

Sabine Michalowski

MEDICAL CONFIDENTIALITY AND CRIME

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Medical Confidentiality and Crime

SABINE MICHALOWSKI

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List of Abbreviations

A.2d	Atlantic Reporter, Second Series
AC	Appeal Cases
AJDA	Actualité Juridique Droit Administratif
ALD	Actualité Législative Dalloz
All ER	All England Law Reports
App.	Court of Appeals
App.Div.	Appellate Division
Ariz.	Arizona; Arizona Supreme Court Reports
Ark.	Arkansas; Arkansas Supreme Court Reports
ARS	Arizona Revised Statutes
Art.	Article
Arts	Articles
Bay ObLG	Bayerisches Oberstes Landesgericht
BGH	Bundesgerichtshof
BGHR	Bundesgerichtshof Rechtsprechung Strafsachen
BGHSt	Entscheidungen des Bundesgerichtshofs in Strafsachen
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen
BL	Basic Law
BMA	British Medical Association
BMJ	British Medical Journal
BMLR	Butterworths Medical Law Reports
BT	Deutscher Bundestag
Bull.	Bulletin
BVerfGE	Entscheidungen des Bundesverfassungsgerichts
C.3d	California Reports, Third Series
CA	Cour d'Appel; Court of Appeal
Cal.	California
Cal.App.3d	California Appellate Reports, Third Series
Cal.Rptr.	California Reporter
Cal.Rptr.2d	California Reporter, Second Series
Cass. Civ.	Arrêt de la Chambre Civile de la Cour de Cassation
CFLQ	Child and Family Law Quarterly
Ch	Law Reports, Chancery Division
Ch. civ.	Chambre Civile
Ch. corr.	Chambre Correctionnelle
Ch. crim.	Chambre Criminelle
Ch D	Chancery Division
chron.	chronique
Cir.	U.S. Court of Appeal ... Circuit

CJ	Chief Justice
C.L.R.	Commonwealth Law Reports
Cmnd.	Command Papers
Colo.	Colorado; Colorado Reports
Comm.	Commentaire
Comp. State	Compiled Statutes
Conn.	Connecticut
Cr App R	Criminal Appeal Reports
Crim LR	Criminal Law Review
Ct App.	Court of Appeal
CYS	Children and Youth Services
D.	District Court (Federal); Recueil Dalloz Sirey
DC	District of Columbia; District Council; District Court; Divisional Court
Dist.	District
DNotZ	Deutsche Notarzeitschrift
doct.	doctrine
D.P.	Recueil Dalloz Périodique et Critique
DPA	Data Protection Act 1998
DRiZ	Deutsche Richterzeitung
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECR	European Court of Justice, Reports of Cases (European Court Reports)
Ed.	Edition; editor
E.D.	Eastern District
E.H.R.R.	European Human Rights Reports
EJHL	European Journal of Health Law
EMLR	Entertainment and Media Law Reports
Ent.L.R	Entertainment Law Review
F.2d	Federal Reporter, Second Series
F.3d	Federal Reporter, Third Series
Fam	Law Reports, Family Division
Fam Law	Family Law
FCR	Family Court Reporter
FD	Family Division
Fed.Reg.	Federal Register
Fla.	Florida
FLR	Family Law Reports
FRD	Federal Rules Decisions
FRE	Federal Rules of Evidence
FSR	Fleet Street Reports of Patent Cases
F.Supp.	Federal Supplement
F.Supp.2d	Federal Supplement, Second Series
GA	Goldammer's Archiv für Strafrecht

Ga.	Georgia
Gaz.Pal.	Gazette du Palais
Gen. State.	General Statutes
GMC	General Medical Council
G.S.	General Statutes
HL	House of Lords
HRA	Human Rights Act 1998
ICLQ	International and Comparative Law Quarterly
Id.	Idaho
Ill.	Illinois
Ind.	Indiana
J	Justice
JA	Juristische Arbeitsblätter
J.C.P.	Juri-classeur périodique (Semaine juridique)
JMBINW	Justizministerialblatt für das Land Nordrhein-Westfalen
JME	Journal of Medical Ethics
JOAN	Journal Officiel de l'Assemblée Nationale
JR	Juristische Rundschau
JZ	Juristenzeitung
Kan.	Kansas
KG	Kammergericht
La.	Lousiana
LG	Landgericht
LJ	Lord Justice
LSA-C.E.	Lousiana Statutes Annotated – Code of Evidence
Ltd	Limited
Mass.	Massachusetts
Md.	Maryland
M.D.	Middle District
MDR	Monatschrift für Deutsches Recht
Med Law Int	Medical Law International
Med L Rev	Medical Law Review
MedR	Zeitschrift für Medizinrecht
Med. Sci. Law	Medicine, Science and the Law
Mich.	Michigan
Minn.	Minnesota
Misc.2d	New York Miscellaneous Reports, Second Series
MLR	Modern Law Review
Mo.	Missouri
MR	Master of the Rolls
N.C.	North Carolina
N.D.	Northern District; North Dakota
N.D.R.Evid.	North Dakota Rules of Evidence
N.E.2d	North Eastern Reporter, Second Series
Neb. Rev. State.	Revised Statutes of Nebraska

N.H.	New Hampshire; New Hampshire Supreme Court Reports
NHS	National Health Service
N.J.	New Jersey
N.J. Super.	New Jersey Superior Court; New Jersey Superior Court Reports
NJW	Neue Juristische Wochenschrift
NLJ	New Law Journal
N.M.	New Mexico
n°	number
NStZ	Neue Zeitschrift für Strafrecht
N.W.2d	North Western Reporter, Second Series
N.Y.	New York; New York Reports
N.Y.2d	New York Court of Appeals Reports, Second Series
N.Y.S.2d	New York Supplement, Second Series
Ohio St.	Ohio State Reports
Okl.	Oklahoma
OLG	Oberlandesgericht
Or.	Oregon
P	President of the Family Division
P.2d	Pacific Reporter, Second Series
Pa.	Pennsylvania
PACE	Police and Criminal Evidence Act
para.	paragraph
PC	Privy Council
PN	Professional Negligence
QB	Law Reports, Queen's Bench Division
QBD	Queen's Bench Division
R	Rule; Recueil des Décisions du Conseil d'Etat; Regina, Rex
RCW	Revised Code of Washington
Rec.	Recueil des Décisions du Conseil Constitutionnel
Rev. Stat. Ann.	Revised Statutes Annotated
RGSt	Entscheidungen des Reichsgerichts in Strafsachen
RPC	Reports of Patent Cases
RSA	Revised Statutes Annotated
RSC Ord	Rules of the Supreme Court Ordinance
S.	Recueil Sirey; Scotland
s.	section
S.C.	South Carolina
S.D.	Southern District; South Dakota
S.E.2d	South Eastern Reporter, Second Series
Sec.	Section
S.W.2d	South Western Reporter, Second Series
So.2d	Southern Reporter, Second Series

Sol J	Solicitors Journal
somm.	sommaire
ss.	sections
St	Statutes
Stat. Ann.	Statutes Annotated
StPO	Strafprozeßordnung
StV	Strafverteidiger
Sup. Ct.	Supreme Court
Supp.	Supplement
Trib. civ.	Tribunal Civil
Trib. corr.	Tribunal Correctionnel
U.S.	United States Supreme Court Reports
Va.	Virginia
V-C	Vice-Chancellor
Vol.	volume
Vt.	Vermont; Vermont Reports
Wash.	Washington
W.D.	Western District
Wis.	Wisconsin
wistra	Zeitschrift für Wirtschaft, Steuer, Strafrecht
WLR	Weekly Law Reports
Wyo.	Wyoming
ZStW	Zeitschrift für die gesamte Strafrechtswissenschaft



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Chapter 1

Introduction

Medical confidentiality lies at the very heart of the physician-patient relationship and is relevant to all areas of medical law. It is universally recognised as a value worth protecting, and there is widespread agreement that physicians should not, in principle, announce to the world that which the patients have confided in them. This principle was already recognised by the Hippocratic Oath which provided that:

Whatsoever things I see or hear concerning the life of men, in my attendance on the sick or even apart therefrom, which ought not to be noised abroad, I will keep silence thereon, counting such things to be as sacred secrets.

The concept of medical confidentiality is now an integral part of International Conventions, such as the Declaration of Geneva of 1994, and an obligation to maintain medical confidentiality is imposed on physicians by the rules of their profession. Many legal systems guarantee the protection of medical confidentiality in various ways. At the European level, the importance of medical confidentiality was recently confirmed by the European Convention on Human Rights and Biomedicine, and by the Data Protection Directive 1995 addressing the particular threats to the confidentiality of personal (including medical) data which are being processed by automatic or non-automatic means; in the U.S., the significance of patient privacy has been stressed by the Privacy Rule.¹

As with many other areas in which there is a general consensus that a particular interest deserves protection, the principle of medical confidentiality is uncontroversial as long as it does not conflict with other interests. Such conflicts, however, frequently arise where the physician holds confidential patient information which may be relevant for the purposes of crime prevention or criminal prosecution. A physician may, for example, receive information in confidence that the patient has committed a serious crime, or that the patient intends to commit such a crime. It is also possible that the physician holds confidential information that would exonerate a person who is accused in criminal proceedings, or at least assist that person's defence. In these cases, the interest in medical confidentiality can compete with a number of other interests: that of finding the truth in the course of criminal proceedings; the general public interest in crime prevention and criminal prosecution; the interests of parties who are wrongly accused in criminal proceedings; and defence rights. To resolve such conflicts of interests, a balance

¹ Standards for Privacy Protection of Individually Identifiable Health Information (65 FR 82462).

must be struck to decide how to accommodate the competing interests. The outcome of such a balancing exercise is largely based on policy considerations and deeply rooted moral concepts. In order to resolve these conflicts of interests, it is thus essential to be clear about the reasons for which the various interests that are at stake receive legal protection.

Despite the general agreement that medical confidentiality should, in principle, be guaranteed, opinions differ when it comes to explaining why exactly medical confidentiality should be protected. Is medical confidentiality mainly protected in the interests of the patient, and if so, how, exactly, can the patient's interest in medical confidentiality be defined? Or is medical confidentiality mainly protected in the interests of the physician? The physician's job may be made much easier if he/she has the right to refuse any disclosure of confidential patient information, as many patients will only be willing to reveal all information necessary for diagnosis and treatment if they can rely on the physician's silence. Alternatively, is medical confidentiality mainly protected in the public interest, as patients might, for example, be deterred from seeking medical advice and treatment if they fear the disclosure of their medical secrets? It can easily be seen that the answers to these questions are of more than academic relevance, as the approach adopted towards potential conflicts depends largely on the reasons for which the different interests receive protection. If, for example, the main emphasis were to be placed on the protection of the physician's interests, it would be sensible to give the physician discretion in deciding whether or not to disclose certain confidential patient information, regardless of the wishes of the patient. If, on the other hand, medical confidentiality is mainly protected to pay heed to the interests of the patient, the existence or absence of the patient's consent to disclosure would have a decisive role to play. If the public interest were to be the most significant consideration behind the protection of medical confidentiality, the scope and limits of confidentiality protection would mainly depend on an analysis of how these public interests could best be secured.

The idea for this book was born when the author, who had trained as a German lawyer and took it for granted that confidential patient information should receive protection from disclosure in criminal proceedings, realised that English lawyers find it just as natural that the interests in the administration of justice in principle prevail over medical confidentiality. This raised academic questions about the reasons behind such a difference in approach, such as whether this can be explained by a different legal tradition, a divergence in moral thinking, or whether it is just accidental that the two systems have developed differently. Moreover, it raises the question of which of the approaches, if any, reflects sounder legal and moral principles. From a German perspective, the main interest in comparing different approaches to medical confidentiality in the context of crime prevention and criminal prosecution would be to identify better and more consistent ways of balancing the competing interests in certain problem areas. From an English perspective, until the coming into force of the Human Rights Act 1998, a discussion of the potential merits of introducing a medical privilege in criminal