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The Right to Privacy and Medical Confidentiality – Some Remarks in Light of ECtHR Case Law

Abstract: This article is devoted to a selection of ECtHR judgements concerning the right of a patient to have his or her privacy respected, and the corresponding duty of doctors to keep medical confidentiality. The case law of this court confirms the fundamental importance of trust between the patient and the therapist. It also underlines that one important scope of the right to privacy is the patient's medical data, which is subject to legal protection. The law allows for a limitation of the obligation to maintain medical confidentiality, but only on the basis and within the limits of the law.

Keywords: privacy, medical confidentiality, ECtHR judgements, patient's rights, physician's duties

Introductory notes

Privacy is a fundamental human right recognized by the international community in the UN Declaration of Human Rights¹, the International Covenant on Civil and Political Rights², and in many other international and regional treaties, as well as in state's constitutions. The right to privacy is based on key values, such as the dignity and worth of the human person. What should be stressed is that it has become one of the most important human rights issues of the modern age, in particular because of new technologies and discoveries in the fields of medicine and biology. A very im-

1 Universal Declaration of Human Rights, <https://www.un.org/en/universal-declaration-human-rights/> (01.04.2020).

2 International Covenant on Civil and Political Rights, UNTS vol. 999-i-14668, <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf> (01.04.2020).

portant step in the evolution of the protection of private life was the creation of the modern privacy notion, which first appeared in the famous study written by Louis Brandeis and Samuel Warren in 1890. In this paper the authors defined the right to privacy as “the right to be let alone”³. Since then, the right to privacy has become widely known and has started to evolve, and has also become a fundamental human right in the international community and also in the constitutions of many states, notably in Europe⁴.

The right to respect for private and family life, set forth in the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the European Convention on Human Rights or ECHR)⁵, is interpreted very widely⁶. In principle, in accordance with art. 31.1 of the Vienna Convention on the Law of Treaties: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”⁷. In the doctrine it can be seen that this rule is understood as an evolutive interpretation⁸. Such a conclusion is based on the opinion that each of these elements (from art. 31) guides the interpreter in establishing the common intention of the parties which is clearly defined in the preamble of the ECHR: “The Governments (...) reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend”. Together with the jurisprudence of the ECtHR – according to which, human rights should be interpreted in light of present day circumstances – it creates a well-established principle of finding new necessary meanings in classical rights and freedoms⁹. This task is not at all easy.

3 S.D. Warren, L.D. Brandeis, *The Right to Privacy*, “*Harvard Law Review*” 1890, vol. 4, no. 5., pp. 193-220, <https://www.cs.cornell.edu/~shmat/courses/cs5436/warren-brandeis.pdf> (01.04.2020).

4 See more on the subject: A.H. Maehle, *Preserving Confidentiality or Obstructing Justice? Historical Perspectives on a Medical Privilege in Court*, “*Journal of Medical Law and Ethics*” 2015, vol. 3, no. 1-2, pp. 91-108.

5 Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No.005, <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680063765> (01.04.2020).

6 D.J. Harris, M. O’Boyle, *Law of the European Convention on Human Rights*, 3rd ed., Oxford 2014, pp. 524-526.

7 Vienna Convention on the Law of Treaties, “UNTS” 1980, vol. 1155, no.1-18232, <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf> (01.04.2020).

8 See for example: G. Letsas, *Strasbourg’s Interpretive Ethic: Lessons for the International Lawyer*, “*The European Journal of International Law*” 2010, vol. 21, no. 3, pp. 509-541; K. Dzehtsiarou, *European Consensus and the Evolutive Interpretation of the European Convention on Human Rights*, “*German Law Journal*” 2011, vol. 12, no. 10, pp. 1730-1745.

9 See for example: *Case of Tyrer v. the United Kingdom*, 25 April 1978, no. 5856/72; See also: J. Silvis, *Human Rights as a Living Concept. Case-law overview*, <http://www.ejtn.eu/Documents/>

In the *Niemietz v. Germany* case and the *Costello-Roberts* case the court ruled that: “private life is a broad concept which is not susceptible to exhaustive definition”¹⁰. This article will try to find the meaning and importance of the right to privacy in the context of the principle of doctor-patient confidentiality.

The aim of this study is to present a selection of judgments of the ECtHR, in which the court considered the issue of the patient’s right to privacy in combination with the obligation on the part of the doctor to observe medical confidentiality (or more broadly – on the part of medical professionals to observe medical confidentiality). This presentation, together with the author’s comments, is intended to demonstrate the validity of the thesis that the protection of the patient’s medical data and information taken by the doctor and other medical personnel during the conduct of medical services is an important element of the human right to privacy. This, in turn, makes it necessary for the State Parties to the ECtHR to ensure effective protection of patients’ medical data. It should also be noted that the right to privacy is not absolute and may be limited, on condition that any limitation clauses are provided for by law and applied in accordance with the principles of proportionality and necessity.

1. The Notion and Scope of Medical Confidentiality

Secrecy, as R. Kubiak writes in his book on medical confidentiality, is understood as “an object (matter, fact, message) that should not be advertised, that should not be made public, a secret; a message defined by law, the knowledge or disclosure of which is prohibited by law, non-disclosure, concealment of something”¹¹. In the same book the author explains the meaning of physician’s confidentiality as: “The duty of the doctor not to disclose to outsiders everything he has learned about the patient in connection with the exercise of his profession”. At the same time he rightly observes that respect for the confidentiality of information obtained from the patient requires that the covert power of lightning should be understood today more broadly as a medical mystery, and the duty of confidence should be binding on everyone who professionally provides health services, and in connection with the exercise of their profession will come into possession of data concerning the patient¹².

About%20EJTN/Independent%20Seminars/Human%20Rights%20BCN%2028-29%20April%202014/Case_Law_Digest_Human_Rights_as_a_Living_Concept_SILVIS.pdf (05.04.2020).

10 Case of *Niemietz v. Germany*, 16 December 1992, no. 13710/88, par. 29; Case *Costello-Roberts v. the United Kingdom*, 25 March 1993, no.13134/87, par. 36

11 R. Kubiak, *Tajemnica medyczna*, Warszawa 2015, s. XIX.

12 See also: R. Kubiak, *Tajemnica medyczna*, (in:) M. Boratyńska, P. Konieczniak (red.), *System Prawa Medycznego pod redakcją E. Zielińskiej, Regulacja prawna czynności medycznych*, Tom II cz. 1, Warszawa 2019, pp. 211-266.

Without any doubt respect for persons in the health care context includes the duty to keep a patient's medical information private and confidential.¹³ On the most universal level, Article 12 of the Universal Declaration of Human Rights specifically recognizes the right to privacy: "No one shall be subjected to arbitrary interference with his privacy, family, home or

correspondence." In very similar words Art. 8 of the ECHR protects everyone's right to respect for his private and family life, his home and his correspondence. The human right to privacy, in connection with patients' rights, means that patients should have substantial control over how their intimate health information is shared with others. In the health care setting, privacy and confidentiality refer to the patient's right to expect that health care workers (not only physicians) or others will not improperly access, use, or disclose identifiable health data without the person's consent.

From these brief introductory words it can therefore be deduced that the privacy of a person is very closely linked to medical information concerning him/her. Medical data are an important part of private life. Given the authority of the ECtHR among the States Parties to the Convention and the argument of legal consistency, it is worth looking at the case law of this court concerning the right to privacy and medical confidentiality. The Court itself defines its role as building a certain line of case law: "The Court considers that, while it is not formally bound to follow any of its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases"¹⁴. The view expressed by the Court itself and confirmed by the doctrine should be accepted. The effects of Strasbourg judgments go well beyond the sphere of the individual case, i.e. the concrete allegation of violation of the Convention and its possible confirmation by the Court. The application of appeals to previous rulings in the practice of the Court is one of the dimensions of this impact – in addition to the powerful influence of the ECtHR on national legal orders and non-systemic impacts¹⁵.

As early as in publications from the 60s, when the European system of human rights protection was only being developed, trust between a doctor and a patient was compared to the relationship between a lawyer and a client, emphasizing that it is the foundation of professionalism. Although the essence of trust in these two relationships is different, the ethics in both professions in relation to the client/patient should be the same. Keeping the information entrusted to a lawyer or a doctor confidential should be seen as an absolute obligation, especially due to the very pertinent view pre-

13 L. Gostin et. al., *The domains of health responsiveness: a human rights analysis*, Health and human rights working paper series, World Health Organization 2003, <https://apps.who.int/iris/handle/10665/73926> (01.04.2020).

14 *Case Chapman v. The United Kingdom*, 18 January 2001, no. 27238/95, par. 70.

15 M. Balcerzak, *Zagadnienie precedensu w międzynarodowym prawie praw człowieka*, Toruń 2008, p. 164.

sented by T. Hellin that: “To attend those who suffer, a physician must possess not only the scientific knowledge, but also an understanding of human nature. (...) The importance of the intimate relationship between patient and physician can never be overstated because in most cases an accurate diagnosis, as well as an effective treatment, relies directly on the quality of this relationship”¹⁶. An exception to this principle should be made only for the public good and the interests of justice, of course correctly balanced by proportionality and necessity. The disclosure of medical information related to the patient should be subject to the patient’s written consent, and each doctor or hospital (currently – the provider of medical services) should treat this requirement as a cardinal and inviolable rule¹⁷. It seems that the words of Lord Mansfield from 1776, mentioned in the above-quoted study, are an extremely accurate and still valid reflection of the essence of medical confidentiality. It follows from them, without the slightest doubt, that: “If a surgeon voluntarily reveals these secrets, to be sure, he would be guilty of a breach of honour and of a great indiscretion; but to give that information in a court of justice, which by the law of the land he is bound to do, will never be imputed to him as any indiscretion whatever”¹⁸. It is therefore clear that the right to privacy can and should be limited by important matters recognized and defined by applicable law.

2. The Jurisprudence of the ECtHR

The fundamental premise for the protection of a patient’s medical data is to respect his or her privacy and intimacy, and to ensure that the patient’s trust in the doctor treating him or her is respected¹⁹. This idea was very well expressed by the ECtHR in its judgment in *Z v Finland*:

“The protection of personal data, not least medical data, is of fundamental importance to a person’s enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the Convention (art. 8). Respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties

16 T. Hellin, *The physician-patient relationship: recent developments and changes*, “Haemophilia: the Official Journal of the World Federation of Haemophilia”, 01 May 2002, no. 8(3), pp. 450-454.

17 R.W. Baldwin, *Confidentiality between Physician and Patient*, “Maryland Law Review” 1962, vol. 22, p. 181, <http://digitalcommons.law.umaryland.edu/mlr/vol22/iss3/2> (01.04.2020).

18 L. Mansfield, *In the case Duchess of Kingston’s Trial*, “Howell’s State Trials” 1776, vol. 20, pp. 355, 573. See more: D. Mendelson, *The Duchess of Kingston’s Case, the ruling of Lord Mansfield and duty of medical confidentiality in court*, “International Journal of Law and Psychiatry” 2012, no. 35, pp. 480-489.

19 See also: A. Wnukiewicz-Kozłowska, *Prawo do prywatności w kontekście dokumentacji medycznej Praktyka orzecznicza Europejskiego Trybunału Praw Człowieka*, (in:) M. Śliwka, M. Urbaniak (red.), *Prowadzenie dokumentacji medycznej. Aspekty prawne oraz zarządcze*, Warszawa 2018, pp. 73-86.

to the Convention. It is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general. Without such protection, those in need of medical assistance may be deterred from revealing such information of a personal and intimate nature as may be necessary in order to receive appropriate treatment and, even, from seeking such assistance, thereby endangering their own health and, in the case of transmissible diseases, that of the community”²⁰.

In the above-mentioned case, the Court found that the disclosure in the judgment of health data concerning HIV infection of the accused man’s ex-wife in a rape trial against another woman violated her right to privacy. At the same time, the ECtHR recognised the need to present this information at the trial itself in order to establish whether the raped woman may have become infected with HIV and whether the man had consciously acquired it. In order to establish these facts, it was necessary to know when the accused was infected, which was directly related to the intimate relationship between the spouses. However, the indication in the judgment of an ex-wife’s personal data, together with her HIV diagnosis, went far beyond what was necessary in a democratic society, and constituted for the applicant a violation of her privacy. The Court clearly and emphatically stated that the disclosure of information about the HIV infection exposed the patient to social rejection, problems in finding work, and may lead to discouragement of the health system to the detriment of the individual and society.

The violation of medical confidentiality in connection with the publication of information on AIDS was the subject of an ECtHR ruling on the cases of *Armonas v. Lithuania* and *Biriuk v. Lithuania*²¹. The situation considered by the court was that in January 2001 *Lietuvos Rytas*, Lithuania’s biggest daily newspaper, published an article on its front page concerning an AIDS threat in a remote part of Lithuania. In particular, medical staff from the AIDS centre and *Pasvalys* hospital were cited as having confirmed that Mr *Armonas* and Ms *Biriuk* were HIV positive. Ms *Biriuk*, described as “notoriously promiscuous”, was also said to have had two illegitimate children with Mr *Armonas*. The information contained in the press release manifestly infringed the applicants’ right to privacy. From the point of view of medical confidentiality, the most important thing is that the Court was particularly concerned about the fact that, according to the newspaper, the information about Ms *Biriuk*’s and Mr *Armonas*’ illness had been confirmed by medical staff. It was crucial that domestic law safeguarded patient confidentiality and discouraged any disclosures on personal data, especially bearing in mind the negative impact of such disclosures on the willingness of others to take voluntary tests for HIV and seek appropriate treatment²². Fur-

20 Case *Z v. Finland* 25 February 1997, no. 22009/93, par. 95.

21 Cases of *Armonas v. Lithuania* and *Biriuk v. Lithuania*, 25 February 2009, no. 36919/02, 23373/03.

22 Case of *Armonas*, par. 44, Case of *Biriuk*, par. 43.

thermore: “The disclosure of such data may dramatically affect his or her private and family life, as well as the individual’s social and employment situation, by exposing that person to opprobrium and the risk of ostracism”²³. The latter sentence of the Court clearly shows how sensitive medical data are and how far-reaching the consequences of unauthorised disclosure can be. Such behaviour not only shatters the trust between the patient and the doctor, or more broadly, the health care system, but also condemns a person to the behaviour of others that undermines his or her dignity and self-esteem, i.e. to the most fundamental rights of the individual.

The privacy of an individual with regard to the protection of his or her medical data is therefore considered to be a fundamental value which may be waived in favour of other values or rights of others, but always under the condition of necessity and proportionality. The European Court of Human Rights in *L.L. v. France* explicitly reiterated this thesis, referring to the already cited judgment in the case *Z v. Finland*: “The protection of personal data, not least medical data, is of fundamental importance to a person’s enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the Convention, bearing in mind that respect for the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention. Consequently, domestic law must therefore afford appropriate safeguards to prevent any communication or disclosure of personal health data as may be inconsistent with the guarantees in Article 8 of the Convention e ECHR”²⁴.

In the alleged case of a divorced couple, in which the woman used before the court the medical records of her husband indicating his alcoholic illness and violent behaviour in order to establish his exclusive guilt, the ECtHR admitted that the interference with his privacy was provided for by law and served to protect the rights of the applicant’s wife, but at the same time found no evidence on the part of France that the interference with the privacy of the man was justified. The judgment of the national court of appeal was based primarily on other evidence gathered in the proceedings, and the applicant’s medical records were merely supplementary to the facts already established. The auxiliary reference by the national courts to the man’s medical records shows that the infringement of his medical data was not necessary or justified.

Very similarly to those cases, the European Court of Human Rights in its judgment in *M.S. v. Sweden* addressed the issue of the justification of the obligation to protect medical data and the related privacy and intimacy of the patient. According to the Court: “Respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention. It is crucial not only to

23 Case of *Biriuk*, par. 39.

24 Case *L.L. v. France*, 12 February 2007, no. 7508/02, par. 44.

respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general²⁵.

In the above-mentioned case, the applicant claimed that more medical information concerning it was disclosed than was relevant to the case. Indeed, at first sight, the information about a past abortion did not seem to be directly related to the spinal column disorders for which she was treated and for which she claimed financial benefits from the State. However, after a detailed analysis of the medical records, it turned out that there was an important link between the abortion and the spine dysfunction in the sense that the reason for the abortion was a strong, long-lasting, hindering pain of this organ. Therefore, the applicant was not entitled to benefits related to the accident at work (a fall), because the pain of the spine was not a consequence of the accident, but an ailment diagnosed and treated by the patient much earlier.

The Court found that the transmission of those data did not breach the conditions laid down in Article 8(2) of the ECHR. The data were made available in accordance with the Swedish law in force. The purpose of the measure was justified, since it was to protect the economic interests of the State; the provision of the data affected the allocation of public funds intended for those entitled. The restriction of the right to privacy that we are faced with here can be considered necessary in a democratic society; it made it possible for the competent authority to verify the information provided directly by the claimant while at the same time requiring the authority to treat the data as confidential on a similar basis as the clinic does.

However, an unjustified violation of the right to privacy will constitute a breach of Article 8 ECtHR. In the case of *Avilkina and others against Russia*, the ECtHR stated that disclosure of the medical records of a Jehovah's witnesses who refused to undergo a blood transfusion violates their right to privacy: "There is therefore no doubt, in the Court's view, that the disclosure by State hospitals of the second and fourth applicants' medical files to the prosecutor's office constituted an interference with the applicants' right to respect for their private life as secured by Article 8 § 1 of the Convention"²⁶. In that case, the Court considered whether the public prosecutor's interference was justified, and finally concluded that: "The collection by the prosecutor's office of confidential medical information concerning the applicants was not accompanied by sufficient safeguards to prevent disclosure inconsistent with the respect for the applicants' private life guaranteed under Article 8 of the Convention"²⁷. The prosecutor's actions, allegedly carried out for the protection of the public interest (the purpose was to establish the lawfulness of the organization of the Centre of Jehovah's Witnesses, of which the applicants were members, in Russia), were not justified,

25 Case *M.S. v. Sweden*, 27 August 1997, no. 74/1996/693/885, par. 41.

26 Case of *Avilkina and Others v. Russia*, 7 October 2013, no. 1585/09, par. 32.

27 *Ibidem*, par. 53.

in the Court's opinion, because the balance between the public interest and patients' rights was not struck.

In one case concerning the protection of medical data, the ECtHR clearly underlined the importance of circumstances restricting the right to privacy. In *Radu v Republic of Moldova*, the Court recalled that: "The expression "lawful" [in accordance with law] not only necessitates compliance with domestic law, but also relates to the quality of that law"²⁸. The Court stressed that: "Domestic law must indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities so as to ensure to individuals the minimum degree of protection to which citizens are entitled under the rule of law in a democratic society"²⁹. In this way, the Court demonstrated the relevance and importance of the condition of the legality of a possible derogation from the obligation to respect the right to privacy. In the case referred to above, the applicant, a police officer who had become pregnant by means of in vitro fertilisation, considered it unlawful for a medical practitioner to inform her employer, at his request, of the medical grounds for the sick leave issued to her. The Court admitted that she was right.

In a relatively recent ECtHR ruling in *Mockutė v. Lithuania* on the confidentiality of medical records, in which doctors disclosed information on the state of health of an adult patient undergoing forced psychiatric hospitalisation to both her mother and journalists, the judges clearly stated a violation of the right to privacy. The Court made it clear that: "Domestic law must indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities so as to ensure to individuals the minimum degree of protection to which citizens are entitled under the rule of law in a democratic society"³⁰.

An interesting case, in which, in addition to an element of medical secrecy as such, there is also a theme of the image of public persons in connection with their possible illnesses, was considered by the ECtHR after the publication a book by a personal physician of the former president of France, François Mitterrand, in which he disclosed information on the state of health of his patient at the time when he was a public person. Mr Claude Gubler – the applicant – was a general practitioner and the private physician to François Mitterrand. In 1981 the French president, who had undertaken to issue regular health bulletins, it is assumed in relation to persons performing important public functions, asked the applicant not to divulge the diagnosis of his prostate cancer, which was only disclosed to the public in 1992. In 1996 the doctor published a book entitled "Le Grand Secret" ("The Big Secret"), in which he recounted in particular the difficulties he had encountered in hiding this illness from the French public. The late President's widow and children had the book seized

28 Case of *Radu v. the Republic of Moldova*, 15 April 2014, no. 50073/07, par. 28.

29 *Ibidem*.

30 Case of *Mockutė v. Lithuania*, 27 February 2018, no. 66490/09, par. 99.

and the applicant was found guilty of breaching professional confidence and given a suspended sentence of four months' imprisonment. At the same time, the National Council of the *Ordre des médecins* (Medical Council) lodged a complaint about the applicant with the Ile de France Regional Council of the *Ordre des médecins*, alleging that he had disclosed information covered by professional confidentiality and concerning François Mitterrand's private life, issued spurious medical certificates and damaged the reputation of the profession³¹. The application was based on art 6 of the ECHR – the right to a fair trial. The very problem of revealing President Mitterrand's medical secret was still under consideration in the case brought to the ECtHR by the publisher of a book written by Dr Gubler. In the case of *Plon (Société) v. France*, the ECtHR ultimately found that the ban imposed by the French courts nine months after the publication of the book (even if it related to medical information obtained in confidence by the personal physician of the former president) was a violation of Article 10 of the European Convention on Human Rights (freedom of expression)³². The passage of time since the death of the president allowed the interests of the deceased patient and the public interest to be weighed. Finally, the court concluded that: "The public interest in discussion of the history of President Mitterrand (...) prevailed over the requirements of protecting the President's rights with regard to medical confidentiality. This certainly does not mean that the Court considers that the requirements of historical debate may release medical practitioners from the duty of medical confidentiality, which under French law is general and absolute, save in strictly exceptional cases provided for by law. However, once the duty of confidentiality has been breached, giving rise to criminal (and disciplinary) sanctions against the person responsible, the passage of time must be taken into account in assessing whether such a serious measure as banning a book – a measure which in the instant case was likewise general and absolute – was compatible with freedom of expression"³³. The reasoning of the court shows that, in the case of public persons, the right to privacy, even with regard to medical confidentiality, may be restricted. Therefore, it seems that anyone who chooses to perform certain socially important public roles should be aware of a certain risk of extending the limits of his or her privacy.

Conclusions

In view of the cases referred to above and the accompanying judgements of the ECtHR and their justification, it can be concluded that the provisions of the European Convention on Human Rights do indeed protect the right to respect for one's private life. In particular, an individual's personal data, including medical data as

31 Case of *Gubler v. France*, 27 October 2006, no. 69742/01.

32 Case of *Editions Plon v. France*, 18 August 2004, no. 58148/00.

33 *Ibidem*, par. 53.

a special category of data (sensitive data), need the widest possible respect due to the nature of information on the state of health of the person. The Court therefore takes the view that States Parties to the Convention are obliged to treat the confidentiality of medical data as an essential tool for the protection of the private sphere of the patient, and to make any derogation leading to the disclosure of such data prudent, bearing in mind the criteria of lawfulness, necessity and proportionality. The admissibility of interference with the sphere of human privacy, provided that it has a sufficient statutory basis and serves a legitimate purpose, depends on its classification as 'necessary in a democratic society'. When making an exception to the protection of the right to privacy in the context of medical data, it is always necessary to indicate the considerations that prevail over the right to keep such data secret (confidentiality). Criminal proceedings against the person concerned or, for example, proceedings for disability benefits may be invoked as a special circumstance.

Any limitation to the right to privacy must be justified, necessary and proportionate, and clearly provided for in national law. These principles are well illustrated in *Eternit v. France*, where the employer questioned the grounds on which the occupational nature of the employee's illness was recognised³⁴. In the course of the proceedings before the national authorities, the French company Eternit requested access to its employee's file. Without having been granted that Case of right, the applicant brought an action before the European Court of Human Rights on the grounds of infringement of Article 6(1) ECHR (the right to a fair trial). He claimed that he had no access to the medical evidence on the basis of which the occupational nature of the former employee's illness was recognised. Thus, according to the applicant, he was deprived of any possibility of effectively contesting the occupational nature of the disease.

The Court, having considered the parties' arguments, rejected the application, but pointed out that: "A balance must be struck between the employer's right to be heard and the employee's right to medical confidentiality. In the Court's view, such a balance would be maintained if the employer could ask the court to appoint an independent expert doctor whose task would be to review the employee's medical records and issue a separate expert's report. This expertise would take into account the employee's right to respect the principle of confidentiality of medical data, but on the other hand it would provide guidance to the court and the parties to the proceedings"³⁵.

It should be strongly emphasised that doctors are aware of the essence of medical confidentiality. This can be seen, for example, in the contemporary version of the Hippocratic Oath, which is the Geneva Declaration (one of the World Medical Association's (WMA) oldest policies, adopted by the 2nd General Assembly in *Geneva* in

34 Case of *Eternit v. France*, 27 March 2012, no. 20041/10.

35 *Ibidem*, par. 37.

1947, and last updated in October 2017): “I WILL RESPECT the secrets that are confided in me, even after the patient has died”³⁶. In the recommendations prepared by the association of senior physicians (it must therefore be assumed that they are very experienced people): “The key principles of healthcare confidentiality are: the patient’s right to privacy, the patient’s right to control access and disclosure of their own health information by giving, withholding and withdrawing consent, and respect for necessity and proportionality conditions for any non-consensual disclosure of confidential information connected with patients”³⁷. Obligations on the part of medical professions correspond to the rights of the patient, which are included in the European Charter of Patients’ Rights: “Every individual has the right to the confidentiality of personal information, including information regarding his or her state of health and potential diagnostic or therapeutic procedures, as well as the protection of his or her privacy during the performance of diagnostic exams, specialist visits, and medical/surgical treatments in general”³⁸.

By creating various types of recommendations or guidelines for the doctor-patient relationship, doctors emphasize the obligation to respect the intimacy of the patient and the confidentiality of information entrusted to them and obtained in the course of treatment. The point is that every medical practitioner should not treat the accepted recommendations as empty phrases, but as an integral part of his or her professionalism.

It seems that both the medical and legal communities are unanimous as to the importance and significance of medical confidentiality. It is undoubtedly a key element of the patient-doctor relationship, and more broadly, of the health care system. As the ECtHR systematically and consistently demonstrates, medical data and patient information obtained during the treatment process are part of the human right to privacy. As a consequence, medical secrecy is subject to legal protection – both at the national and international levels, and its unlawful violation means legal liability.

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36 WMA Declaration of Geneva, <https://www.wma.net/policies-post/wma-declaration-of-geneva/> (10.04.2020).

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38 European Charter of Patients’ Rights, Rome November 2002, https://ec.europa.eu/health/ph_overview/co_operation/mobility/docs/health_services_co108_en.pdf (10.04.2020).

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