employer or insurance company.[340] Even if he does not so stipulate at the time of giving his consent, he may nonetheless, by notice to the doctor supplying the report, request access prior to the report being given to the employer or insurance company[341] or, again by notice to the doctor, within six months of the report being so supplied.[342] The individual's right of access to medical reports under the Act is not absolute. There are three situations in which doctors are justified in refusing to provide access. First, where disclosure would in the opinion of the practitioner is likely to cause serious harm to the physical or mental health of the individual or others….[343]. Secondly, where disclosure would 'indicate the intentions of the practitioner in respect of the individual'[344] and thirdly, where disclosure would be likely to reveal information about another person, or to reveal the identity of another person who has supplied information to the practitioner about the individual unless that person has consented; or that person is a health professional who has been

336 s.3, Access to Health Records Act 1990.
337 (1989) 12 EHRR 36.
338 s.1, defined in s2(1).
339 s.4(4).see also s. 5(2) conferring upon the individual the right to request corrections to the report.
340 s.3(1).
341 s.4(3).
342 s.6.
343 s.7(1).
344 Id.

involved in the care of the individual and the information relates to or has been provided by the professional in that capacity.[345] The doctor, therefore, is obliged to inform the individual that his request for access has been denied under any one of the exceptions.[346] The individual, however, is entitled to apply to the county court for an order that the doctor must provide him access under the Act.[347] Difficult questions arise in relation to the position of an occupational health doctor who is employed to advise employers and employees about issues involving health and safety at work, as reports prepared by an independent medical practitioner who is not, and has not been, involved in a therapeutic doctor-patient relationship with the individual concerned are not covered by the Act.[348] According to Andrew Grubb whether or not reports prepared by such a doctor will fall within the scope of the Access to Medical Reports Act 1988 will most likely depend upon the degree of involvement with the employees and in particular whether the physician has, or has had, any direct responsibility in relation to the mental or physical well-being of the individual concerned.[349] Similarly, patients have a right of access to personal data, which includes their health records, under section 7 of the Data Protection Act, 1998. The right of access to health records under the Data Protection Act too is not absolute. As per the Data Protection (Subject Access Modification) (Health) Order 2000, disclosure of data can be withheld if it would be likely to cause serious harm to the physical or mental health of the data subject or any other person, or would lead the data subject to identify another person. Data Protection Act, 1998 requires it to be read in the light of the Freedom of Information Act, 2000 which provides access to information held by public bodies. Personal information is exempt from the Freedom of Information Act's provisions both in relation to the patient's own access to her health records and to third parties seeking access to them. It is only non-personal health information, such as an NHS trust's policy decisions, which might be subject to requests under the Freedom of Information Act.

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345 s.7(2).

346 s.7(3).

347 s.8.

348 As s. 2(1) care is defined in the Act to include 'examination, investigation or diagnosis for the purposes of, or in connection with, any form of medical treatment'. They may however be covered by the DPA 1998.

349 Andrew Grubb, *Principles of Medical Law*, 2nd edn., Oxford University Press, New York (2004), p.632.

Australia has enacted Commonwealth Freedom of Information Act[350] that provides individuals with access to records in the public sector, as well as a Privacy Act. Australian courts, however, do not recognize a patient's right to access privately held records. However, Privacy Amendment (Private Sector) Act, 2000 has reversed the rule in *Breen* v *Williams* allowing patients to access their own health information, subject to exceptions outlined in the National Privacy Principles.

United States allows patients to access medical records that are held by public institutions under the Freedom of Information Act, 1966 (FOIA) and the Privacy Act, 1974. These Acts however, apply to federal agencies only. Therefore, the only medical records that patients can obtain under these statutes are those that a federal medical care facility maintains or those records that are maintained in a records system operated under a contract with a federal government agency. In addition, most states grant statutory recognition to a patient's right of access to hospital records.[351] Procedural details of the right of access, however, differ between states. Many state statutes provide that medical records are the property of the organization or provider that maintains or possesses the records. For example, the South Carolina statute states that the 'physician is the owner of medical records in his possession that were made in treating a patient and of records transferred to him concerning prior treatment of the patient'.[352] A typical regulation provides that medical records are the property of the hospital and shall not be removed from its premises except for court purposes.[353] While the health care organization owns the physical medical record, the patient has an interest in information contained in the record. State legislation frequently subjects the health care organization's right of ownership to the patient's right of access to the information contained in the medical record. In Louisiana, for example, the statute provides that although the medical records are the property and business records of the health care provider, a patient has the right to obtain a copy of the record.[354] Thus, the patient has an ownership interest in the information contained in the medical record. At least one state, New Hampshire, explicitly recognizes the patient's interest in the medical information

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350 See generally, Commonwealth Freedom of Information Act, 1982.
351 For example, Texas Medical Records Privacy Act, 2001; Georgia Open Records Act, 2012.
352 S.C.Code Ann. S.44-115-20.
353 See e.g., 902 Ky. Admin.Regs. 20: 016(11) (c).
354 LA. REV.STAT.ANN. s.40:1299.96.

contained in the medical record.[355] Some states allow patients to access their records during the course of hospitalization[356], while others give a right of access only after discharge from the hospital.[357] Some statutes declare that the health care practitioner or physician must make the records available at reasonable times and places and at reasonable costs.[358] Still other statutes specify the maximum time limits and fees for inspecting and copying the records. Many states grant the physicians a therapeutic privilege to deny a patient access to the records where the release of the information would adversely affect the patient's mental or physical well-being.[359] Some states reserve this privilege for mental health records only. In most states, when this exception denies the patient access to her records, the hospital may still be required to grant the patient's representative or attorney access. Here, mention must be made of The Health Insurance and Portability Accountability Act (HIPAA) 1996, which required composing uniform standards for electronic exchanges of health information in US. The regulations, implemented under HIPAA, require providers to protect the confidentiality, integrity, and availability to patients of individually identifiable personal health information in any form, whether electronic, written, or oral. The regulations apply to all health care organizations, including hospitals, physicians' offices, health care plans, employers, public health authorities, life insurers, clearinghouses, billing agencies, information systems, and any person or organization who furnishes, bills or is paid for health care in the normal course of business. The HIPAA thus, aims to improve the efficiency and effectiveness of the healthcare system by encouraging the development of a health information system through the establishment of standards and requirements for the electronic transmission of certain health information.[360] It also ensures that individuals' health information is properly protected while allowing the flow of information needed to promote high-quality health care.[361]

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355 N.H. REV.STAT.ANN.s.332-I:1.
356 See, e.g., s.144.335, Minnesota Statute,1996.
357 See, e.g., 735 Illionis Compiled Statutes. ANN. 5/8-2001 (West 1997).
358 See, e.g., 735 Illionis Compiled Statutes. ANN. 5/8-2003 (West 1997) .
359 See, e.g., Arkansas Code 16-46-106 (Michie 1995).
360 s. 261, HIPAA 1996.
361 Sharyl J. Nass, Laura A. Levit, and Lawrence O. Gostin, *Beyond the HIPAA Privacy Rule: Enhancing Privacy,*
Improving Health through Research, The National Academies Press, Washington, DC (2009), p.2.

6.9. INDIAN POSITION

Under the Indian Medical Council Regulations, every medical professional is obligated to maintain physician-patient confidentiality.[362] While a physician disclosing personal information about his or her patients could be held guilty of professional misconduct[363], this obligation does not extend to other persons responsible for processing patient data[364], either under the mandate of a state body or a body corporate. Physicians are only allowed to disclose patient information to public health authorities in limited circumstances, such as in case of a 'serious and identified risk to a specific person and or community'.[365] With the enforcement of the MCI Regulations, 2002 it has been held without confusion that the patient has a right to claim medical records pertaining to his or her treatment and the hospitals are under obligation to maintain them and provide them to the patient on request.[366]

The Information Technology Act, 2000, has had several amendments in the last couple of years that have expanded and changed the law according to the latest technological innovations. The Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011

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362 See, The Indian Medical Council (Professional Conduct, Etiquette and Ethic) Regulations, 2002.

363 Id. see, Chapter 8- Punishment And Disciplinary Action

364 Medical Council Regulations, Rule 1.1 'Character of Physician' covers only 'Doctors with qualification of MBBS or MBBS with post-graduate degree/diploma or with equivalent qualification in any medical discipline' are covered under the Regulations.

365 See, The Indian Medical Council (Professional Conduct, Etiquette and Ethic) Regulations, 2002, Rule 7.14. states: The registered medical practitioner shall not disclose the secrets of a patient that have been learnt in the exercise of his or her profession except-
(i) in a court of law under orders of the Presiding Judge;
(ii) in circumstances where there is a serious and identified risk to a specific person and or community; and
(iii) notifiable diseases.
In case of communicable and notifiable diseases, concerned public health authorities should be informed immediately.

366 Id. Rule 1.3 **Maintenance of Medical Records:**
1.3.2 If any request is made for medical records either by the patients or authorized attendant or legal authorities involved, the same may be duly acknowledged and documents shall be issued within the period of 72 hours.

defines 'sensitive personal data'[367] for the first time in India. The Rules stipulate that a body corporate collecting such sensitive personal data shall obtain written consent from the provider of said data.[368] This data can only be collected for a lawful purpose, which is connected to the working of the body corporate.[369] The body should also make sure that the data provider is made aware of the fact that such information is being collected along with the reasons for which such information is being collected and also of the identity of the persons who intend to receive such information.[370] There are very few instances in which sensitive personal data can be disclosed to a third party, such as when under a previous contract, the provider has consented to such disclosure by the body corporate.[371] Government agencies can collect such information without prior consent, subject to the condition that the information is collected for certain specified purposes alone and that those purposes are made known to the individual.[372] The only basis on which a body corporate in India can send data to other such bodies whether, within or outside India is if they maintain the same level of data protection.[373] Admittedly, the effect of introducing the concept of 'sensitive personal data' to the IT Rules in India is yet to be determined.

Legal protection of privacy in India is scattered, inconsistent, and often leaves individual privacy unprotected. Various statutes deal with issues as diverse as banking and finance, professional ethics of lawyers, doctors and chartered accountants, information technology and telephone etc contain provisions which either explicitly or

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367 s.3. **Sensitive personal data or information.—** Sensitive personal data or information of a person means such personal information which consists of information relating to;—
(i) password;
(ii) financial information such as Bank account or credit card or debit card or other payment instrument details ;
(iii) physical, physiological and mental health condition;
(iv) sexual orientation;
(v) medical records and history;
(vi) Biometric information;
(vii) any detail relating to the above clauses as provided to body corporate for providing service; and
(viii) any of the information received under above clauses by body corporate for processing, stored or processed under lawful contract or otherwise:
provided that, any information that is freely available or accessible in public domain or furnished under the Right to Information Act, 2005 or any other law for the time being in force shall not be regarded as sensitive personal data or information for the purposes of these rules.

368 Id. Rule 5.

369 Id.

370 Id. Rule 4.

371 Id. Rule 6.

372 Id. see,Proviso to Rule 6

373 Id. Rule 7.

impliedly protect privacy or offer victims remedies for their breach. Therefore, a uniform statute specifically protecting medical privacy does not exist. The above discussion makes it clear that the existing and emerging legislations makes it an obligation for the doctors to maintain the confidentiality of their patients.

6.10. CONCLUSION

Respecting a person's right to privacy-the right to decide who receives personal information and how it may be used requires that those privileged to have access to such information maintain its confidentiality.[374] Confidentiality, rooted in the right to privacy, is a matter of personal autonomy.[375]

While the belief that what one tells one's doctor 'will go no further' has probably always been an illusion. The Hippocratic Oath only instructs doctors to keep secret that 'which ought not to be noised abroad', the implication being that there are circumstances in which information should be noised abroad.[376] The Declaration of Geneva, however, does not appear to be qualified in this way. The existence and acceptance of exceptions to the duty of confidence is so well established that it would probably be a mistake to read too much into this.

Today, medical care is generally provided by team of doctors and nurses. Patients may be referred to specialist consultants, or for additional diagnostic procedures, such as blood tests, X-rays, and scans. If information about the patient's condition could never be shared with others, the provision of health care would grind to a halt. As a result of new technologies, patients' notes now contain a great deal of information that can very easily be shared and transferred. The provision of appropriate diagnostic and therapeutic care is often dependent upon a number of health care professionals having access to patient's records. Thus, an absolute duty of confidentiality would make it impossible to provide effective medical treatment. But, nevertheless the duty of confidentiality is important and reflects the personal autonomy of the patient which must be as far as possible respected and upheld.

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374 S. Abraham, J. Prasad, A. Joseph, K. S. Jacob, **"**Confidentiality, partner notification and HIV infection: Issues related to community health programmes"**,** 13 *The National Medical Journal of India* 207 (2000), p.208.

375 Id.

376 Emily Jackson, *Medical Law, Text, Cases and Materials*, Oxford University Press, 2nd edn (2010), p.351.