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**AN ANALYSIS OF THE DOCTOR-PATIENT RELATIONSHIP WITH REFERENCE TO
THE CELEBRITY OR FAMOUS PATIENT- ISSUES PERTAINING TO PRIVACY AND
CONFIDENTIALITY**

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It has been a very long period of study characterised by many challenges. I give thanks to God for His caring, wisdom and strength. His grace and wisdom provided me with the opportunity continually to develop and to express myself. The support of my family and friends has been remarkable. My supervisor, Prof P A Carstens, I thank you for being a wonderful mentor. Your guidance was invaluable, and your words of encouragement and support have been amazing.

SUMMARY

A good doctor must have a good academic foundation, as well as mastering the humanistic aspect of practice to better understand patients in order to lessen their pain and suffering. The Hippocratic Oath places on the doctor responsibility for protecting patients from harm as well as restoring them to health. A clinical combined with a relational model are recommended in respect of the manner of treatment in the doctor-patient relationship. These models complement each other; the clinical model promotes the delivery of a first-class service in bringing healing to patients, whereas the relational model concentrates not on the management of an outcome but on the quality of the interaction between physician and patient which is more participatory in nature.

During the interactions associated with the doctor-patient relationship, the patient confides private, sensitive and intimate information to the doctor on the understanding that such information will be divulged only with his/her permission. The doctor-patient relationship remains the same regardless of whether the patient is an everyday person or a celebrity. Media interest outside of a person's public achievements and a focus on the the private life of an individual indicates their elevation from being ordinary to the status of a celebrity or public figure in which inquiry into his/her personal life, including his/her health, is considered normal practice.

The ethical obligations in a professional situation to a great extent are entrenched in the law, therefore medical ethics and the law cannot be dealt with separately. However, an act viewed as unethical need not be illegal. Nevertheless, issues surrounding life choices, bodily integrity, dignity, privacy and equality, which are based on ethical values, also describe legal rights and medical ethical codes or instruments in South Africa are given legal status in so far as they are incorporated into the Bill of Rights. In respect of their being rights issues they depend on the protection and promotion by the state.

A multi-layered approach was used to analyse the doctor-patient relationship in relation to patient privacy and confidentiality and relied on the Constitution, legislative documents

and case law, as well as ethical principles, to determine the legal position. It is important a balance is maintained between the right to privacy and freedom of expression as both rights are enshrined in the Constitution. Crucially, there is a distinction to be made between providing the public with truthful information and the unnecessary harm created by revealing private and confidential information in the public domain. The analysis clearly supports the view that the code of conduct in journalism is violated when pressure is put on medical practitioners to obtain private and confidential information about patients. In such cases the conduct of doctor and journalist is unethical and illegal. In the case of *Tshabalala-Msimang vs Mondli Makhanya* it was found that by the nature of occupying the position or by seeking publicity or consenting to it, an individual cannot object to the publicising of his/her action.¹ Further comment in the media on the matter was not restricted; the judgement clearly stated that the public could be informed about the minister's life and condition since these aspects were public knowledge.² The release of private, sensitive and intimate information about a public figure by law is allowed to be publicised in the public interest.

¹ Para 40 of *Manto Tshabalala-Msimang vs Mondli Makhanya*.

² Para 45 of *Manto Tshabalala-Msimang vs Mondli Makhanya*.

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CHAPTER 1: INTRODUCTION

1.1. INTRODUCTION

In this chapter the topic of the research is introduced, the research problem is outlined and the researcher's reasons in pursuing the study explained. The chapter poses questions that the research problem addresses in seeking a resolution. The methodology followed is outlined and the content of the chapters is presented.

1.2. RESEARCH PROBLEM

In general the media exert pressure on doctors to provide information, consequently the doctor-patient relationship may be compromised when a famous person or celebrity is involved and the focus is on issues pertaining to patient privacy and confidentiality.

To an extent ethical obligations are entrenched in law; therefore medical ethics and the law are not separable.³In various countries medical professionals take different forms of an oath but in all of them the main themes are the same⁴ and relate to keeping patient information confidential (as far as possible); dedicating one's life to serving humanity; making the health of the patient one's first consideration; practicing with conscience and dignity; not permitting the interaction between doctor and patient to be influenced by factors such as race or party political affiliation, etcetera; viewing fellow doctors as brothers and not being driven by profit-seeking.⁵

The relationship between doctor and patient is governed by ethical guidelines which pervade all situations such as respect for patient autonomy, the requirement of consent,

³ Giesen, D. (1988). *International medical malpractice law: A comparative law study of civil liability arising from medical care*. Page 669.

⁴ Giesen (1988: 671).

⁵ Giesen (1988: 670–673).

truth-telling, confidentiality, respect for personhood and the person, respecting personal dignity and justice.⁶

Section 32 of the Constitution⁷ makes provision for a right to the access to information. It stipulates that information may be accessed by the state or any person in the event that access is necessary to exercise or to protect any other right.⁸ It directs the national legislature to enact an act in parliament to give effect to this right.⁹ The right to freedom of expression affords the press and other forms of media the right to request information in the public interest.¹⁰ The situation that arises may be expressed as a dilemma when a doctor treats a celebrity patient.

On one hand the Constitution makes provision for freedom of expression¹¹ and access to information, which are rights enjoyed by journalists and the general public, and on the other hand there are ethical issues as well as a right to privacy¹² and a right to human dignity;¹³ rights which must be respected by doctors.

In general, doctors face pressure from the media to supply information. The doctor-patient relationship may be compromised in these circumstances if it involves a public figures or a celebrity patient, particularly in terms of an issue pertaining to patient privacy and confidentiality.

⁶ Kennedy, I., & Grubb, A. (2002). *Medical law*. Page 3.

⁷ The Constitution of the Republic of South Africa, 1996.

⁸ Section 32 of the Constitution.

⁹ Section 32 of the Constitution.

¹⁰ Section 16 of the Constitution.

¹¹ Section 16 of the Constitution.

¹² Section 14 of the Constitution.

¹³ Section 10 of the Constitution.

1.3. HYPOTHESIS, RESEARCH QUESTIONS AND RESEARCH FOCUS

1.3.1. Hypothesis

Events which involve famous people or celebrities attract media attention; these stories sell. However, there is a need to be reminded that even public figures are people first and public figures second. In the cases of two public figures (discussed later) whose admission to hospital made headlines, their condition was publicised in several media formats; in print, on the radio and on television. This situation motivated the researcher to investigate the intersection of patient privacy and access to information, with specific reference to patients who are celebrities or public figures, and including a doctor's obligation to maintain confidentiality, issues around a conflict of interests and breaches that may arise if medical information is reported in the media in the public interest.

1.3.2. Research question

If people of exceptional social standing are patients there is a possibility that treatment in their best interest may be compromised.¹⁴ What happens to a celebrity or public figure (including illness) is of interest to the public.¹⁵ In a situation of a conflict between personal autonomy and the public interest the research examines:

To what extent is a patient's private and confidential information acquired in the doctor-patient relationship respected?

The researcher finds it useful to break down the main question into the following sub-questions:

- Do doctors, including their support personnel, respect patient confidentiality with regard to private information acquired in the doctor-patient relationship?
- To what extent does their response affect the doctor-patient relationship?

¹⁴ Groves, J.E., Barbara, A., Dunderdale, R.N., Theodore, A. & Stern, M.D. (2002). Celebrity patients, VIPs, and potentates. *The Primary Care Companion to the Journal of Clinical Psychiatry*, 4(6): 215.

¹⁵ Groves et al. (2002: 215).

1.3.3. Research focus

The research focuses on:

- outlining the importance of the doctor-patient relationship in order to establish a standard;
- critically outlining the manner in which celebrity patients may be viewed differently from other patients;
- critically analysing patient confidentiality, privacy and the freedom of expression as rights to be respected; and
- outlining the impact of a compromised doctor-patient relationship with regard to confidentiality and privacy with the aim of ensuring this terrain is treated with the care it deserves.

1.4. MOTIVATION

Two important cases which deal with these issues are discussed in this study. The first is that of the former president of the Republic of South Africa, Mr Nelson Mandela, in his final illness. The media reported on his illness in every aspect, including the breakdown of the ambulance on the way to the hospital which left him stranded for over 40 minutes.¹⁶ It was reported that the night before Mr Mandela went into cardiac arrest and was resuscitated.¹⁷ It was further stated that Mr Mandela's kidneys and liver were functioning at 50% and that he had been unable to open his eyes in days.¹⁸

The second case is that of former Minister of Health, Ms Manto Tshabalala-Msimang.¹⁹ This example clearly illustrates the issues surrounding the right to freedom of expression versus privacy and confidentiality, specifically with reference to celebrities or public

¹⁶ Sunday Times, 22 June 2013.

¹⁷ Sunday Times, 22 June 2013.

¹⁸ Sunday Times, 22 June 2013.

¹⁹ Tshabalala-Msimang and Mediclinic v Sunday Times (2008).

figures. Case law is thoroughly discussed in chapter 3 and illustrates the relevance to the research topic.

There is a need to strike a balance in society between the public life and the private space of an individual; our humanity is by virtue of respect for our dignity and not the result of fame.²⁰ Individuality underscores the rights to dignity and privacy and sets the limits of humanity in human interaction.²¹

The main focus of the study is on the duty of a medical doctor to maintain the confidentiality of medical information from a legal and an ethical perspective.²² Medical confidentiality is justified in terms of trust in what is a fiduciary relationship, as well as by the intrinsic value to medical privacy and the personal and social consequences which relate to breaches in medical practice.²³ Confidentiality may be breached to fulfil society's legitimate interest that at times requires access to information.²⁴

All information relating to health status, treatment, or stay in a health establishment is confidential. The disclosure of such information is prohibited unless consented to in writing, there is a court order to disclose such information or if non-disclosure represents a serious threat to public health or would cause serious harm to the community.²⁵ In discharging his/her duties, a health practitioner strives to respect confidentiality, privacy, personal choices and dignity while acting in the best interest of the patient.²⁶

²⁰ Burchell, J. (2009). The legal protection of privacy in South Africa: A transplantable hybrid. *Electronic Journal of Comparative Law*, 13(1): 2.

²¹ Burchell, J. (2009: 2).

²² Mathews, C. & Martinho, A.M. (2012). Patient-physician confidentiality: 'Til death do us part. *Visual Mentor Journal*, 14. Page 720.

²³ Mathews, C. & Martinho, A.M. (2012: 720).

²⁴ Mathews, C. & Martinho, A.M. (2012: 720).

²⁵ Section 14 of National Health Act (Act 61 of 2003).

²⁶ Health Professions Council of South Africa. (2008). Guidelines for good practice in the health care profession: Ethical and professional rules of the Health Professions Council of South Africa, as promulgated in Government Gazette R717/2006, Booklet 2, Rule 27A, page 20.

The constitutional implications, legislative practice and case law, as well as ethical obligations (to be discussed in detail in later chapters), which focus on the issues of the rights to privacy and confidentiality and to freedom of expression in relation to public figures or famous patients specifically with reference to the two cases outlined above, support research into the position if media attention compromises a celebrity patients' right to privacy and confidentiality.

1.5. METHODOLOGY

The study analyses the doctor-patient relationship in the case of a celebrity or famous person with specific reference to the issues of privacy and confidentiality. Theoretical documents, both primary and secondary sources, are analysed but the focus is on the primary sources. The researcher uses secondary sources to supply an outline of the scholarly research or as a resource for further references.²⁷ Primary sources provide original information in support of the points in the argument,²⁸ as well as offering substance and context.²⁹

The Constitution, legislative documents, case law, journal articles and text books, as well as the documents which outline the ethical rules are the theoretical basis for the analysis. The South African legal system is relied on, although international law will be used to supplement it. This practice is supported in the Constitution which indicates in interpreting the Bill of Rights a court, tribunal or forum consider both international and foreign law to supplement South African law in order to promote human dignity, equality and freedom.³⁰ The research takes an integrative approach and seeks to synthesise information gained from the Constitution, legislative documents, case law, ethical points of view and the theories of different authors. The supremacy of the Constitution is recognised in the overall approach.

²⁷ Van Zyl, L.E. (2012). *Research methodology for the economic and management sciences*. Page 50.

²⁸ Van Zyl, L.E. (2012: 52).

³⁰ Section 39 of the Constitution

1.6. STRUCTURE / CHAPTER OUTLINE

1.6.1. Chapter 1: Introduction

The first chapter provides the framework to the project. It provides as well background to the research topic and the methodology used. The chapter outlines the problem statement and declares the focus of the research. The main research question is posed and assumptions as well as the hypothesis are presented. The research document comprises six chapters.

1.6.2. Chapter 2: Defining the doctor-patient relationship: privacy and confidentiality in respect of celebrities or famous people

Chapter 2 focuses on establishing a common understanding of the terms which are critical to the research (i.e., doctor-patient relationship, privacy, confidentiality and celebrities or famous people). The researcher identifies the issues which need be considered in order to ensure an appropriate doctor-patient relationship which is used as the standard. The researcher indicates an understating of what constitutes a famous person or celebrity. The differences between privacy and confidentiality are outlined. The researcher examines the issues to be considered if the privacy and confidentiality of patients is valued.

1.6.3. Chapter 3: A multi-layered approach in relation to privacy and confidentiality

This chapter focuses on the concepts of 'privacy' and 'confidentiality' by examining the legislative documents and case law, as well as ethical obligations, under the umbrella of the supremacy of the Constitution. This approach advocates first analysing the provisions of the Constitution, then legislative provisioning (acts of parliament), ethical issues and finally case law.

1.6.4. Chapter 4: The role of media in the treatment of issues relating to privacy and confidentiality

The researcher outlines the provisions in the Constitution and legislative documents which relate to the procedure that needs to be followed in order to access information.

The role of the press ombudsmen is explained and the researcher addresses the question of to what extent the press should respect privacy, including patient confidentiality.

1.6.5. Chapter 5: Defences in cases in which privacy and confidentiality have been violated

Privacy and confidentiality are rights long given protection, but the researcher outlines circumstances in which they can be transgressed and provides examples of situations where it is justifiable to violate these rights and the oath of the medical profession.

1.6.6. Chapter 6: Conclusion

In this chapter the researcher synthesises the findings and returns to the research focus in order to evaluate the results and to establish the success in answering the research question.

CHAPTER 2: DEFINING THE DOCTOR-PATIENT RELATIONSHIP: PRIVACY AND CONFIDENTIALITY IN RESPECT OF CELEBRITIES OR FAMOUS PEOPLE

2.1. INTRODUCTION

The obligation to benefit patients is the oldest and most fundamental tenet of the medical profession.³¹ By the Hippocratic Oath many generations of physicians have pledged to protect patients and restore them to health.³²

A rise in medical tourism means that many more hospital-based doctors are likely to find celebrities, royalty and political leaders under their care.³³ Caring for celebrities or public figures creates special issues and challenges in the form of a so-called “VIP syndrome”.³⁴ This syndrome refers to patients of special social or political status or to people’s perception of celebrities or public figure patients which affects the behaviour and clinical practice of professionals and leads to greater work pressures and the withdrawal of personnel or professionals, ultimately creating poor outcomes.³⁵

In order properly to diagnose and to provide effective treatment doctors depend on critical information supplied by their patients.³⁶ The patient assumes that the confidential information communicated to the doctor will not be revealed to a third party without his/her consent, and the doctor has a duty to keep the information confidential.³⁷ The patient cooperates with the doctor by giving proper and sufficient information.³⁸

³¹ Chin, J.J. (2002). Doctor-patient relationship: from medical paternalism to enhanced autonomy. *Singapore Medical Journal*, 43(3): 152.

³² Chin (2002: 152).

³³ Guzman, J.A., Sasidhar, M., & Stoller, J.K. (2011). Caring for VIPs: nine principles. *Cleveland Clinic Journal of Medicine*, 78(2): 90.

³⁴ Guzman et al. (2011: 90).

³⁵ Guzman et al. (2011: 90).

³⁶ Moodley, K. (2017). *Medical ethics, law and human rights: A South African perspective* (2nd ed.). Page 151.

³⁷ Giesen (1988: 407).

³⁸ Giesen (1988: 406).

The doctor-patient relationship is discussed in order to establish what constitutes an acceptable standard for this relationship. The term 'celebrity' or famous patient is examined with a view to establishing its meaning in relation to the context of this study. The words 'confidentiality' and 'privacy' are defined and differentiated. The discussion concludes with a preliminary synthesis.

2.2. THE DOCTOR-PATIENT RELATIONSHIP

It has been claimed that it is the attitude of physicians which makes them respected in the community and not necessarily their knowledge.³⁹ It is critical that the physician has a good foundation in and masters the humanistic side of patient care as the main goal is to reduce the suffering of patients.⁴⁰ The Hippocratic Oath imposes a responsibility on physicians to protect patients from harm and to restore them to health.⁴¹

It is this Oath that is the foundation of the doctor-patient relationship and requires that health professionals avoid the abuse of the relationship and keep secret any outcome of the relationship which should not be divulged.⁴²

2.2.1 Models of the doctor-patient relationship

Since the relationship between the doctor and patient is central to patient treatment, it is important that one look at the models which enhance this relationship. Kushner advocates a relational model (suggesting a move away from a purely clinical model), which interprets the relationship in terms of two factors; utilitarian and teleological.⁴³ The relationship is utilitarian in the sense that a doctor is expected to provide beneficial consequences that

³⁹ Osorio, J.H. (2011). Evolution and changes in the physician-patient relationship. *Colombia Medical Journal*, 42: 400.

⁴⁰ Osorio (2011).

⁴¹ Chin (2002: 152).

⁴² Giesen (1988: 670)

⁴³ Kushner, T. (1981). Doctor-patient relationships in general practice: a different model. *Journal of Medical Ethics*, 7: 128

cause a patient happiness in the form of relief from pain and suffering.⁴⁴ This model portrays the doctor as a powerful figure who through his/her skills and expertise acts upon the more passive patient, who expects to be restored to health through cooperation with the doctor.⁴⁵ It is considered to be the oldest model of the doctor-patient relationship and advocates that physicians act in relation to patients in their capacity to alleviate pain and suffering.⁴⁶

A more contemporary version of the relational model concentrates not on managing the outcome of the treatment but on the quality of the interaction between doctor and patient, in which the patient's role is participatory more than passive.⁴⁷ The best outcome for the patient derives by starting with a high level of communication and interpersonal skills which enable the physician to gather information in order to arrive at the correct diagnosis, provide proper counselling and proper therapeutic instruction, and to establish a caring relationship with the patient.⁴⁸

2.2.2 Communication in the doctor-patient relationship

Communication between doctor and patient is viewed as a complex phenomenon because it seeks to communicate critical issues (i.e., they are emotionally laden and sometimes involuntary). Often it requires greater cooperation than other forms of communication and is an interaction between people who are not on an equal footing.⁴⁹ The relationship is unequal because the doctor has superior knowledge about the health of the individual and their illnesses, which means the doctor has a formal and an informal

⁴⁴ Kushner (1981: 128).

⁴⁵ Kushner (1981: 128).

⁴⁶ Kushner (1981: 128).

⁴⁷ Kushner (1981: 130).

⁴⁸ Ha, J.F. & Longnecker, N. (2010). Doctor-patient communication: A review. *The Ochsner Journal*, 10: 38.

⁴⁹ Prag, P., Wittek, R. & Mills, M.C. (2016). The educational gradient in self-rated health in Europe: Does the doctor-patient relationship makes a difference? *Acta Sociologica*, 60(4): 3.

gatekeeping-functionality with regard to health and illness, and the doctor has the power to steer the interaction with the patient.⁵⁰

The main aim in doctor-patient communication is to improve patient health and gain a medical outcome, which can be achieved through patient and doctor-centred approaches.⁵¹ Communication in a doctor-patient relationship has three important functions: creating a good inter-personal relationship, information exchange and making treatment decisions.⁵² The interpersonal relationship between doctor and patient should be good since it is a prerequisite for optimal medical care.⁵³

Information-sharing requires a verbal interaction between two or more parties and takes two forms: information giving and information seeking.⁵⁴ The doctor needs information to decide on the diagnosis and treatment, while the patient needs information in order to make a decision and give input regarding his/her treatment in the so-called participatory decision-making treatment model.⁵⁵

2.2.3 Patient autonomy in a doctor-patient relationship

The relational model, such as that discussed above, is being revisited with an emphasis on the patient's right to make a choice in terms of the treatment received. For the patient to make an informed decision regarding treatment based on his/her value system the doctor must provide full and accurate information.⁵⁶ The doctor needs to make recommendations to the patient about different treatment options, but also provide full and accurate information about these options and their implications. The patient has the

⁵⁰ Prag et al. (2016: 3).

⁵¹ Ha & Longnecker (2010: 38).

⁵² Ong, L. M. L., De Haes, J. C. J. M., Hoos, A. M., & Lammes, F. B. (1995). Doctor-patient communication: A review of the literature. *Social Science & Medicine*, 40(7): 903.

⁵³ Ong et al. (1995: 904).

⁵⁴ Ong et al. (1995: 904).

⁵⁵ Ong et al. (1995).

⁵⁶ Kushner (1981: 130).

right to make the decision about his/her health, including the decision to refuse any recommended medical treatment, provided that there is a full explanation and an understanding of the implications, as well as the risk and obligation.⁵⁷

The above discussion leads to the concept of 'autonomy', which means self-rule or the right of everyone to make decisions for him/herself including decisions about his/her health, after being provided with critical information about the available treatment and different options. It should be noted that a discussion of autonomy alone without reference to other principles leaves the puzzle incomplete when dealing with an ethical dilemma. Other principles are not discussed in detail but are listed with short definitions: respect for autonomy (informed consent, confidentiality, truth telling and communication), beneficence (do good), non-maleficence (not do harm) and justice (rights justice, legal justice and distributive justice).⁵⁸

In the past medical professionals treated patients as objects, a practice known as medical paternalism. Until the dawning of patient autonomy, which is seen as a fundamental ethical principle, patients could not make decisions.⁵⁹ Autonomy is about recognising the rights of patients and moving away from the notion that 'doctor knows best'.⁶⁰ This development is called an information model, in that doctors are obliged to provide full and accurate information to the patient about the treatment options, including the advantages and disadvantages to each option, and the patient ultimately makes the decision about his/her treatment.⁶¹

This model of autonomy depends heavily on mutual trust and understanding between the parties involved (i.e., the doctor and patient) which can be achieved through a partnership

⁵⁷ Section 6 of National Health Act.

⁵⁸ Moodley (2017: 53).

⁵⁹ Herring, J. (2010). *Medical law and ethics*. (3rd ed.). New York: Oxford University Press. Page 192.

⁶⁰ Herring (2010: 192).

⁶¹ Chin (2002: 153).

and a well-negotiated management plan. The doctor provides a professional recommendation, but the patient's ideas, concerns and expectations also are addressed.⁶² The protection of a principle of autonomy may require greater effort in that consequences such as litigation serve a purpose of sanctioning or ensuring that proper standards are observed by health or medical professionals. A lawsuit might result if a full implication of the treatment is not explained to the patient with a view to fully respect the patient's interests and responsibilities.⁶³ It should be noted also that the notion of autonomy comes with an obligation of informed consent, confidentiality, truth telling and effective communication in the course of the doctor-patient relationship.⁶⁴

2.3. CONFIDENTIALITY AND PRIVACY

Modern technological developments and global convergence have introduced a new element of threat to Individual privacy by facilitating the dissemination of information which undermines confidentiality.⁶⁵ For example, a comprehensive electronic dossier about any person is rapidly compiled and images can be recorded easily using either a digital camera or mobile phone.⁶⁶ The discussion of the topic of confidential information in this section takes into account the challenges posed by modern technology and its effect on the confidentiality of information in relation to the doctor-patient relationship. Issues relating to privacy cannot be separated from the discussion of confidentiality, thus privacy will be examined, including offering a definition, constitutional provisions and types of infringement of privacy.

2.3.1 Confidentiality

An understanding of confidentiality is approached through a discussion in this section of the theories that underpin the concept, its definition, factors which qualify information as

⁶² Chin (2002: 154).

⁶³ Giesen (1988: 691).

⁶⁴ Moodley (2017: 55).

⁶⁵ Burchell (2009: 1-26).

⁶⁶ Burchell (2009).

being confidential, the introduction of an electronic patient record and of the complexity of the notion of confidentiality.

Theories of confidentiality

The three important theories in relation to confidentiality are utilitarian, duty-based and virtue theory. Utilitarian theory encourages openness on the part of patients seeking assistance since this practice maximises utility. Duty-based and right-based theories advocate individual rights and interests. Virtue theory focuses on issues like trustworthiness and confidentiality.⁶⁷ It should be noted utilitarian theory is striving to maximise utility even in favouring a breach of confidentiality, whereas duty-based theory advocates confidentiality at all cost.⁶⁸

Defining confidentiality

Confidentiality can be defined in relation to two spheres; public and private.⁶⁹ There is not a clear boundary between the two, and the requirement is that any infringement of either sphere be known of and accepted by both doctor and patient.⁷⁰

The ability of an individual or professional to keep patient information secret is the main factor affecting confidentiality.⁷¹ It is important that the rules governing or the policy relating to confidentiality is updated in response to technological and other current developments, as is usually the case in respect of law and ethics.⁷²

⁶⁷ Pattinson, S.D. (2006). *Medical law and ethics*. London: Sweet and Maxwell Limited. Page 174.

⁶⁸ Pattinson (2006: 175).

⁶⁹ Van Bogaert, D.K. & Ogunbanjo, G.A. (2009). Confidentiality and privacy: what is the difference? *South African Family Practice Journal*, 51(3): 194.

⁷⁰ Van Bogaert & Ogunbanjo (2009: 194).

⁷¹ De Cruz, P. (2001). *Comparative healthcare law*. London: Cavendish Publishing Limited. Page 48.

⁷² De Cruz (2001: 49).

Information qualifying as confidential

An exchange between the confider and the recipient of the information ought to be confidential, and in declaring a breach of confidentiality the following conditions are met: the quality of confidentiality attached to such information must be clear, the way the information has been imparted must command confidentiality on the part of the receiving person and the use of such information by the receiving person must not be detrimental to the communicating person.⁷³

There are three justifications for maintaining confidentiality in respect of the doctor-patient relationship:⁷⁴

- Patient autonomy: information is divulged to the doctor by the patient for the purpose of a proper diagnosis on the understanding that confidential information will be kept secret.
- Doctor integrity: an undertaking by the doctor who is given the information provided by the patient for a specific purpose with a promise that the information will not be communicated to a third party without the patient's consent.
- Consequences for the future of the relationship: the patient may refuse to divulge critical, sensitive and personal information to the doctor if the patient learns that confidences have been broken, resulting in the possibility of a misdiagnosis or the wrong treatment being given to the patient.

In short, confidentiality is determined by the nature of the information and the circumstances under which information is acquired. The information is not in the public domain and is not useless or trivial.⁷⁵ An example of a relationship which gives rise to

⁷³ Garwood-Gowers, A., Tingle, J. & Lewis, T. (2001). *Healthcare law: The impact of the Human Rights Act 1998*. London: Cavendish Publishing Limited. Page 129.

⁷⁴ De Cruz (2001: 51).

⁷⁵ Pattinson (2006: 176).

confidentiality of information is that between doctor and patient, and includes other health professionals.⁷⁶ Medical information remains confidential⁷⁷.

Confidentiality in general

The Hippocratic Oath addresses the issue of privacy as follows: “what I may see or hear in the course of the treatment or even outside of treatment in regard to the life of a man, which on no account one must spread abroad, I will keep to myself holding such things shameful to be spoken about”.⁷⁸ Physicians are to keep a patient’s secrets confided to them during treatment even after the patient has died.⁷⁹ The issue of the confidentiality of information in a medical situation generally is expressed in absolute or near absolute terms.⁸⁰

The notion of confidentiality in medicine is as old as the practice of medicine and defines the doctor-patient relationship since without this relationship there is no medical profession.⁸¹ The cooperation between doctor and patient is important since the doctor needs the information the patient provides in order to give proper advice and treatment and it is the responsibility of the patient to give truthful information.⁸²

Patients communicate personal and sensitive information to the doctor in the belief that the doctor will not reveal such information to a third party without the patient’s consent.⁸³ As the Hippocratic Oath entails it is the duty of the doctor not to disclose patient

⁷⁶ Pattinson (2006: 176).

⁷⁷ Pattinson (2006: 176).

⁷⁸ Bauer, K.A. (2009). Privacy and confidentiality in the age of e-medicine. *Journal of Health Care Law and Policy*, 12(1): 48.

⁷⁹ Moodley (2017: 62).

⁸⁰ Moodley (2017: 62).

⁸¹ Giesen (1988: 406).

⁸² Giesen (1988: 406).

⁸³ Giesen (1988: 407).

information with the aim of protecting the privacy of the patient.⁸⁴ It should be noted that the recognition of confidentiality between doctor and patient with regard to the exchange of information is a fundamental requirement.⁸⁵

The duty of doctors to respect patient confidentiality as common law⁸⁶ imposes implies that all confidential information (not limited to medical information) is protected, whether received under notice of confidentiality or under circumstances in which a reasonable person ought to know that such information is confidential.⁸⁷ Any information acquired by a doctor as a consequence of the practice of his/her professional duties must not be disclosed to anyone without the patient's consent since this is private information which has the full protection of the law.⁸⁸

Electronic patient records

When the health information of an individual, which has been acquired through the health care process, is disclosed to an unauthorised party it does great economic, psychological and social harm.⁸⁹ The need to revisit the element of the security of electronic information with specific reference to confidentiality and privacy is prompted by the emergence of information technology platforms.⁹⁰ Large and complex systems of medical records are easily manageable by means of electronic storage.⁹¹ However, electronically captured

⁸⁴ Giesen (1988: 408).

⁸⁵ Garwood-Gowers et al. (2001).

⁸⁶ Jansen Van Vuuren v M J Kruger. 1993. The case of the fateful golf course conversation. Alleged breach of privacy.

⁸⁷ Mason, J.K., & Laurie, G.T. (2011). *Law and medical ethics* (8th ed.). New York: Oxford University Press. Page 172.

⁸⁸ Mason & Laurie (2011: 172).

⁸⁹ Barrows, R.C. & Clayton, P.D. (1996). Privacy, confidentiality, and electronic medical records. *Journal of the American Medical Informatics Association*, 3(2): 139.

⁹⁰ McGuire, A.L. (2008). Confidentiality, privacy, and security of genetic and genomic test information in electronic health records: points to consider. *Genetics in Medicine*, 10(7): 495.

⁹¹ McGuire (2008: 495).

health information is easy to disseminate and is more likely to land in the hands of unauthorised people who might use it for nefarious purposes.⁹²

The security of information technology in the banking and military sectors has been a focus but has not been found appropriate for the health care sector⁹³. Four ways in which security of information can be compromised (including health information) are:⁹⁴

- the threat of cookies and spyware,
- hackers gaining access to patient information,
- patient information being stolen by means such as identity theft, and
- the human element which is identified as the greatest threat due to the poor design of security around information and a lack of training.

Complexity of confidentiality

Confidentiality in a health setting is complicated by patients being seen or treated by a multidisciplinary team who need to communicate with regard to the patient in order to provide effective and efficient treatment.⁹⁵ In a hospital setting record keeping is the task of administrative personnel who are responsible for ensuring the required quality in the standard of record keeping is achieved.⁹⁶

The basis of the doctor-patient relationship is trust with an expectation that patient privacy is respected.⁹⁷ Apart from verbal transmission, patient information can be communicated symbolically as well as in a written form (e.g., name, age, x-ray and laboratory tests).⁹⁸

⁹² McGuire (2008: 495).

⁹³ Barrows & Clayton (1996: 139).

⁹⁴ Bauer, K. A. (2009: 48).

⁹⁵ Herring (2010: 213).

⁹⁶ Herring (2010: 213).

⁹⁷ Herring (2010: 214).

⁹⁸ Van Bogaert & Ogunbanjo (2009: 194).

The doctor-patient relationship, including the issue of confidentiality, presents challenges that need to be acknowledged, such as the volume of information that a patient generates and which needs to be stored, the rate at which the technology for storing, transmitting and retrieving the information changes, and the need for the information to be monitored and evaluated more closely than ever before.⁹⁹

2.3.2. Privacy

Defining privacy

'Privacy' in the terms of this discussion is defined as the ability to determine how, when, and to what extent information about oneself can be communicated to others.¹⁰⁰ This definition focuses on the perspective of information but it includes physical privacy.¹⁰¹ In the definition the important elements are the ability to control information about oneself and to control who can experience oneself or observe oneself.¹⁰²

Privacy is a fundamental principle in supporting the concept of dignity, and forms part of the law of persons.¹⁰³ The weight and importance of this issue relies on its value in fostering the conditions which support a wide range of other aspects of human flourishing, which are reflected by autonomy and the freedom from state interference.¹⁰⁴

Privacy is the cornerstone of human rights law and of the Constitution, 1996. It is vital in maintaining the balance between the rights of the individual and society, as well as representing the freedom of the individual from interference by the public authorities.¹⁰⁵ It

⁹⁹ Garwood-Gowers et al. (2001).

¹⁰⁰ Bauer (2009: 49).

¹⁰¹ Bauer (2009: 49).

¹⁰² Van Bogaert & Ogunbanjo (2009: 194–195).

¹⁰³ Wicks, E. (2007). *Human rights and healthcare*. Portland: Hart Publishing. Page 120.

¹⁰⁴ Wicks (2007: 120).

¹⁰⁵ Wicks (2007: 119).

sets people free from the influence of external forces, and under its protection their actions most resemble a true choice and intention in terms of the concept of autonomy¹⁰⁶.

Privacy is a facet of the personality of an individual, and includes issues such as dignity, identity and reputation.¹⁰⁷ The right to privacy together with an inherent right to dignity define humanity.¹⁰⁸ Humanity respects the individual and the private domain. Thus, it is essential to keep a balance between the private sphere and the involvement of others in our life.¹⁰⁹

Protection of privacy

The right to privacy in respect of natural persons is recognized in South African law and is given expression in the Bill of Rights.¹¹⁰ Privacy is a right not to have their possessions seized, their communications infringed or their home, property or selves (person) searched.¹¹¹

Mechanism for the infringement of privacy

An infringement of privacy occurs as a result of intrusion or by the disclosure by an acquaintance of personal facts contrary to the determination and will of a person whose right is being infringed.¹¹² An infringement of privacy should be viewed in the same light as an infringement of dignity, since the disclosure of private facts not only is contrary to the subjective determination and will of the prejudiced party, but the action viewed objectively is in contradiction to the community's values and is deemed unreasonable.¹¹³

¹⁰⁶ Wicks (2007: 119).

¹⁰⁷ Burchell (2009: 2).

¹⁰⁸ Burchell (2009: 2).

¹⁰⁹ Burchell (2009: 2).

¹¹⁰ Neethling, J., Potgieter, J. M., & Visser, P. J. (1996). *Neethling's law of personality*. Durban: Butterworth Publishers (Pty) Ltd. Page 239.

¹¹¹ The Constitution of the Republic of South Africa (Act 108 of 1996).

¹¹² Neethling et al. (1996: 243).

¹¹³ Neethling et al. (1996: 243).

The criterion which determines the wrongfulness of a violation of privacy is the *boni more* or conviction of the community.¹¹⁴

When an outsider gains knowledge of a private or personal fact contrary to a person's determination and wishes it is a violation of privacy through intrusion.¹¹⁵ When an outsider reveals personal facts to a third party and this revelation is contrary to the determination and will of the person whose information has been revealed it is called disclosure.¹¹⁶ There is a greater challenge in maintaining the privacy of a celebrity or a public figure since there is strong public interest in information relating to such a person.

Consent in relation to privacy

The right to bodily and psychological integrity is supported by the concept of informed consent and includes the right to have control over one's body and enjoy security and not to be subject to scientific or medical experimentation.¹¹⁷ A breach of patient confidence can occur only with his/her consent, if it is in the public interest, under order from court of law or if non-disclosure is a risk to the community.

2.4. CELEBRITY

The constitutive discourse emerging out of a wide range of media formats and practices makes the concept of celebrity somewhat slippery.¹¹⁸ It is difficult to determine satisfactorily what does or does not constitute a celebrity story due to the fact that news individuates its subjects and foregrounds major players in the stories.¹¹⁹ It is the doings and the way of life of the celebrity – and not that they possess a particular level of political,

¹¹⁴ Neethling et al. (1996: 243).

¹¹⁵ Neethling et al. (1996: 244).

¹¹⁶ Neethling et al. (1996: 248).

¹¹⁷ Section 12 of the Constitution.

¹¹⁸ Bonner, F., Farley R., Marshal, D. & Turner, G. (1999). Celebrity and the media. *Australian Journal of Communication*, 26(1): 56.

¹¹⁹ Bonner et al. (1999: 56).

economic or religious power – that attracts a considerable amount of interest.¹²⁰ The way in which individuals are presented and discussed makes it clear that celebrity does not exist as the property of an individual.¹²¹

Defining celebrity

When media show an interest that extends beyond a personal achievement and investigate the private life of an individual, he/she is elevated above being an ordinary person to the status of a celebrity.¹²² A celebrity is defined as someone who is well-known for his/her 'well-knownness', who has the power to influence mass opinion and shape certain behaviour in addition to entertaining the public.¹²³ It should be noted that the media establish and communicate knowledge and not an elite or experts.¹²⁴

In determining the 'well-knownness' of a person, the first criterion which must be satisfied is awareness of the person by the public, either through personal contact or mediated stories about the person.¹²⁵ Since there is no threshold to determine the critical level of 'knownness' among the public, this awareness is calculated per quota of people who are 'concerned' with information about such an individual.¹²⁶

The term 'celebrity' is problematic since it has varying connotations; for example, in the film industry it refers to someone who is considered a star which, in turn, refers to the representation of both on- and off-screen personas.¹²⁷ More broadly, celebrity is regarded

¹²⁰ Bonner et al. (1999: 56).

¹²¹ Bonner et al. (1999: 56).

¹²² Biancovilli, P., Machado, G.D.C. & Jurberg, C. (2015). Celebrity and health promotion: How media can play an active role in cancer prevention and early detection. *Journal of Media and Communication Studies*, 7(3): 41.

¹²³ Biancovilli et al. (2015: 41).

¹²⁴ Barry, E. (2008). Celebrity, cultural production and public life. *International Journal of Cultural Studies*, 11(3): 251.

¹²⁵ Rupp, H. (2014). Who owns celebrity? – law and the formation of fame. *The Entertainment and Sports Law Journal*, 12(4): Paragraph 4.

¹²⁶ Rupp (2014: Paragraph 4).

¹²⁷ Holmes, S. & Redmond, S. (2010). A journal in *Celebrity Studies*. *Celebrity Studies*, 1(1): 4.

as referring to the contemporary state of being famous, which means that a celebrity impacts the public consciousness.¹²⁸ The notion is concerned with transgressing the boundary between private and public in which emphasis is on the private life not on his/her career.¹²⁹

For the purpose of this study the following definition of 'celebrity' is used: "the person must have exposed him/herself through his/her personality, status or conduct to a degree of publicity which justifies intrusion into or a public discourse on, certain aspects of his life".¹³⁰

Different types of celebrity

The state of 'celebrity' depends on some qualitative factors; thus it is associated with an element of being feted for something.¹³¹ To be called a celebrity one must have achieved something extraordinary, be regarded as heroic, act as a model to others or have done something remarkable, for example be an explorer, politician or scientist.¹³² Such a person is seen as having achieved celebrity, but another type of celebrity status is attained by being related or married to a public person, for example, the public knows the person because his/her life partner or relative is a prominent figure.¹³³

In the past fame and status were characterised by performance and accomplishment, whereas nowadays celebrity is seen as a product which is produced in movie studios, by media companies and by public relations experts with the sole purpose of promoting some special interest such as selling products or influencing the decisions of politicians.¹³⁴

¹²⁸ Holmes & Redmond (2010: 4).

¹²⁹ Holmes & Redmond (2010: 4).

¹³⁰ Paragraph 39 of Tshabalala-Msimang v Mondli Makhanya.

¹³¹ Rupp (2014: Paragraph 5).

¹³² Rupp (2014: Paragraph 5).

¹³³ Rupp (2014: Paragraph 7).

¹³⁴ Milner, M. (2010). Is celebrity a new kind of status system? *Journal of Social Science*, 47: 379.

It is the exposure of the personal life of an individual which, in the eyes of the law, makes such an individual a public figure. This exposure can result from being a film actor or actress, being an international criminal or an involuntary victim of circumstance.¹³⁵ “Public figures’ includes but [is] not limited to celebrity (i.e., people from the entertainment sector), those holding or formerly holding public office, including politicians and other elected officials, criminals, inventors, researchers, and academics, war heroes, figures from the news, and unwilling or unexpected public figures (e.g., someone who was at the scene of a crime or in a demonstration), amongst others”.¹³⁶

Privacy and confidentiality as it relates to celebrities or public figures

It is what happens around a celebrity figure, particularly bad things, in which the public is interested; in general ‘celebrity’ makes news.¹³⁷ The spotlight on celebrities cannot be “switched off”, for example, if they are ill.¹³⁸ The newsworthiness of celebrity patients creates a problematic situation for the care provider and even if an attempt is made to keep the patients’ medical condition secret, usually the news finds its way to the public ear.¹³⁹

A security failure in relation to privacy and confidential information results in a patient being less likely to trust health-care providers and becoming reluctant to share information that is critical for the patient history in order to make a diagnosis and to provide appropriate treatment.¹⁴⁰ Maintaining a ‘private’ life as a celebrity is impossible due to their parasitical relationship with the public.¹⁴¹ Most celebrities live two lives: one is an image offered to the public and the other attempts to reserve elements of privacy and

¹³⁵ Yanisky-Ravid, S., & Lahav, B. Z. (2017). Public interest vs private lives – affording public figures privacy in the digital era: The three principle filtering model. *Journal of Constitutional Law*, 19:4, 980.

¹³⁶ Yanisky-Ravid & Lahav (2017: 980-981).

¹³⁷ Groves et al. (2002: 215).

¹³⁸ Groves et al. (2002: 215).

¹³⁹ Groves et al. (2002: 215).

¹⁴⁰ Bauer (2009: 50).

¹⁴¹ Rockwell & Giles (2009: 202).

intimacy.¹⁴² Some celebrities isolate themselves in trying to protect their private lives, which can lead to a sense of loneliness.¹⁴³

Problems that arise from celebrity

The media largely are interested in the moral conduct of a public person, and publicise issues such as drug abuse, marriage, divorce and a 'party lifestyle'.¹⁴⁴ Celebrity journalism is reflected in the unethical behaviour of the 'paparazzi' in a quest to cover stories they deem important and interesting to the public.¹⁴⁵ The hacking of celebrities' electronic gadgets is evidence of a disregard of professional ethics, and so is the publication of false stories despite the threat of a libel action.¹⁴⁶

Measures to protect privacy and confidentiality

The developments in technology have led to an increasing demand for the protection of individual privacy.¹⁴⁷ In respect of the legal and ethical aspects it is important to protect and maintain a right to privacy in health care.¹⁴⁸ The right to privacy encourages an open and frank discussion between clinicians and patients about health-related issues, and is equally important in establishing and maintaining an effective and respectful doctor-patient relationship.¹⁴⁹ An important factor in patient care is patient rights and the need to respect them is identified as exemplifying the ethical aspect of the doctor-patient relationship.¹⁵⁰

In South Africa the Constitution entrenches the right to privacy and its protection. The right to privacy is also protected in legislative documents, such as the National Health Act

¹⁴² Rockwell & Giles (2009: 203).

¹⁴³ Rockwell & Giles (2009: 203).

¹⁴⁴ Paragraph 15 of Rupp (2014).

¹⁴⁵ Tataru, L. (2012). Celebrity stories as a genre of media culture. *Journal of Teaching and Education*, 1(6): 16.

¹⁴⁶ Tataru (2012: 16).

¹⁴⁷ Demirsoy, N., & Kirimliogin, N. (2016). Protection of privacy and confidentiality as a patient right: Physician and nurse's view point. *Biomedical Research Journal*. 27(4): 1437.

¹⁴⁸ Demirsoy & Kirimliogin (2016: 1437).

¹⁴⁹ Demirsoy & Kirimliogin (2016: 1438).

¹⁵⁰ Demirsoy & Kirimliogin (2016: 1438).

61 of 2003, Protection of Personal Information Act 4 of 2013 and Promotion of Access to Information Act 2 of 2000. The ethical rules for health practitioners have provision for the protection of privacy and confidentiality. Further, case law demonstrates the recognition of a right to privacy and confidentiality.

2.5. CONCLUSION

The interaction between patient and doctor by means of a balanced intervention is foundational in the doctor-patient relationship. The patient is autonomous in the relationship and takes the final decision in relation to treatment after receiving full and accurate information regarding assessment and treatment options. An outcome-based approach is as important as the relational approach and in combination they reduce the pain and suffering of the patient.

Normally, consultation takes place behind a closed door allowing the patient to tell the doctor his/her private issues in confidence and enabling, the doctor to make a proper diagnosis. The patient confides in the doctor due to the trust he/she has that the doctor will not reveal information to a third party without consent. A doctor needs to keep information about patients confidential even after the patient has died, and divulging information is regarded as shameful. Individual rights and interests are important and confidentiality must be respected demonstrating trustworthiness in order to encourage openness on the part of the patient.

A manner of defining privacy is the ability to control information about oneself and one's experiences. However, the issue of privacy is not limited to information but includes physical privacy. The community mores are a yardstick in deciding whether disclosure of information is acceptable and to what extent disclosure infringes privacy and is considered an infringement of human dignity. Another factor in measuring acceptability of disclosure is the harm it causes.

Celebrity is the state of being known for one's 'well-knownness'. The public sees some quality in this person (e.g., an extraordinary achievement) that warrants an elevation to a celebrity. A person can attain celebrity by being related to a famous person, for example, spouse, child or sibling. The terms 'celebrity' and 'public figure' tend to be used interchangeably. When a person's personality, status or conduct expose him/her to a certain level of publicity, this factor justifies intrusion or public discourse about certain aspects of his/her private life.¹⁵¹ When a person consents to be a public figure by taking up a position that causes him/her to become visible he/she cannot object if his/her actions are made public,¹⁵²

¹⁵¹ Tshabalala-Msimang v Mondli Makhanya.

¹⁵² Tshabalala-Msimang v Mondli Makhanya.

CHAPTER 3: A MULTI-LAYERED APPROACH IN RELATION TO PRIVACY AND CONFIDENTIALITY

3.1. INTRODUCTION

A multi-layered approach to privacy and confidentiality is followed with regard to the legal position. In order to be certain that in the context of medical law the rights defended by the Constitution are upheld.¹⁵³ As the supreme law in South Africa the Constitution is the starting point of the discussion, it is followed by relevant legislative documents, common law, the application of case law and lastly the application or a consideration of medical ethics.¹⁵⁴ The basic principle in dealing with constitutionally entrenched rights is to give attention to all forms of law relevant to the problem at hand.¹⁵⁵ The multi-layered approach establishes the legal position to resolve a problem or find a solution, in this case patient privacy and confidentiality specifically of celebrities or public figures.

This multi-layered approach has been followed in other legal systems, especially English law, which the Constitution advises should be called on to supplement domestic law.¹⁵⁶ The Constitution demands the promotion of an open, democratic state to be achieved in the manner of the Bill of Rights based on human dignity, equality and freedom, and the interpretation of law should promote the spirit, purport and objectives of the Bill of Rights.¹⁵⁷ The first issue examined is the general interface between medical ethics and law. Then provisions of the Constitution are discussed, followed by legislative requirements, case law in relation to patient privacy and confidentiality and medical ethics, with specific reference to patients who are celebrities or public figures.

¹⁵³ Carstens, P. A., & Labuschagne, D. (2014). The constitutional influence on organ transplants with specific reference to organ procurement. *Potchefstroom Electronic Law Journal*, 1(17): 210

¹⁵⁴ Carstens, P. A. & Labuschagne, D. (2014). P 210

¹⁵⁵ Carstens, P. A. & Labuschagne, D. (2014). P 2010

¹⁵⁶ Section 39 of the Constitution.

¹⁵⁷ Section 39 of the Constitution.

3.2. THE GENERAL INTERFACE BETWEEN MEDICAL ETHICS AND THE LAW

The concept of medical ethics requires explanation as it is important in informing the legal framework.¹⁵⁸ It is important to note that law is not an end in itself but rather a means to an end;¹⁵⁹ its purpose is to empower human beings to lead a fulfilled life by promoting human flourishing with dignity.¹⁶⁰

Many horrific practices have been committed in the name of medicine, for example the doctors under National Socialism in Germany who conducted medical experiments on people without their consent.¹⁶¹ The desire to ensure that doctors act ethically has been stimulated by the decreased trust patients have in the medical profession.¹⁶²

Medical ethics are an important influence in the development of the doctor-patient relationship. Medical ethics and law are not independent factors;¹⁶³ they are interrelated.¹⁶⁴ To some extent the demands medical ethics place on physicians have become legal obligations.¹⁶⁵

Two important issues are raised: (1) the relationship between medical ethics and medical law and (2) transfer of this relationship to the conduct in a doctor-patient relationship. By agreeing to treat a patient, a doctor promises to do no harm and to act in the patient's best interest.¹⁶⁶

¹⁵⁸ Carstens, P. (2012). Revisiting the infamous Pernkopf Anatomy Atlas: historical lessons for medical law and ethics. *Fundamina: A Journal of Legal History*, 18(2):29.

¹⁵⁹ Carstens (2012:29).

¹⁶⁰ Carstens (2012:29).

¹⁶¹ Herring (2010: 10).

¹⁶² Herring (2010: 10).

¹⁶³ Giesen (1988: 669).

¹⁶⁴ Giesen (1988: 669).

¹⁶⁵ Giesen (1988: 669).

¹⁶⁶ Carstens (2012:21).

Life choices, bodily integrity, dignity, privacy and equality are factors in a discussion of ethical values, and share space with an examination of legal rights and their embodiment in medico-ethical codes or instruments.¹⁶⁷ As elsewhere, in South Africa legal rights and ethical values are reflected in the provisions in the Bill of Rights, and illustrates that medico-ethical values are incorporated in legal rules.¹⁶⁸ There are various components to law; family, criminal and public law, contract and torts,, but medical law involves a variety of legal aspects and as a discrete area concerns itself with governing the interaction between doctor and patient, including medico-ethical principles and the particular organisation of a health care system.¹⁶⁹

Normative medical ethics consists of four main principles: respect for autonomy, non-maleficence, beneficence and justice. These principles apply to everyone equally and are foundational ethical principles.¹⁷⁰

The principles rest on the demand not to cause harm or *primum non nocere*, which means simply “above all, do no harm”.¹⁷¹ In order to solve a moral issue or problem is to rely on the application of one or more of the principles.¹⁷² An important aspect is that at all times a medical professional must act for the benefit of the patient and avoid inflicting pain.¹⁷³ The focus here is on a positive ethical obligation owed by the medical profession.¹⁷⁴

¹⁶⁷ Carstens (2012: 25)

¹⁶⁸ Carstens (2012: 25).

¹⁶⁹ Carstens (2012: 26).

¹⁷⁰ Carstens (2012: 21).

¹⁷¹ Herring (2010: 23).

¹⁷² Moodley (2017: 37).

¹⁷³ Herring (2010: 24).

¹⁷⁴ Herring (2010: 24).

3.2.1. Patient autonomy and human dignity

Patients have autonomy with regard to the type of treatment they receive or indeed whether or not they accept receiving treatment. The literal meaning of 'autonomy' is control over oneself and empowers to make decisions for oneself.¹⁷⁵ It means that the patient makes the final decision about his/her treatment after receiving accurate information,¹⁷⁶ in practical terms the patient decides which treatment he/she should receive. Correctly, the issue of autonomy is described as related to the right to bodily integrity.¹⁷⁷

This principle does not apply to patients who are viewed as not autonomous due to being immature, incapacitated coerced into a decision or exploited (infants, young children, suicidal individuals and psychiatric patients).¹⁷⁸ Even in such a case a level of autonomy is recognised in respect of telling the truth and in obtaining consent to treat them, among other things.¹⁷⁹ Human dignity is identified as fundamental if one is to live an autonomous life, since it requires respect for an individual's choice.¹⁸⁰

In order to comply with ethical and legal requirements each intervention, from an initial investigation to treatment, should be done with the patient's consent.¹⁸¹ If informed consent is not obtained before the intervention, there are ethical and legal consequences.¹⁸² A capacity to consent is measured by the patient's ability to communicate a choice, to understand the information given to him/her, to appreciate the medical consequences of a situation and to weigh treatment options reasonably.¹⁸³

¹⁷⁵ Moodley (2017: 54).

¹⁷⁶ Moodley (2017:54).

¹⁷⁷ Herring (2010: 19).

¹⁷⁸ Moodley (2017: 54).

¹⁷⁹ Moodley (2017:54).

¹⁸⁰ Herring (2010: 19).

¹⁸¹ Moodley (2017: 55).

¹⁸² Moodley (2017: 55).

¹⁸³ Moodley (2017: 57).

3.3. CONSTITUTIONAL PROVISION

3.3.1. Human rights in general

The supreme law of the Republic of South Africa is the Constitution; the validity of any law is determined by its being consistent with the provisions of the Constitution.¹⁸⁴ All laws must be developed to support the implementation of the Constitution or are declared invalid. Chapter two of the Constitution expresses the Bill of Rights,¹⁸⁵ which affirms the democratic values of human dignity, equality and freedom. For this reason the Constitution is seen as the cornerstone of democracy.¹⁸⁶ The state is tasked with the responsibility to ensure that rights in the Bill of Rights are respected, promoted, protected, and fulfilled.¹⁸⁷

The Bill of Rights applies to all; it is the glue which binds the executive, the legislature, the judiciary and all other organs of state.¹⁸⁸ When interpreting rights contained in the Bill of Rights, courts must seek to promote the values which underpin an open and democratic South Africa, and¹⁸⁹ the Constitution relies on the courts for its fulfilment.

The protections and benefits of the law rely on respect for the rights, which are enjoyed equally by all since everyone is equal before the law.¹⁹⁰ The full and equal enjoyment of rights and freedoms is embedded in the equality clause.¹⁹¹ Legislative and other measures must be taken to promote equality and ensure that these rights are protected.¹⁹² Among other things, the state may not directly or indirectly unfairly discriminate on the basis of race, sex, gender, marital status, ethnic or social origin,

¹⁸⁴ Section 2 of the Constitution.

¹⁸⁵ The Constitution of the Republic of South Africa (Act 108 of 1996).

¹⁸⁶ Section 7 of the Constitution.

¹⁸⁷ Section 7 of the Constitution.

¹⁸⁸ Section 8 of the Constitution.

¹⁸⁹ Section 8 of the Constitution.

¹⁹⁰ Section 9 of the Constitution.

¹⁹¹ Section 9 of the Constitution.

¹⁹² Section 9 of the Constitution.

pregnancy, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth unless it can be established that such discrimination is fair.¹⁹³

Celebrity status does not nullify one's privacy and confidentiality rights or one's obligations, as this would violate the right to equality. The prevention of and prohibition on unfair discrimination is through national legislation in instruments such as the Promotion of Equality and Prevention of Unfair Discrimination Act.¹⁹⁴

The basis for allowing a reasonable and justifiable limitation of any right in an open and democratic society is to promote human dignity, equality, and freedom.¹⁹⁵ It has been indicated that a right to privacy as well as a right to have access to information are important. In dealing with these rights in the context of the doctor-patient relationship, is the issue of maintaining a balance between them. Section 36 of the Constitution provides a guide of how to deal with a conflict between these rights in the form of the emphasis on human dignity, equality and freedom. However, no law may limit the rights contained in the Bill of Rights.¹⁹⁶

3.3.2. Patient autonomy

The right to make decisions concerning one's reproductive choices and security and have control over one's body and to give consent to medical treatment or participate in scientific experimentation fulfils the right to bodily and psychological integrity.¹⁹⁷ It means anything which is done is only by consent and is not limited to medical procedures. A celebrity does not forfeit the rights to freedom and personal security. Medical professionals who treat them have a responsibility not to divulge patient information disclosed in confidence as this is the cornerstone of the doctor-patient relationship. Patients need to be in control

¹⁹³ Section 9 of the Constitution.

¹⁹⁴ Section 9 of the Constitution.

¹⁹⁵ Section 36 of the Constitution.

¹⁹⁶ Section 36 of the Constitution.

¹⁹⁷ Section 12 of the Constitution.

of their body and their decisions based on respect for the requirement of informed consent.

Everyone has the right to privacy, which includes not having one's home, person and property searched, communications intercepted or possessions seized.¹⁹⁸ Privacy is a foundational principle in the doctor-patient relationship; in its absence patients will not provide information they consider sensitive fearing that it might become public. The belief that the doctor-patient relationship entails privacy and confidentiality enables patients to reveal private information in return for medical care.

The right to dignity and to have that right respected and protected is guaranteed simply by virtue of being human.¹⁹⁹ Dignity is a foundational right and is central to tenets in the Constitution. Properly interpreted, the right to privacy and confidentiality are complementary to the right to dignity, and belong to the law of persons.

3.3.3. The issue of public interest

A right to freedom of expression includes the media being free to impart or receive information or ideas, as well as artistic creativity.²⁰⁰ Celebrities and the media cohabit, and unscrupulous journalists will report everything about them, including hospital visits, their diagnosis and the treatment they receive. Ordinarily, this behaviour constitutes unlawful and unethical conduct. These matter are confidential; it is expected that a doctor keeps patient information confidential and any breach of confidence constitutes a violation of patient privacy. There is a need to establish a balance between these respective rights and between media and celebrities since neither right supersedes the other.

¹⁹⁸ Section 14 of the Constitution.

¹⁹⁹ Section 10 of the Constitution.

²⁰⁰ Section 16 of the Constitution.

In the exercise and protection of other rights everyone has a right of access to information held by the state and/or other entities.²⁰¹ National legislation in the form of the Promotion of Access to Information Act 2 of 2000 and Protection of Personal Information Act 4 of 2013 has been enacted.²⁰² The function of journalists is to source and publicise information they deem important in the public interest.

Chapter 10 of the Constitution spells out the values and principles that govern public administration.²⁰³ Among these is the notion that timely, accessible and accurate information should be provided to public in order to foster transparency.²⁰⁴ The Bill of Rights contains the right of access to information, due to the role the information plays it was deemed critical for this right to be emphasised in Section 195 of Constitution.

The values and principles of public administration apply to spheres of government, organs of state and public entities, and it is the responsibility of the government to promote values and principles, which include fostering transparency through timely, accessible and accurate provision of information to public.²⁰⁵

3.4. LEGISLATIVE PROVISIONS

Responsibility for the creation and maintenance of health records for all health-service users rests with the heads of health establishments.²⁰⁶ Every user of a health service has a file with a unique identification. This identification enables the services to be an ongoing process in which the diagnosis and/or medication that has been prescribed might influence the patient's next course of treatment. In a sense record-keeping and the quick retrieval of patient information assists the therapeutic role.

²⁰¹ Section 32 of the Constitution.

²⁰² Section 32 of the Constitution.

²⁰³ Chapter 10 of the Constitution.

²⁰⁴ Section 195 of the Constitution.

²⁰⁵ Section 195 of the Constitution.

²⁰⁶ Section 13 of National Health Act (Act 61 of 2003).

Information in respect of a user's health status, treatment or stay in a health establishment is confidential and cannot be disclosed without consent, if a court orders such disclosure or there is a threat to the public as a result of non disclosure.²⁰⁷ The status of the person does not alter the rule.

Disclosure of information by a healthcare provider, worker and/or health establishment as a consequence of having access to the records is for legitimate purposes within the ordinary course and scope of their work or duties and access or disclosure is in the interest of the user.²⁰⁸ It is not only information that relates to education; the medical, criminal, or employment history of an individual or the financial transactions in which an individual has been involved which is classified as personal information but any information which identifies that individual.²⁰⁹

It is the responsibility of the head of a health establishment to prevent unauthorised access to records and storage facilities.²¹⁰ The serious attention paid to the protection of health records is demonstrated by the punitive measures sanctioned against those who transgress in the form of a fine or imprisonment for period which does not exceed one year or both.²¹¹

3.4.1. Accessing personal information

In order to achieve a balance there is a limitation placed on the right to privacy specifically to give effect to the right of access to information. Nevertheless, personal information when processed by responsible parties is safeguarded as required by the Constitution in the Protection of Personal Information Act 4 of 2013 (POPIA).²¹²

²⁰⁷ Section 14 of National Health Act.

²⁰⁸ Section 15 of National Health Act.

²⁰⁹ Section 1 of the Promotion of Access to Information Act (Act 2 of 2000).

²¹⁰ Section 17 of National Health Act.

²¹¹ Section 17 of National Health Act.

²¹² Section 2 of Protection of Personal Information Act (Act 4 of 2013) (POPIA).

A legitimate act of processing personal information may not infringe on the privacy of the data subject (in this case a celebrity).²¹³ The central issues in processing personal information relate to the lawfulness of the act and the non-infringement of the privacy of the data subject. Any act that does not comply is unlawful according to the Act. A journalist who accesses the information or health records of a celebrity patient depends on the lawfulness of the act and that it does not infringe the privacy of the celebrity.

The processing of information relies on the consent of the data subject or a competent person (by proxy) in cases of persons who are not competent due to age or mental capacity.²¹⁴ Only the patient can consent to the disclosure of the information acquired by a doctor in the process of therapy, even if the patient is a celebrity. The processing must satisfy three factors; (1) the responsible party and the data subject have a contract, (2) the processing of information is consistent with the law and (3) the data subject or the public interest need to be protected in the process.²¹⁵ The doctor-patient relationship establishes an obligation not to cause harm to the patient.

Only specific, defined and lawful purposes permit the collection of personal information in the line of duty of a responsible party.²¹⁶ In this situation the patient confides in the doctor during the consultation process in the belief that such information will not be shared with anyone without his/her consent.

3.4.2. Circumstances in which personal information can be processed

The collection of information must be compatible with the methods of processing personal information as assessed by a responsible party and taking into account the original purpose in collecting the data as well as any further processing, the nature of the

²¹³ Section 9 of POPIA.

²¹⁴ Section 11 of POPIA.

²¹⁵ Section 11 of POPIA.

²¹⁶ Section 13 of POPIA.

information, the consequences of further data-processing on the data subject, the manner in which information is collected and the type of contractual obligation that exists between the parties.²¹⁷ Further processing of information collected in a doctor-patient relationship must be for further treatment by other health professionals and have the aim of healing the patient. Information should be collected on the understanding that it will not be shared except for therapeutic purposes. There is a contract between the parties; the patient agrees to provide accurate and full information and the doctor agrees to provide treatment.

3.4.3. Security of personal information

The responsible party is required to secure the integrity and maintain the confidentiality of personal information in their possession or under their control by taking appropriate and reasonable measures to prevent its loss or unlawful access or processing.²¹⁸ The responsible party must identify risks, internal and external, which might lead to the theft or loss of information and monitor the implementation of a strategy to mitigate risk.²¹⁹ In respect of a celebrity patient the identification of risk to the patient's record is ongoing and strategies to minimise risk need continuing attention.

The security of the information must meet the standards prescribed by the rules and regulations of the profession, including practices and procedures.²²⁰ In the case of a doctor he/she must establish a record-keeping system which complies with the prescriptions of the Health Professions Council of South Africa and with legislation that regulates information such as POPIA and PAIA.

²¹⁷ Section 15 of POPIA.

²¹⁸ Section 19 of POPIA.

²¹⁹ Section 19 of POPIA.

²²⁰ Section 19 of POPIA.

3.5. ETHICAL CONSIDERATIONS

Health care providers act in the best interest of the patient and at all times must without fail respect patient confidentiality and privacy, their choices and dignity.²²¹ This ethical rule may not be compromised despite the pressure placed on the health care provider by journalists to release confidential information, for example of a celebrity. Further, practitioners at all times must keep patient records which are accurate and maintain with their patients and other professionals a channel of communication which is proper and effective. Accurate communication enables the doctor to source information from the patient in order to provide good care and to communicate patient information to other health professionals in service of the purpose of care for which the information was acquired. Any information provided by the patient must be stored accurately.

A practitioner or health care provider can divulge patient information, either in writing or verbally with consent or without patient consent.²²² Patient information can be divulged without patient consent only in terms of statutory provision under instruction by a court of law and in justification as being in the public interest.²²³

A practitioner may divulge information with patient consent only explicitly given in writing or verbally. Consent may be given by a parent and/or guardian if the patient is a minor and written consent is required from the next of kin and/or executor of the deceased's estate if a patient is a deceased.²²⁴ Clearly a health care practitioner does not have the power to divulge patient information to others, including journalists; power vests in the patient, an authority such as a court of law or a statutory imperative.

²²¹ Ethical rule 27A of the Health Professions Council of South Africa (HPCSA).

²²² Ethical rule 13 of HPCSA.

²²³ Ethical rule 13 of HPCSA.

²²⁴ Ethical rule 13 of HPCSA.

3.6. CASE LAW

This section presents an analysis of various examples in case law in respect of issues surrounding privacy and/or confidentiality in relation to the rights to access to information and freedom of expression. It must be noted that privacy and/or confidentiality issues have the same implication whether or not the person is a patient.

3.6.1. The case of Manto Tshabalala-Msimang v Mondli Makhanya and others

The issues in the case refer to infringements of patient privacy and confidentiality. The emphasis in the discussion is on the rights to privacy and confidentiality in relation to freedom of expression. The application was for the respondent to deliver copies of the medical records made during a stay in the hospital, to restrain the respondent from publishing and commenting on records and the gaining of access to hospital records and confidential information concerning the applicant's medical condition and treatment.²²⁵

In this case the complaint is the contravention of section 17 of the National Health Act 61 of 2003 in that the applicant's private and confidential medical records unlawfully were in possession of the *Sunday Times* and its employees.²²⁶ The applicant was admitted to a Mediclinic in Cape Town and her medical records were stolen from the hospital.²²⁷ The National Health Act classifies medical records as private and confidential information and any disclosure constitutes an infringement of the right to privacy, aggravated by the wrongful act of intrusion used to acquire such knowledge.²²⁸

Personal, sensitive and intimate information which relate to the person's bodily and psychological integrity is contained in the medical records, which reflect sensitive decisions and choices made reliant on personal autonomy.²²⁹ A strong interest in

²²⁵ Para 4 of Manto Tshabalala-Msimang v Mondli Makhanya

²²⁶ Paragraph 10 of Tshabalala-Msimang v Mondli Makhanya.

²²⁷ Paragraph 14 of Tshabalala-Msimang v Mondli Makhanya.

²²⁸ Paragraph 26 of Tshabalala-Msimang v Mondli Makhanya.

²²⁹ Paragraph 27 of Tshabalala-Msimang v Mondli Makhanya.

maintaining confidentiality makes it imperative to afford medical information protection against unauthorised disclosure.²³⁰ If information is disclosed, it will cause harm and pain to the patient.²³¹ Furthermore, disclosure without patient consent constitutes a criminal act if a breach of confidentiality is established.²³²

The Constitution regards human dignity as foundational and central to a rights culture. The historical background to the achievement of a constitutional democracy highlights the effort to restore human dignity, equality and freedom.²³³

The freedom of the press is not an argument in favour of the publication of information wrongfully gained which ruins a reputation and breaks a confidence. However, the media need to be free of unreasonable restrictions on what can or cannot be published.²³⁴ The respondent uses the “public interest” as a defence in this matter; a concept that is elastic and changes with the facts of each case.²³⁵

Freedom of expression supports a right to acquire and disseminate information which contributes to the social and moral debate.²³⁶ The rights in freedom of expression and dignity (which includes privacy) must be reconciled by a court since all Constitutional rights are assigned equal value.²³⁷ The benefit that flows from allowing the right to receive and impart information must be weighed against the right to privacy and confidentiality.²³⁸ Journalistic professional standards respect privacy and human dignity, and information gained by a criminal act violates those standards.²³⁹

²³⁰ Paragraph 27 of *Tshabalala-Msimang v Mondli Makhanya*.

²³¹ Paragraph 27 of *Tshabalala-Msimang v Mondli Makhanya*.

²³² Paragraph 27 of *Tshabalala-Msimang v Mondli Makhanya*.

²³³ Paragraph 28 of *Tshabalala-Msimang v Mondli Makhanya*.

²³⁴ Paragraph 35 of *Tshabalala-Msimang v Mondli Makhanya*.

²³⁵ Paragraph 37 of *Tshabalala-Msimang v Mondli Makhanya*.

²³⁶ Paragraph 41 of *Tshabalala-Msimang v Mondli Makhanya*.

²³⁷ Paragraph 43 of *Tshabalala-Msimang v Mondli Makhanya*.

²³⁸ Paragraph 44 of *Tshabalala-Msimang v Mondli Makhanya*.

²³⁹ Paragraph 53 of *Tshabalala-Msimang v Mondli Makhanya*.

It is argued a reasonable journalist could have foreseen there was not consent to publish the medical records and have taken steps to avoid harm since the possibility of harm was great and the effort to avoid such harm was minimal. These facts render the act negligent.²⁴⁰ In that privacy and confidentiality are a part of human dignity, which the professional standards of journalists respect, they should have been considered in this matter. Under the banner of a right to freedom of expression is not an acceptable rationale if the information causes harm to others. However, in the case of public figures their life and affairs are of public interest.²⁴¹

A cabinet minister is a public figure, and despite the information being obtained unlawfully the media can inform the public.²⁴² Furthermore, the information was already in the public domain and there was a pressing need for the public to be informed.²⁴³ In this case disclosure was found to be in the interest of the public and that the public had a genuine concern in accessing such information. Disclosure contributed to the public debate about the fitness of a politician to discharge their function in a democratic society.²⁴⁴

3.6.2. The case of NM and others v Patricia De Lille and others

In this case three women who were HIV positive claimed that their names had been disclosed and that their right to privacy, dignity and psychological integrity had been violated. The emphasis in the discussion of the case is on the rights to privacy and confidentiality and freedom of expression. The definition and scope of a right to privacy is a matter of academic controversy, but from a legal perspective it amounts to a right to be left alone.²⁴⁵ There is a need for an intimate and personal life to be protected and the recognition of an untouchable sphere beyond interference by any public authority. For

²⁴⁰ Paragraph 58 of *Tshabalala-Msimang v Mondli Makhanya*.

²⁴¹ Paragraph 45 of *Tshabalala-Msimang v Mondli Makhanya*.

²⁴² Paragraph 45 of *Tshabalala-Msimang v Mondli Makhanya*.

²⁴³ Paragraph 46 of *Tshabalala-Msimang v Mondli Makhanya*.

²⁴⁴ Paragraph 46 of *Tshabalala-Msimang v Mondli Makhanya*.

²⁴⁵ Paragraph 32 of *NM and others v Patricia De Lille and others*.

one to live his/her life as he/she wishes one must be afforded a right to privacy.²⁴⁶ The ordinary feelings and intelligence of a person means they are caused distress and injury if private facts about him/her are disclosed.²⁴⁷

Sensitive and personal information is regarded as private and confidential, in the reference to bodily and psychological integrity and personal autonomy; the delicate decision-making and choices contained in individual's health information exemplify this position.²⁴⁸ The need to value the private nature of confidential medical information is triggered by potentially harmful effects and the fear of jeopardy in relation to an individual's right to make choices that may result from the disclosure of such information.²⁴⁹

Unauthorised disclosure must be guarded against, but the right to access information in each case must be weighed against the right to privacy.²⁵⁰ If medical information passes out of the control of authorised health practitioners in the process of the facilitation of medical care, access to the information is compromised and a person loses control over information about him/herself and the ability to enforce confidentiality.²⁵¹ The respondent failed to persuade the court that sufficient effort had been made to establish whether the necessary consent was obtained before publishing the names and HIV status of the women. It was noted that she neglected to make use of pseudonyms.²⁵² The publication of the applicants' HIV status constituted a wrongful publication of private facts and breached the applicants' right to privacy.²⁵³ In this case the public interest is not indicated and is not relevant.²⁵⁴

²⁴⁶ Paragraph 33 of *NM and others v Patricia De Lille and others*.

²⁴⁷ Paragraph 34 of *NM and others v Patricia De Lille and others*.

²⁴⁸ Paragraph 40 of *NM and others v Patricia De Lille and others*.

²⁴⁹ Paragraph 41 of *NM and others v Patricia De Lille and others*.

²⁵⁰ Paragraph 43 of *NM and others v Patricia De Lille and others*.

²⁵¹ Paragraph 44 of *NM and others v Patricia De Lille and others*.

²⁵² Paragraph 46 of *NM and others v Patricia De Lille and others*.

²⁵³ Paragraph 46 of *NM and others v Patricia De Lille and others*.

²⁵⁴ Paragraph 47 of *NM and others v Patricia De Lille and others*.

Human dignity is a principle jealously guarded in the light of historical events.²⁵⁵ The respondent violated the dignity and psychological integrity of the applicants, and failed to show that the disclosure was in the public interest.²⁵⁶ In an open and democratic society freedom of expression is a critical right without which transparency is severely compromised and endangered.²⁵⁷ However, the court found freedom of expression to be part of a web of mutually supporting rights.²⁵⁸

3.6.3. The case of Van Vuuren v Kruger

This case the HIV status of a patient was disclosed without the patient's consent. The Health Professional Council of South Africa rules this action unprofessional conduct.²⁵⁹ The reason for this rule is two fold: the protection of the privacy of a patient and the performance of a public interest function.²⁶⁰ It is an ethical and a legal duty on the part of a doctor to respect patient confidentiality.²⁶¹ Neither the patient's right to privacy nor the physician's duty is absolute in that both factors may be outweighed by public interest in the matter.²⁶²

The finding of the court was that Vos and Van Heerden had not a moral right to be given the HIV status of the applicant or to transfer such information.²⁶³ A right to privacy is the foundation of the doctor-patient relationship, a patient has a reasonable expectation that a medical practitioner will comply with established professional standards.²⁶⁴ The undertaking by the first defendant not to disclose private and confidential information

²⁵⁵ Paragraph 49 of *NM and others v Patricia De Lille and others*.

²⁵⁶ Paragraph 54 of *NM and others v Patricia De Lille and others*.

²⁵⁷ Paragraph 66 of *NM and others v Patricia De Lille and others*.

²⁵⁸ Paragraph 66 of *NM and others v Patricia De Lille and others*.

²⁵⁹ *Jansen Van Vuuren v M J Kruger*.

²⁶⁰ *Jansen Van Vuuren v M J Kruger*.

²⁶¹ *Jansen Van Vuuren v M J Kruger*.

²⁶² *Van Vuuren v Kruger*.

²⁶³ *Van Vuuren v Kruger*.

²⁶⁴ *Van Vuuren v Kruger*.

meant the expectation was more profound.²⁶⁵ It was concluded that it was wrong and unjust for the communication to take place between Vos and Van Heerden since it was unreasonable²⁶⁶

3.6.4. The case of Stoffberg v Elliot

In the case of Stoffberg v Elliot the penis of the patient was surgically removed without the patient's consent. Certain rights are absolute and do not depend on any statute or contract. These rights must be respected, among which is the right to the absolute security and control over one's person.²⁶⁷

This case is an illustration of the principle of patient autonomy. Interference in bodily integrity is permissible only if justified by law or with the patient's consent.²⁶⁸ It is unlawful interference and a violation of patient's right to security and control of his/her body if an operation is performed without patient consent.²⁶⁹ It was noted that it is justifiable to operate without consent in an emergency to save a patient's life. In this case the operation could not be justified on grounds of urgency or excused on any other grounds.²⁷⁰

A patient retains the right to have control over his/her body, which means that he/she cannot be treated as an object or specimen.²⁷¹ An act of unlawful interference entitles the patient to any applicable damages.²⁷² The actions of the doctor in this case were unjustified and inexcusable and constituted interference with the patient's body.²⁷³

²⁶⁵ Van Vuuren v Kruger.

²⁶⁶ Van Vuuren v Kruger.

²⁶⁷ Stoffberg v Elliot. 1923. Operation on patient without the patient's consent, medical assault.

²⁶⁸ Stoffberg v Elliot.

²⁶⁹ Stoffberg v Elliot.

²⁷⁰ Stoffberg v Elliot.

²⁷¹ Stoffberg v Elliot.

²⁷² Stoffberg v Elliot.

²⁷³ Stoffberg v Elliot.

3.7. CONCLUSION

A multi-layered approach to legal issues is inclusive and examines theories relating to the topic as well as the applicable constitutional and legislative provisions and case law or common law and ethical principles. The issues discussed in this chapter referred to patient autonomy and human dignity. Clearly, patients should have control over anything that happens to them which requires agreement between patient and doctor on the type of treatment. With regard to celebrity patients and the issue of privacy and confidentiality, it was established that a patient must explicitly consent for information to be released to third party, except if the public interest outweighs the patient's right to privacy and/or a doctor's duty to keep the patient's confidence.

The cases above deal with three important issues in relation to the topic: privacy, confidentiality and freedom of expression, with specific reference to medical privacy, patient confidentiality and a right to freedom of expression in relation to medical information. Further, they deal with the issue of patient consent in a doctor-patient relationship. The courts assert an opinion that the owner of medical information (the patient) be afforded the opportunity to choose whether his/her medical information is disclosed. In the case of *Manto Tshabalala-Msimang v Mondli Makhanya* a cabinet minister is involved, therefore a public figure, which means her personal information was viewed as of public concern.

Certain absolute rights need to be protected.²⁷⁴ Security of a person is an absolute right not dependent on statute or contract.²⁷⁵ Interference with the body of a person is unlawful except when justified in law or consented to.²⁷⁶ In the case of a patient interference must be consented to.²⁷⁷

²⁷⁴ *Stoffberg vs Elliot*

²⁷⁵ *Stoffberg vs Elliot*

²⁷⁶ *Stoffberg vs Elliot*

²⁷⁷ *Stoffberg vs Elliot*

The Constitution, the National Health Act 61 of 2003 and the Protection of Personal Information Act 4 of 2013 support the autonomy of a patient or a person who confides personal, sensitive and intimate information to a health care practitioner. Such information cannot be released without the patient's consent.

The Constitution supports a right to freedom of expression. It plays an important role in ensuring that in a democracy transparency is not compromised and is referred to as part of a web of mutually supporting rights. The right to freedom of expression is constrained by the demand of responsibility which respects the right to privacy and to human dignity and which is upheld by journalistic professional standards.

A reasonable journalist or publisher ought to foresee the possibility of harm resulting from the disclosure of personal information without consent. A patient's personal, intimate and sensitive information can be released without consent only if the patient is a public figure and there is a public interest in releasing such information. The lives and affairs of public persons, which include politicians and public officials, exemplify the possibility of a case for upholding a demand that the public have the right to be informed.²⁷⁸ The public benefits from a discussion of matters which are of public interest,²⁷⁹ the debate around policy and politics is central to democracy.²⁸⁰ It is by nature of the position the individual occupies or if a person seeks publicity and consents to be a public figure that an objection cannot be raised if their actions are publicised.²⁸¹

²⁷⁸ Para 38 of *Tshabalala-Msimang vs Mondli Makhanya*

²⁷⁹ Para 36 of *Tshabalala-Msimang vs Mondli Makhanya*

²⁸⁰ Para 37 of *Tshabalala-Msimang vs Mondli Makhanya*

²⁸¹ Para 40 of *Tshabalala-Msimang vs Mondli Makhanya*

CHAPTER 4: THE ROLE OF MEDIA IN THE TREATMENT OF ISSUES OF PRIVACY AND CONFIDENTIALITY

4.1. INTRODUCTION

In the day-to-day work of journalists, publishers, broadcasters or media houses certain fundamental principles need to be taken into account but may be overlooked. This behaviour leads people to be wary of journalists or even overtly hostile.²⁸² The reasons for such oversight include budget constraints, limited electronic library resources, demanding managers and distribution challenges.²⁸³ In respect of the law there is conflict between the right of the community to be informed about issues of public interest and the need for appropriate remedies should the media damage an individual's reputation.²⁸⁴

The Constitution delineates the importance attached to the right to privacy by including it under the protection offered in the Bill of Rights, and ensuring that it is the responsibility of the state to promote and protect the right. This chapter discusses provisions in the Constitution and other legislative documents establishing the procedures to be followed in accessing information, the role of the press ombudsmen and the extent to which the law determines that the press respect privacy.

4.2. CONSTITUTIONAL AND LEGISLATIVE PROVISIONS REGARDING ACCESS TO INFORMATION

4.2.1. Constitutional provision

The freedom of the press and other media to receive and impart information or ideas, as well as the protection of artistic creativity and academic and scientific research are

²⁸² Limpitlaw, J. (2012). *Media law handbook for southern Africa*. Volume 1. Konrad Adenauer Stiftung Regional Media Programme, Johannesburg, South Africa. Page 1.

²⁸³ Limpitlaw (2012: 1).

²⁸⁴ Carey, P., Coles, P., Armstrong, N. & Lamont, D. (2007). *Media law* (4th ed.). London: Sweet & Maxwell Limited. Page 36.

constituent parts in the right to freedom of expression as expressed in the Constitution.²⁸⁵ These freedoms apply to everyone and are not limited to speech acts, but include nonverbal and non-written expression, for example, mime or dance, photography or art.²⁸⁶ This right incorporates the free flow of information between the audience and the media.²⁸⁷

In the exercise of this right anyone has a right to access information held by the state or another entity.²⁸⁸ However, information held by the state can be freely accessed, whereas information held by private bodies or individuals is accessible if the purpose is to exercise or protect any other right²⁸⁹. This right enables the media to inform the public and in turn the public can hold government accountable. In short, the right fosters transparency.²⁹⁰

Lawful, reasonable and procedurally fair administrative action is a right and if a person has been adversely affected by administrative action, he/she has the right to receive a written explanation.²⁹¹ This provision also protects journalists and the media in general when officials act unfairly or unreasonably in contravention of the legal requirements.²⁹²

The right not to have their person, home or property searched, their possessions seized or the privacy of their communications infringed constitute the elements of the right to privacy.²⁹³ In this context 'communication' includes but is not limited to letters, emails, telefaxes, telephone conversations and social media. This factor is viewed as an important right for working journalists.²⁹⁴

²⁸⁵ Section 16 of the Constitution.

²⁸⁶ Limpitlaw (2012: 214).

²⁸⁷ Limpitlaw (2012: 215).

²⁸⁸ Section 32 of the Constitution.

²⁸⁹ Limpitlaw (2012: 215).

²⁹⁰ Limpitlaw (2012: 215–216).

²⁹¹ Section 33 of Constitution.

²⁹² Limpitlaw (2012: 216).

²⁹³ Section 14 of the Constitution.

²⁹⁴ Limpitlaw (2012: 217).

Everyone has a right to his/her own thoughts, beliefs and opinions.²⁹⁵ By extension this right covers comment on public issues which are deemed important and is accepted as a function of the media.²⁹⁶

An important right that is applicable to the media industry is freedom of association since it enables the formation of bodies like the Press Council of South Africa, as well as the establishment of media houses.²⁹⁷ There is a right to follow the profession of one's choice, however professions are subject to internal limitations which take the form of regulation by law, for example the medical profession and journalism.²⁹⁸ The regulation of these professions aims to protect the public by ensuring that there is no malpractice or unethical behaviour by members of the profession.²⁹⁹

4.2.2. Legislative provisions

Accessing information held by government

The Promotion of Access to Information Act 2 of 2000 ensures the right to access information for the purpose of protecting or exercising any other right contained in the Bill of Rights.³⁰⁰ It seeks to foster transparency and accountability in both public and private bodies by giving effect to the right to access information.³⁰¹

The right of access to information is subject to justifiable limitation with the aim to provide a reasonable protection of privacy, commercial confidentiality and effective, efficient and good governance, and to balance the freedoms afforded by this right against the claims of other rights.³⁰² Access to the records of any public body must be available provided

²⁹⁵ Section 15 of the Constitution.

²⁹⁶ Limpitlaw (2012: 217).

²⁹⁷ Section 18 of the Constitution.

²⁹⁸ Section 22 of the Constitution.

²⁹⁹ Limpitlaw (2012: 217).

³⁰⁰ Promotion of Access to Information Act (Act 2 of 2000) (PAIA).

³⁰¹ Section 9 of PAIA.

³⁰² Section 9 of PAIA.

that the requester follows the procedures as laid down in this Act. Such a request may be refused in terms of chapter four of the Act.³⁰³ The right to access information is not supposed to be affected for any reason furnished by the requester or inferred by the information officer as to why the requester requires the information.³⁰⁴

The information officer, from time to time, determines or submits to the minister categories of records of public bodies which can be accessed automatically or made available and the procedures for gaining such access.³⁰⁵ The information officer must determine the fees to be paid to access information if the requester is not an individual or so-called personal requester. Fees must be paid before processing the request which cover the cost of making copies and the time spent searching for the information.³⁰⁶ A decision should be communicated to the requester within 30 days of receipt of the request, which stipulates whether the request is granted or not and communicates the decision in a form the requester stipulated, including the fees to be paid.³⁰⁷

If granting permission to access information relating to the health of a person may cause harm to the person's physical or mental well-being, the information officer must consult with a health care practitioner before releasing such information. If it is established that the release of the information will not cause harm to the owner, the information can be released. If harm would be caused as a result of releasing such information, the information must not be released.³⁰⁸ Only a person who has parental responsibilities or who has been appointed by the court may manage the affairs of a person who is incapable due to age or other cause, including mental status.³⁰⁹ It must be proven that counselling

³⁰³ Section 11 of PAIA.

³⁰⁴ Section 11 of PAIA.

³⁰⁵ Section 15 of PAIA.

³⁰⁶ Section 22 of PAIA.

³⁰⁷ Section 25 of PAIA.

³⁰⁸ Section 30 of PAIA.

³⁰⁹ Section 30 of PAIA.

is arranged, to the extent that this is reasonably practicable, before, during or after disclosure of the record to limit, alleviate or avoid harm.³¹⁰

The justification for refusing to disclose information by an information officer is if it is believed that disclosure unreasonably will disclose personal information about a third party, including a deceased individual.³¹¹ Third party information can be disclosed only if the owner consents to such disclosure, if information is already in the public domain or information pertains to the physical or mental health and well-being of a person who³¹² is under care of the requester, is under 18 years old, lacks the capacity to understand the request or if such a request is in the individual's best interest.³¹³ If the person is deceased, the next of kin may provide written consent for the disclosure of personal information.³¹⁴

It is only when disclosure constitutes an action for breach of the duty of confidence by a third party and such information was found to have been obtained in confidence by a third party that the refusal to disclose is justified.³¹⁵ Information which already is public knowledge and if the third party has consented in writing to its disclosure, the request cannot be refused.³¹⁶

An information officer must take reasonable steps to inform a third party to whom the record relates within 21 days of receipt of the request, and do so speedily..³¹⁷ Written or oral representation to an information officer as to why a request is refused is required or written consent to the disclosure of records is made.³¹⁸ The conditions under which

³¹⁰ Section 30 of PAIA.

³¹¹ Section 34 of PAIA.

³¹² Section 34 of PAIA.

³¹³ Section 34 of PAIA.

³¹⁴ Section 34 of PAIA.

³¹⁵ Section 37 of PAIA.

³¹⁶ Section 37 of PAIA.

³¹⁷ Section 47 of PAIA.

³¹⁸ Section 48 of PAIA.

information pertaining to private bodies may be given are that the information is required to exercise or protect any other rights and the requester complies with the procedures of the Act.³¹⁹

The treatment of personal information in general

The unlawful collection, retention, dissemination and use of personal information infringe the right to privacy that is safeguarded in the preamble to the Protection of Personal Information Act.³²⁰ This Act regulates the processing of personal information by both private and public bodies in harmony with the international standard with a view to giving effect to the right to privacy but expressing limitations aimed at protecting other rights and interests.³²¹ Two important issues are raised; protection against the unlawful processing of personal information and an understanding of the limitations which exist in protecting the right to privacy.

The processing of personal information must be lawful and must not infringe on the right to privacy.³²² Processing the information relies on consent by the data subject or a proxy if the subject is not competent due to age or mental status.³²³ The information can be processed for the purposes of the performance of a contract between the data processor and the data subject, for example in the doctor-patient relationship in which there is duty to heal on a doctor's part and duty to confide on the patient's.³²⁴

Processing of data is lawful if it is in the best interest of a data subject, is in compliance with regulations imposed by law or is for the purpose of the performance of a public duty by a public body.³²⁵ The burden of proof that a data subject or a proxy consents is borne

³¹⁹ Section 50 of PAIA.

³²⁰ POPIA.

³²¹ POPIA.

³²² Section 9 of POPIA.

³²³ Section 11 of POPIA.

³²⁴ Section 11 of POPIA.

³²⁵ Section 11 of POPIA.

by the responsible party.³²⁶ A data subject lawfully can withdraw consent at any time provided doing so does not affect the information which needs to be processed.³²⁷

4.3. THE ROLE OF THE PRESS OMBUDSMAN

In terms of the constitution of the Press Council of South Africa the office of a press ombudsman was established and became effective on 1 February 2018. The preamble to the constitution affirms the right to freedom of expression and establishes the freedom of the media as a cornerstone of democracy.³²⁸ It states further that the best system for promoting high standards in the media is through self-regulatory practices leading to ethical journalism aimed at achieving or realising the promise of democracy.³²⁹ Self-regulation by the press or media is enriched by public participation in a co-regulatory process designed to enhance journalistic standards and ethical conduct.³³⁰

The main objective of the Press Council is to preserve the right to freedom of expression and the freedom of the press by means of promoting and developing ethical journalistic practices and by journalists adhering to the standards developed for the press.³³¹ Public complaints about the conduct of those subscribing to the press code are dealt with by a voluntary independent mediation and arbitration process that was established and is maintained and functions in a cost-effective and swift manner.³³²

It is the responsibility of the press ombudsman to adjudicate complaints regarding journalistic conduct that have not been resolved in the earlier stages of mediation.³³³ The office of the ombudsman may reach a decision regarding the complaint without a hearing

³²⁶ Section 11 of POPIA.

³²⁷ Section 11 of POPIA.

³²⁸ Constitution of the Press Council of South Africa (2018).

³²⁹ Constitution of the Press Council of South Africa (2018).

³³⁰ Constitution of the Press Council of South Africa (2018).

³³¹ Section 2 of the Constitution of the Press Council of South Africa (2018).

³³² Section 2 of the Constitution of the Press Council of South Africa (2018).

³³³ Section 6.4 of the Constitution of the Press Council of South Africa (2018).

but must base its decision on representations by both parties. If a hearing is held, press and public representatives are called upon as the press and public co-regulate the media space.³³⁴ An appeal is lodged with the chairperson of the appeals – usually a retired judge recommended by the Chief Justice – who adjudicates the appeal and has the power to grant an appeal if he/she deems there to be a good prospect for success and to refuse the appeal if the prospects for success are slim.³³⁵

4.4. CODE OF CONDUCT FOR JOURNALISM

The independent scrutiny of authority by the media or press is important in shaping society and realising the promise of democracy. Their scrutiny empowers the community to make an informed judgment and to engage meaningfully regarding the development of day-to-day issues.³³⁶ Public interest is regarded as the main source of guidance for the media's work, since the media publicises information which is of legitimate interest or importance to citizens.³³⁷

The constitution of the Press Council of South Africa prescribes that the media strive for truth telling, avoid unnecessary harm and that at all times their coverage reflects multiple voices and demonstrating special concern for children and special groups, in a quest to maintain the highest standard and credibility and to keep the trust of the public or community.³³⁸ The constitution requires journalists to exercise care and consideration in matters involving the private life of an individual, even though public interest overrides a right to privacy.³³⁹ Among the most important principles in dealing with privacy, dignity and reputation in a South African context relate to the cultural customs for bereaved

³³⁴ Section 6.4 of the Constitution of the Press Council of South Africa (2018).

³³⁵ Section 6.7 of the Constitution of the Press Council of South Africa (2018).

³³⁶ Preamble of the Code of ethics and conduct for South African print and online media.

³³⁷ Preamble of the Code of ethics and conduct for South African print and online media.

³³⁸ Preamble of the Code of ethics and conduct for South African print and online media.

³³⁹ Section 3 of the Code of ethics and conduct for South African print and online media.

people and the need to respect those who have died, as well as children, the aged and physically and mentally disabled people.³⁴⁰

The right to privacy can be overridden by the public interest only if the reporting of facts is true, the reporting amounts to fair comment, the reporting is on court, parliamentary or a quasi-judicial tribunal or forum proceedings, the reporting is fair and accurate, the information is prepared according to acceptable standards of journalistic conduct, there is public interest and the information forms part of a dispute to which the complainant was a party.³⁴¹ Groups identified and singled out as exceptions in the process are survivors of rape and sexual violence and children, who are viewed as vulnerable. Information about these individuals can be published only when there is consent and in the case of a child by a legal guardian.³⁴²

4.5. A BREACH OF CONFIDENTIALITY OR AN INVASION OF PRIVACY

Stuart (1986) identifies the following factors as a form of breach of privacy or an invasion of confidentiality:

4.5.1. Intrusion

According to South African criminal law an invasion of privacy constituted *crimen injuria*.³⁴³ It described the unreasonable intrusion on an individual's seclusion or personal affairs which might happen without invading someone's property, for example by unreasonable searches, eavesdropping on conversations, surveillance by cameras, telescope or other devices, telephone harassment, peering through windows and wiretapping.³⁴⁴ Other examples of intrusion include when a man follows a woman in the

³⁴⁰ Section 3 of the Code of ethics and conduct for South African print and online media.

³⁴¹ Section 3 of the Code of ethics and conduct for South African print and online media.

³⁴² Section 3 of the Code of ethics and conduct for South African print and online media.

³⁴³ Stuart, K.W. (1986). *The newspaperman's guide to the law* (4th ed.). Durban: Butterworth Publishers (Pty) Ltd. Page 69.

³⁴⁴ Creech, K. C. (2002). *Electronic media law and regulation* (4th ed.). New York: Focal Press. Page 257.

street with the aim of conducting an immoral act, such as spying on a naked woman, entering her home without consent or planting a listening device in her house without her consent.³⁴⁵ An act can be deemed intrusion when it is not a question of public concern and a reasonable person judges such an act as offensive.³⁴⁶

4.5.2. Publication of private facts

There is a right to determine the extent of communicating one's thoughts, sentiments and emotions, which has the protection of common law as well.³⁴⁷ Information which constitutes the publication of private facts includes the content of private correspondence, debts, physical deformities and health, life-style choices, childhood background, family life, past activities, embarrassing facts and confidential information.³⁴⁸

4.5.3. Putting a person in a false light

If a person gives consent for private information to be used for a particular purpose and the information is twisted and loses its original meaning or is used for a purpose different to that for which the consent was offered, then it constitutes an impairment of *dignitas* which is punishable in common law.³⁴⁹

4.5.4. Embarrassing facts

For facts to be classified as embarrassing they must have been communicated widely to the public, they must be private in nature, the information must have been found to be highly offensive if publicised, and it should be shown that a reasonable person would object to having such information publicised.³⁵⁰ In most cases this information is found to

³⁴⁵ Stuart (1986: 69).

³⁴⁶ Creech (2002: 257).

³⁴⁷ Stuart (1986: 69).

³⁴⁸ Stuart (1986: 69).

³⁴⁹ Stuart (1986: 70).

³⁵⁰ Creech (2002: 261).

be truthful and non-defamatory facts which are found to be embarrassing and the person to whom they refer is easily identifiable.³⁵¹

4.6. CONCLUSION

The Bill of Rights protects several rights that are relevant to the media. The main aim for their inclusion is a means to ensure that they are promoted, protected and implemented by the state. However, because there is a right to privacy which also needs protection, legislation has been enacted to provide guidance in the manner of accessing personal information, namely the Promotion of Access to Information Act 2 of 2000 (PAIA) and the Protection of Personal Information Act 4 of 2013 (POPIA).

Both address the manner of accessing information; PAIA focuses on the general access to information, including personal information, and POPIA focuses specifically on personal information. Although there are procedures in place to follow in accessing information held by the state, certain information the state is obliged to publicise from time to time or at specific intervals. Personal and private information can be accessed lawfully if there is consent by the data subject, accessing it is in the best interest of the data subject, it is accessed in compliance with an imposed law or it is accessed for purposes of the performance of a public duty by a public body.

The office of the press ombudsman adjudicates complaints relating to the media and the press. The complaints process includes an appeal process that is chaired by a retired judge. The only cases in which the right to privacy can be overridden are those that incorporate true reporting of the facts; fair comment; court, parliamentary or quasi-judicial tribunal or forum proceedings; fair and accurate reporting; information prepared according to acceptable standards of journalistic conduct; public interest; information that forms part of dispute to which the complainant was party or to sexual violence.

³⁵¹ Creech (2002: 261).

CHAPTER 5: DEFENCES WHERE PRIVACY AND CONFIDENTIALITY HAVE BEEN VIOLATED

5.1. INTRODUCTION

The Hippocratic Oath states: “I will keep secret all that will come to my knowledge which ought not to be spread abroad.” This statement permits a qualification to the absolute duty of professional secrecy.³⁵² The Oath further states: “I will respect the secrets which are being confided in me”,³⁵³ which allows for the interpretation that these secrets might be published. The Bill of Rights enshrines a right to privacy precisely to ensure that it is protected.³⁵⁴

Constitutional rights entail a responsibility on the state to respect, protect and promote them on the understanding a Bill of Rights is the cornerstone of democracy. At the same time in an open and democratic society it is reasonable and justifiable that the rights contained in the Bill of Rights are limited on account of human dignity, equality and freedom in accordance with a law of general application.³⁵⁵ Although it is unlawful to violate the right to privacy, justifications have been identified which are considered when there is a suspicion that the right has been violated. The following issues will be explained as exceptions to the absolute exercise of the right to privacy and confidentiality: patient consent, patient interest, public interest, police investigation, anonymised information, public safety and special statutory provisions.

³⁵² Mason & Laurie (2011: 177).

³⁵³ Mason & Laurie (2011: 177).

³⁵⁴ Section 14 of the Constitution.

³⁵⁵ Section 36 of the Constitution.

5.2. DEFENCE IF PRIVACY AND CONFIDENTIALITY ARE VIOLATED

5.2.1. Patient consent

In regard to consent to disclose personal information by a patient the duty of a doctor to keep confidentiality is exceptional in that generally there is no need to balance an individual's right against the interests of society.³⁵⁶ There is no breach of confidentiality if the patient consents.³⁵⁷ Medical professionals often rely on implied consent rather than explicit consent. When a doctor shares confidential information with other health professionals for the purpose of therapy the patient must be informed and if he/she refuses consent, his/her refusal must be respected.³⁵⁸ It is important to note that a patient's consent to have his/her private information shared with the public is lawful if given unilaterally and can be revoked at any time.³⁵⁹ For consent to qualify as justification in defence it must have been given voluntarily and must not be contrary to public policy or *contra bonos more*.³⁶⁰

5.2.2. Patient interest

It is permissible to break confidentiality when it is in a patient's interest to disclose such information and/or it was found to be undesirable on medical grounds to keep the confidence or if seeking consent is totally impractical.³⁶¹ In such instances the information is to be shared only with other health care providers in order to benefit the patient or with close relatives of the patient if the doctor suspects an issue such as sexual abuse. It is the duty of the doctor to persuade patients to give consent for information to be shared and to make it clear that the shared information will be kept strictly confidential.³⁶² Parents provide proxy informed consent for their child to receive treatment, but a parent can become a threat to the patient's right to privacy and confidentiality if the minor child is

³⁵⁶ Wicks (2007: 126).

³⁵⁷ Herring (2010: 230).

³⁵⁸ Herring (2010: 230).

³⁵⁹ Neethling et al. (1996: 274).

³⁶⁰ Neethling et al. (1996: 274–275).

³⁶¹ Mason & Laurie (2011: 179).

³⁶² Mason & Laurie (2011: 179).

more mature and has sufficient capacity to give informed consent.³⁶³ Two criteria have been identified which justify a breach of patient confidential information: whether or not the extent of the conduct is found to be reasonably necessary and whether or not the defendant acted with an improper motive.³⁶⁴

5.2.3. Public interest in information

Public interest is a limitation on the absolute protection of privacy and confidentiality, especially in respect of the importance and comprehensiveness of public interest in the information. The main issue in relation to a conflict of interest between the right to privacy and the public interest relates to the extent to which the publication of private facts is justified by public interest.³⁶⁵ It is the right of the public to be informed by the media about the life of a public person such as politicians and public officials.³⁶⁶ In the case of *Manto Tshabalala-Msimang v Mondli Makhanya* it was found that disclosing patient information on account of the public interest is permissible provided that the person is a public figure.³⁶⁷

5.2.4. Public safety

In protecting confidentiality, nevertheless there is a public interest in keeping innocent people from serious harm.³⁶⁸ If a patient poses a danger to others, he/she forfeits the protection of the law with regard to confidentiality.³⁶⁹ It is proportionate for a doctor to breach his/her duty of confidentiality if he/she receives information in confidence that a patient poses a direct physical threat to another person.³⁷⁰

³⁶³ Wicks (2007: 132).

³⁶⁴ Neethling et al. (1996: 266).

³⁶⁵ Neethling et al. (1996: 268).

³⁶⁶ Paragraph 38 of *Tshabalala-Msimang v Mondli Makhanya*.

³⁶⁷ *Tshabalala-Msimang v Mondli Makhanya*.

³⁶⁸ Herring (2010: 232).

³⁶⁹ Herring (2010: 232).

³⁷⁰ Wicks (2007: 128).

In the case of *Van Vuuren v Kruger* damages for the breach of privacy against the defendant arising from disclosing private and confidential information (HIV status) without informed consent were instituted.³⁷¹ The judgement indicated a legal and ethical duty on the part of a medical practitioner to respect a patient's confidential information.³⁷² The right to confidentiality is not absolute, but relative.³⁷³ A situation in which the disclosure of a patient's personal information by a medical practitioner is justified by his/her obligation to society outweighs his/her duty to his/her patient. The disclosure is permitted because public interest is the deciding factor.³⁷⁴ A doctor is expected to exercise reasonable care to protect a potential victim even if the information was obtained in confidence.³⁷⁵ In a case in which the spouse/partner of the patient does not know the positive HIV status of his/her partner the information may be disclosed without patient consent in order to protect a partner from being infected.

5.2.5. Assisting police investigation

Doctors may not obstruct a police investigation but on condition of a lawful excuse they do not commit an offence if they fail to answer a question. However, they are required to report or disclose information about anyone they suspect may be involved in unlawful activities,³⁷⁶ for example if the police request a medical practitioner to provide information to identify a driver alleged to have committed a traffic offence.³⁷⁷

Doctors may disclose confidential information under the following conditions: the offence is grave, failure to do so will delay prevention or detection of a crime, the information disclosed will be used only for the prosecution and detection of an alleged criminal or the

³⁷¹ *Van Vuuren v Kruger*.

³⁷² *Van Vuuren v Kruger*.

³⁷³ *Van Vuuren v Kruger*.

³⁷⁴ *Van Vuuren v Kruger*.

³⁷⁵ Herring (2010: 234).

³⁷⁶ Herring (2010: 235).

³⁷⁷ Herring (2010: 235).

released material will be destroyed once it has been used.³⁷⁸ If a doctor discloses confidential information relating to a minor crime, it is contrary to professional guidelines, but disclosure of confidential information in relation to a serious crime (either committed or contemplated) is permitted.³⁷⁹

In the case of *Minister of Safety and Security and Van der Heeven v Mr Gaqa* the main contention concerned the surgical removal of a bullet from the leg of Mr Gaqa for ballistic testing and the main purpose was for the court to sanction the removal of the bullet.³⁸⁰ The reason for the removal of the bullet was for further investigation into a case in which people were killed during a robbery and Mr Gaqa was suspected of being involved.³⁸¹ It was ruled that the refusal of the applicant to have the bullet removed would result in the failure to solve a serious crime, thwart law enforcement and diminish justice in the eyes of the public.³⁸² Although the intrusion suffered was substantial, in this instance the public interest prevailed.³⁸³ The judge ordered that the police could use force to facilitate the removal of the bullet by a medical doctor and Mr Gaqa was ordered to subject himself to the surgical procedure within 24 hours.³⁸⁴

5.2.6. Special statutory provision

This provision allows certain issues to be disclosed to a third party in situations where non-disclosure poses a risk to society. Each country has a list of notifiable diseases which need to be reported by a treating doctor if he/she diagnoses or suspects a patient is suffering from one of them.³⁸⁵ Due to the danger they pose to society, diseases such as Ebola need special care and a patient suspected of suffering from them must be quarantined to curb their spread or the danger of cross-infection. Disclosure of information

³⁷⁸ Herring (2010: 235–236).

³⁷⁹ Herring (2010: 236).

³⁸⁰ *Minister of Safety and Security and Van der Heeven v Mr Gaqa*.

³⁸¹ *Minister of Safety and Security and Van der Heeven v Mr Gaqa*.

³⁸² *Minister of Safety and Security and Van der Heeven v Mr Gaqa*.

³⁸³ *Minister of Safety and Security and Van der Heeven v Mr Gaqa*.

³⁸⁴ *Minister of Safety and Security and Van der Heeven v Mr Gaqa*.

³⁸⁵ Herring (2010: 239).

of this nature is permissible according to section 90(1) (j), (k), and (w) of the National Health Act 61 of 2003 which states regulations relating to surveillance and the control of notifiable medical conditions since the intent is to protect the community or society at large.

5.2.7. Anonymised data for research and other purposes

Two judgments, the first a declaratory order and the second the appeal on the declaratory order, demonstrate a shift of focus from the issue of disclosing patient information on the basis of public interest to the fairness of the use of such information. The consequence of the judgements is in so far as the confider is not exposed to unfair treatment as a result of disclosure of information it is permissible by law.³⁸⁶

The removal of the threat of unfair treatment was achieved by making sure that the data is anonymised with the result there is no breach of confidence.³⁸⁷ In the case of *NM and others v Patricia De Lille and others* it was found that publishing people's names and their HIV status in a book led to unfair treatment of these people by the community, for example one had her house burned down.³⁸⁸ The court found that such disclosure was inconsistent with the right to privacy and had exposed those people to unfair treatment.³⁸⁹ It was found that protection of patient privacy in such situations can be achieved or secured sufficiently through concealment of the confider's personal identity.³⁹⁰

5.3. CONCLUSION

The right to privacy can be relied on as government and the press must respect it. If a patient consents to the disclosure of private and confidential information and it can be established that patient was not forced to give consent, the disclosure is lawful. The

³⁸⁶ Wicks (2007: 134).

³⁸⁷ Wicks (2007: 134).

³⁸⁸ *NM and others v Patricia De Lille and others*.

³⁸⁹ *NM and others v Patricia De Lille and others*.

³⁹⁰ Wicks (2007: 135).

patient retains the right to revoke his/her consent at any time. There are two criteria for lawful non-consensual disclosure of private and confidential information: that the doctor has a proper motive and exercises reasonableness in disclosing such information or that disclosure was motivated by the doctor's duty of care.

The right to privacy is outweighed by the public interest right to be informed, which means the right to freedom of expression.³⁹¹ If a patient currently poses a danger to other people, disclosure of the patient's personal and private information is justified, but only if it is to an authority which has the power to take steps to mitigate such danger.

Doctors can disclose a patient's private information if the offense is grave, if failure to do so would delay prevention or detection of a crime or if such information is used for the prosecution of a crime and then destroyed.³⁹² Some diagnoses of communicable diseases must be reported in order to prevent the further spread of the disease even if disclosure contains private and confidential information. This action is lawful in so far as the information disclosed does not include the patient's name, the patient cannot be identified and disclosure will not lead to unfair treatment of the patient by the community or society.

³⁹¹ Tshabalala-Msimang v Sunday Times.

³⁹² Minister of Safety and Security and Van der Heeven v Mr Gaqa.

CHAPTER 6: DISCUSSION AND CONCLUSION

6.1. INTRODUCTION

The preamble to the Constitution introduces issues that the Constitution crucially seeks to achieve: the establishment of a society based on democratic values, social justice and fundamental human rights with the aim of healing the injustices of the past,³⁹³ the creation of a system in which government is based on the will of people as the foundation of an open and democratic society where every citizen is equally protected by the law,³⁹⁴ the creation of a system which seeks to free the potential of each citizen and improve the quality of life of each citizen and to enable the state to take its rightful place as sovereign by building a united and democratic South Africa.³⁹⁵

A factor in improving the quality of life of each citizen calls for establishing a meaningful relationship between doctors and patients, including patients who are celebrities or public figures. A contested issue in building this relationship is to maintain the privacy and confidentiality of celebrity patients. A celebrity patient, as is any person, has rights that must be protected.

The research focus is revisited to establish whether the research question has been answered and the objectives as set out in chapter one have been achieved. The concluding remarks synthesise the research focus areas.

³⁹³ Preamble of the Constitution.

³⁹⁴ Preamble of the Constitution.

³⁹⁵ Preamble of the Constitution.

6.2. THE ESTABLISHMENT OF A STANDARD IN THE DOCTOR-PATIENT RELATIONSHIP

The main aim in establishing the doctor-patient relationship is to reduce suffering.³⁹⁶ The Hippocratic Oath calls on physicians to protect patients from harm and to restore them to health.³⁹⁷ In exploring the doctor-patient relationship it was found that a combination of different models is instrumental in achieving a reduction in suffering. The clinical model describes a situation in which the skill of the doctor creates the power to restore health, if only by the cooperation of the patient; the relational model concentrates on the interaction between the doctor and patient and not on managing the outcome. Good communication and interpersonal skills assist in delivering an accurate diagnosis, proper counselling and correct therapeutic instruction.³⁹⁸

The notion of 'patient autonomy' is important to the doctor-patient relationship. It refers to self-rule, in other words the right of everyone to make decisions including decisions about one's health or treatment by a doctor. The establishment of autonomy as a fundamental principle means that patients no longer are treated as objects. It requires that doctors provide patients with full and accurate information about their diagnosis, treatment options, the benefits and risks to each treatment option and the right to seek a second opinion. It is clear that a standard relationship between doctor and patient must be characterised by participation on the part of both the doctor and patient, patient autonomy in decision making and a need for the doctor to provide full and accurate information.

³⁹⁶ Osorio (2011).

³⁹⁷ Chin (2002).

³⁹⁸ Ha & Longnecker (2010).

6.3. CELEBRITY PATIENTS AND HOW PEOPLE VIEW THEM IN RELATION TO THE CARE THEY RECEIVE

Media interest in more than personal achievement and the investigation into the private life of an individual indicate the bestowal of celebrity status.³⁹⁹ A celebrity or public figure is a person who as a result of a degree of publicity experiences a justified intrusion or a level of public discourse into certain aspects of their life which their status or conduct exposes them to.⁴⁰⁰ The media's interest extends to the person's health and if admitted to a health facility results in his/her being viewed differently from other patients in respect of their privacy.

Persons admitted to a health facility, either as a day patient or a ward patient, demand special precautionary measures to be in place to prevent unauthorised access to his/her personal and private information.

That a person is a celebrity or public figure does not mean anyone may access his/her records without consent, even if their private life is material for journalists. An infringement of patient privacy and confidentiality by a third party constitutes a compromised service or care by the health professionals and is not permitted constitutionally, ethically as well as in terms of legislative provisions. In the case of *Manto Tshabalala-Msimang v Mondli Makhanya and others* the disclosure of private, sensitive and intimate information was permissible due to public interest in a public figure.

6.4. CONFIDENTIALITY, PRIVACY AND FREEDOM OF EXPRESSION AS RIGHTS TO BE PROTECTED

All rights have equal value and need equal protection and promotion; the right to privacy and confidentiality as well. The Bill of Rights enshrines these rights to hold the state accountable for their implementation. The relationship between doctor and patient

³⁹⁹ Biancovilli et al. (2015).

⁴⁰⁰ *Tshabalala-Msimang v Mondli Makhanya*.

involves the right to privacy and confidentiality because the patient provides personal, private and intimate health information on the understanding it will be kept confidential.

The media rely on the right to freedom of expression to inform the community about issues in their interest. Appropriate remedies are in place such as defamation suits and criminal and civil liability to prevent the media from damaging an individual's reputation.⁴⁰¹

The constitution of the Press Council of South Africa affirms the right to freedom of expression⁴⁰² and establishes a mechanism for handling complaints against the media in the form of the office of a press ombudsman and its appeal process.⁴⁰³ The code of conduct for journalism states that the media avoid unnecessary harm to its subjects, individuals in the community. In dealing with health information, the important issue in this context is patient privacy which demands the patient give consent to the release of any information to a third party.⁴⁰⁴

In the case of *Tshabalala-Msimang v Mondli Makhanya and others* the judge ruled that a reasonable journalist would have realised that there was no consent to publish the information or the medical records and described the way in which the information was obtained as problematic. Nevertheless, public interest is the deciding factor in determining whether or not information can be publicised and the demand is great if the information is about a public person, even information which is private and confidential.⁴⁰⁵

⁴⁰¹ Section 16 of the Constitution.

⁴⁰² Constitution of the Press Council of South Africa (2018).

⁴⁰³ Constitution of the Press Council of South Africa (2018).

⁴⁰⁴ Section 3 of the Code of ethics and conduct for South African print and online media.

⁴⁰⁵ *Tshabalala-Msimang v Mondli Makhanya*.

6.5. IMPACT OF A COMPROMISED DOCTOR-PATIENT RELATIONSHIP WITH REGARD TO CONFIDENTIALITY AND PRIVACY

The doctor-patient relationship is central to patient care. It is characterised by trust that information confided to the health care professional will not be divulged without the patient's consent.⁴⁰⁶ Sensitive, private and intimate information is confided in a private space designed to ensure that the information discussed remains between the doctor and the patient. This relationship is governed by the Constitution of the Republic of South Africa, legislation, case law pertaining to confidentiality and privacy and the ethical rules established by the Health Professions Council of South Africa.

The doctor-patient relationship is compromised when the doctor divulges private, sensitive and intimate health information to a third party without the patient's consent. This situation has the result the patient does not trust the doctor and withholds information that is crucial in providing a proper diagnosis and treatment plan that would relieve his/her pain and suffering. In short, the major impact of a compromised doctor-patient relationship is loss of trust, though legally-speaking the result is a lawsuit.

6.6. CONCLUSION

The media have an interest in pressurising health care professionals (including support personnel) to divulge private, sensitive and intimate information about a patient, particularly if he/she is a public figure, for example the acquisition by the *Sunday Times* of the medical records of Ms Tshabalala-Msimang without her authorisation or that of Mediclinic.⁴⁰⁷ The public interest in the private life of celebrities or public figures means journalists go to great lengths to obtain information, regardless of whether or not access to the information is legal. In the case of *Tshabalala-Msimang v Mondli Makhanya* it was ruled that the information about the plaintiff was obtained illegally.⁴⁰⁸ Health information needs to be safeguarded and its access limited to those involved directly in the patient's

⁴⁰⁶ Chin (2002: 154).

⁴⁰⁷ *Tshabalala-Msimang v Mondli Makhanya*.

⁴⁰⁸ *Tshabalala-Msimang v Mondli Makhanya*.

care. The journalists' code of conduct cautions against causing unnecessary harm in the execution of their day-to-day work.

The release of information without a patient's consent leads to mistrust and a patient will withhold information that might be crucial to a proper diagnosis and treatment plan. In the case of a public figure the issue in such a situation is that it is the public interest which determines the justification for the disclosure of private and sensitive information. It is recommended by this author that there is a need to investigate if more needs be done to ensure that private, sensitive and personal patient information does not find its way into the hands of unauthorised people and if there is a need to limit support personnel's access to health records in light of the information that was provided to journalists.

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